

SUPERIOR COURT OF JUSTICE - ONTARIO

B E T W E E N:

J.P. RUSTON, Plaintiff/Defendant by Counterclaim

- and -

KEDDCO MFG. (2011) LTD., Defendant/Plaintiff by Counterclaim

BEFORE: Madam Justice V.R. Chiappetta

READ: In Writing

COUNSEL: *Andrew H. Monkhouse and Samantha Lucifora*, for the plaintiff

Gerald Griffiths and Adam James, for the defendant

ENDORSEMENT

[1] The plaintiff was successful after an 11 day trial with an award totaling \$604,627.09 plus interest and costs. The counter-claim of \$1.75 million was dismissed in its entirety. The plaintiff now seeks its costs on a substantial indemnity basis of \$546,684.73 including HST and disbursements.

[2] The defendant does not dispute the plaintiff was successful in this action. Nor does it dispute that it was served with a Rule 49 offer at the same time as the Statement of Claim, and that the cost consequences as set out in Rule 49.10(1) of the *Rules of Civil Procedure* R.R.O. 1990 Reg. 194 are triggered commencing as of July 2, 2015. The defendant argues however that the magnitude of costs contained in the plaintiff's costs outline are neither fair nor reasonable and that they far exceed anything a reasonable party would expect to spend. The defendant therefore requests a cost award of \$200,000 plus disbursements.

[3] I disagree with the defendant. In my view, it is a fair and reasonable exercise of my discretion pursuant to s. 131(1) of the *Courts of Justice Act* R.S.O. 1990, c. C.43, considering the factors enumerated under Rule 57.01(1) of the Rules, to indemnify the plaintiff for his costs of this action in an amount as claimed, \$546,684.73. I make this conclusion for the following reasons taken together:

- (1) The costs requested are proportionate to the result. \$700,000 was in dispute for the plaintiff's claim plus \$1,750,000 in the conter-claim. Out of a total of \$2,450,000 in dispute, the plaintiff was successful on \$2,354,628.00, calculated

as the amount won, plus the entire value of the counter-claim which was dismissed in its entirety.

- (2) The defendant pursued unfounded allegations of fraud. This was a matter of utmost importance to the plaintiff. Both his financial and professional future were at risk if the allegations were proven in court.
- (3) It was the defendant's conduct that contributed to the plaintiff's costs. The plaintiff's costs can be said to be what a reasonable party would expect to spend upon pursuing litigation against a party who engaged in conduct like that of the defendant. The defendant refused to admit facts but failed to contest them at trial. The defendant only provided relevant financial documents after the plaintiff brought a motion. The defendant provided will say statements 14 days in advance of the trial and not 30 days in advance as ordered. The defendant relied on only 45 of the 163 documents it produced on the first day of trial. The defendant caused an adjournment of the first trial less than six weeks before the date scheduled due to the introduction of a 25 person witness list. This led to a one year delay, double preparation and the requirement to have a second pre-trial. The defendant called only two fact witnesses at trial. By this conduct, the defendant caused the plaintiff to incur far greater costs than expected, substantially increasing the costs of trial preparation and the length of trial.
- (4) The counter-claim rendered this action much more complex than a simple case of wrongful dismissal. Because of the fraud accusations the plaintiff had to hire an expert witness costing approximately \$30,000.
- (5) The defendant threatened the plaintiff with expensive litigation if he pursued his wrongful dismissal matter and then proceeded to follow through on the threat. The plaintiff would have been denied access to justice had his lawyers not agreed to defer their fees. The plaintiff survived financially by relying on his RRSP's, selling his house below market value and breaking his car lease.
- (6) The use of two counsel at trial was reasonable for this case, considering the complexity of the counter-claim and the serious consequences to the plaintiff if he was unsuccessful in defending the counter-claim. Having adjudicated the trial, I observed that the work done during the trial by both counsel was different.
- (7) The amounts claimed by the plaintiff to prepare the trial record were reasonable as the plaintiff had to determine if it was appropriate to set the matter down for trial. This requires a detailed documentary review to ensure full disclosure and that there will be no need for further motions.
- (8) Having reviewed the costs outline submitted by the plaintiff, I have concluded that the time spent for various steps in the litigation is reasonable. It cannot be

compared to the costs outline submitted by the defendant which is not certified. Further, my observation at trial was that plaintiff's counsel was well prepared for trial while the defendant's counsel was comparatively unprepared in that he arrived late or not at all in one instance, could not advise the court of the sequence and timing of his witnesses, failed to effectively use his book of documents and delivered materials at the last minute. The plaintiff's costs outline is reflected of more time spent than the defendant in preparing for trial. This difference was demonstrated at trial to the detriment of the defendant's counsel.

- (9) The plaintiff was awarded both punitive and moral damages. The costs awarded herein are done so to indemnify the plaintiff, as the successful litigant, for the costs of litigation. Any references to the defendant's conduct are meant to explain why the plaintiff's costs are higher than one would reasonably expect from litigating a simple claim for wrongful dismissal and in no way reflect an overlap of the punitive or moral damages awarded.

V.R. Chiappetta J.

Released: August 28, 2018