Hegeman v. *Carter et al*, 2008 NWTSC 48

Date: 2008 07 07
Docket: S-0001-CV-2007000080

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE RESIDENTIAL TENANCIES ACT R.S.N.W.T. 1988 CHAPTER R-5, AND AMENDMENTS THERETO

AND IN THE MATTER OF THE ORDER OF THE RENTAL OFFICER FILED MARCH 28, 2008

BETWEEN:

LONA HEGEMAN

Applicant

- and -

TRACY CARTER AND JACK CARTER

Respondents

- and -

HAL LOGSDON, in his capacity as Rental Officer

Second Respondent

- and -

ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

Intervenor

RULING ON COSTS

A) INTRODUCTION

[1] Ms. Hegeman applies for costs in relation to an appeal she filed in this Court pursuant to the *Residential Tenancies Act*. Ms. Hegeman appealed a Rental Officer's decision rendered on March 20, 2007 ordering her to return a security deposit of $900.00 to her former tenants, Tracy and John Carter. I allowed Ms. Hegeman's appeal in Reasons for Judgment reported at 2008 NWTSC 24, and ordered a re-hearing of the matter before a different Rental Officer.

[2] Ms. Hegeman does not seek costs against the Carters or against the Rental Officer. She seeks costs against the Attorney General. The Attorney General was not originally a party in these proceedings, but successfully applied to be granted intervenor status.

B) ANALYSIS

[3] Ms. Hegeman relies on the principle that the successful party in litigation is usually entitled to costs. She asks that the costs be enhanced from the Tariff set out in the *Rules of Court* because that Tariff is outdated.

[4] The Attorney General resists the application for costs. He argues that he intervened in the public interest and that costs are not normally ordered for or against a public interest intervenor. Alternatively, the Attorney General argues that any costs ordered should be in a much more modest amount than what Ms. Hegeman seeks.

1. Whether the Attorney General is liable for costs

[5] A number of factors have an impact on an intervenor's entitlement to, or liability for, costs:

> In general, an intervenor should bear its own costs unless there is a reason to depart from the rule. An intervenor added as a party on its own initiative and participating fully in the proceedings may be liable for some or all of the costs of the proceedings, at least after the date of intervention, absent special circumstances that warrant a departure from the general principle that costs should follow the event. It would appear that some participation in the proceedings is essential; thus, a party added on its own initiative and did nothing more than hold a watching brief was denied costs, but the court ordered intervenors to pay additional costs incurred by reason of the intervention. [footnotes omitted]

M. Orkin, *The Law of Costs*, 2nd edition, Canada Law Books, at 2-36.1 and 2-36.2.

[6] One of the circumstances where an intervenor is not generally liable for costs is when the intervention is done in the public interest, rather than being aimed at advancing the intervenor's own interests:

> The general rule is '... that a party granted intervenor status in the public interest is, generally, neither entitled nor liable for costs in the matter. Part of the reasoning behind this rule is that it is generally not appropriate to require parties who have initiated litigation to bear the costs of those whom they did not themselves cause to be involved in the litigation. Costs are not awarded against public interest intervenors because the intervention is offered and expected to assist the court. They should not be in jeopardy of a costs order for having voluntarily offered the court their assistance.
>
> There are circumstances where a deviation from the general rule is appropriate. Where for example a party intervenes in the public interest but is personally affected by the result more than other members of the public, costs may be awarded to or against that intervenor. [citations omitted]
>
> *Ritter* v. *Hoag* [2003] A.J. No.579, at paras 3-4.

[7] The Attorney General sought and was granted intervenor status in these proceedings for the sole purpose of presenting submissions on whether Subsection 71(2) of the *Residential Tenancies Act* creates an irrebuttable presumption of notice where service is effected by registered mail. The Attorney General's involvement in this matter was limited to that issue. He did not seek to cross-examine Ms. Hegeman on her Affidavits, nor did he cross-examine her when she testified. He made no submissions about the merits of the Rental Officer's decision.

[8] The Attorney General argues that he intervened to ensure that the Court had the benefit of full argument on the statutory interpretation issue. He argues this was especially important in this case because the Carters were not represented by counsel on the appeal and the Rental Officer, whose decision was at issue, could not have presented submissions on that issue.

[9] I accept that the Attorney General's intervention had a public interest component to it. It ensured that the Court had the benefit of submissions supporting all the possible interpretations of Subsection 71(2). Indeed, the

Attorney General's submissions were helpful to the Court in identifying the competing principles that were engaged on this issue.

[10] That does not mean that the Attorney General did not also have a personal interest and stake in the proceedings. The Office of the Rental Officer is not entirely isolated from the government. The administrative relationship between the Rental Officer's office and the Department of Justice was alluded to during the hearing of the appeal, when the question was raised as to how legal representation of the Rental Officer would be arranged. The materials filed on this costs Application include correspondence explaining that the Attorney General would be responsible for any costs that the Rental Officer might be ordered to pay. Even though there is no evidence before me about the precise level of administrative and financial relationship between the Office of the Rental Officer and the government, there is enough to suggest that a decision that impacts the daily operations of the Rental Officer's office has the potential of having an impact on the government. In that sense, it is of interest to the Attorney General.

[11] In addition, to the extent that other territorial statutes permit service by registered mail and include a deeming provision similar to Subsection 71(2), the statutory interpretation issue that arose in this case had the potential to have an impact and operational consequences beyond the ones at issue in this case. That too would be of interest to the Attorney General.

[12] Hence, I conclude that the statutory interpretation issue that arose in this case was of particular interest to the Attorney General and this was part of the reason for the intervention. The Attorney General, as the representative of the government, stood to be affected by the outcome of this case more than members of the public. Because Ms. Hegeman's position prevailed on the statutory interpretation issue, I find that the Attorney General is liable to her for some costs.

2. What is an appropriate order for costs

[13] Ms. Hegeman seeks a lump sum between $1,500.00 and $2,000.00, and argues that this is a very modest amount in comparison to her actual costs in this litigation. According to the Affidavit sworn by Paul Folkes on June 25, 2008, the fees invoiced to Ms. Hegeman between January 7, 2008 and June 2008 were $8,250.00.

[14] Party - and - party costs, it is important to remember, are designed to achieve partial compensation to the successful party in a litigation. They are not designed to achieve full compensation. Full compensation is achieved through solicitor client costs, a type of order generally reserved for circumstances where the Court feels it is necessary to sanction conduct on the part of a party. *5142 NWT Ltd. et al.* v. *Town of Hay River et al.* 2008 NWTSC 31, at para.7.

[15] Since there is no suggestion here that solicitor-client costs should be ordered, Ms. Hegeman's actual costs for this litigation are of limited relevance, although they might serve to illustrate the gap between what she can claim under the Tariff and what she actually spent. But even where the gap is significant, there are limits to the extent to which that consideration will affect the amount of costs awarded.

[16] Ms. Hegeman argues that the costs award should be enhanced from the Tariff because of the complexity of the matter. She argues that in addition to certain aspects of the case that were inherently complex, the Attorney General's intervention made the case more complex. She argues that it is not fair for her to bear the full financial burden of that increased complexity.

[17] Ms. Hegeman's complaint in this appeal was that she was not aware of the hearing date and was therefore not able to present her case to the Rental Officer. That issue was clearly raised on the materials she filed to initiate the appeal, before Ms. Hegeman retained counsel and before the Attorney General intervened.

[18] The Rental Officer proceeded to the hearing on the basis that Ms. Hegeman had been sent a Notice of Hearing by registered mail. Therefore, the question of whether Subsection 71(2) of the *Act* creates a rebuttable or irrebuttable presumption of notice was, from the start, the central issue in this case. It was a question the Court was going to have to resolve, irrespective of the Attorney General's intervention.

[19] Ms. Hegeman argues that the position advocated by the Attorney General forced her to argue the appeal on the basis of natural justice issues that would not have arisen otherwise. I disagree. I fail to see how the Attorney General's position changed anything to the basic tenets of the case: Ms. Hegeman's position was that she did not know about the hearing, and that the Rental Officer should have never proceeded in her absence given what he knew or ought to have known about her desire to be present at the hearing. She sought a re-hearing because she

said she had a case to present in response to the Carters' case, and she should get an opportunity to present it. In my view, the Attorney General's intervention did not materially change anything to these basic issues.

[20] The Attorney General's intervention may have resulted in some additional costs to Ms. Hegeman, in the sense that her counsel had to deal with one more party, which affects matters of general communications between counsel, service of documents, and things of that nature. But in my view, the complexity of this appeal itself was not altered significantly by the Attorney General's intervention.

[21] Ms. Hegeman also argued that the matter was rendered more complex because she had to present *viva voce* testimony on the appeal. She relies on Rule 26 of the *Rules of Court* in support for the proposition that *viva voce* evidence was necessary. Rule 26 reads as follows:

> The Court may, on the return of the originating notice, permit evidence to be given orally.

[22] This Rule does not force a party to adduce *viva voce* evidence. It simply says that the Court may receive oral evidence. Ms. Hegeman had already filed two Affidavits before she testified. No other party had asked to cross-examine her on those Affidavits. Most of what she testified about was already set out in her Affidavits, and anything new or intended to clarify earlier matters could have also been presented through affidavit materials. I say this not to be critical of the fact that *viva voce* evidence was called; a party is free to present its case as he or she wishes, within the parameters of the *Rules of Court* and the rules of evidence. But it is inaccurate, in my view, to suggest that Ms. Hegeman had no choice but to adduce oral evidence on this appeal.

[23] Two aspects on the draft Bill of Costs attached to Mr. Folkes' Affidavit require some comments. First, I do not think that the Attorney General should be held liable for costs that occurred prior to his intervention in these proceedings. Second, I note one item listed is for an adjournment of the appeal. There were a number of appearances on this matter but the hearing of the appeal was only adjourned once. It had been set to proceed on January 8, 2008 and was adjourned on that date at the request of Ms. Hegeman's counsel, who had very recently been retained. I granted that adjournment request but made a costs order in favor of the Carters because of it (See 2008 SCNWT 04). That being so, I do not see how Ms. Hegeman could be awarded any costs arising from that adjournment.

[24] I accept that the Tariff set out in the *Rules of Court* is dated, and that it can be appropriate to adjust it to bring it more in line with the current realities of the costs of litigation. On the other hand, I cannot lose sight of the fact that this litigation was about a security deposit in the amount of $900.00. In fairness to Ms. Hegeman, however, I also recognize that her case served as an opportunity to clarify the interpretation to be given to the deeming provision of Subsection 71(2) of the *Act*. The result may inform some of the procedures at the Rental Officer's office in the future. It may also assist other landlords or tenants who have been served by registered mail and find themselves in the position Ms. Hegeman was in. Finally, it may have a bearing on how similar provisions dealing with service are interpreted by other agencies.

[25] For reasons I have already given, I find that the main area of costs that Ms. Hegeman can legitimately claim against the Attorney General are those associated with the hearing of the appeal itself, including the preparation of additional evidence that was adduced for that hearing, the preparation of the brief, and the presentation of oral submissions. I also think that it is reasonable to make allowances for some ancillary costs such as the preparation of some correspondence. But in my view, even enhanced from the Tariff, an appropriate compensation for those items, on a party - and - party basis, amounts to much less than what is sought.

[26] There will be a lump sum order costs order in Ms. Hegeman's favor, against the Attorney General, in the amount of $700.00.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
7th day of July 2008

Counsel for the Applicant: Douglas G. McNiven
No one appeared on behalf of Tracy Carter and Jack Carter
Counsel for Hal Logsdon and
the Attorney General: Sheldon Toner

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RULING ON COSTS OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU