

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Burgar v. Assh*, 2017 NSSC 134

Date: 2017-05-19

Docket: 1201-069055 SFHD-098373

Registry: Halifax

Between:

Rodney Frederick Burgar

Petitioner

v.

Sharon Donna Assh

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Leslie J. Dellapinna

Subject: Costs flowing from the cancellation of a Settlement Conference

Summary: On October 27, 2016, a Settlement Conference was scheduled for the following May 9, 2017. Filing deadlines were given for the exchange of Settlement Conference briefs. The Petitioner withdrew from the Settlement Conference process approximately three weeks prior to the Respondent's filing deadline and more than a month and two weeks prior to the Settlement Conference. The Petitioner felt that he did not have sufficient disclosure from the Respondent to conduct an effective Settlement Conference. The Court agreed to cancel the Settlement Conference. The Respondent made a Motion for costs.

Result: Although a Settlement Conference is a voluntary process, once the parties agree to take part in a Settlement Conference they are bound by the Court's directions. If either party wishes to cancel the Settlement Conference they must make that request to the Court and it is for the Court to decide. If the Court is prepared to cancel the Settlement Conference it is subject to the Court's discretion on costs. Costs should be

restricted to expenses incurred by the opposing party for work that would have no lasting value if the Settlement Conference does not proceed. Other factors that may weigh on the Court's decision on the amount of the costs are the timing of the cancellation relative to the parties' filing deadlines and the date of the Settlement Conference, the reason for the cancellation and the reasonableness and the necessity of the work performed or the disbursements incurred by the opposing party.

In this case costs of \$250.00 were ordered payable by the Petitioner.

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Judge: The Honourable Justice Leslie J. Dellapinna

Counsel: Diana Musgrave for the Petitioner
Gordon Kelly for the Respondent

By the Court:

[1] This decision results from the Respondent's Motion for Costs following the Court's decision to cancel the parties' Settlement Conference at the request of the Petitioner.

Background

[2] The Petitioner and the Respondent are in the midst of divorce proceedings.

[3] On October 26, 2016, the parties and their counsel appeared before the Honourable Justice Elizabeth Jollimore of this Court for a Date Assignment Conference. The parties requested a Settlement Conference and one was scheduled to take place before me on May 9, 2017.

[4] In addition to the divorce itself, Justice Jollimore identified the issues as being:

1. the division of assets and debts,
2. whether the Petitioner was entitled to spousal support and if so the quantum and duration of that support, and
3. potentially child support for the parties' younger son who, I have been told, has special needs.

[5] Filing directions in preparation for the Settlement Conference were given. The Petitioner's Settlement Conference brief was to be filed with the Court and exchanged no later than March 28, 2017 and the Respondent's was to be filed and exchanged no later than April 11, 2017. Justice Jollimore also gave both parties until April 25, 2017 to file second Settlement Conference briefs.

[6] Justice Jollimore's memo to the parties contemplated the possibility that documents may not be filed on time in which case the conference may be rescheduled and costs awarded against the party who failed to meet their deadline. There was a further provision that stated that if scheduled court time was no longer needed, the Court's scheduling office was to be advised in writing.

[7] On March 2, 2017, more than two months prior to the scheduled Settlement Conference and more than a month prior to the Respondent's first filing deadline, Ms. Musgrave, counsel for the Petitioner, sent by e-mail a letter to the Respondent's counsel, Mr. Kelly, containing an offer to settle. In the same letter, she stated:

“We require a response no later than March 16, 2017, as our filing deadline for our settlement conference date is March 28. If we have not received a response by that date we will be writing to the Court to indicate we are no longer participating in the Settlement Conference...”

[8] Ms. Musgrave then received, also on March 2, an automatic reply e-mail from Mr. Kelly's office indicating he was away on vacation and to address all matters to his assistant. The same offer was then sent to Mr. Kelly's assistant.

[9] On March 16 Ms. Musgrave received from Mr. Kelly a letter of the same date in which he made it clear that her client's Offer to Settle was not accepted.

[10] Counsel had a telephone conversation on Tuesday, March 21, 2017 after which Ms. Musgrave sent to Mr. Kelly another letter. In her letter of March 21, 2017 she indicated that she was seeking further disclosure from the Respondent, and, given the proximity of her filing deadline, she would be writing to the Court and indicating that her client would not be proceeding with the Settlement Conference. She then wrote to the Court's scheduling office by way of a letter dated March 22 in which she said that the Petitioner was withdrawing from participation in the Settlement Conference. That letter was copied to Mr. Kelly. That was six days prior to the Petitioner's filing deadline and 20 days prior to the Respondent's first filing deadline and almost seven weeks prior to the Settlement Conference.

[11] The Court's scheduling office then received a letter from Mr. Kelly dated March 22 in which, among other things, the following was said:

“It is [the Respondent's] position that the appropriate procedure to follow should [the Petitioner] wish to cancel the Settlement Conference is the procedure set out in *Aurini v Drake*, 2016 NSSC 126 and followed in *Armoyan v Armoyan*, 2015 NSSC 46 – that the parties appear before the Settlement Conference Justice on the scheduled Settlement Conference date.”

[12] I then arranged a telephone conference with counsel which took place on March 23, 2017. During that telephone conference Mr. Kelly objected to the

cancellation of the Settlement Conference and sought the opportunity to provide written submissions on “throw away costs”. I advised counsel that I was prepared to interpret Ms. Musgrave’s March 22 letter to the Court’s scheduling office as a request to the Court to cancel the Settlement Conference and I cancelled the Settlement Conference pursuant to Civil Procedure Rule 59.39 (6). I also indicated that I was prepared to receive written submissions from both parties on the issue of costs. Filing deadlines for those submissions were then provided.

[13] In addition to counsel’s written submissions I received an affidavit from Ms. Musgrave sworn April 27, 2017, and an affidavit from Mr. Kelly’s associate, Ms. Gauvin, sworn April 5, 2017. I have considered the contents of both affidavits.

[14] In Ms. Gauvin’s affidavit she described the preparation for the Settlement Conference that began on January 26, 2017 (approximately two and a half months prior to the Respondent’s filing deadline) which included a review of their client’s file and the parties’ respective financial statements and other financial information, a consultation with their client on January 27, 2017, a review of the pleadings, a review of further financial information provided by their client after their consultation in January and general preparation for the Settlement Conference including drafting a Settlement Conference brief. The majority of the work performed was completed by March 2 – more than a month before the Respondent’s filing deadline.

[15] Ms. Gauvin attached to her affidavit an exhibit entitled “Summary of legal fees incurred preparing for Settlement Conference”. The work performed, according to the schedule, amounted to fees totalling \$3,900.00, excluding H.S.T.. That figure included \$495.00 relating to the receipt of Ms. Musgrave’s letter of March 21 advising of her client’s withdrawal from the Settlement Conference, Mr. Kelly’s attendance at the telephone conference on March 23, research into the issue of cancellation of Settlement Conferences and potential costs as a result, and the preparation of the brief that was submitted to the Court on the issue of costs. I would subtract that figure from the \$3,900.00.

THE POSITIONS OF THE PARTIES

[16] Relying on the *Armoyan* and *Aurini* decisions referred to earlier and Civil Procedure Rules 59.39, 10.12 (5) and 77.09 counsel for the Respondent submitted that the Respondent should either be fully indemnified for the costs that she

incurred in preparation for the Settlement Conference or alternatively be granted a substantial contribution to those costs in the sum of \$2,000.00.

[17] Ms. Musgrave, on behalf of the Petitioner, stated that her client had good reason for withdrawing from the Settlement Conference, i.e. that the Respondent had not resolved what assets were held by the Respondent at the time of the marriage. In particular, Ms. Musgrave had asked Mr. Kelly for confirmation of whether shares that the Respondent held in two incorporated companies were obtained prior to the marriage or after. Confirmation of when she acquired the shares was not provided. Based on Ms. Musgrave's submissions it appears that the value of those shares could be significant (millions of dollars) and, if any portion of the shares were considered to be matrimonial, the value of the shares would have a significant impact on the parties' negotiations.

[18] Ms. Musgrave also submitted that the circumstances in this case could be distinguished from the circumstances in *Armoyan* and *Aurini* because in both of those cases the party who withdrew from the Settlement Conference withdrew after the opposing side had submitted their brief.

[19] It was the Petitioner's position that no costs should be payable by the Petitioner to the Respondent for withdrawing from the Settlement Conference and instead the Respondent should pay \$1,000.00 costs to the Petitioner for putting the Petitioner and his counsel to the task of responding to her Motion for Costs.

ANALYSIS

[20] Civil Procedure Rule 59 applies to most proceedings in the Supreme Court (Family Division) that fall within the scope of section 32A of the *Judicature Act* R.S.N.S., 1989, c.240. Rule 59.02(1) states:

“This Rule applies to a proceeding in the Supreme Court (Family Division) that is within section 32A of the *Judicature Act* and is not transferred by a judge under section 32C of the *Act*, except a proceeding provided for in Rule 60A – Child and Adult Protection, Rule 60B – *Involuntary Psychiatric Treatment Act* and *Hospitals Act* Applications, or Rule 61 – Adoption.”

[21] Rule 59 applies to divorce proceedings such as this.

[22] Rule 59.02 (2) provides that Rules outside Part 13-Family Proceedings (i.e. Rules other than Rules 59 to 62 inclusive), with any necessary changes, apply to practice and procedure in the Family Division that is not governed by Part 13. In other words, all of the Civil Procedure Rules apply to proceedings in the Family Division subject to how those Rules might be replaced or altered by Rules within Part 13.

[23] Rule 59.39 specifically deals with Settlement Conferences in the Family Division. It addresses the scheduling of Settlement Conferences, the directions for the preparation for and conduct of Settlement Conferences and filing deadlines for Settlement Conference briefs.

[24] Rules 59.39 (6), (7) and (8) state the following:

“(6) A judge may cancel a settlement conference and may make an order for costs against a party who, after agreeing to participate in a settlement conference, fails to comply with all of the following;

- (a) any directions provided under Rules 59.39 (2) and (3);
- (b) the filing requirements and deadline for the settlement conference brief under Rules 59.39 (4) and (5);
- (c) the requirement to appear at the settlement conference at the appointed date and time.

(7) Rules 10.05 to 10.10 of Rule 10 – Settlement, concerning formal offers, do not apply to a family proceeding.

(8) Rules 10.11 to 10.15, concerning the conduct of a settlement conference, do not apply to a family proceeding, unless a judge directs otherwise.

[25] Rule 10 falls outside of Part 13. Because of Rule 59.39 (7) Rules 10.05 to 10.10 inclusive do not apply to a family proceeding. Those Rules deal with formal offers to settle in proceedings other than Part 13 family proceedings. Rule 59.39 (8) provides that Rules 10.11 to 10.15 do not apply to family proceedings although a judge could direct that they do apply. Rules 10.11 to 10.15 deal with settlement conference procedures outside of family proceedings and include Rule 10.12 (5) which reads:

“(5) A judge may order a party who cancels a settlement conference after another party incurs expenses for the conference to indemnify the party for the expenses.”

[26] Rule 10.12 (5) leads to Rule 77.09 which says in part:

“77.09 (1) This Rule 77.09 applies to an indemnification under any of the following Rules, or a similar Rule: ... (c) Rules 10.12 (4) and (5), of Rule 10 – Settlement;

....

(2) A judge may order indemnification for all of the following amounts under a Rule to which this Rule 77.09 applies;

- (a) a substantial contribution towards the cost of necessary services of counsel, or a fair payment for the work of a person who acts on their own;
- (b) necessary and reasonable out of pocket expenses or disbursements;
- (c) fair compensation for a harm or loss referred to in the applicable Rule.

[27] In the circumstances of this case Rules 10.11 to 10.15 do not apply. In most circumstances it would be up to the judge who schedules the Settlement Conference or the judge who is to preside over the Settlement Conference to direct whether those Rules apply. No such direction was given. Therefore, in this case the applicable Rules are Rule 59.39 (6) and Rule 77- Costs.

[28] Rule 77.02 (1) states:

A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

Costs are always in the discretion of the Court. The appropriate question to ask is, in the circumstances of this case what order about costs will do justice between the parties?

[29] In *Armoyan v Armoyan* Justice Williams ordered Ms. Armoyan to pay substantial costs to Mr. Armoyan after she had agreed to take part in a Settlement Conference and then later chose to withdraw from the Settlement Conference process. Justice Williams had given both parties very detailed directions on what was to be filed prior to the Settlement Conference, which conference was scheduled for five days. Ms. Armoyan only withdrew from the process after Mr. Armoyan had complied with the Court’s directions which compliance would have entailed significant work on his and his counsel’s part and considerable expense.

[30] Similarly, in *Aurini v Drake* Ms. Drake withdrew from participating in a Settlement Conference just days prior to the scheduled conference and after both

parties had filed their Settlement Conference briefs with the Court. By the time of her withdrawal Mr. Aurini had incurred considerable expense preparing for the conference.

[31] Whether costs will be awarded and the amount of those costs will depend on the circumstances of each case.

[32] In Nova Scotia participation in Settlement Conferences is voluntary. However, once litigants agree to take part in a Settlement Conference they are expected to follow the Court's directions in terms of filing requirements and participation. If those directions are not followed Rule 59.39 (6) allows a judge to order costs against the defaulting party.

[33] Once litigants have agreed to take part in a Settlement Conference and directions have been given, the parties should not be permitted to simply cancel a Settlement Conference but rather should seek the permission of the judge who will ultimately preside over the Settlement Conference to withdraw from the process. Permission to withdraw will more than likely be granted but will be subject to the Court's discretion to award costs to the opposing party.

[34] The Court's decision whether to award costs will depend on a number of factors including, in some cases the reason for the cancellation as well as the timing of the cancellation relative to the parties' filing deadlines and the date of the Settlement Conference. If a party needs to cancel due to illness or some other circumstance beyond their control, the Court may award no costs whatsoever.

[35] If the Court determines that it is appropriate to order costs, it is my view that the expense incurred by the opposing side should be analyzed and any cost award restricted to expenses incurred specifically in preparation for the Settlement Conference and for work which would have little or no lasting value if the Settlement Conference does not proceed.

[36] The work performed in preparation for the Settlement Conference need not be restricted to work performed in the few days or two or three weeks prior to that party's filing deadline provided it is apparent that the work performed was done in preparation for the Settlement Conference.

[37] It will then be for Court to consider the reasonableness and necessity of the work performed or the disbursement that was incurred. The reasonableness of the

fees incurred should be proportionate to the importance of the outstanding issues and the likely range of outcomes in the event of a trial.

[38] The reason the Petitioner chose not to take part in the Settlement Conference in the circumstances of this case is not particularly important. However, I accept that counsel for the Petitioner believed that she lacked necessary information from the Respondent which would significantly impact any settlement discussions.

[39] Ms. Musgrave gave to Mr. Kelly what I consider to be reasonable advance notice of her client's intention to withdraw from the Settlement Conference. Ms. Musgrave's letter of March 2, 2017 provided some forewarning of the possible cancellation of the conference. Actual notice of the Petitioner's decision to withdraw from the Settlement Conference came by way of her letter of March 21, 2017 which was more than a month and two weeks prior to the Settlement Conference and approximately three weeks prior to the Respondent's filing deadline.

[40] I accept that Mr. Kelly and Ms. Gauvin performed the services itemized by Ms. Gauvin in her affidavit and on the dates indicated but, as stated earlier, the work performed on March 23 was not done in preparation for the Settlement Conference.

[41] The description of the work performed by Mr. Kelly and Ms. Gauvin before March 23 as is contained in the summary attached to Ms. Gauvin's affidavit would appear, for the most part, to be work that I would not consider to be wasted simply because the Settlement Conference was cancelled. The vast majority of the work performed would not only be useful but even necessary in order for counsel to properly advise their client or to prepare for trial should it come to that. Only the actual drafting of the Settlement Conference brief was specific to the preparation for the Settlement Conference.

[42] Finally, I agree with the comments of Campbell, J. in paragraph 22 of *Aurini v. Drake* in which he said:

“The Court must not promote a policy that would allow each litigant to cancel Settlement Conferences on a whim that settlement is unlikely.”

The Respondent should also not be penalized because her counsel took the initiative to prepare for the Settlement Conference well before her filing deadline.

[43] Considering all of the circumstances I have come to the conclusion that it is appropriate to order costs but not in the amount sought by the Respondent. I order costs to be paid by the Petitioner to the Respondent in the sum of \$250.00.

[44] I direct that counsel for the Respondent to prepare the necessary order.

Dellapinna, J.