MacNeil v. McLeod-Norris, 2005 NWTSC 17 Date: 2005 02 04
Docket: S-1-CV 2003000403

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LARRY MacNEIL

Applicant

-and-

MARGARET McLEOD-NORRIS

Respondent

MEMORANDUM OF JUDGMENT

[1] This memorandum addresses the question of costs in these proceedings.

[2] On December 7, 2004, I issued reasons for judgment (2004 NWTSC 81). I granted the declaratory relief sought by the applicant and ordered specific performance of a contract to transfer a lease held by the respondent. I have now received further submissions on the question of costs. The respondent is now unrepresented since her counsel ceased to act after delivery of my reasons. I have, however, received correspondence from the respondent in answer to the claim for costs.

[3] As a general comment, it is worthwhile reiterating that an award of costs to the successful party in a litigation is the norm. Generally, the decision on whether to award costs and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. That discretion, however, must be exercised judicially, i.e., not arbitrarily or capriciously. And it must be exercised consistently with the Rules of Court. There is a well-recognized expectation that the successful party will be awarded costs absent some special circumstances. And, as so pithily noted in *Metz v. Weisgerber*, [2004] A.J. No. 510 (C.A.), at para. 15: "Costs cannot be withheld to give the loser a consolation prize."

[4] In this case, applicant's counsel has submitted a draft bill of costs totalling $9,907.26, inclusive of disbursements and tax. The fees are partly calculated on the basis of the party-and-party schedule of fees and partly on solicitor-and-client fees as a result of an offer to settle delivered prior to the hearing of this case. The submission raises a number of issues which need to be addressed individually.

Offer to Settle:

[5] The Rules of Court provide that a party to an action may serve on another party an offer in writing to settle all or any of the claims in dispute. If the offer is not accepted, then certain costs consequences are triggered. In the context of this case, the applicant's counsel submits that the judgment obtained by the applicant was as favourable, or more favourable, than the offer to settle. Thus, according to Rule 201, the applicant "is entitled to party-and-party costs to the day on which the offer to settle was served and solicitor-and-client costs from that day on". In this case, the offer was served on November 10, 2004, and the hearing was held on November 22, 2004.

[6] To appreciate the offer one needs to understand the case. The two parties each held cabins on federal land leased by the government to the respondent. In my reasons, I issued a declaratory judgment holding that the applicant was entitled to the lease pursuant to an oral agreement made by the respondent to transfer the lease to him in consideration of a payment of $1,000.00 (which was paid therefore amounting to part performance of the oral agreement). I also ordered specific performance of the agreement, specifically the delivery of an executed assignment of the lease by the respondent. The offer proposed that the respondent pay for a survey of the leased land so as to divide it more-or-less in half; then to surrender the existing lease; and, finally, to take the steps necessary to have two new leases issued covering the land on which each of the applicant's and respondent's respective cabins are located. If the offer had been accepted, the respondent could still have a lease to part of the land and keep the $1,000.00 already paid. As a result, after the hearing, while she still keeps the $1,000.00, she lost all of her leasehold interest. On any objective basis, it seems that the offer was more favourable than the end result. Thus the costs consequences of Rule 201 come into play.

[7] Rule 202 of the Rules of Court, however, states that the costs consequences do not apply if the offer incorporates a term or condition that could not have been included in a judgment in the proceeding. While I may doubt that I could have ordered a survey and a division of the land in question, the point of the offer to settle rules is to examine the offer as a whole, not its individual parts, to determine if it is

more or less favourable than the judgment. As noted by Schuler J. in *Lay v. Lay*, 2003 NWTSC 23, the concept of favourability requires comparability between the offer and the judgment, not equivalence or correspondence. On that basis, the offer as a whole is more favourable to the respondent than the result of my judgment. It was, in my opinion, a reasonable effort at achieving a compromise without a hearing.

[8] There is a presumption in favour of the costs consequences of Rule 201 in this type of situation. The offer to settle rules are meant to be an incentive to settlement. They contemplate predictability of outcome and general application. Rule 206 maintains a general discretion in the court notwithstanding Rule 201; but, the clear intention of the rules is that the costs consequences resulting from an offer to settle would be applied unless there was good reason not to do so.

[9] Here the respondent says that she could not accept the offer because she did not have the resources to pay for a survey. This is part of an overall plea by the respondent that she cannot afford to pay costs due to poverty.

[10] Generally speaking, just as impecuniosity is no defence to a claim, it is not a basis for refusing to order costs: *Anderson v. Canada Safeway Ltd.*, [2005] A.J. No. 1 (C.A.). The fact that a litigant may not be able to pay costs merely means that the successful party may not be able to collect them: *Schubert v. Hogue*, [2002] A.J. No. 858 (Q.B.). Just because the respondent has no funds is no reason to disentitle the applicant from the award he is entitled to by the rules.

[11] Even if I accept what the respondent says, she also says that she is employed. If she had wanted to make a real attempt to avoid litigation I am sure the costs of a survey could have been worked out between her and the applicant. And, in any event, I am sure the cost of the survey would have been less than the cost of litigation. In these circumstances I see no justifiable reason why the costs consequences of Rule 201 should not apply.

[12] Accordingly, the applicant is entitled to party-and-party costs to the date of the offer, on the basis of Column 1 of the tariff, and solicitor-and-client costs thereafter.

<u>Disbursements:</u>

[13] The draft bill of costs includes as disbursements the amount of $1,097.23 representing travel expenses for applicant's counsel to attend in Yellowknife for the hearing. Counsel is a litigation associate with the firm of McLennan Ross based in Edmonton. McLennan Ross has a branch office in Yellowknife. I am told, however, that there is no litigation support at the Yellowknife office. Thus, counsel submits, it was not unreasonable to bring a litigation associate from Edmonton for the hearing and these expenses are recoverable.

[14] For years the governing principle was that some special circumstance must justify the retention of non-resident counsel if recovery for the additional costs incurred thereby, such as travel expenses, is sought from the other side. This is now set out in the Rules of Court in Rule 648(4):

> (4) The proper travelling and living expenses of a solicitor who does not reside in the Territories are recoverable under subrule (3) only where, in the opinion of the Court:
>
> (a) the expertise required to perform the particular service was not available from those solicitors resident in the territories; or
>
> (b) conflicts of interest prevented solicitors resident in the Territories from acting in the matter.

These criteria have been applied for all types of proceedings and all aspects of a proceeding.

[15] In this case nothing has been said about any requirement for expertise not available locally or about any conflicts of interest. The only thing said in justification of the travel expenses is that the client wished to use this firm and the firm did not have litigation support at its local office. That, in my opinion, does not come within the ambit of the rule. The client can choose any firm he wants but it is obviously the firm's choice not to have local litigation support. The firm chooses to do business in this jurisdiction by maintaining an office so if it chooses to bring in litigators from somewhere else then that is a cost of how it chooses to do business.

[16] The applicant is not entitled to recover as costs the travel expenses incurred by his counsel.

Interest:

[17] For some reason not clear to me, the applicant seeks recovery of pre-judgment interest. His counsel has calculated this as being payable on the sum of $1,000.00 paid by the applicant pursuant to the oral agreement that was the subject-matter of the hearing. I have two difficulties with this claim.

[18] First, pre-judgment interest is calculated on monetary awards. Here there was no claim for money or damages. Second, if this is in the context of costs, the *Judicature Act*, R.S.N.W.T. 1988, c.J-1, specifically excludes pre-judgment interest on costs: s.56(4)(c).

[19] Therefore, there will be no award by way of interest.

Costs Claim Against Intervenor:

[20] The applicant also claims costs against a non-party, Mr. Daniel Norris, who had applied for intervenor status. At an earlier appearance, it was decided that his application would be heard at the November hearing. He did not appear at the hearing, either in person or by counsel, and his application was dismissed. Now the applicant seeks a costs award as against Mr. Norris for the time and effort spent in anticipation of the intervenor application.

[21] In my opinion, this claim is separate from the question of costs as between the applicant and the respondent. I make no comment about the merits of this claim but, if the applicant wishes to pursue it, it should be done by way of a formal application, on notice to Mr. Norris, returnable in chambers.

Conclusions:

[22] The applicant will recover from the respondent costs as follows:
(a) fees of $7,534.50; plus,
(b) disbursements of $1,133.06; plus,
(c) tax on taxable disbursements; plus,
(d) costs of this submission which I fix in the lump sum of $500.00 (all inclusive).

[23] The applicant will have judgment for the total of these amounts.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT
this 4th day of February, 2005

Counsel for the Applicant: Alexis N. Moulton
The Respondent was unrepresented.

[24]