Normandin v. *Kovalench*, 2008 NWTSC 07

Date: 2008 02 06
Docket: S-0001-CV2005000229

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARYSE NORMANDIN

Applicant

- and -

WILFRED KOVALENCH

Respondent

MEMORANDUM OF JUDGMENT ON COSTS

This Memorandum deals with the issue of costs of these proceedings.

A) Background

[1] The trial proceeded in November 2006. A number of issues raised in the pleadings had been resolved by the time the matter went to trial. The issues that remained were what income should be imputed to Mr. Kovalench for the purposes of calculating his child support obligations, and how far back in time should retroactive child support be ordered for.

[2] Ms. Normandinargued that Mr. Kovalenchwas deliberately underemployed and that annual income in the range of $70,000.00 should be imputed to him. Mr. Kovalench denied he was deliberately underemployed. His position was that income should be imputed to him in the range of $30,000.00.

[3] On the issue of retroactive child support, Mr. Kovalenchargued that it should be ordered back to September 1, 2005, the date when the Application for child support was filed. Ms. Normandin's position was that the retroactive support should be

ordered back to February 2004, the date she notified Mr. Kovalench that she was seeking increased child support.

[4] My Reasons for Judgment disposing of these issues are reported at 2007 NWTSC 107. I imputed $40,000.00 in annual income to Mr. Kovalench. I ruled that the retroactive child support should be ordered going back to February 2004.

[5] Ms. Normandin argues that she is entitled to party and party costs because she was successful in this litigation. Moreover she argues she is entitled to solicitor-client costs as of October 26, 2007, as a result of a Settlement Offer she sent to Mr. Kovalench. Mr. Kovalench argues that in the circumstances of this case, each party should bear its own costs.

B) The Offer to Settle

[6] Ms. Normandin's claim for solicitor-client costs is based on Rule 201 of the *Rules of the Supreme Court of the Northwest Territories.* That Rule applies where Offers to Settle are made "at least ten days before the commencement of a hearing".

[7] Ms. Normandin's Offer to Settle is attached as Exhibit "A" to Debra Saftner's Affidavit sworn January 21, 2008. The terms of the Offer were that Mr. Kovalench's income would be imputed at $39,764.00; there would be a retroactive child support order going back to October 1, 2004; and the childcare expenses would be divided equally between the parties. The terms of the Judgment rendered were more favorable than the terms of this Offer. The question is whether the offer was made sufficiently ahead of the trial date to trigger the costs consequences set out at Rule 201.

[8] The manner in which time provided for in the *Rules of Court* is to be computed is set out at Rule 712:

> 712. In the computation of time under these rules or under an order, in addition to the rules and other provisions of the Interpretation Act, the followingrules apply unless a contrary intention appears:
>
> > (a) where any period of less than seven days is specified, a holiday other than Sunday shall not be counted but Saturday and Sunday shall
> > (b) service of a document, other than an originating document, made after 5:00PM or at any time on a Saturday or holiday shall be

> deemed to have been made on the next day that is not a Saturday or holiday

It would seem, then, that Saturdays and Sundaysare not to be countedwhen computing a period of more than seven days, such as the one provided for in Rule 201

[9] Even if Saturdays and Sundays were to be counted, it still appears that the offer was not made sufficiently ahead of the trial date to trigger the costs consequences arising from Rule 201.

[10] In her written submissions Ms. Normandin states that the offer letter was faxed on Friday, October 26. In his written submissions, Mr. Kovalench states that it was received the next day and seen by his counsel the following Monday, October 29. There is no evidence supporting either of these claims. In her Affidavit Ms. Saftner does not depose as to when the letter was faxed. She only states that the exhibits to her Affidavit are true copies of documents that are in her office's file.

[11] The copy of the offer letter that is attached to Mr. Kovalench's costs submissions does appear to indicate that it was received on October 27. The bottom portion of both pages has printed writings and numbers to that effect. Ms. Normandin, who filed her written submission after Mr. Kovalench filed his, has not attempted to challenge or rebut the assertion that the fax arrived on October 27. I accept, therefore, that the letter was received at the office of Mr. Kovalench's counsel on Saturday, October 27. By virtue of Rule 712(b), service is deemed to have been made on the next day that is not a Saturday or a holiday, namely, Monday October 29.

[12] The trial in this matter started on November 6, 2007. Because of the language used in Rule 201, which speaks of offers made "*at least* ten days before the commencement of the hearing", the date of service and the date of the commencement of the trial must not be included in the time computation. Rule 712 incorporates the *Interpretation Act*, R.S.N.W.T. 1988, c. I-8. Subsection 24(3) of that *Act* reads:

> 24.(...)
>
> > (3) Where an enactment contains a reference to a number of clear days or to "at least" or "not less than" a number of days between two events, in calculating the number of days there shall be excluded the days on which the events happen.

[13] I conclude, therefore, that the costs consequences provided for in Rule 201 are not engaged in the circumstances of this case. Of course, costs are ultimately a matter for the Court's discretion. It would be open to me to take the settlement offer into account, even if it was not made within the time frame specifiedin Rule 201. However, an order for solicitor-client costs is the exception, not the rule. The costs consequences set out in Rule 201 are significant. Where, as in this case, the prerequisites are not strictly adhered to, I am reluctant, in the absence of any other compelling reason, to exercise my discretion and grant elevated costs on the basis of that offer.

[14] For those reasons, I am not satisfied that Ms. Normandin is entitled to solicitor-client costs in these proceedings.

[15] Before I leave the question of settlement offers, I want to briefly address the question of offers to settle made by Mr. Kovalench. In his written submissions Mr. Kovalench refers to an offer he made to Ms. Normandin, dated April 23, 2007. A copy of that offer is attached to his submissions. I note, however, that Exhibit "B" to Ms. Saftner's Affidavit is a copy of a letter dated September 9, 2007, signed by Mr. Kovalench's counsel, which also includes a settlement offer. The September letter states that the previous offer to settle is revoked. The letter also states:

> You may consider this to be a formal offer to settle pursuant to the Rules. We will, naturally, rely on the costs consequences of same.

[16] Given this, the relevance of the April settlement offer is unclear to me. It seems to me that the only offer that could have relevance for the purposes of costs would be the September one. That offer was to have Mr. Kovalench's income be imputed at $32,777.00. It proposed that he pay a proportionate share of child care expenses. It is silent on the issue of retroactive child support. That offer is less favorable to Ms. Normandin than the Judgment she obtained, so I find it has no bearing on my decision.

C) Party and Party costs

[17] To determine whether Ms. Normandin is entitled to party and party costs, the first question to be answered is whether she was the successful party. If so, the next question is whether there exist circumstances that would justify a departure from the usual rule that the successful litigant is entitled to party and party costs.

[18] The income imputed on Mr. Kovalench at the conclusion of the trial was approximately $30,000.00 less than what Ms. Normandin was seeking, and approximately $10,000.00 more than what Mr. Kovalench was saying should be ordered. To that extent, it can be said that success was somewhat divided. On the issue of retroactive child support, however, Ms. Normandin's argumentprevailed. On the whole, I find that Ms. Normandin was successful in this litigation.

[19] Mr. Kovalench argues that quite apart from each party's level of successat trial, there are reasons why the parties should each bear their own costs. He incurred significant litigation costs as a result of having to travel from Saskatchewan for the trial. He appears to suggest that this could have been avoided, as he would have been prepared to proceed to trial on the basis of an agreed statement of facts. He had to attend the trial because Ms. Normandin insisted that he provide *viva voce* testimony about his medical condition.

[20] I cannot fault Ms. Normandin for having wanted to have Mr. Kovalench testify on that issue and others, such as his efforts to find employment. She was entitled to hear his evidence and to test it through cross-examination. Ultimately, I accepted Mr. Kovalench's testimony about his medical difficulties and rejected Ms. Normandin's submission that he was deliberately under-employed. But that does not mean that she should be deprived of her costs for having wanted an opportunityto cross-examinehim on those issues.

[21] Mr. Kovalench also points out that there is some uncertaintyin the law as to how income should be imputed to someone in his situation. While that is a factor to consider, it is often the case that, when matters do go to trial, part of the reason they go to trial is that the law is not altogether clear and there is some unpredictability in the outcome.

[22] It is evident that efforts were made by the parties to narrow down the issues in this case. They were able to resolve a number of things and the result was a trial that proceeded smoothly, efficiently, and with focus. That is to the credit of the partiesand their counsel. Nevertheless, I am not satisfied that there exist compelling reasons to depart from the usual practice of granting costs to the successful party.

[23] Accordingly there will be an order for party and party costs in favor of Ms. Normandin. These costs are to be calculated in accordance with Column 2 of Schedule "A" of the *Rules of Court.*

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
6th day of February 2008

Counsel for the Applicant: Donald P. Large, Q.C.

Counsel for the Respondent: Terri Nguyen

S-0001-CV-2005000229

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

MARYSE NORMANDIN

Applicant

- and -

WILFRED KOVALENCH

Respondent

MEMORANDUM OF JUDGMENT ON COSTS OF
THE HONOURABLE JUSTICE L.A. CHARBONNEAU
