CITATION: Cordeiro v. Pinnacle Caterers Ltd., 2017 ONSC 4221
COURT FILE NO.: CV-14-504321
DATE: 20170707

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Keith Cordeiro, Plaintiff/Defendant by Counterclaim

– AND –

Pinnacle Caterers Ltd., Defendant/Plaintiff by Counterclaim

BEFORE: Justice E.M. Morgan

COUNSEL: *Stephen Gillman and Jennifer Corbett*, for the Plaintiff/Defendant by Counterclaim

Jonathan Dye and Megan Beal, for the Defendant/Plaintiff by Counterclaim

HEARD: Costs submissions in writing

COSTS ENDORSEMENT

[1] On June 1, 2017, following a 6-day trial, I found that the Plaintiff, Keith Cordeiro, had stolen money from the Defendant, Pinnacle Caterers Ltd. Flowing from this finding, I held that the Defendant was within its rights in having terminated the Plaintiff from his employment without notice and claiming back the amount that the parties had agreed was in issue.

[2] There is no reason here that costs should not follow the event. The Defendant therefore deserves its costs of the action, including both the defense of the Plaintiff's claim and the prosecution of its own counterclaim.

[3] Counsel for the Defendant have submitted a Bill of Costs in which they seek a total of $152,343.89 on a substantial indemnity basis or $111,670.95 on a partial indemnity basis. They submit that they are entitled to the higher scale of costs in view of the fact that they made an offer to settle in conformance with Rule 49 in which they offered to have each side walk away from the claim and counterclaim without costs. That clearly would have been a better outcome for the Plaintiff than the trial produced for him.

[4] I have received written submissions from counsel for the Plaintiff in response to Defendants' counsel. They do not take issue with the amount requested by the Defendant on its own terms; rather they say that the Plaintiff cannot afford to pay that much. They make the point

that the Plaintiff is not a high income earner and that the Defendant is a large corporation with several hundred employees. With this in mind, they ask that I exercise my discretion to reduce or dispense with costs altogether.

[5] While I understand Plaintiff's counsel's concern for the financial predicament of their client, I am reluctant to reduce costs just because the Defendant has more financial depth than the Plaintiff. I have found that the Plaintiff stole money from his employer and was justifiably terminated from his job. As I described in my reasons for judgment of June 1, 2017, it was only by chance that the Defendant's managers caught on to the misappropriations when they did. While it is doubtless true that the Plaintiff has less money than his former employer, he seems to have been doing his best back in 2014 to even out that disparity. His current financial circumstances are not something that can be visited on the Defendant.

[6] Plaintiffs' counsel also make the point in their submissions that the amount of costs sought by Defendants' counsel is out of proportion to the amounts at issue in the litigation. That is certainly accurate; indeed, Defendants' counsel do not deny this fact. What they say is that this was self-evident from the outset of the litigation, and is the very reason they were willing to settle the matter on a mutual walk-away basis.

[7] Defendant's counsel has appended to its written submissions on costs the series of correspondence they had with Plaintiff's counsel setting out their settlement offer. The first communication of the offer was made in June 2014, within a very short time of being served with the Statement of Claim and as soon as Defendant's counsel had had a chance to review their client's file on the matter.

[8] The offer was reiterated by the Defendant periodically throughout the course of the litigation in correspondence between counsel. The dismissal without costs offer was repeated by the Defendant at the mediation session held on February 11, 2016, at the pre-trial held on August 9, 2016, and at a second pre-trial held on October 31, 2016. Each time the Plaintiff refused the offer.

[9] A month before the trial date, on April 25, 2017, Defendant's counsel again wrote to Plaintiff's counsel repeating the offer, in an effort to resolve the matter before incurring the significant costs of trial preparation and trial. A third pre-trial was held on May 11, 2017, at which the Defendant's offer was repeated. As Defendant's counsel state in their costs submissions, "The Plaintiff was not interested."

[10] The fact that the costs of trial would outweigh the amounts at issue in the claim and counterclaim was noted by me at the outset of the trial. On the first morning, before hearing anything from the parties, I indicated in open court that while I was happy to preside at the trial the amounts set out as potential damages in the litigation agreement were smaller than each side's respective costs were likely to be for a trial predicted to go for more than a week. Without knowing anything about the prior settlement efforts, I encouraged the parties to take a break before commencing the trial in order to discuss this with their respective counsel and, if possible, with each other.

[11] The court adjourned to allow for those discussions. When the parties subsequently returned to court, both sides indicated that they were ready to start the trial. Whatever else can be said about the matter, the Plaintiff and his counsel were certainly aware that taking the matter through trial would be more expensive than the amounts at stake in either the claim or the counterclaim. The Plaintiff made a conscious decision to pursue the case knowing the financial considerations and being fully cognizant of the longstanding offer from the Defendant that was on the table. Once again, the disproportion between the amount of costs and the amount of the judgment is not something that can be visited on the Defendant.

[12] In light of the Defendant's offer under Rule 49, the Defendant is entitled to costs on a substantial indemnity basis. Rule 49 is a cost shifting or cost enhancing rule, and like all such rules in other common law jurisdictions it is designed to encourage settlement and to discourage litigants from making the kind of calculation that the Plaintiff made here in the face of a generous offer: See Albert Yoon and Tom Baker, "Offer of Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East", 59 Vanderbilt L. Rev. 155, 163-64 (2006).

[13] Defendant's counsel's Bill of Costs strikes me as a reasonable one for this case. Lead counsel has 20 years experience, and has calculated his time at a substantial indemnity rate of $450 per hour. If anything, that is on the modest end for the civil litigation bar. Defendant's counsel did nothing to unduly prolong the trial, and they did not incur more preparation time than was necessary. Although the amounts at stake in the trial were not large, the allegations about the Plaintiff's misappropriation of funds and his covering this up through manipulation of the Defendant's computerized accounting system were relatively complex. The trial entailed 10 witnesses for the Defendant as well as a lengthy cross-examination of the Plaintiff. The preparation time was understandably substantial. The time invested by Defendant's counsel paid dividends in the result of the trial, and I am not inclined to second-guess that success.

[14] I will exercise my discretion under section 131 of the *Courts of Justice Act* to slightly round down the amount requested by Defendant's counsel. The Plaintiff shall pay the Defendant costs in the all-inclusive amount of $150,000.

Morgan J.

Date: July 7, 2017