Court of King's Bench of Alberta

Citation: Axis Real Estate Investment Corporation v Fort Saskatchewan (City), 2025 ABKB 170

2025 ABKB 170 (CanLII)

Date: 20250321
Docket: 0903 10780
Registry: Edmonton

Between:

Axis Real Estate Investment Corporation

Plaintiff

- and -

City of Fort Saskatchewan

Defendant

Reasons for Judgment
of the
Honourable Justice Peter Michalyshyn

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[1] The parties have been unable to agree on costs following the outcome at trial reported at ***Axis Real Estate Investment Corporation v Fort Saskatchewan (City)***, 2023 ABKB 395.

[2] The trial of this matter was decided after nine days of evidence and argument. The Plaintiff went into the trial with a Statement of Claim filed July 14, 2009 that sought well over $2 million for alleged defamation and related economic losses, together with relatively minor lease-related claims. Several heads of damages changed as the trial began and unfolded. The Defendant disputed the claims in any event, and sought a finding of set-off damages in the agreed sum of $71,200.55.

[3] The issues at trial were decided as follows:

a. Were certain statements attributed to the defendant City of Fort Saskatchewan in all of the circumstances defamatory of the Plaintiff Axis Real Estate Investment Corporation? The answer was No.

b. Had the Plaintiff proven damages for the alleged defamation? The answer was No.

c. What amounts were still owing under the Lease? The answer was an award of $13,202.22 (coming out of paras 66-67 of the Decision: $1,440.93 + $11,761.29, not including gst), a small fraction of the $118,991.10 claimed at the outset of the trial.

d. Did the Defendant prove liability for its set-off claim? The answer was No.

[4] The costs issues are now as follows:

a. What is the effect of any offers made by the Defendant?

b. Is the Plaintiff entitled to solicitor-client costs for successful claims under the Lease?

c. Is the Defendant entitled to costs for the Plaintiff's failure to prove defamation, and if so, on what measure?

d. Is the Plaintiff entitled to costs for the Defendant's failure to prove liability for set-off damages, and if so, on what measure?

e. At the end of the day what costs are recoverable?

What is the effect of any offers made by the Defendant?

[5] The short answer is that the numerous offers made should be given no effect.

[6] The Defendant's first offer was made before formal litigation began. It was made on February 4, 2009. The offer was to pay $31,247.36 to resolve the parties' dispute over certain disputed invoices. The offer did not mention other disputes that arose later at trial.

[7] The invoices referred to in the February 4, 2009 letter appear to include the 10 invoices that were litigated at trial. Looking at just those 10 common invoices, it appears that on February 4, 2009 the Defendant was prepared to pay just over $18,000 of the $31,247.36 total offer to resolve them. Of course, that is more than the Plaintiff's recovery at trial for the same 10 invoices.

[8] However, it must also be noted that the February 4, 2009 letter refers to six other invoices. Those additional invoices had a face value of more than $38,000. Again, these additional invoices comprised part of the Defendant's $31,247.36 offer. I have no idea what happened to those additional six invoices. As far as I can tell they were in addition to the 10 invoices litigated at trial.

[9] The Defendant objects that the February 4, 2009 offer was vague, uncertain and thus incapable of acceptance. I agree. I am unable to conclude, one way or another, that on (or about) February 4, 2009 the Defendant would have agreed piecemeal to pay @$18,000 to resolve the 10 invoices that went to trial, allowing the @$38,000 balance of the Plaintiff's claims as of

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February 4, 2009 to be further contested. Indeed, the Defendant's letters of February 10 and 13, 2009 suggest otherwise – those letters leave little doubt that the February 4, 2009 offer was not open for further discussion or clarification.

[10] All of which leads me again to agree with the position taken by the Plaintiff that for costs purposes the February 4, 2029 pre-litigation offer was incapable of being accepted in full and final settlement of all lease-related claims. (I made no comment whether other claims taken to trial were in the minds of the parties at the time of the February 4, 2009 offer.) The offer thus gives the Defendant no advantage in limiting the Plaintiff's costs in relation to the lease-related claims, or at all.

[11] It is important to note as well that I find the Defendant, unable to rely on the February 4, 2009 offer, is also unable to cap its liability to pay lease interest beyond the same February 4, 2009 date.

[12] I have considered the Defendant's submissions in this regard as set out at paragraphs 9-13 of its initial Costs Brief, including the included notes of the February 4, 2029 meeting and various correspondence provided to me by the parties. In sum, these submissions urge me to cap lease interest to reflect the Defendant's February 4, 2009 offer to resolve the lease-related claims.

[13] Of course, I have rejected that the Defendant's February 4, 2009 offer was capable of acceptance for costs purposes. For similar reasons I reject that it can be relied on to limit liability to pay lease interest. Nothing in the Defendant's further submissions or materials (for what they are worth – I agree with the Plaintiff's objection that the February 4, 2009 meeting notes are of little if any probative value) persuades me that lease interest should be denied to the Plaintiff, in all of the circumstances. The Plaintiff argues persuasively that the very claim the Defendant now raises in the costs hearing was dealt with unequivocally in the trial decision, at paragraph 69.

[14] The Defendant's next offer was to re-introduce the $31,247.36 offer informally more than eight years later, on July 25, 2017. The offer was then made to resolve *all* claims as they had emerged in formal litigation, including interest and costs. I agree with the Plaintiff that including lease interest and Schedule C costs (estimated at $16,613.44) on July 25, 2017, the Plaintiff's recovery at trial easily exceeds the Defendant's informal offer.

[15] The Defendant made a further all-inclusive informal offer to resolve all claims then in litigation for $46,586 on December 28, 2017. Although by a much closer margin, this offer also fails to exceed the Plaintiff's recovery at trial. According to the helpful analysis provided by Plaintiff's counsel in her brief at para 15, the margin was less than $3,000. That being said, counsel's estimate of Schedule C Column 1 costs did not take into account divided success – about which more below – or the Defendant's liability for solicitor-client costs in relation to the lease-related claims. The balance between divided Schedule C Column 1 costs and solicitor-client costs for lease-related claims, while not yet calculated with precision, is highly unlikely to reduce the approximate $3,000 margin significantly, if at all.

[16] Finally, the Defendant made an all-inclusive Formal Offer of $50,000 at the outset of trial. Again, that offer was significantly less than the Plaintiff's recovery including damages, lease interest and costs leading up to the trial.

[17] In sum, as noted above none of the Defendant's informal or formal offers reduce its liability for the Plaintiff's costs.

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Is the Plaintiff entitled to solicitor-client costs for successful claims under the Lease?

[18] The short answer is Yes: ***Zero Stores (Sask.) Ltd. v KAH Investments Ltd***, 1983 ABCA 56; ***155569 Canada Ltd. v 248524 Alberta Ltd.***, 1999 ABQB 395.

[19] I agree with the Defendant’s position that I retain a discretion not to award solicitor-client costs even in the face of an agreement between the parties: ***Manufacturers Life Insurance Co v 423632 Alberta Ltd.***, 2015 ABQB 566. I find however that for reasons already expressed in relation to the events of February, 2009 in particular, and having regard for the conduct of the trial in relation to the lease claims, that an award of solicitor clients costs pursuant to the agreement of the parties is reasonable, taking into account all of the circumstances.

[20] That being said, the lease claims took up relatively little time at trial. This was in part the result of the party’s agreement, through counsel, to provide helpful written submissions following the trial. I estimate that some 20 per cent of the entire trial was taken up by the lease claims. That includes the time at trial and additional time afterwards to prepare written submissions and for the court to review and make findings arising from them.

[21] As to the measure of solicitor-client costs pertaining to 20 per cent of the trial, if the parties are unable to agree on the quantum of those costs they may have them assessed. Not having the raw numbers before me, I make no comment about the proportionality between the quantum of solicitor-client costs and the Plaintiff’s modest actual recovery on the lease-related claims. It may be doubted that permitted solicitor-client costs would exceed the actual recovery of damages at trial, but that is for the assessment officer to say more about if the parties are unable to agree.

Is the Defendant entitled to costs for the Plaintiff’s failure to prove defamation, and if so, on what measure?

[22] The short answer is No. But of course, the Plaintiff is equally not entitled to claim costs for that portion of the trial taken up by the defamation issues.

[23] For costs purposes I assess that the defamation claims took up a total of 40 per cent of trial time. Liability evidence was not only the five ‘publications’ referred to in the Decision, but also various witness’s evidence of surrounding circumstances which the Plaintiff said influenced the words in the publications. As to damages, the evidence (paras 41-59 of the Decision) was extensive and frankly difficult in that it shifted at trial and was unsupported by any expert opinion. At the end of the day there was no substance to either of the liability or damages claims at trial coming out of the defamation cause of action.

[24] The Plaintiff accordingly is entitled to no costs in relation to its defamation-related claims. As alluded to above, the Plaintiff’s trial-related Schedule C costs should be reduced by 40 percent.

Is the Plaintiff entitled to costs for the Defendant’s failure to prove liability for set-off damages, and if so, on what measure?

[25] The short answer is Yes.

[26] I disagree with the Defendant’s submission that no costs should be assessed as a result of its pleading of an unsuccessful defence of set-off. I find that but for that pleading, fully 40 per

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cent of the trial could have been avoided. This finding reflects the significant amount of time spent at the trial hearing evidence, including expert evidence, about mould and its impact on the Defendant's decision to leave the premises, and whether in the circumstances the costs relating to that leaving should be visited upon the Plaintiff.

[27] Granted, the set-off damages were agreed to and were limited to set-off rather than a counterclaim as such. Still, the Plaintiff successfully resisted the Defendant's set-off liability claim and is entitled to Schedule C, Column 1 costs.

[28] In so finding, I am unable to agree with the Plaintiff that its costs relating to the defence of the set-off claim should be assessed under the lease provisions for solicitor-client costs.

At the end of the day what costs are recoverable?

[29] I have taken into account Rules 10.31 and 10.33 of the *Alberta Rules of Court* and the many considerations the court may or shall factor into a costs award. The *Rules* and the many authorities interpreting it – some of which were referred to by counsel and have all been taken into account whether or not mentioned in these reasons – make it clear that courts assessing costs have a wide discretion based ultimately on fairness. The foundational *Rule* 1.2 is always a consideration in that captures not only the intention of the legislature but the common law: that rules of court are meant to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way, but *still* in a way that if and when necessary gives parties access to formal, or courtroom justice.

[30] The Defendant argues that owing to its grossly disproportionate small recovery the Plaintiff should be denied costs entirely. Alternatively, the Defendant argues, costs should be assessed according to the tariff applicable to the Civil Division of the Alberta Court of Justice. I am not persuaded by these submissions. Costs have been apportioned – the Plaintiff is being denied 40 per cent of its Schedule C Column 1 costs for failing to prove defamation. The Defendant's set-off claims were hard-fought and unsuccessful. The Defendant's position regarding lease interest on the lease-related claims was rejected, with significant quantum consequences which its offers manifestly failed to take into account. As counsel for the Plaintiff argues persuasively in her written submission as to costs, the trial was ultimately necessary for the Plaintiff to obtain judgment in the amounts owing under the lease; there were opportunities for the Defendant to pay the amounts owing; the Defendant instead elected to defend the action, now with costs consequences as outlined in these reasons.

Heard by written submissions received December 4, 2023, February 29, 2024, March 1, 2024, October 24, 2024 and November 8, 2024.

Dated at the City of Edmonton, Alberta, this 21st day of March, 2025.

Peter Michalyshyn
J.C.K.B.A.

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Appearances:

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