CITATION: Esquire Rose Investment Corporation v. Moxness, 2025 ONSC 4313
COURT FILE NO.: CV-23-0257-0000
DATE: 2025-07-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ESQUIRE ROSE INVESTMENTS CORPORATION v. MATHEW MOXNESS

HEARD: In writing

BEFORE: Nieckarz J.

COUNSEL: Nicola-Antonio Melchiorre and Robert Schroeder for the Plaintiff
Andrei Dobrogeanu for the Defendant

Endorsement on Costs

Overview:

[1] In my Reasons for Decision released May 27, 2025 ("Reasons"), I granted the Plaintiff's summary judgment motion in part. The Plaintiff claimed $93,500 in damages and I granted judgment for $80,000. At para. 59 of my Reasons, I provided for written submissions as to costs if the parties could not agree. I have now received both parties' costs submissions.

[2] The Plaintiff seeks costs of the action on a partial indemnity basis up to February 1, 2024, that being the date of a written offer to settle, with substantial indemnity costs thereafter. Total fees, disbursements, and HST claimed on this mixed indemnity basis are $17,409.23.

[3] The Defendant acknowledges that the Plaintiff was "mostly" successful on its summary judgment motion and is entitled to costs. The Defendant disagrees with the total amount claimed.

The Defendant argues that $11,504.56, inclusive of fees, disbursements, and HST is a reasonable amount.

Legal Framework:

[4] The applicable legal principles are as follows:

a. By virtue of s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, an award of costs is in the discretion of the judge.

b. In addition to considering the result in the proceeding and any offer to settle, the court is to exercise the discretion granted by s. 131(1) taking into consideration the factors outlined in Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"). These factors include (but are not limited to) the following:

- the principle of indemnity, including, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- the amount claimed and the amount recovered in the proceeding;
- the apportionment of liability;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
- whether any step in the proceeding was,

  (i) improper, vexatious or unnecessary, or

  (ii) taken through negligence, mistake or excessive caution.

c. Modern costs rules are designed to indemnify successful litigants for the cost of litigation, encourage settlement, and sanction inappropriate behaviour by a litigant.

d. If there are offers to settle, Rule 49.10 of the *Rules* is to be considered.

[5] In *Mudford v. Smith*, 2009 CanLII 63136, at para. 7, Belobaba J. said the following in relation to fixing the costs of a trial or motion:

> In *Boucher*, the Court of Appeal reminded trial and motion judges that fixing costs is not simply a mechanical exercise beginning and ending with a calculation of hourly time and rates. The costs award should reflect what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs to the successful litigant. In deciding what is fair and reasonable it is relevant to consider the expectations of the parties. When a quantum has been determined, it is then necessary to step back and consider the result produced and assess whether, in all the circumstances, the result really is fair and reasonable.

Analysis:

Is there a Rule 49 offer?

[6] The Plaintiff submits that, on December 12, 2023, it served an offer to settle the proceeding for payment by the Defendant of $60,000. If the offer to settle was accepted prior to "February 1, 2023", it could be accepted without costs. Thereafter, it could only be accepted by payment of substantial indemnity costs.

[7] The Defendant does not deny that the Rule 49.10 costs consequences should apply. While there is no affidavit of service attached to the offer to settle showing exactly when and how it was served, the Defendant does not deny that service occurred. The Defendant attaches a cover letter sent with the offer, which is dated December 12, 2023. I take it that the reference to February 1, 2023, should have been February 1, 2024, given that the offer date was in December 2023. In the absence of evidence or submissions to the contrary, I also take the date of the letter as the date of service.

[8] I find that there is no reason cited by the Defendant, or otherwise, not to apply the costs consequences of Rule 49.10(1). The Defendant does not deny that the offer was made at least seven days before the commencement of the hearing, that it remained open for acceptance (albeit with payment of costs) until the commencement of the hearing, or that the Plaintiff obtained a judgment more favourable than the terms of the offer. As such, Rule 49.10(1) provides that, unless the court orders otherwise, the Plaintiff is entitled to partial indemnity costs to the date the offer was served and substantial indemnity costs from that date. The Plaintiff has not claimed Rule 49.10 consequences until February 1, 2024. I find that the Plaintiff is entitled to partial indemnity costs up to February 1, 2024, and substantial indemnity thereafter.

What is an appropriate amount of costs?

[9] The Defendant submits that the costs claimed by the Plaintiff are excessive. The Defendant argues that this was a simple action of breach of contract between two parties. Aside from the pleadings, the only other steps taken in this action were attendance at a case conference, and a 1.5-hour summary judgment motion. No cross-examinations were done. No undertakings were requested. No Affidavits of Documents were exchanged. Work was done that did not need to be done, including the drafting of the affidavit of Mr. St. Jarre, which was disregarded by the court, and the making of arguments in their factum for issues that were not in dispute. The Defendant submits that the amount of costs claimed are not proportionate to the complexity of this action nor the work required for it.

[10] The Defendant argues that the quantum of costs should be reduced by 25%, to $14,759.62, to more properly reflect what would be reasonable, fair, and proportionate in the circumstances of

this case. The Defendant argues for a further 10% reduction of both the partial indemnity and substantial indemnity costs to account for the Defendant's success in reducing the amount of the damages claimed. The Defendant takes no issue with the disbursements claimed.

[11] In response, the Plaintiff argues as follows:

a. At no time prior to the delivery of the Plaintiff's factum did the Defendant advise he was conceding the issues of the contract breach and deposit forfeiture. As far as the Plaintiff knew, these issues needed to be addressed.

b. The affidavit of Mr. St. Jarre was required to outline the sale process and mitigation efforts, regardless of the fact he was not qualified as an expert.

c. In the absence of a Bill of Costs from the Defendant, his attack on the quantum of costs claimed is no more than an attack in the air: *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2003] 64 O.R. (3d) 135, (S.C.), at para. 10.

d. It is not for the court to second-guess successful counsel on the amount of time spent on the case or the allocation of counsel to the tasks at hand.

[12] The Defendant does not provide his own Bill of Costs. While not strictly necessary, it does often assist the court in considering arguments as to the reasonableness of costs claimed in terms of both time spent and expectations of the unsuccessful party.

[13] Despite the absence of a Bill of Costs from the Defendant, I find that the amount claimed by the Plaintiff is in excess of what the unsuccessful party would reasonably expect to pay having regard to the following:

a. The case was not factually complex, nor did it involve a significant number of documents. There were no complex productions or any discoveries at all. Pleadings were exchanged, there was some communication between counsel, one offer was sent, and the motion was brought. The materials for the motion were not voluminous or complicated.

b. The primary issue as to whether there was personal liability to be attributed to the Defendant was somewhat complex. The other legal issues to be determined were not.

c. While I acknowledge that it is not for the court to second guess the amount of time and resources counsel devote to a case, it is for the court to determine a reasonable amount for an unsuccessful party to pay. This is often quite different from what a lawyer may charge their client pursuant to the terms of their retainer. Given the simple fact scenario and only one complex, but clearly defined legal issue, 91 hours of lawyer time and 8.2 hours of law clerk time is not a reasonable amount to expect the Defendant to pay for. I also note that much of the law clerk time is in fact on account of administrative tasks that the Defendant should not be called upon to pay on a partial indemnity basis (such as opening the file).

d. I agree with the Defendant that the Affidavit of Mr. St. Jarre ultimately had limited value.

e. The Defendant was successful in eliminating some of the damages claimed. The addition of these additional claims would have slightly increased the costs associated with preparing and defending the case.

f. There is some limited overlap between the counsel working on the case.

[14] I find that a fair and reasonable amount to be paid by the Defendant to the Plaintiff is $14,000, inclusive of fees, disbursements, and HST.

The Hon. Justice T.J. Nieckarz

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ENDORSEMENT ON COSTS

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