

CITATION: Ranger v. Triovest Realty Advisors, 2024 ONSC 6593
SUDBURY COURT FILE NO.: C-3224-14
DATE: 2024-11-28

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Carmen Ranger) A. Bourdon, Counsel for the Plaintiff
)
Plaintiff)
)
– and –)
)
Triovest Realty Advisors, New Sudbury) S. Croteau, Counsel for the Defendants
Holdings Inc., Lasalle Boulevard)
Investments Inc., CPP Investment Real)
Estate Holdings Inc. and Pioneer)
Construction)
)
Defendants)
)
) **HEARD:** November 18, 2024

THE HONOURABLE JUSTICE J. R. HENDERSON

DECISION ON INTEREST AND COSTS

INTRODUCTION

- [1] The plaintiff, Carmen Ranger, slipped and fell on January 29, 2013, during a winter weather event, in a marked pedestrian crosswalk, near the entrance to the Walmart store at the New Sudbury Centre.
- [2] The parties settled the amount of the plaintiff’s damages, and the case proceeded to trial on the issue of liability only. The trial took place over the course of five days in March 2024, under the simplified procedure set out in rule 76 of the *Rules of Civil Procedure*. By written reasons dated May 2, 2024, I found that the defendants

were 100 percent liable for the plaintiff's damages. The matter is now before me to deal with the issues of interest and costs.

BACKGROUND

- [3] This court action was commenced on April 28, 2014, as an ordinary action, when counsel for the plaintiff issued a statement of claim. The defendants collectively defended the plaintiff's claim by delivering a statement of defence and a jury notice.
- [4] In summary, the steps taken prior to the trial included three attendances for examinations for discovery, the examination of a non-party, three pretrials, and one motion. The parties prepared for a trial that was originally scheduled to take place in May 2023, but the case was not reached at that time.
- [5] After the examinations for discovery and two of the pretrials, the parties settled the quantum of the plaintiff's damages. The confirming letter from plaintiff's counsel to defence counsel, dated May 4, 2020, reads, "I confirm that the plaintiff is agreeable to damages of \$65,000 plus costs and disbursements."
- [6] On June 25, 2021, pursuant to a contested motion brought by the plaintiff, Cornell J. granted leave to amend the statement of claim, struck the jury notice, and ordered that the action continue under the simplified procedure set out in rule 76.
- [7] The rescheduled trial commenced on March 18, 2024. At trial, the defendants took the position that they were not liable for the plaintiff's damages.

THE POSITIONS OF THE PARTIES

- [8] Regarding interest, the plaintiff submits that she is entitled to prejudgment interest at the rate of five percent per year from the date on which the statement of claim was issued, April 28, 2014, to the date of judgment, May 2, 2024, on the sum of \$65,000. The plaintiff further submits that she is entitled to postjudgment interest at the rate of seven percent per year on \$65,000 from the date of judgment to the date of payment.
- [9] The defendants' position regarding prejudgment interest is that the settlement figure of \$65,000 included all of the plaintiff's claims except costs and disbursements. Therefore, the settlement figure included prejudgment interest, and there should be no further prejudgment interest awarded. The defendants do not dispute the plaintiff's claim for postjudgment interest.
- [10] There is no dispute that the plaintiff was the successful party and is entitled to a costs award. The plaintiff requests costs on a substantial indemnity basis. The bill of costs from plaintiff's counsel shows substantial indemnity fees of approximately

\$369,000 (excluding HST) and disbursements of \$26,529.07 (including HST). However, given all the factors for consideration in this case, the plaintiff requests that her costs be fixed at \$100,000 for fees, plus HST, plus disbursements.

- [11] The defendants' position regarding costs is that rule 76.12.1 provides an upper limit on costs for actions under the simplified procedure of \$50,000 for fees and \$25,000 for disbursements, exclusive of HST. Therefore, the defendants submit that the plaintiff is not entitled to costs in excess of this upper limit.

INTEREST

- [12] On May 4, 2020, the parties agreed to settle the plaintiff's damages at "\$65,000 plus costs and disbursements" but the parties did not specify a breakdown of this figure. I accept that the plaintiff's damages at that time included prejudgment interest from the date on which the statement of claim was issued to the date of the settlement. Therefore, I find that the plaintiff is not entitled to any prejudgment interest on this amount prior to the date of the settlement.

- [13] I further find that, as of May 4, 2020, neither the plaintiff nor the defendants put their minds to the issue of the plaintiff's right to prejudgment interest on the settlement figure from the date of the settlement to the date of the judgment.

- [14] I do not accept the defendants' position that the settlement agreement in May 2020 resolved any claim that the plaintiff may have for prejudgment interest from the settlement date until some distant future date on which the defendants would be required to pay the funds to the plaintiff, if the court so ordered.

- [15] My trial decision confirms that the defendants are liable to the plaintiff, and therefore the plaintiff is entitled to her damages, which includes general damages, special damages, and interest. In my view, it would be extremely unfair to the plaintiff if I were to find that the plaintiff was not entitled to any prejudgment interest after the date of the settlement considering that the plaintiff has still not received payment of any of the settlement amount more than four years after the agreement was reached. To make such a finding in the circumstances would encourage the defendants to withhold payment of the settlement funds for as long as possible, knowing that as each day passes, the true value of the plaintiff's claim would be diminished.

- [16] Accordingly, I find that the plaintiff is entitled to prejudgment interest at the rate of five percent per year on the sum of \$65,000 from May 4, 2020 to May 2, 2024. I calculate this prejudgment interest to be \$3,250 per year or \$8.90 per day. This

amounts to prejudgment interest totaling \$12,976.20 as of May 2, 2024, the date of judgment.

- [17] Regarding postjudgment interest, the parties agree that postjudgment interest should be applied to the settlement figure of \$65,000 at the rate of seven percent per year. I therefore calculate postjudgment interest after May 2, 2024, to be \$4,550 per year or \$12.47 per day. As of November 18, 2024, such postjudgment interest amounts to \$2,494.

COSTS

- [18] As the successful party, the plaintiff is presumptively entitled to recover her costs against the defendants. See *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at para. 34. The plaintiff's entitlement to costs here is not disputed.

- [19] Rule 76.12.1(1) and (2) sets out a hard cap for a costs award where an action proceeded under the simplified procedure. It reads:

(1) Except as provided for under rule 76.13 or an Act, no party to an action under this Rule may recover costs exceeding \$50,000 or disbursements exceeding \$25,000, exclusive of harmonized sales tax (HST).

(2) Subrule (1) does not apply in the case of an action that was commenced before January 1, 2020.

- [20] The defendants submit that this rule limits the plaintiff's costs award to \$50,000 for fees in this case. I disagree. I find that the action in the present case "was commenced" on April 18, 2014, when the plaintiff issued the statement of claim. The fact that the action was commenced under the ordinary procedure and subsequently converted to the simplified procedure does not change the date on which the action was commenced. In that respect, I rely on the analysis of Mew J. in the case of *Crawford v. Standard Building Contractors Limited*, 2021 ONSC 655 at paras. 12-14.

- [21] The wording of rule 76.12.1(2) is clear and unequivocal; subsection (1) does not apply in the case of an action that was commenced before January 1, 2020. Therefore, in the present case there is no hard cap as to the costs that the plaintiff may recover for fees or disbursements.

- [22] Defence counsel also relies on rule 76.13. That rule applies when a party commences an ordinary action and then amends its pleadings so that the matter will continue under the simplified procedure. In such a case, the amending party may be ordered to pay costs incurred by the opposing party up until the date of the amendment. In this case, the plaintiff brought a motion to amend her pleadings

and convert the matter to the simplified procedure. Defence counsel submits that this is a factor for my consideration.

- [23] I reject the defendants' submission that rule 76.13 applies to the circumstances of this case. I note that this rule only applies to costs that would not have been incurred had the claimant originally complied with rule 76. In the present case, counsel for the defendants is unable to provide examples of costs that would not have been incurred by the defendants had the matter been commenced under rule 76. Further, I find that the move from the ordinary procedure to the simplified procedure was a direct result of both parties jointly agreeing to settle the damages of the plaintiffs. Thus, in my view, rule 76.13 has no application to the present case.
- [24] Section 131(1) of the *Courts of Justice Act* provides the court with broad discretionary power to make a costs order. It reads, "Subject 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." Rule 57(1) provides a list of factors to be considered when determining the amount of the costs award.
- [25] With respect to the scale of costs, I have reviewed and considered the offers to settle that were exchanged. The plaintiff made two offers to settle. The first offer, dated November 26, 2015, was an offer to settle the plaintiff's claim for \$30,000 plus interest and costs. This offer remained open until it was replaced with the plaintiff's second offer, dated May 10, 2023, whereby the plaintiff offered to settle for damages of \$48,750 plus costs. The second offer remained open until the commencement of trial.
- [26] I accept that the only offer to settle made by the defendants was an offer dated December 2, 2015, whereby the defendants offered to agree to a dismissal of the plaintiff's claim without costs if the offer was accepted within three weeks, and thereafter the defendants would agree to a dismissal if the plaintiff agreed to pay the costs of the defendants.
- [27] I find that the combination of the two offers made by the plaintiff engages the provisions of rule 49.10. That is, I find that the plaintiff obtained judgment that was more favourable to the plaintiff than the terms of the plaintiff's offers to settle. From November 26, 2015, onward, the plaintiff had an outstanding offer that remained available for acceptance by the defendants. Pursuant to rule 49.10, the plaintiff is entitled to her partial indemnity costs to November 26, 2015, and her substantial indemnity costs thereafter.
- [28] I find that the offer made by the defendants is insignificant with respect to a determination of costs. The defendants' offer does not engage the provisions of rule 49, and it simply amounts to an offer to agree to a dismissal of the action.

- [29] As to quantum, the cases are clear that the court should not calculate a costs award by simply multiplying hours docketed by hourly rates and then adjusting the product of that calculation for the appropriate scale of costs. See *BNY Financial Corp. v National Automotive Warehousing Inc.*, [1999] O.J. No. 1273 (Gen. Div.), at para. 5, and *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26.
- [30] The goal in setting the amount of costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay to the successful party in the circumstances. See *Boucher* at paras. 24-26. Further, the amount should be within the fair and reasonable expectation of the parties. See *Boucher* at para. 38. I note that this is also a factor set out in rule 57.01(1)(0.b).
- [31] In the present case, I have considered that the trial was neither complex nor simple. In many ways, this was a routine slip and fall case that was complicated by the passage of time, the inadequacy of the maintenance records, and the conflict between the opinions of the expert engineers. Thus, I would describe the overall level of complexity as moderate.
- [32] Regarding the conduct of the parties, I do not find that the defendants engaged in any egregious conduct as alleged by the plaintiff. There is no doubt that the defendants took a rigid position on liability. However, the defendants are entitled to take that position knowing that they must face the costs consequences if they are unsuccessful.
- [33] Moreover, although the defendants did not offer a monetary sum to resolve the matter, I accept that the defendants engaged in settlement discussions that narrowed the issues as the parties were able to reach an agreement on damages.
- [34] A significant factor in this case is the principle of proportionality. That is, in general the amount of costs should be proportional to the amount claimed and/or the value of the lawsuit to the parties. In that respect, rule 57(1)(a) requires me to consider “the amount claimed and the amount recovered” in the proceeding when I make a costs decision.
- [35] In the present case, the plaintiff obtained judgment for \$65,000 plus interest. This is a relatively small amount. Thus, in my view, costs should not be excessive but rather should be in proportion to this amount. The substantial indemnity fees of approximately \$369,000 shown in the plaintiff’s bill of costs are well out of proportion to the amount claimed and recovered in this case. However, I acknowledge that plaintiff’s counsel recognized that the amount in the bill of costs is inconsistent with the principle of proportionality, and accordingly plaintiff’s counsel submitted that the fees should be fixed at \$100,000.
- [36] It is also important to recognize that the principle of proportionality is engaged in this case by reason of the fact that the matter proceeded to trial under the simplified

procedure. I accept that one of the purposes of the simplified procedure is to provide a process that improves a party's access to justice by setting out procedures that are designed to reduce costs and increase efficiency.

- [37] I adopt and accept the statements made in *Dentec Safety Specialists Inc. v. Degil Safety Products Inc.*, 2012 ONSC 6871, at para. 5, that “[t]he simplified procedure... was introduced to provide and promote more affordable access to justice. Not surprisingly, costs awards in simplified procedure cases have historically been significantly lower than costs awards in ordinary procedure cases.”
- [38] Consequently, I find that the costs award in this case, even on a substantial indemnity basis, should be tempered by the fact that the amount claimed was relatively small and the matter proceeded under the simplified procedure rules which are designed to improve access to justice.
- [39] Despite that finding, I must consider the principle of proportionality in a broader sense. One of the objectives of the costs system, including the principle of proportionality, is to facilitate access to justice. That is, where a plaintiff has successfully litigated a claim, a costs award is intended, in part, to compensate the plaintiff for reasonable legal expenses that were legitimately incurred to fund the court action.
- [40] However, if the principle of proportionality is strictly applied, it may limit a plaintiff's access to justice, particularly regarding small or modest claims. I adopt and accept the comments made by McCarthy J. in *Aaccurate v Tarasco*, 2015 ONSC 5980, at para. 16, that “over-emphasis on proportionality may serve to under-compensate a litigant for costs legitimately incurred.”
- [41] For example, if a plaintiff wishes to proceed with a modest claim, that plaintiff must incur significant legal expenses to commence and prosecute the claim. If in response to the plaintiff's claim the defendants take a rigid stance, that plaintiff may need to incur legal expenses that significantly exceed the value of the claim. Thus, if the principle of proportionality is strictly applied, the prosecution of the plaintiff's claim cannot possibly be cost-effective.
- [42] Therefore, even in a modest claim such as the present case, the principle of access to justice requires a court to avoid unduly limiting the plaintiff's costs award simply because the amount at stake was relatively small.
- [43] In light of all of these factors, I must determine a fair and reasonable amount for costs in this case. I return to rule 76.12.1. Although this section does not strictly apply to the present case, as discussed earlier, it does provide some guidance as to the upper limits of costs awards that should be made for cases conducted using the simplified procedure. That is, the provincial legislators have indicated that costs awards should generally be limited for simplified procedure cases.

- [44] Considering that this action was commenced well before rule 76.12.1 introduced the hard cap on costs, that a significant amount of work was done in this action prior to January 2020, and that the plaintiff is entitled to substantial indemnity costs from 2015, I am prepared to make a costs order that is above the upper limit set out in rule 76.12.1.
- [45] In my view, the disbursements of the plaintiff are valid. The majority of these disbursements relate to the expert engineer who provided guidance throughout the case and testified at the trial. Thus, I fix disbursements at \$26,529.07 (including HST).
- [46] Regarding fees, on a substantial indemnity scale, I will allow \$6,000 per day for the five days of trial, amounting to \$30,000 for the trial, and I will allow preparation time for the trial and the earlier trial that was not reached in the amount of \$30,000. For all other matters I will allow \$20,000. In summary, for fees I will allow \$80,000, plus HST, for a total of \$90,400.

CONCLUSION

- [47] For all these reasons, I make the following orders:
1. The defendants shall pay prejudgment interest to the plaintiff in the total amount of \$12,976.20.
 2. The defendants shall pay postjudgment interest to the plaintiff on the sum of \$65,000 at the rate of seven percent per year from May 2, 2024, until the date of payment, such interest to be calculated at the rate of \$12.47 per day.
 3. The defendants shall pay costs to the plaintiff fixed at a total of \$116,929.07.

J. R. Henderson J.

Released: November 28, 2024

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Defendants

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