CITATION: Adili v. Donn, 2012 ONSC 5321
COURT FILE NO.: CV-10-24003
DATE: 2012-09-20

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ELISA ANGELA ADILI	)	
	)	
	)	
	)	
Applicant	)	Derek A. Schmuck and Brian J. Decaire for the Applicant
	)	
- and -	)	
	)	
	)	
DEREK EDWARD RUSSELL DONN AND JENNIFER MAUREEN SPANGENBERGER	)	
	)	
	)	
	)	
Respondents	)	Michael J. Valente and Frank Pignoli for the Respondents
	)	
	)	**HEARD:** May 14, 16, 17 and 22, 2012

SUPPLEMENTARY REASONS - COSTS

Cavarzan J.

[1] This matter began with the issuance of a notice of application in late November 2010. The dispute between the parties was over the interpretation of their respective rights and obligations arising from a registered easement agreement dated May 1, 2005.

[2] On February 3, 2011, Lococo J. granted the applicant's request for interim relief including enjoining the respondents from parking their motor vehicles on the applicant's lands.

[3] On March 9, 2011, the respondents' motion seeking an order that the dispute go to arbitration was resolved by the order of Reid J. based upon a written consent that the application proceed to trial for the determination of specified issues.

[4] After a trial, which began on May 14, 2012 and lasted four days, the applicant was successful in obtaining every item of relief claimed.

[5] The applicant now claims her costs of these proceedings on a substantial indemnity basis in the total amount of $98,628.09 inclusive of disbursements and applicable taxes.

[6] An offer to settle dated April 30, 2012 was served on that date by the applicant. It is not disputed that the applicant obtained a judgment as favourable as or more favourable than the terms of the offer to settle. Rule 49.10(1) of the Rules of Civil Procedure specifies that in such a case, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

[7] The position of the applicant is that she is entitled to substantial indemnity costs throughout. In the alternative, her claim is for costs as specified in Rule 49.10(1).

[8] The primary position of the respondents is that there should be no costs award. In support of this position they invoke the arbitration clause in the agreement of May 1, 2005 and the terms of the above consent order by Reid J., matters which I will address presently.

[9] Respondents' alternative position is that costs, if awarded, should be on a partial indemnity basis at 60 percent rather than the 67 percent claimed, and subject to deduction of amounts claimed by the applicant for the motion to arbitrate, and 50 percent of the amount claimed in connection with researching and drafting the moving party's factum.

[10] Finally, the respondents plead impecuniosity to the extent that "any costs award would financially ruin the respondents and force them to sell their home".

THE ARBITRATION ARGUMENT

[11] The agreement of May 1, 2005 is in two parts. The first part establishes the easements and rights-of-way; the second

part (sections 5 to 11) is entitled "Driveway Maintenance Agreement". Sections 5 to 10 spell out the obligations of the owners of Lots 1, 2, 3 and 4 to maintain the paved common laneway and the lands over which it travels, establishes for each lot a percentage share of the maintenance costs, and establishes a mechanism whereby the Lot owners meet at least annually "to organize and fund the maintenance of the common lane".

Section 11 provides as follows:

> In the event of a dispute, any lot owner may require arbitration under The Arbitrators [sic] Act, Ontario. No lot owner can revert to court action except for collection of unpaid maintenance costs. Any arbitration shall be summary in nature, no party shall be ordered to pay any legal or other costs, and the costs of the arbitration shall be a joint expense of all lot owners unless the arbitrator deems the arbitration to be frivolous, in which case the lot owner requesting arbitration shall be responsible for the costs of the arbitrator.

[12] It seems evident that the respondents' motion to arbitrate was abandoned in favour of the consent order to litigate the issues in court, because section 11 above speaks only to the issue of the cost of maintaining the common lane. Whether or not that is the effect in law of section 11, the written Consent

of the parties incorporated in the March 9, 2011 order of Reid J. amounts to a waiver of any right to arbitrate.

[13] The respondents submit that paragraph 6 of the Consent amounts to an agreement to arbitrate. I disagree. Paragraph 6 provides that:

> The parties shall meet to try to resolve all outstanding issues with counsel and the assistance of third parties.

[14] Paragraphs 1 to 4 inclusive deal with converting the application to a trial of specified issues and specifying the pre-trial procedures to prepare the matter for a court hearing "expected to take 2 days".

[15] Paragraph 7 provides that "the costs of today are reserved to the judge hearing the Application, as costs in the cause".

[16] As noted above, the applicant was successful at trial in obtaining every item of relief claimed. There is no reason in the circumstances to depart from the principle that the successful party is entitled to an award of costs.

QUANTUM

[17] The applicant cites the factors in subrules 57.01(1)(d), (e), and (g) as governing the exercise of the courts discretion in this case under s. 131 of the Courts of Justice Act to award costs:

> (d) the importance of the issues;
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;

[18] The issues were important in the sense that success for either side depended upon which of the significantly different interpretations of the easement agreement prevailed. In my view, "importance of the issues" in subparagraph 57.01(1)(d) means more than importance of the issues to the parties. This case involved no more than a garden variety dispute over the meaning of the terms in a written agreement.

[19] The respondents cannot be faulted for lengthening unnecessarily the duration of the proceeding. It was open to the applicant to seek a legal remedy long before late November 2010 when the application was commenced. Nor can the

respondents be faulted for testing their view of the law by bringing the motion to arbitrate. In brief, absent demonstrated bad faith, they had the right to be wrong.

[20] Resort, in the circumstances here, to subparagraph 57.01(1)(g) is, in my view, of no assistance to the applicant. Although ultimately unsuccessful, the respondents were entitled to raise all available arguments in support of their view that they were entitled to an expansive interpretation of the easement.

[21] Having considered all factors listed in rule 57.01 guiding the court's discretion under s. 131 of the Courts of Justice Act to award costs, this is not a case justifying an across-the-board award of substantial indemnity costs. It is a case however in which the above-noted costs consequences of making an offer to settle come into play.

[22] It is not the role of the court to second guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered. See *Basedo v. University Health Network* [2002] O.J. No. 597 (Sup. Ct.).

[23] I find that the time spent in this case is not manifestly unreasonable.

[24] The approach I am taking in fixing costs is based on my determination of what the services devoted to the case are worth according to the submissions of counsel, my own experience, and with regard to the law declared in *Zeta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4:

> In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

[25] In its 2004 decision in *Boucher v. Public Accountants Council for the Province of Ontario* (2004) 71 O.R. (3d) 291 at para. 26, the following was said concerning rule 57.01(3):

> In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates ... the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

[26] The applicant's claim for partial indemnity costs to the date of their offer to settle ($28,223.88) and substantial indemnity costs thereafter ($58,046.92) plus $2,668.50 for disbursements amounts to $88,939.30.

[27] I would not give effect to the respondents' submission that partial indemnity costs should be awarded at 60 percent of the amount claimed. The appropriate rate as requested by the applicant is 67 percent. The applicant has calculated substantial indemnity costs at 90 percent of the amount charged to her.

[28] Nor would I give effect to the deductions claimed by the respondents. The consent order signed by Reid J. incorporates the provision that costs of the motion to arbitrate are reserved to the judge hearing the application. The applicant is entitled to her costs of that proceeding. Furthermore, there is no reason to reduce by one-half the amount claimed for researching and drafting the applicant's factum and brief of authorities.

[29] In the absence of evidence to support the claim of impecuniosity on the part of the respondents, I am unable to give effect to the submission that that should be a factor to be taken into account.

CONCLUSION

[30] For the above reasons, I find that an appropriate award for costs in the circumstances and one that an unsuccessful party could reasonably expect to pay is $85,000.00 inclusive of disbursements and applicable taxes.

[31] It is ordered, therefore, that the respondents Derek Donn and Jennifer Spangenberger pay costs of the application to the applicant Elisa Adili in the amount of $85,000.00, inclusive of disbursements and applicable taxes, within 30 days of the release of this decision.

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Cavarzan J.

Released: September 20, 2012

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- and -

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JENNIFER MAUREEN SPANGENBERGER

Respondents

REASONS FOR DECISION

Cavarzan J.

JC:mg

Released: September 20, 2012