

CITATION: Bonello v. Gores Landing Marina, 2018 ONSC 3187
COURT FILE NO.: CV-09-383809-00A1
DATE: 20180523

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TIMOTHY BONELLO, TED BONELLO, ANNE CUTAJAR WAGNER,
ANDREW BONELLO and MARK BONELLO, Plaintiffs

AND:

GORES LANDING MARINA (1986) LIMITED, JOSEPH DAVIES, and
MURRAY E. CARSLAKE and JOSEPH DAVIES JR. also known as JOEY
DAVIES, Defendants

AND BETWEEN:

CHRIS KANE, CHRIS RYAN, ANTHONY COOK, GABE MANSUETO,
GERALD CHESTNUT, JEFF JAGLEL, FRANK BUTTIGIEG, DAN RULE,
MIKE BUTTIGIEG, Third Parties

BEFORE: Cavanagh J.

COUNSEL: *Andrew C. Murray*, for the Plaintiffs

R. Steven Baldwin, for the Defendants, Gores Landing Marina (1986) Limited and
Joseph Davies,

Russell Tilden, for the Third Party Anthony Cook

Nadine Nasr, for the Third Party Gerald Chestnut

Lianne Sharvit, for the Third Party Jeff Jaglel

Jeffrey Pasternak, for the Third Parties Frank and Mike Buttigieg

Lazina Khan, for the Third Party Gabe Mansueto

HEARD: By Written Submissions

COSTS ENDORSEMENT

[1] In the main action, the plaintiffs sued the defendants for damages in the amount of \$5 million. The claim was made in relation to personal injuries suffered by Timothy Bonello during a tug-of-war game at a campground owned by the defendant Gores Landing (1986) Limited (the “Marina”). The defendant Joseph Davies Sr. is a principal of the Marina.

[2] The Marina and Mr. Davies Sr. commenced a third party claim against nine (of approximately forty) participants in the tug-of-war game. The third party claim was for full contribution and indemnity for any and all amounts which may be found owing by the Marina or Mr. Davies Sr. to the plaintiffs.

[3] Six of the nine third parties moved for summary judgment dismissing the third party claim against each of them on the ground that there was no genuine issue requiring a trial. I granted these motions, and invited written submissions with respect to costs if there was no agreement. This is my endorsement with respect to costs of these motions.

[4] The third parties' motions were first brought in 2016. At this time, the Marina and Mr. Davies Sr., also brought a motion for summary judgment dismissing the main action. As a result of this motion, the motions by the third parties were scheduled to be heard, if necessary, following release of the decision on the motion for summary judgment brought by the Marina and Mr. Davies Sr. The motion judge on the first motion for summary judgment granted the motion and dismissed the action against the Marina and Mr. Davies Sr. The third party claim was also dismissed. The Marina and Mr. Davies Sr. were ordered to pay costs to the third parties who had brought motions.

[5] The plaintiff, Timothy Bonello, appealed the motion judge's judgment to the Court of Appeal. On August 2, 2017, the Court of Appeal allowed the appeal and set aside the judgment dismissing Mr. Bonello's action. In his reasons, Lauwers J.A., for the court, wrote that he would "leave the parties free to pursue their claims including, if so advised, other motions for summary judgment, without being bound by any of the determinations made in the decision under appeal." Lauwers J.A. wrote that he "would reverse the order for costs made below and require the respondents to pay the amount awarded to the appellant".

[6] Following the Court of Appeal's decision, six of the third parties brought motions for summary judgment dismissing the third party claim as against each of them.

[7] As noted, the plaintiffs' claim was for damages in the amount of \$5 million. The injury that was suffered by Mr. Bonello was a serious one and the third parties were exposed to a claim for full contribution and indemnity in a significant amount. I accept that the litigation was very important to the third parties.

[8] The third parties have been involved in this litigation for over eight years. Multiple parties were involved, and examinations for discovery were spread over five days throughout 2013 and 2014. In total, ten parties were examined. A mediation was held on July 6, 2015 which was not successful. A number of scheduling appearances were required. An additional examination of the defendant Mr. Davies Jr. was held. The motions before me were heard together with a motion for summary judgment brought by the Marina and Mr. Davies Sr. for judgment dismissing the main action. These motions were heard over two days.

[9] The Marina and Mr. Davies Sr. do not disagree that the third parties are entitled to their costs on a partial indemnity scale. The Marina and Mr. Davies Sr. submit, however, that the third parties are not entitled to costs of the first motion for summary judgment because they were not

successful on that motion, and the order providing for payment of costs was set aside on appeal. The Marina and Mr. Davies Sr. also submit that the only jurisdiction for an award of costs of the appeal is with the Court of Appeal, and that the Court of Appeal did not award costs of the appeal to the third parties. The Marina and Mr. Davies Sr. submit that the costs claimed by the third parties should be reduced to account for costs of the first motion for summary judgment and costs of the appeal.

[10] In his costs submissions, counsel for Mr. Cook addressed these submissions. He submits that the only reason that his motion was not heard and decided in 2016 was because of the procedure set by the court by which the motion for summary judgment brought by the Marina and Mr. Davies Sr. would be heard first. Counsel for Mr. Cook submits that he was obliged to attend at the first motion for summary judgment, and the hearing of the appeal, to monitor these proceedings. He submits that had Mr. Cook's motion been heard when it was first brought, he would have been successful.

[11] Section 131(1) of the *Courts of Justice Act* provides that “[s]ubject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.” The costs of and incidental to the third party claim brought by the Marina and Mr. Davies Sr. against the third parties are within my discretion.

[12] I accept the submissions made on behalf of the third parties that the materials that were used by the third parties on the motions for summary judgment before me included the materials that were prepared for the summary judgment motions that were first brought. These motions were reasonably brought, and they were not heard because of the decision that the motion for summary judgment by the Marina and Mr. Davies Sr. should be heard first. The work that was done to prepare these motion materials was necessary for the motions brought before me and it is fair and just that the third parties should recover costs in relation to the preparation of these materials.

[13] The third parties were entitled to be represented on the motion for summary judgment brought by the Marina and Mr. Davies Sr. and, in my view, it was reasonable that they be represented at the hearing of this motion. I would not reduce the costs that are claimed by the third parties to eliminate costs of the attendance of counsel at the hearing of the first motion for summary judgment. I regard the costs of attending the hearing of the first motion for summary judgment to be costs incidental to the third party claims and, as such, costs that are within my discretion to award.

[14] The motion judge's judgment in the main action dismissing Mr. Bonello's claim was the subject of the appeal. The third parties are not parties to the main action and they were not parties to the appeal. However, the third parties had an interest in the outcome of the appeal because it would affect whether Mr. Bonello's action would proceed, and whether the third party claim by the Marina and Mr. Davies Sr. for full contribution and indemnity would also proceed. I also regard the costs for counsel to attend the hearing of the appeal to be costs incidental to the third party claims and, as such, costs that are within my discretion to award. By allowing such

costs as costs incidental to the third party claims, I am not awarding costs of the appeal itself, which would not be within my discretion to award.

[15] In my view, it would not be fair and just for me to reduce the costs claimed by the third parties to account for time spent on the first motion for summary judgment or time spent attending to hear the arguments made in the Court of Appeal. These costs were not improper or unnecessary.

[16] I exercising my discretion as to costs, I have taken into account the factors in r. 57.01(1) of the *Rules of Civil Procedure*. I have also considered whether the amount claimed by a given third party is fair and reasonable for the unsuccessful parties to pay, having regard to the principles expressed by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 at para. 26.

[17] I note that there are differences among the third parties with respect to the amount of time expended and the hourly rate that is claimed. These differences are understandable, and reflect different decisions taken in relation to the conduct of the litigation as well as some differences in staffing of the litigation and the actual rates of counsel. My assessment in respect of each of the bills of costs that have been submitted is that the amount of time that was expended is not unreasonable for litigation of this type that involved a substantial claim that spanned a period of many years.

[18] Other than objecting to payment of costs for the first motion for summary judgment and the appeal, the Marina and Mr. Davies Sr. do not challenge the costs claimed by the third parties, with the exception of the amount claimed for fees by Mr. Chestnut and the claim for costs by Gabe Mansueto on a full or substantial indemnity scale.

[19] The Marina and Mr. Davies Sr. submit that the partial indemnity fees that Mr. Chestnut claims in the amount of \$46,215 are large in comparison to the fees claimed by other third parties, and may require some reduction for purposes of parity. These defendants also submit that the costs claimed should be reduced by \$15,824 to reflect fees claimed in respect of the first motion for summary judgment and the appeal. These parties also submit that the fees also be further reduced to \$25,000 for purposes of parity.

[20] I regard the amount of time expended and the hourly rate claimed by Mr. Chestnut on a partial indemnity scale to be reasonable and proportionate. I observe that counsel for Mr. Chestnut took a lead role in the submissions that were made at the hearing of the third parties' motions for summary judgment, and her submissions were adopted by counsel for other third parties and benefited these parties. The preparation that was necessary for her submissions may reflect a slightly higher claim for fees.

[21] Mr. Mansueto submits that I should exercise my discretion and order that the Marina and Mr. Davies Sr. pay costs to Mr. Mansueto on a full or substantial indemnity scale for the following reasons:

- a. At his examination for discovery, Mr. Davies Sr. admitted having no evidence to support the allegations against Mr. Mansueto in the third party claim.

- b. Mr. Mansueto offered to consent to a dismissal of the claim against him without costs on October 20, 2011 and again following the examination for discovery of Mr. Davies Sr., and these offers were not accepted. By letter dated September 18, 2017, counsel for Mr. Mansueto offered to consent to dismissal of the third party claim in exchange for payment of costs of \$15,000 and a release. This offer expired on October 6, 2017.
- c. They submit that the conduct of the Marina and Mr. Davies Sr., initiated by their counsel in the litigation, involved many unnecessary steps that lengthened unnecessarily the duration of the action and the third party claim, and these parties took unreasonable positions during the course of the litigation.

[22] The offers to settle do not trigger automatic costs consequences under the *Rules of Civil Procedure*, and I do not regard the conduct upon which Mr. Mansueto relies to be reprehensible conduct that that should be subject to sanction through an award of costs on a substantial indemnity scale. I would not exercise my discretion to make an award of costs on a full or substantial indemnity scale in this case.

[23] Mr. Mansueto's claim for costs on a partial indemnity scale is in the amount of \$45,234.10 I regard the amount of time expended by counsel for Mr. Mansueto to be reasonable and proportionate. I also regard the partial indemnity rates used to be reasonable for this case.

[24] I do not regard the amounts claimed by the other third parties to be unreasonable or disproportionate or outside of the range of costs that the Marina and Mr. Davies Sr. would have reasonably expected to pay if they were unsuccessful.

[25] With respect to costs of the third parties who brought motions for summary judgment in the following amounts:

- a. I fix costs of Anthony Cook in the amount of \$28,953.05 comprised of fees of \$23,088, HST on fees of \$3,001.44, and disbursements (inclusive of HST) of \$2,863.61.
- b. I fix costs of Frank Buttigieg and Mike Buttigieg in the amount of \$40,463.39, comprised of fees of \$33,395.20, HST on fees of \$4,341.38 and disbursements (inclusive of HST) of \$2,726.81.
- c. I fix costs of Mr. Chestnut in the amount of \$55,054.74, comprised of fees of \$46,215, HST on fees of \$6,007.95 and disbursements (inclusive of HST) of \$2,831.79.
- d. I fix costs of Mr. Jagl in the amount of \$40,843.01, comprised of fees in the amount of \$32,206.50, HST on fees of \$4,186.85 and disbursements (inclusive of HST) of \$4,449.66.

- e. I fix costs of Mr. Mansueto in the amount of \$45,234.10, comprised of fees (inclusive of HST) of \$42,633.76 and disbursements (inclusive of HST) of \$2,600.34.

[26] The costs that I have awarded are to be paid within 30 days.

Cavanagh J.

Date: May 23, 2018