

SUPREME COURT OF NOVA SCOTIA

Citation: *McLaughlin v. Rumscheidt*, 2017 NSSC 267

Date: 20171124

Docket: Hfx No. 447307

Registry: Halifax

Between:

Anne Marie McLaughlin

Plaintiff

v.

Peter Rumscheidt

Defendant

Judge: The Honourable Justice Ann E. Smith

Heard: August 22nd (Motions) and August 28th (Oral Decisions),
2017, in Halifax, Nova Scotia

**Final Written
Submissions on
Costs:** September 29, 2017

Counsel: Anne Marie McLaughlin, Plaintiff, In Person
William L. Mahody, Q.C., for the Defendant

By the Court:

Introduction

[1] In oral decisions delivered on August 22, 2017, I allowed the Defendant's (Mr. Peter Rumscheidt) motion for summary judgment on the pleadings, with costs to Mr. Rumscheidt. I dismissed the Plaintiff's (Ms. McLaughlin) motion for summary judgment on the evidence, with costs to Mr. Rumscheidt.

[2] In my decisions, I asked that, if the parties could not agree on costs, they make written submissions by September 29, 2017. Both Ms. McLaughlin, on her own behalf, and Mr. Mahody, Q.C. on behalf of Mr. Rumscheidt filed written submissions on September 29, 2017.

[3] Mr. Rumscheidt requests lump sum costs of \$27,596.00 for both motions.

[4] In her September 29, 2017 submissions Ms. McLaughlin says costs should be awarded on her summary judgment motion pursuant to Tariff C in the amount of \$1,000.00, inclusive of disbursements. On the second motion, Ms. McLaughlin says in her September 29, 2017 submissions that, pursuant to Tariff C, costs of \$2,500.00, inclusive of disbursements, are reasonable. Ms. McLaughlin's total costs position was \$3,500.00 for both motions.

[5] On October 10, 2017, my judicial assistant received correspondence from Ms. McLaughlin via email with a "Re" line "URGENT Hfx 447307 Costs Complaint Mahody." Ms. McLaughlin asked that my judicial assistant bring her "complaint" to my attention prior to my rendering decisions regarding costs on the two summary judgment motions. Ms. McLaughlin's attached correspondence was framed as a "complaint" against Mr. Mahody to myself and to the Prothonotary.

[6] In this correspondence, Ms. McLaughlin makes a number of allegations against Mr. Mahody relating to his September 29, 2017 submissions on costs. In particular, she says that Mr. Mahody made false representations and assertions to the Court concerning the motions when he referenced the motions hearing requiring a full day. She also says that Mr. Mahody ignored my "instructions" on costs and "submitted for a lump sum."

[7] Ms. McLaughlin revises her costs position in her October 10, 2017 letter from \$3,500.00 for both motions to an award of no costs, or in the alternative, costs in the amount of \$250.00 for the Plaintiff's motion and \$750.00 for the Defendant's motion.

[8] Prior to reviewing in more detail the parties' submissions on costs and the relevant *Civil Procedure Rules*, I note that on June 20, 2016, Mr. Rumscheidt delivered a formal offer to settle to Ms. McLaughlin pursuant to *Rule 10*. The offer was that the action be dismissed without costs to either party. Ms. McLaughlin rejected the offer.

Civil Procedure Rule 77, Costs

[9] Costs are always in the discretion of the Court. As such, I may make any order that satisfies me will do justice between the parties.

[10] *Rule 72* states:

General discretion (party and party costs)

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

(2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 – Settlement.

[11] Party and party costs of a proceeding are assessed with the tariff amounts under the *Costs and Fees Act*, unless a judge orders otherwise.

[12] A motion for summary judgment is usually assessed in accordance with Tariff C (*Civil Procedure Rule 77.06*):

Assessment of costs under tariff at end of proceeding

77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[...]

(3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

[13] Tariff C provides as follows:

TARIFF C

**Tariff of Costs payable following an Application heard
in Chambers by the Supreme Court of Nova Scotia**

For applications heard in Chambers the following guidelines shall apply:

(1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

- (a) the complexity of the matter,
- (b) the importance of the matter to the parties,
- (c) the amount of effort involved in preparing for and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	Range of Costs
Less than 1 hour	\$250 - \$500
More than 1 hour but less than ½ day	\$750 - \$1,000
More than ½ day but less than 1 day	\$1000-\$2000
1 day or more	\$2000 per full day

(emphasis added)

[14] In light of Ms. McLaughlin's October 10, 2017 correspondence to the Court in which she accused Mr. Mahody of making false representations, providing the Court with "falsified information", making "errors, omissions and misrepresentations" and "fraud by false representation" in his costs submissions, it is necessary to make several matters clear.

[15] On May 15, 2017 in a telephone conference with Ms. McLaughlin and Mr. Mahody, I permitted Ms. McLaughlin to amend her notice of motion from a motion for summary judgment on the pleadings to a motion for summary judgment on evidence (or both evidence and pleadings).

[16] I determined that the Plaintiff's motion would be heard in special chambers on August 22, 2017 starting at 11:30 a.m. and scheduled the Defendant's motion to begin at the conclusion of the Plaintiff's motion. On June 15, 2017, when Ms. McLaughlin filed her amended notice of motion for summary judgment on evidence, she indicated the motion was to be heard in special chambers for a half hour or less.

[17] The court log for August 22, 2017 shows that the Plaintiff's motion began at 11:30 a.m. and concluded at 3:50 p.m. (with a 45-minute midday break). The Defendant's motion commenced at 3:50 p.m. and concluded at approximately 4:45 p.m.

[18] The Plaintiff's motion took approximately 3.5 hours to hear. The fact that the amended notice of motion filed by Ms. McLaughlin refers to the motion being scheduled for one-half hour or less, is irrelevant. The fact is that Ms. McLaughlin's motion took more than a half day, but less than a full day to hear.

[19] The Defendant's motion took approximately one hour to hear.

[20] Pursuant to Tariff C, paragraph 4, the range of costs for a motion that takes more than one-half day, but less than one day, is \$1,000.00 -\$2,000.00.

[21] I exercise my discretion to determine that the basic Tariff C costs for the Plaintiff's motion is \$1,500.00 and is \$500.00 for the Defendant's motion.

[22] I note that the parties returned to court (Ms. McLaughlin by teleconference) on August 28, 2017 for the hearing of my oral decision on the merits.

[23] Mr. Mahody was entitled on behalf of his client to propose that a lump sum award of costs be awarded instead of an award based on the Tariff amounts. Mr. Mahody did not, as contended by Ms. McLaughlin in her October 10, 2017 correspondence, “ignore” my “instructions” by requesting lump sum costs. I did not instruct anything, other than that the parties provide me with submissions on costs if they could not agree on costs. I have the discretion pursuant to *Civil Procedure Rule 77.08* to award lump sum costs instead of Tariff costs.

[24] As previously stated, I have determined that the basic Tariff costs on the Plaintiff’s motion are \$1,500.00 and the basic Tariff costs on the Defendant’s motion are \$500.00.

[25] As quoted above, Tariff C (paragraph 4) provides that a Chambers Judge may apply a multiplier of 2, 3 or 4 when the motion is determinative of the entire matter at issue.

[26] The Defendant’s summary judgment motion was determinative of the matter. Ms. McLaughlin’s action against Mr. Rumscheidt was dismissed. The factors to consider when selecting whether to apply a multiplier, and which multiplier to apply are:

- a) the complexity of the matter;
- b) the importance of the matters to the parties;
- c) the amount of effort involved in preparing for and conducting the application.

[27] I apply a multiplier of three to the Defendant’s motion. Although the issues raised on summary judgment were not particularly complex, they did require the Defendant to respond to pleadings which raised serious allegations of breaches of duty, professional misconduct and breaches of privacy. The issues were very serious and important to Mr. Rumscheidt.

[28] The Defendant was put to considerable effort to advance its summary judgment motion.

[29] Accordingly, applying a multiplier of three, I fix the Defendant’s costs on its motion for summary judgment on pleadings at \$1,500.00.

[30] *Civil Procedure Rule 77.07* provides factors which are relevant to increasing Tariff costs:

Increasing or decreasing tariff amount

77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

- (a) the amount claimed in relation to the amount recovered;
- (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
- (c) an offer of contribution;
- (d) a payment into court;
- (e) conduct of a party affecting the speed or expense of the proceeding;
- (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
- (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
- (h) a failure to admit something that should have been admitted.

(3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

(emphasis added)

[31] As noted previously, the Defendant offered to settle the within action on a without costs basis on June 20, 2016. The offer was a formal offer pursuant to *Civil Procedure Rule 10.05*. The Plaintiff rejected that offer. Pursuant to both *Civil Procedure Rule 10.09(2)* and *Civil Procedure Rule 77.07(2)(b)*, the failure of a Plaintiff to accept a formal offer to settle, when the Plaintiff achieves a result which is no better than the Plaintiff would have received by accepting the offer, may result in an increased costs award. *Rule 10.09(2)(b)* says that a judge may award costs in circumstances where the formal offer is made more than 25 days after pleadings close and before setting down for trial. Ms. McLaughlin rejected that offer on October 6, 2016. The Defendant's formal offer was made more than 25 days after pleadings closed, but before the matter was set for trial, which means that an additional 75% could be added to the Tariff C amounts.

[32] In terms of *Rule 77.07(2)*, that is, “conduct of a party affecting the speed or expense of the proceeding”, I note that on May 2, 2017, Ms. McLaughlin filed a motion by correspondence requesting that the Court allow her motion for summary judgment and dismiss the Defendant’s motion for summary judgment. She also sought an adjournment of the May 30, 2017 motions (the two motions being originally scheduled for May 30, 2017) so that her motion by correspondence could be heard first. Mr. Rumscheidt opposed Ms. McLaughlin’s requests. On May 5, 2017, I dismissed the Plaintiff’s motion by correspondence.

[33] I also note that Ms. McLaughlin wrote to the Court in advance of the hearing of the motions (scheduled for August 22, 2017), on July 26, 2017, accusing Mr. Mahody of making a false and dishonest assertion to the Court in his pre-hearing brief. Mr. Mahody had referred to s. 77A of the *Legal Profession Act*. Section 77A establishes that documents and reports created as part of the professional responsibility process are not admissible in legal proceedings, except in circumstances not before this Court. Ms. McLaughlin attempted to put such documentation before the Court in her Affidavit of June 13, 2017. During the hearing of the motion on August 22, 2017, I struck all such documentation from her Affidavit. I also struck portions of Ms. McLaughlin’s Affidavit which contained irrelevant matters and hearsay. Mr. Mahody did not, as Ms. McLaughlin contended, put false assertions before the Court with respect to the *Legal Profession Act*.

[34] Ms. McLaughlin’s conduct increased the expense of this proceeding. She filed a meritless motion by correspondence in an attempt to revisit the scheduling of the hearing of the two motions; she made meritless written allegations of wrongdoing against Mr. Mahody in terms of his reliance upon s. 77A of the *Legal Profession Act*. She submitted a “complaint” against Mr. Mahody on October 10, 2017 which necessitated Mr. Mahody’s response. The allegations raised in the October 10th letter were without merit.

[35] Ms. McLaughlin wrote again to the Court on October 12, 2017 alleging that Mr. Mahody’s reference to the motions taking a full day to complete was an attempt to “manipulate the time.” Ms. McLaughlin also said that Mr. Mahody made a false assertion to the Court when he said that the motions were completed at 5:00 p.m. In fact, Mr. Mahody said that the motions were completed at approximately 5:00 p.m. Ms. McLaughlin says that the proceeding concluded at 4:15 – 4:20 p.m. The court log shows that the motions were completed (court

adjourned) at 4:52 p.m. Mr. Mahody completed his submissions at 4:44 p.m. The remaining five minutes or so was a discussion about costs.

[36] Considering Ms. McLaughlin's conduct and the formal offer to settle which she rejected, I am convinced that I should increase the basic Tariff amounts (\$1,500.00 and \$1,500.00) for both motions to the sum of \$6,000.00. I am satisfied that, in all of the circumstances, that sum does justice between the parties.

[37] I decline to award lump sum costs, in part because I have no affidavit from the Defendant providing an accounting of legal fees incurred, but also because I do not consider that a departure from Tariff C costs is warranted.

[38] Finally, I note that Ms. McLaughlin attached an email from Mr. Mahody to her submissions on costs which disclosed a without prejudice settlement offer advanced by the Defendant; I disregarded this communication in its entirety.

Conclusion

[39] Costs in the amount of \$6,000.00, inclusive of disbursements, are payable by Ms. McLaughlin to Mr. Rumscheidt.

Smith, J.