Spears v. Young et al, 2001 NWTSC 8

Date: 2001 01 16
Docket: CV 06643

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MODENA SPEARS

Plaintiff

-and-

CHERYL YOUNG, PAUL YOUNG, SHAREN CONNELLY, SHARRON OLIPHANT, CAROLINE WIEBE, DR. CHARLES MACNEIL, ANDREW LOCKHART, DALE HANSON, KAREN LEIDL, DR. FRAN PATTERSON, THE INUVIK REGIONAL HEALTH BOARD, and HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendants

MEMORANDUM OF JUDGMENT ON COSTS

[1] This is my ruling on the costs of the Chambers applications heard on October 16, 2000. I have read and considered all of the submissions filed on this issue.

[2] The applications were, briefly summarized:

> 1. an application by the Defendant Her Majesty the Queen in Right of Canada (referred to as the Attorney General of Canada in the Notice of Motion but as the "Crown" in this Memorandum) for a declaration that the order of June 12,1998 permitting the filing of the Amended Amended Amended Statement of Claim had become inoperative under Rule 135 for failure to file it in time;
>
> 2. a cross-application by the Plaintiff to extend the time for filing and serving the Amended Amended Amended Statement of Claim to the dates on which those actions were actually taken;
>
> 3. an application by the Defendant Crown to have the claim against it struck out for failure to disclose a cause of action, or, alternatively, as frivolous and vexatious, or, alternatively, to have the action against it stayed as an abuse of process or,

> alternatively, to have the action against it severed from the action against the other Defendants or, alternatively, to have portions of the Statement of Claim as against it struck out as irrelevant and embarrassing;
>
> 4. an application by the Plaintiff for an order compelling the Defendants Cheryl Young and Paul Young to re-attend for further examination for discovery at their own expense;
>
> 5. an application by the Plaintiff to amend the Statement of Claim for a fourth time.

[3] My rulings on the applications can be found in *Spears v. Young et al*, 2000 NWTSC 66. In summary, the Plaintiff was successful in the result on all of the applications except that although Cheryl and Paul Young were ordered to re-attend for examinations for discovery, it was not to be at their sole expense, as requested by the Plaintiff, but the costs of re-attendance were to be split between those Defendants and the Plaintiff.

[4] I will deal with the applications by reference to the above paragraph numbers:

Applications 1 and 2

[5] The Plaintiff seeks solicitor and client costs of these applications. The general rule is that solicitor and client costs should not be awarded except against a party who has engaged in conduct which is "reprehensible, scandalous or outrageous": *Young v. Young*, [1993] 4 S.C.R. 3. In my view, the Crown's conduct does not reach that standard.

[6] The Crown argued that no costs should be awarded to the Plaintiff because of her failure to comply with the Rules. On the other hand, on the application itself, the position taken by the Crown was a technical one brought forward only a long time after it learned that the Plaintiff had not complied with the Rules. The situation was one that, in my view, should have been dealt with by way of a consent order to extend the time for filing the amended pleading.

[7] Although counsel for the Crown cited Rule 141, which provides that unless otherwise ordered, the costs of an amendment shall be borne by the party making the amendment, the costs at issue here are not the costs of the amendment but rather of the Crown's unsuccessful application to have the June 12, 1998 order declared inoperative

and the Plaintiff's successful application to have the time for filing the amendment extended.

[8] The Crown also argues that the June 12, 1998 amendments were inadequate in any event because the Plaintiff applied to amend the Statement of Claim for a fourth time. While that may be so, the applications for which costs are at issue are, as I have pointed out above, not to do with the amendments but the operation of the order granting them. And the fourth set of amendments, as I noted in my decision on the merits of the applications, did not materially change the Plaintiff's claims but clarified some of the allegations.

[9] In the circumstances, I see no reason why the Plaintiff should not have her costs.

[10] The Plaintiff will therefore have her costs of applications 1 and 2 as against the Crown. The Crown's application for costs is dismissed. There will be no costs against the other Defendants as they merely indicated that they supported the Crown's position but did not otherwise engage in argument on the issues.

Application 3

[11] The Plaintiff was successful in opposing the Crown's application to strike out, stay or sever the claims against it. In its written argument on costs, the Crown states that it was justified in bringing the application because of vagueness and deficiencies in the Plaintiff's pleadings. However, had the Crown been unsure as to what was being alleged against it and unable to obtain clarification from counsel for the Plaintiff, a demand for particulars could have been filed and served under Rule 119.

[12] The Crown also attempts to rely on the comment allegedly made by counsel for the Plaintiff during examinations for discovery that he might have to add the Crown as a party in order to obtain documents from the Royal Canadian Mounted Police. I declined, during argument before me on the applications on October 16, 2000, to make a finding as to whether that comment had been made or to allow counsel for the Crown to cross-examine counsel for the Plaintiff about it. Having declined to make such a finding for purposes of the abuse of process application, I am not now going to make a finding for purposes of the costs application. In my view the alleged comment is not relevant in any event since the real issue was whether the Plaintiff has

an arguable cause of action against the Crown, and I found she was successful on that issue.

[13] The Plaintiff will therefore have her costs of application 3 as against the Crown.

Application 4

[14] Cheryl Young argues that success was divided on the Plaintiff's application to have her and Paul Young re-attend for examination for discovery because the Plaintiff was not successful in having the entire costs of re-attendance borne by those Defendants. She says that costs of this application should therefore be in the cause. Paul Young argues that the need to continue the examination for discovery was caused by various failures on the part of the Plaintiff and that the costs of the further examination should be borne by the Plaintiff.

[15] The issue here is not, however, the costs of the further examination. The issue is the costs of the applications heard October 16. Who pays the costs of the examination itself should be left to the end of the case.

[16] In my decision rendered on the merits of the applications, I ruled that the questions asked at the examinations for discovery about Cheryl Young's criminal complaint against the Plaintiff, which Cheryl Young and Paul Young refused to answer, were relevant and should have been answered. I noted that no attempt was made to justify Paul Young's refusal to answer on the basis of his oath of secrecy as a police officer, as had been done at the examination. Accordingly, in my view, it is not now open to the Crown to say that the need for further examination for discovery was the fault of the Plaintiff.

[17] The only remaining issue on this point is whether costs should be in the cause. In my view, the Plaintiff was substantially, although not wholly, successful and should receive her costs against Paul Young and Cheryl Young and I so order.

Application 5

[18] The Plaintiff does not seek costs of her application to amend the Statement of Claim for a fourth time and is content to have them dealt with at the end of the case. Paul Young seeks costs of having to amend his Statement of Defence. I decline, in the circumstances, to deal with these costs and leave them to the trial judge.

Amount of costs

[19] Having decided that the Plaintiff is to have her costs of the first four applications referred to above, I now turn to the amount of costs. Costs will be on a party and party basis in Column 6 of the tariff.

[20] As to the specific items referred to in the written submissions and the Plaintiff's request for lump sum costs, in the exercise of my discretion I have decided as follows.

[21] Considering the issues raised and arguments made, I have decided to treat applications 1 and 2 as one complex opposed application under item 35(a) of the tariff. Applications 3 and 4 will each separately be treated as complex opposed applications.

[22] The Plaintiff seeks costs in a multiple of column 6 of the tariff. In my view, there must be a reason if costs are to be increased significantly from the tariff since the tariff under the Rules of Court which came into effect in 1996 cannot be said to be outdated, as I stated in *Woodley v. Yellowknife Education District*, 2000 N.W.T.S.C. 62. I am not satisfied that there is sufficient reason for an increase in this case.

[23] As to the Plaintiff's claim for an allowance for the written argument, item 29 refers to written argument at the request of the Court, whereas the written argument in this case was required under the Rules of Court. In my view, Rule 648(2) applies and the written argument is included in item 35(a), there being no other specific allowance for a Chambers brief.

[24] Cross-examination on affidavits is a separate item, however, and will be allowed under items 18, 20 and 21.

[25] The Plaintiff's claim for her non-resident counsel's travel expenses is disallowed as there is no evidence before me which satisfies the circumstances in Rule 648(4).

[26] The final issue I want to address was raised by the Crown in its written submissions. In arguing that the Plaintiff should not be awarded costs of applications 1 and 2, the Crown took the position that the amendments made to the statement of claim in 1998 were inadequate and that she should bear the cost for her decision to

keep changing the allegations without any new information coming to light. In response, the Plaintiff took the position that new information had come to light and said that "if anything, there has been a deliberate and calculated attempt on the part of the R.C.M.P., Cheryl Young and Paul Young to conceal evidence from the Plaintiff and from this court". In further response, counsel for the Crown called these allegations extremely serious and inflammatory and asked for costs as a result.

[27] I agree that the allegations are serious. However, they have to be taken in context. In the same paragraph where the allegations are made, the Plaintiff referred to the lengthy delay before the written statements of Cheryl Young and Paul Young made in the criminal complaint investigation were produced to her. The statements, made in 1997, were not produced until 2000, although the Plaintiff had been asking for their production since 1997. No explanation was put forward for the delay. The Plaintiff also complained that documents produced to her under the *Freedom of Information Act* had been edited. I take her allegations in this context and although I consider the words used unfortunate, I am not going to address them by way of costs.

[28] In the result, and having considered all of the submissions made, the Plaintiff will have costs as follows:

On applications 1 and 2, as against the Defendant Crown:

Item 35(a) -	$550.00

On application 3, as against the Defendant Crown:

Item 35(a) -	$550.00
Item 18 -	$210.00
Item 20 -	$350.00
Item 21-	$300.00

Total for applications 1, 2, and 3: $1960.00 plus disbursements for courier charges and cross-examination transcripts ($74.74 and $339.00 = $413.74).

On application 4, one set of costs against the Defendants Paul Young and Cheryl Young:

Item 35(a)-	$550.00

[29] All of the costs ordered are payable forthwith.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT
this 16th day of January, 2001.

Counsel for the Plaintiff:	Allan A. Garber
Counsel for the Defendant,Her Majesty the Queen in Right of Canada and Paul Young:	Alan Regel
Counsel for the Defendant, Dr. Fran Patterson:	Jonathan P. Rossall
Counsel for Cheryl Young, Sharen Connelly, Sharron Oliphant, Caroline Wiebe, Dr. Charles MacNeil, Andrew Lockhart, Dale Hansen, Karen Leidl and The Inuvik Regional Health Board:	Garth Malakoe