CITATION: Nakhuda v. Story Book Farm Primate Sanctuary, 2014 ONSC 296
OSHAWA COURT FILE NO.: 81654/12
DATE: 20140117

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Yasmin Nakhuda, Plaintiff

and

Story Book Farm Primate Sanctuary and Sherri Delaney, Defendant

BEFORE: The Honourable Madam Justice M.E. Vallee

COUNSEL: Theodore Paul Charney, for the Plaintiff

Kevin Donald Toyne, for the Defendants

HEARD: In Writing

COSTS ENDORSEMENT

Overview

[1] This endorsement follows my reasons for judgment released on September 13, 2013. The trial of this action proceeded over four days. Prior to trial, the plaintiff brought a one day motion for replevin in which she was unsuccessful. The defendants were completely successful in defending the plaintiff's claim. The action was dismissed.

[2] The defendants seek substantial indemnity costs of $122,450.94 or, in the alternative, partial indemnity costs of $101,286.61. Both of these amounts include disbursements and HST. A further amount of $4,489.72 is requested for the costs incurred by the defendants for hiring security for their premises, which they submit was necessary after they received certain threats, including a death threat to Ms. Delaney and threat to burn down the premises.

[3] The plaintiff argues that the defendants are not entitled to costs for the following reasons:

(a) Although counsel for the defendants acted *pro bono* and although good authority exists for the principle that a *pro bono* party may recover costs in a proceeding, the defendants should not be awarded costs because:

(i) a *pro bono* party, by assumption, is a litigant who cannot afford the cost of litigation, is impecunious and her counsel volunteers his services because the matter is a worthy cause. Ms. Delaney, is not the typical litigant who requires *pro bono* counsel for a worthy cause. She is a senior police officer, owns her own home and the property on which the defendant Sanctuary is located.

(ii) The Sanctuary is a registered charity but is not incorporated. Therefore, it has no legal status. If there had been no expectation that the defendant *pro bono* party would be able to pay costs if unsuccessful, then costs should not be awarded against the unsuccessful plaintiff.

(b) The defendants' conduct unnecessarily lengthened the proceedings. They took a step which was improper in that they made allegations against the plaintiff in their defence which were defamatory and for the purposes of scandalizing the plaintiff in an effort to destroy the plaintiff's reputation and that of her family.

(c) The defendants made an offer to settle on January 8, 2013; however, it did not comply with Rule 49 and therefore has no effect on costs.

Are the defendants entitled to costs, considering their counsel acted in a *pro bono* capacity for them in this matter?

[4] Both counsel referred the court to *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.). In this matter, a party who was represented *pro bono* was successful in setting aside a default judgment and an order for security for costs. The issue on appeal was whether the successful party was entitled to costs of earlier proceedings. Pro Bono Law Ontario, The Advocates' Society and the Ontario Trial Lawyers' Association, were represented by separate *amicus curiae*. They made submissions. The court held in paragraphs 34 and 35 that there should be no prohibition on an award of costs in favour of *pro bono* counsel in appropriate circumstances. It stated:

> Although the original concept of acting on a pro bono basis meant that the lawyer was volunteering his or her time with no expectation of any reimbursement, the law now recognizes that costs awards may serve purposes other than [page 768] indemnity. To be clear, it is neither inappropriate, nor does it derogate from the charitable purpose of volunteerism, for counsel who have agreed to act pro bono to receive some reimbursement for their services from the losing party in the litigation.
>
> To the contrary, allowing pro bono parties to be subject to the ordinary costs consequences that apply to other parties has two positive consequences: (1) it ensures that both the non-pro bono party and the pro bono party know that they are not free to abuse the system without fear of the sanction of an award of costs; and (2) it promotes access to justice by enabling and encouraging more lawyers to volunteer to work pro bono in deserving cases. Because the potential merit of the case will already factor into whether a lawyer agrees to act pro bono, there is no anticipation that the potential for costs awards will cause lawyers to agree to act only in cases where they anticipate a costs award.

[5] The court also went on to say in paragraph 37 that awarding costs to a successful pro bono party, " will depend on the Rule 57.01 factors, considerations of access to justice and the need to maintain a level playing field between the parties."

[6] Both counsel also referred the court to *Josef v. Ontario (Minister of Health),* [2013] O.J. No. 4400 (S.C.J.). In paragraph 33, the court stated,

> Courts are swift to extol the virtues of making legal services available, and the duty and valour of working on a *pro bono* basis. These sentiments are pious and empty if costs awards de-value *pro bono* work. Court do not, as a rule, award enhanced costs to a party because she is represented on a *pro bono* basis. But neither should courts penalize that party by reducing the costs award because her counsel was willing to undertake the risk of not being paid at all if the case was unsuccessful.

[7] The plaintiff argues that "a *pro bono* case is a case in which the individual represented by counsel is impecunious." While some parties who are represented *pro bono* may be impecunious, being completely without financial resources is not a requirement for *pro bono* representation. The plaintiff states that Ms. Delaney is a police officer and owns the farm where the Sanctuary is located. Therefore, she does not fit the category of an individual who requires *pro bono* counsel for a worthy cause. The plaintiff provided the parcel register for Ms. Delaney's property. It should be noted that she and another individual bought the property in 2001. Since that date, a number of mortgages have been registered against the property. The current mortgage was registered in July 2013, in the amount of $500,00. It is true that Ms. Delaney owns the Sanctuary property; however, it is significantly encumbered. Many people who are not impecunious would have difficulty financing the defence of this action. I find that even though Ms. Delaney is employed as a police officer and owns property, this does not impact on her status as a *pro bono* client.

[8] The plaintiff argues that the Sanctuary is not incorporated; therefore it has no legal status. It is a registered charity. If the plaintiff had been successful, the Sanctuary would have argued that it is a charity and therefore should not pay costs. There would have been no expectation that the defendants would pay costs to the plaintiff.

[9] This argument is circular. On the one hand, the plaintiff states that the Sanctuary is not a legal entity. This is why Ms. Delaney was named as a defendant. On the other hand, the plaintiff states that the Sanctuary's charitable status would insulate it from costs. The plaintiff makes an unfounded assumption that Ms. Delaney would not have been expected to pay costs if the plaintiff had been successful. Ms. Delaney is a litigant in this matter. The rules relating to ordinary costs consequences would have applied to her the same as they apply to all litigants.

Did the defendants' conduct unnecessarily lengthen the proceedings? Did the defendants take a step that was improper?

[10] The plaintiff argues that the defendants unnecessarily lengthened the proceedings by making animal abuse allegations against the plaintiff. This constituted vexatious conduct which was designed to scandalize the plaintiff and destroy her reputation. The plaintiff states that, "there is not a scintilla of evidence" to support these pleadings.

[11] Prior to the monkey's escape, the plaintiff and an American animal trainer, Lisa Whittaker, apparently exchanged emails. One of these, dated November 28, 2012, was written by the plaintiff and sets out the circumstances in which the plaintiff purchased the monkey, the difficulties that she was having with him and the methods that she was using to control him. This involved grabbing the monkey by the throat and hitting him on the side of his head so that he would succumb and allow his diaper to be changed. This email was produced at the trial. The defendants state that they obtained the emails directly from Ms. Whittaker as the plaintiff refused to produce them. Some of the animal abuse allegations contained in paragraph 12 of the statement of defence are based on the comments that the plaintiff herself set out in the email to Ms. Whittaker regarding how she was handling the monkey. Other allegations of abuse state that the plaintiff intentionally failed to do certain things. While the plaintiff may have failed to do certain things, such as provide the monkey with appropriate food and veterinary care, those omissions likely resulted from lack of knowledge. Nevertheless, to cite one example, it was clearly not appropriate for the plaintiff to be striking the monkey.

[12] The court finds that there was sufficient evidence in an email written by the plaintiff herself to support the defendants' allegations that corporal punishment was being used on the monkey to subdue him. The defendants' pleadings on this issue were not vexatious. The defendants withdrew these allegations prior to trial. They state that they did so to shorten the trial and avoid further expense. I find that the allegations made by the defendants do not constitute conduct that unnecessarily lengthened the proceedings or was an improper step so as to disentitle or reduce the costs to which the defendants might otherwise be entitled.

Does the offer to settle made by the defendants on January 8, 2013; comply with Rule 49 so as to have an effect on costs?

[13] On January 8, 2013, the defendants' counsel sent an email to the plaintiff's counsel. It stated:

> To avoid further steps being taken in this proceeding, our clients are prepared to resolve matters on the basis of an Offer containing at least the following terms:
>
> (a) The dismissal of the motion and the action on "with prejudice" basis;
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> (b) The plaintiff shall forthwith provide to the Defendants' lawyer the name and contact details for the "Montreal

> breeder" referred to in paragraph 1 of her Affidavit sworn December 13, 2012;
>
> (c) The Plaintiff shall forthwith pay to the Defendants costs in the amount of $37,500.
>
> There are several other terms that I would prefer to discuss with you over the telephone.

[14] In order for an offer to be valid, it must be in writing. The contents of this email do not constitute an offer because all of the terms were not set out in writing. Other terms were to be discussed between counsel. Accordingly, the cost consequences in Rule 49 do not apply.

Are the defendants disentitled to costs because they should have simply returned the monkey after he tested negative for diseases because the plaintiff and her family had a bond with the monkey and the defendants did not?

[15] Even though the plaintiff had a closer bond with the monkey in contrast to the defendants, the trial of this action was not concerned with which party had a closer bond and whether that should be a factor to consider. Both counsel agreed at the outset of the trial that the court did not have jurisdiction to determine what was in the best interests of the monkey. The trial was concerned with only property law principles and was decided accordingly. The fact that the defendants did not return the monkey does not disentitle them to costs. They had no legal obligation to do so.

What is the correct amount of costs to award the defendants?

[16] In awarding costs, the court may consider a number of factors set out in Rule 57.01 of the *Rules of Civil Procedure*. Some of the factors applicable to this matter are the expertise of defence counsel and the rate that he charged, the complexity of the proceeding, the importance of the issues and the amount of costs that the plaintiff could reasonably have expected to pay if unsuccessful.

[17] It is important to remember that the plaintiff brought a motion prior to trial to recover the monkey. Several affidavits were prepared in support and defence of the motion. Cross-examinations were held. The plaintiff was unsuccessful. The motion judge reserved the costs of that motion to the trial judge.

[18] Defence counsel's actual rate is $380 per hour. His partial indemnity rate is $247 per hour. At the time of trial, he had nine years of experience as a lawyer. His firm is located in Toronto. There is no question that he had the expertise required to defend the action. The court finds that his hourly rate is reasonable in the circumstances. Counsel was assisted by a student. His actual rate is $150 per hour. His partial indemnity rate is $97.50. A law clerk assisted counsel to a small degree. The partial indemnity rate for her is $113.75. The rates for the student and clerk are reasonable.

[19] The question of whether the issues in this matter were important could be viewed in two different ways. In comparison to provincial and national issues, the ownership of a monkey could be seen as relatively unimportant. In contrast, the issue was extremely important to the parties. It also highlighted the City of Toronto's exotic animal bylaw which prohibits keeping certain species within the City. One aspect of the action related to the availability and possibly illegal sale of exotic animals.

[20] Regarding the amount of costs that an unsuccessful party could reasonably expect to pay, the defendants provided an article which quotes the plaintiff as saying, "It's very expensive to fight for him [the monkey]...She [the plaintiff] estimated that if her case is unsuccessful and she winds up on the hook for defence costs as well, her legal battle could cost $100,000 - $150,000" [my emphasis]. It is difficult to know whether the plaintiff was accurately quoted. It is also possible that in this quote, the plaintiff may have been referring to her total costs which, if she was unsuccessful, would have included her own legal fees as well. Accordingly, this article does not assist the court in determining what the plaintiff actually expected to pay.

[21] The plaintiff's counsel notes in his submissions that the amount of time devoted to responding to the animal abuse allegations totals approximately $76,000. This action was highly publicized and strenuously contested. Although the trial was only four days long, no doubt a considerable amount of time was spent preparing affidavits for the motion, conducting cross-examinations, carrying out legal research and preparing for trial. It appears that the defence consulted an expert although he did not give evidence at trial. The issues regarding whether the monkey was a wild animal and whether the plaintiff lost ownership of him when he escaped were unusual and complex. The most recent case on point was an old British decision.

[22] A significant amount of costs were incurred to advance the plaintiff's case although it appears that plaintiff's counsel did not actually charge the plaintiff for all of them. The plaintiff ought to have realized that as her own costs were increasing, so were the costs of the defendants.

[23] The defendants request $122,450.94 for substantial indemnity or, alternatively, $101,286.61 for partial indemnity costs. With respect to the request for substantial indemnity costs, as noted above, no Rule 49 offer was made. The plaintiff's conduct in this matter cannot be described as reprehensible, scandalous or outrageous. Substantial indemnity costs are to be awarded in rare and exceptional circumstances to indicate the court's disapproval of a party's conduct in the litigation. There is no reason on the facts of this case to award costs at this higher scale.

[24] The court has reviewed the defendant's detailed bill of costs and finds that many of the hours for preparation are excessive in relationship to the proceedings. Some of the fees charged were not warranted. Although the process of fixing costs does not necessarily involve a detailed scrutiny of the successful party's docketed time, the following are some examples of excessive preparation time and fees charged that were not warranted:

(a) 33.6 hours ($8,299.20) were charged for counsel's time to prepare the responding motion materials and prepare for the motion. Twenty-four hours for this work

($5,928) are allowed, which results in a reduction of $2,371.20. It should be noted that this motion was adjourned to a later date;

(b) 22.2 hours ($2,164) was charged for the student to attend examinations. While the student may have assisted counsel somewhat, his attendance was not strictly necessary. This fee is reduced by 75% resulting in a reduction of $1,623.75;

(c) 23 hours ($5,681) were charged by counsel for preparation of the supplementary motion record materials. Sixteen hours are allowed for this work ($3,952) which results in a reduction of $1,729;

(d) 22.1 hours ($2,154.75) were charged by the student for the same item as set out above. Fifteen hours ($1,462.50) are allowed which results in a reduction of $692.25;

(e) 8.2 hours ($2,205.40) were charged by counsel to prepare for the motion. Six hours are allowed for this work ($1,482) which results in a reduction of $723.40. The sum of $858 was charged for the student to attend the motion. This was not necessary;

(f) 61.9 hours ($6,035.25) were charged for the student's legal research. While this was an unusual matter, the hours equate to 1.5 weeks of time. Two-thirds of this amount being $3,983.27 is allowed which results in a reduction of $2,051.98;

(g) 10.3 hours ($2,544.10) were charged by counsel to attend on the return date and argue the motion. Seven hours are allowed for this work ($1,729) and 3.5 hours of travel time at a reduced rate ($123 per hour) which results in a reduction of $407.55;

(h) $302.25 was charged for a student to attend at the motion. The student's attendance was not necessary;

(i) 27.5 hours ($6,792.50) were charged for correspondence and meetings with the defendants. Half of this amount being $3,396.25 is allowed; and,

(j) 12 hours per day were charged for counsel fee at trial ($11,856). Ten hours per day for 4 days ($9,880) are allowed resulting in a reduction of $1,976.

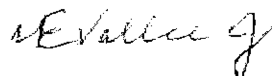
[25] The defendants also request $4,489.72 for security that they retained during the action. Ms. Delaney gave evidence at trial that she received a number of threats including one to burn down the buildings on the property as well as a personal death threat. There is no evidence that these threats came directly from the plaintiff; however, they likely would not have been made but

for the action. The defendants submit that their security costs should be reimbursed as an expense that is incidental to the proceedings. While this expense may be incidental to the proceedings, the defendants did not provide any invoices to support the amount incurred or any evidence regarding payment of the expense. Accordingly, the security expense is not allowed.

[26] It is important to remember that this was a four day trial with a one day motion. In accordance with the principles set out in *Boucher v. Public Accountants* 71 O.R. (3d) 291, the court must consider costs that are fair, reasonable and within the expectations of the parties. The costs must also be proportionate to the action. The amount of $101,286.61 is not proportionate to five days of proceedings; however, this matter did require more preparation than an average four day trial due to the unique issues raised. The plaintiff could have reasonably expected to pay between $60,000 and $70,000 in legal fees if she was unsuccessful on the motion and at trial. This range is fair, reasonable and proportionate to the complexity of the matter and the legal work required to defend the action.

[27] Section 131 of the *Courts of Justice Act* R.S.O. 1990 c. C.43 provides that the costs of a proceeding are within the discretion of the court. Bearing in mind that the court is fixing costs rather than assessing costs and after considering items (a) to (j) above, the factors set out in Rule 57.01(1) and the written submissions of the parties, a reasonable amount for partial indemnity costs is $66,320 for fees, plus HST of $8,621.60. Disbursements of $7,512.86 are claimed. Mileage is not a tariff item. Accordingly, the disbursement amount is reduced by $313.12. Disbursements of $7,199.74 are allowed plus HST of $935.97.

[28] For the foregoing reasons, this court orders that the plaintiff shall pay to the defendants their costs of this action fixed on a partial indemnity basis in the amount of $83,077.31 within 30 days.



Justice M.E. Vallee

Released: January 17, 2014