

CITATION: Wilson v. Scotia Mortgage Corporation, 2017 ONSC 1315
COURT FILE NO.: CV-11-442476
DATE: 20170224

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Paul Wilson, Plaintiff/Responding Party

AND:

Scotia Mortgage Corporation and GCAN Insurance Company,
Defendants/Moving Parties

BEFORE: S.F. Dunphy, J.

COUNSEL: *Carrie Kennedy*, for the Moving Party Scotia Mortgage Company

Neil Colville-Reeves for the Moving Party CGAN Insurance Company

Phillip J. Trotter for the Plaintiff/Responding Party Paul Wilson

HEARD: In Writing

COSTS ENDORSEMENT

[1] I have issued rulings in this matter on November 14, 2016 and December 23, 2016. The matter of costs remained outstanding. Having now received the written submissions of the parties on costs, I am issuing my ruling on that subject now. My two earlier rulings may be found at 2016 ONSC 7000 (CanLII) and 2016 ONSC 8106 (CanLII) respectively and may be consulted for the relevant background which I shall not repeat.

[2] In summary, the plaintiff Mr. Wilson was substantially successful on the motion decided by me, although success was divided and neither side can be considered to have emerged from the process without blemish. Mr. Wilson was found to be entitled to his costs as against Scotia (costs were neither awarded to or against GCAN), but the context must be borne in mind in assessing the submissions of both parties.

[3] The plaintiff claims to have incurred actual costs of \$13,773.69 including HST and evidenced \$7,134.94 in fees and disbursements calculated on a partial indemnity basis in his Costs Outline. The plaintiff suggests that a small premium to partial indemnity rates is in order in this case, amounting to indemnity to 60% of actual rates or \$8,000.

[4] The disbursements claimed in the Outline of Costs amount to 496.19 including HST and have not been challenged by Scotia. These shall be allowed as asked.

[5] Scotia submits that each party should bear their own costs on this matter. I have earlier ruled that Mr. Wilson is entitled to his costs and see no reason to alter that ruling.

[6] Scotia otherwise took no issue with the rates claimed by Mr. Wilson's counsel, seeking only to suggest that the hours spent were somewhat excessive or related to matters for which it should not be held responsible.

[7] Plaintiff's counsel Mr. Trotter is a 2009 call and claimed a total of 47 hours for the motion. His actual rate was \$250 and the plaintiff claims partial indemnity costs of 50% of that amount (or \$125/hr).

[8] There can be little doubt that the hourly rates claimed are well within the band of reasonable rates recommended by the Costs Subcommittee of the Civil Rules Committee in 2005. Indeed, Scotia appears to have misread Mr. Trotter's costs submissions since it was prepared to accept his rate at \$187.50/hr (being the substantial indemnity rate not pursued by the plaintiff here).

[9] I have no hesitation in accepting Mr. Trotter's claimed rate of \$125/hr on a partial indemnity basis as being a reasonable one in the circumstances.

[10] Scotia's main objection to the time expended by Mr. Trotter is that a substantial portion of it may have been in respect of the parallel motions brought by Scotia's insurer and co-defendant GCAN or in attending examinations of witnesses required by GCAN.

[11] I am not prepared to give effect to that objection. While GCAN and Scotia are separate defendants, there was a very substantial overlap between GCAN and Scotia in this litigation arising no doubt from the central role played by Scotia in the administration of the GCAN policy of which it was also beneficiary. I am not prepared to require Mr. Wilson to break out his costs as between these two co-defendants. If that means that Scotia ends up paying, in effect, a portion of costs that might in a perfect accounting be attributable to GCAN, then that is nevertheless a reasonable outcome on the facts in any event.

[12] More to the point, the assessment exercise is not a mechanical one but one that must be assessed in light of *all* of the factors in Rule 57.01(1) of the *Rules of Civil Procedure*. Having regard to the complexity of the issues, the interrelationship between Scotia and GCAN, the amounts at issue and the conduct of the parties, the amount of \$7,134.94 in fees claimed by Mr. Wilson appears to me to be eminently fair and reasonable in all of the circumstances. I have noted that the parties were not without blemish here. Without in any way excusing Mr. Wilson's conduct – conduct that occasionally lacked quite significantly in realism or pragmatism – Scotia never missed an opportunity to miss an opportunity to resolve this litigation on its own and bears a significant share of the responsibility for triggering and prolonging the dispute with a very aggressive approach to the insurance issue.

[13] Scotia has not provided me with its own Costs Outline against which I might have more accurately gauged the reasonable expectations of the losing party, but I infer from the lack of

information on that subject before me that Mr. Wilson's claim bears a very, very reasonable relationship to the actual costs incurred by Scotia in this litigation.

[14] Accordingly, I have determined to accept the plaintiff's claim for \$7,134.94 in partial indemnity fees and disbursements as asked in its submissions with neither premium nor reduction. Scotia shall be required to pay Mr. Wilson such amount. As per my endorsement of November 14, 2016, the amount shall be paid effective November 14, 2016 by way of reduction from the amounts owed by Mr. Wilson to Scotia under the mortgage.

[15] So ordered.

S.F. Dunphy, J.

Date: February 24, 2017