2017 ONSC 1304
Ontario Superior Court of Justice

Waterloo North Condominium Corp. No. 161 v. Redmond

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WATERLOO NORTH CONDOMINIUM CORPORATION NO. 161 (Applicant) and JOHN CURTIS REDMOND (Respondent)

JOHN CURTIS REDMOND (Applicant) and WATERLOO NORTH CONDOMINIUM CORPORATION NO. 161 (Respondent)

D.A. Broad J.

Heard: December 19, 2016
Judgment: February 27, 2017
Docket: C-213-16, C-591-16

Counsel: Donald G. Kidd, Kevin M. Thompson, for Waterloo North Condominium Corporation No. 161
Alexandra Rosu, for John Curtis Redmond

Subject: Civil Practice and Procedure; Property

RULING on costs.

***D.A. Broad J.*:**

Background

1 Waterloo North Condominium Corporation No. 161 (the "Corporation") is a condominium corporation in respect of a residential complex ("complex") located in Kitchener, Ontario. The complex comprises 12 residential townhouse units. The Corporation was created on June 7, 1990, and is now governed by the *Condominium Act, 1998*, S.O. 1998 c. 19 (the "Act").

2 John Curtis Redmond ("Redmond") is the current owner of a unit in the complex known as Unit 9B (the "unit"). Between August 30, 1990 and January 18, 2016 Redmond owned the unit together with Marcia Ann Redmond. As of January 19, 2016 the unit was transferred to Redmond as his sole property.

3 The Corporation is part of an overall community of interwoven condominium complexes, comprising four condominium corporations, of which the Corporation is one. The total community comprises some 44 residential units, with associated common elements. The developer of the community created the Chicopee Villages Services Trust (the "trust") to provide for the coordinated stewardship and management of the collective common elements for all of the condominium complexes comprising the community.

4 For a number of years prior to commencement of these proceedings, Redmond had been dissatisfied with the condition of the surface drainage and grading of the common elements to the rear of the unit, including the exclusive use common area related to the unit (the "9B backyard") and the adjoining general green space common area, and with the failure of the Corporation to repair and/or correct the surface drainage and grading issues.

5 The Corporation alleged that since 2010 Redmond increasingly engaged in excavating and ditching in the general green space common elements and the 9B backyard. It says that none of the excavation activities carried out by Redmond

were discussed in advance with the property manager or the board of the Corporation nor has Redmond ever sought or obtained approval of the board or the trust for his excavation activities. The Corporation maintained that Redmond's excavation activities on the general green space common elements and the 9B backyard were in breach of the rules of the Corporation, which are general rules applicable to all of the condominium corporations participating in the trust. In particular, Rule VII(7) provides that "No sidewalks, driveways, patios or other structures forming part of the common elements, including exclusive use common elements, may be altered in any manner without first obtaining the written approval of the Board and Trust."

6 The Corporation alleged that its repeated overtures to Redmond to cease his excavation activities proved unsuccessful.

7 By Notice of Application issued February 29, 2016 (the "Corporation Application") the Corporation sought relief under the Act, including a declaration that Redmond has created and permitted a condition in the 9B backyard and the general green space common elements that has and is likely to continue to damage those lands and to cause a hazard capable of injuring a person contrary to s. 117 of the Act, a compliance order against Redmond pursuant to s. 134 of the Act enforcing immediate compliance with s. 117, including an interim, interlocutory and permanent injunction against any further or continued excavation, an order permitting the Corporation to have access to the Unit 9B backyard to carry out repairs and also to the general green space common elements, and reimbursement of all expenses incurred by the Corporation to remedy the unauthorized excavation and trenching carried out by Redmond.

8 Redmond responded to the Corporation Application by affidavit sworn June 16, 2016 alleging that, because of defects in the initial grading and landscaping of the complex, which have been exacerbated by subsequent landscaping work at the direction of the Corporation, his property frequently had become saturated with water following heavy rains which had significantly affected his use and enjoyment of his property. He also alleged that for over 10 years he has repeatedly and unsuccessfully attempted to address his concerns with the Corporation. He maintained that the work which the Corporation wished to conduct was ill advised and would not only fail to solve water saturation problems on his property, but will make them worse. He also alleged that the board of the Corporation has chosen to single him out for sanction, notwithstanding that other unit owners have made alterations to their exclusive use common elements without prior approval of the Corporation's board. He stated that Corporation and its agents have relinquished their statutory obligations to maintain and repair the common elements and that their conduct has been oppressive and unfairly prejudicial to his legitimate interests to have his exclusive use common elements area properly maintained and repaired.

9 By Notice of Application issued June 1, 2016 (the "Redmond Application") Redmond sought an order enjoining the Corporation to comply with its statutory and/or fiduciary obligations to repair and maintain its common elements by addressing, repairing and/or correcting the surface drainage and grading issues which affect the exclusive use common area of his unit, a declaration that the conduct of the Corporation is or threatens to be oppressive and unfairly prejudicial to him, enjoining the Corporation to address, repair and/or correct the surface drainage and grading issues by undertaking specified remedial work as recommended by Redmond's engineer, reimbursement of the common expenses paid by Redmond since July, 2005, damages in the sum of $50,000 for loss of enjoyment of the unit and its exclusive use common areas, and aggravated, exemplary and/or punitive damages in the amount of $50,000.

Minutes of Settlement

10 Following a mediation process, the Corporation and Redmond entered into Minutes of Settlement on August 22, 2016 providing for settlement of all of the issues in their respective Applications, with the exception of costs.

11 The Minutes of Settlement provided at paragraph 11(a) that, following approval by the parties' respective engineers of the work to be carried out by the Corporation as specified in the Minutes of Settlement, the Corporation and Redmond will:

(a) consent to the dismissal of both applications, except for the issue of costs. Counsel for both parties shall schedule a hearing before a judge of the Superior Court of Justice to address the quantum of costs for both applications.

12 Paragraph 11(b) of the Minutes of Settlement provided that the parties will execute a Full and Final Mutual Release of all matters claimed in either application, which shall include a term that the fact of the settlement, the Minutes of Settlement and the specific provisions of the Minutes of Settlement shall be kept confidential by Redmond and the Corporation (the "confidentiality provision").

Claims for Costs

13 The parties each brought their application back before the court for a ruling with respect to the question of costs of the applications, all other issues having been resolved by the Minutes of Settlement. Each party claimed entitlement to costs of their own application and of responding to the opposing party's application.

14 The Corporation's position is that through the Minutes of Settlement, substantially all of the relief sought by it was achieved and it is therefore entitled to costs of its application and in responding to the Redmond Application on a full indemnity scale.

15 Redmond, for his part, submits that he should be entitled to his costs of both applications and that the Corporation should not be entitled to any costs. He says that he was forced to respond to the Corporation's application and to issue his own application as result of the Corporation's failure to take a more conciliatory approach to resolving the issues between the parties, and that the Corporation lengthened and complicated proceedings, pursued its application and responded to his application in the same manner in which it has treated him for many years. He says that the events of the litigation have revealed that his long-held concerns respecting the drainage and grading of the common elements were justified.

16 In the alternative, Redmond submits that it is appropriate for the Court to exercise its discretion and not award costs to either party in circumstances where the parties have settled all of the issues in dispute, save costs.

17 Each of the parties filed a Factum, in which they relied upon certain of the conflicting Affidavits that had been filed in the two proceedings.

Preliminary Matters

18 At the commencement of the hearing counsel for Redmond raised a preliminary issue respecting whether the Minutes of Settlement should be disclosed to the court for its review in relation to the costs determination, in light of the confidentiality provision contained therein. By Endorsement made on the Application Record in respect of the Corporation Application, I ruled that the Minutes of Settlement be disclosed to the court for its review in connection with the costs determination, but thereafter the Minutes of Settlement shall be sealed in the court record only to be opened by further order of the court, on notice to the parties. I also made an Endorsement that counsel for Redmond may have until December 28, 2016 to advise the Court whether Redmond wishes to make a motion for non-publication of my determination on costs, in whole or in part. By correspondence dated December 28, 2016 counsel for Redmond advised that Redmond would not be bringing a motion for non-publication of my decision.

Guiding Principles Respecting Costs

19 Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides as follows:

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.

20 Rule 57.01 (1) of the *Rules of Civil Procedure* provides that, in exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing, a number of factors listed at subparagraphs (0.a) to (h). Most notable among the factors are (0.a) the principle of indemnity and (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed.

21 Rule 57.04, under the heading "Costs on Settlement," provides as follows:

> Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the costs may be assessed under Rule 58 on the filing of a copy of the minutes of settlement in the office of the assessment officer.

22 This provision addresses the situation where, as part of a settlement, the parties have agreed upon the question of entitlement to costs but not the amount of costs, in which case the amount may be determined by an assessment conducted by an assessment officer.

23 There is no specific rule addressing the question of how entitlement to costs is to be determined by the court in a case like this one where the parties have settled all of the issues in the proceeding, with the exception of costs, and there has been no adjudication of the substantive issues in the proceeding.

Should the court make a costs award?

24 In the case of *Dhillon v. Dhillon Estate*, [2009] O.J. No. 4459 (Ont. S.C.J.) MacKenzie, J. framed the issue before him as follows at para. 1:

> Under what circumstances should a court award costs where the parties have settled all areas in dispute before trial but have been unable to decide the question of costs?

25 In *Dhillon* there were both family law and estate issues in dispute between the parties. On the eve of trial the parties settled all issues between them with the exception of the question of costs and each party sought substantial costs against the other. Both parties made reference to the factors set out in rule 57.01(1) of the *Rules of Civil Procedure* and argued strenuously in support of the reasonableness of their respective positions and the unreasonableness of the position of the other. At para. 9 MacKenzie, J. observed "a great many of these assertions and arguments, as set out in their written costs submissions, presuppose that the court is now in a position to make factual findings that either support or detract from their respective submissions."

26 At para 10, Justice MacKenzie stated as follows:

> The discretion of the court under s. 131 of the Courts of Justice Act and the factors in Rule 57.01(1) of the Rules of Civil Procedure that form the parameters for the exercise of discretion under s. 131 require factual findings relating to the reasonableness or lack of reasonableness and the conduct of each of these litigants. In the absence of such findings, it is problematic in the extreme for the court to exercise its discretion on a rational basis in making any costs award.

27 Justice MacKenzie made reference, at para. 15, to the principle expressed in Orkin, *The Law of Costs* p. 2-86 that "the view has been expressed that when parties reach a settlement as between themselves, the court should be very slow to make an award of costs against one of them." The authority for this proposition is the case of *Anishinaabe Child & Family Services Inc. v. Canadian Broadcasting Corp.*, [1997] M.J. No. 181 (Man. Q.B.) at para. 32. Oliphant, J. in *Anishinaabe* observed that this principle appears to have stood the test of time, citing the case of *Titterington v. Bank of Hamilton* (1907), 9 O.W.R. 399 (Ont. Master).

28 Justice MacKenzie in *Dhillon* made the very helpful observation that the fact that one party may be regarded, on the face of the minutes of settlement, as having been substantially successful on the issues, should not be given the weight of a determining factor. He stated at paras. 20-21:

> There are doubtless many motivating factors why parties enter into settlements and why a particular party may resile from claims or defences to claims either made or responded to. Again, the reasonableness or unreasonableness of any party's position in either asserting a claim, abandoning a claim, or abandoning a defence or answer to a claim can depend on a myriad of factors. In the absence of judicial fact-finding, unknown motivating factors cannot be relied on by the court for purposes of applying the factors in Rule 57.01(1) on cost questions.
>
> > In my view, it would be inappropriate to apply those Rule 57.01(1) factors in determining entitlement to, let alone quantification of, a costs award on the basis of facts assumed and not arising from the judicial fact-finding process.

29 These principles from *Dhillon* were applied in *Blank v. Micallef*, [2009] O.J. No. 4636 (Ont. S.C.J.) where Ricchetti, J. observed that the parties in that case were themselves in the best position to determine the issue of costs when they negotiated the agreement settling the motion.

30 The fact that the principle that the court should be very reluctant to make an award of costs where all other issues between the parties have been resolved without court intervention is a long-standing one in the jurisprudence is demonstrated by the case of *McClellan v. Powassan Lumber Co.*, 1914 CarswellOnt 228 (Ont. H.C.). In that case the parties were engaged in litigation with reference to the alleged interference by the defendants with the flow of water. The matter never came to trial and in the meantime both the plaintiff and the defendant sold their properties to a common purchaser, rendering any attempt to deal with the merits of the controversy over the water rights academic.

31 The parties asked the court to go into the pleadings and the documentary evidence with the view of forming an opinion as to what the rights of the parties are upon the merits and to award costs upon the view that the court takes of that matter. At para. 5, Middleton, J. stated:

> I do not think the Court should be asked to undertake this task. The parties by their action in selling the property have made it entirely unnecessary that the rights and the litigation should ever be determined. Costs are in truth incident to a determination of the rights of the parties, and not to be made themselves the subject matter of the litigation. When the merits for any reason cannot be determined, there ought not to be a pretended investigation of the merits for the purpose of awarding costs. The intervention of the Court has been rendered unnecessary by the conduct of the parties, and no order should now be made save that the action should now be dismissed.

32 It is noted that *McClellan* was referred to and distinguished on the facts, but not overruled, in the very recent case of *Packard v. Fitzgibbon*, 2017 ONSC 566 (Ont. S.C.J.) at para. 34.

33 The parties in the present case each invite the court to examine the evidence in the affidavit material and to embark upon a detailed consideration of the merits of their respective claims, with a view to persuading the court that the outcome, as represented by the Minutes of Settlement, vindicated their position and that they acted reasonably, whereas the opposing party acted unreasonably.

34 In my view to embark upon this exercise would be, on the authority of *Dhillon*, *Anishinaabe*, *Blank* and *McClellan*, inappropriate and would risk being manifestly unfair. As noted by Justice MacKenzie in *Dhillon*, there may be many motivating factors for parties to enter into settlements and the reasonableness or unreasonableness of any party's position in either asserting a claim, abandoning a claim or abandoning a defence or answer to a claim can depend on a myriad of factors. Moreover to embark upon a full examination and adjudication of the merits of the parties' respective substantive claims and defences for the sole purpose of determining the question of costs, when those substantive issues have been

settled by the parties, would run counter to the principle in *McClellan* that costs are incident to a determination of the rights of the parties and are not to be made themselves the subject matter of the litigation.

35 The Corporation cites the case of *Simcoe Condominium Corp. No. 12 v. Walker*, 2014 ONSC 4109 (Ont. S.C.J.) as an example of a case where the parties settled all outstanding issues other than costs and the court still awarded full indemnity costs to a condominium Corporation where the condominium succeeded on every issue in the case.

36 It is apparent from a review of *Simcoe Condominium Corp. No. 12* that the respondent unit owner in that case consented to a judgment, the terms of which, when compared to the allegations in the condominium corporation's application, made it clear that the applicant condominium corporation did succeed on every issue in the case (see para. 5). It is implicit from this that the "settlement" between the parties in *Simcoe Condominium Corp. No. 12* was not reflective of a negotiated compromise agreement, but rather the unit-owner acceded fully to the condominium corporation's claims.

37 In my view, *Simcoe Condominium Corp. No. 12* is distinguishable from the present case. It is apparent in review of the Minutes of Settlement in this case that they do reflect a negotiated compromise agreement.

38 Rule 57.01(1) places significant emphasis, in the preamble, on a consideration of the "result in the proceeding." To make an adjudication of the "result in the proceeding" would require the court to effectively conduct a full paper trial based upon the affidavit evidence filed by the parties. As established by the jurisprudence referred to above, this is inappropriate, and it is not something the court should embark upon in the absence of compelling reasons, which are not present in the case at bar.

39 It is noted that the parties did not, by the Minutes of Settlement, expressly agree to refer the question of *entitlement* to costs to the court, but rather only agreed to schedule a hearing before a judge of the Superior Court of Justice to address the *quantum* of costs for both applications. Even if a term providing for the issue of *entitlement* to costs could be implied into the Minutes of Settlement, I would still find it to be inappropriate to make a determination on entitlement, for the reasons set forth above.

Disposition

40 Section 131 of the *Courts of Justice Act* provides that "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" (emphasis added). In the exercise of my discretion I decline to make any order as to the costs of these proceedings.

41 As stated by Justice Middleton in *McClellan*, this is intended to be an exercise of judicial discretion and not to be a refusal to adjudicate upon the question submitted.

Order accordingly.

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