

**CITATION:** Dyke v. Metropolitan Toronto Condominium, **2015ONSC2022**  
**COURT FILE NO.:** CV-13-486555  
**MOTION HEARD:** February 5, 2015 (Endorsement February 25, 2015)

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**Re:** ELIZABETH DYKE and DANIELLE DYKE

Plaintiffs

v.

METROPOLITAN TORONTO CONDOMINIUM CORPORATION  
NO. 972, MARILYN GREEN, NORMAN HALL, BRUCE  
DARLINGTON, WILHELMINA DUMAS also known as WILLOW  
DUMAS, ANDREA BELANGER, SAMIR GUPTA, RENUE GUPTA,  
FEIZAL SATCHU and PARUL GUPTA

Defendants

**BEFORE:** Master Lou Ann M. Pope

**COUNSELS :** Lawyer for the plaintiffs:  
Megan Mackey, Miller Thomson LLP  
Fax 416-595-8695

Lawyer for the defendants, Metropolitan  
Toronto Condominium Corporation  
No. 972, Marilyn Green, Norman Hall,  
Bruce Darlington, Wilhelmina Dumas  
also known as Willow Dumas, and  
Andrea Belanger  
David Tompkins, Bell, Temple  
Fax 416-596-0952

Lawyer for the defendants, Samir Gupta and Renu Gupta  
Luke J. Saites, Malach Fidler Sugar +  
Luxenberg LLP  
Fax 905-889-1139

Feizal Satchu and Parul Gupta  
self-represented

### ENDORSEMENT ON COSTS

- [1] Pursuant to my Endorsement dated February 25, 2015, this action was dismissed with costs to the defendants pursuant to rule 23.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- [2] Following my Endorsement, the parties made written submissions on costs of the motion and the action. Having read the written submissions and considered the principles set out in rule 57.01(1), the following is my decision on costs. In fixing costs, I have considered the overriding principles of fairness and reasonableness.
- [3] With respect, I reject the plaintiff's submission that she was successful on the motion. The relief sought by the plaintiff was to discontinue this action without costs. The result was a discontinuance but with costs to the defendants. This result was considered in making my cost orders.

#### Costs of the Action

##### MTCC

- [4] The defendants, Metropolitan Toronto Condominium Corporation No. 972, Marilyn Green, Norman Hall, Bruce Darlington, Wilhelmina Dumas also known as Willow Dumas, and Andrea Belanger ("MTCC"), shall be entitled to partial indemnity costs of this action in the amount of \$15,000 inclusive of disbursements and HST.
- [5] In arriving at that amount, I took into consideration the fact that MTCC's crossclaim was allowed to continue.
- [6] Further, this amount includes costs for the following steps: statement of defence, plaintiff's notice of discontinuance against two defendants in September 2013, directions motion of Stinson J. in October 2013 which includes court file numbers for both proceedings, mediation that included both proceedings which the plaintiff failed to attend, change in plaintiff's counsel January 2014, plaintiff's offer to discontinue without costs in February 2014, plaintiff's second change of lawyer, expert report obtained by MTCC, and the plaintiff's in-writing motion filed subsequent to my endorsement on February 25, 2015 but prior to receipt of costs submissions.
- [7] For some of these steps, I allowed MTCC one half of the expense considering that the event took place in both proceedings.

**Samir Gupta and Renu Gupta**

- [8] These defendants shall be entitled to partial indemnity costs of this action in the amount of \$17,500 inclusive of disbursements and HST. In granting this amount, I considered the same factors as set out above with respect to the MTCC defendants, including the fact that their crossclaim was allowed to continue.
- [9] In addition, I increased the amount slightly from the costs granted to the MTCC defendants to take into consideration that the plaintiff admitted in her affidavit filed on this motion that this action against the personal defendants had been commenced in error as she never intended to make a claim against them. Armed with that knowledge, the plaintiff gave no explanation why she did not discontinue this action against those defendants before the close of pleadings to minimize or eliminate any costs to them. Instead, she continued the action, and it was not until after her daughter passed away that she decided to discontinue the action as she could then seek her damages in the context of her application. One can only assume that she had her daughter not passed away, they would have continued this action.
- [10] In my view, this is reprehensible behaviour. It is particularly egregious because of the timing of her admission; that is, in the motion material, long after the action had been commenced and after the personal defendants had incurred substantial costs to defend the action. In addition, her admission and the timing of it is egregious given that she had made an offer to discontinue the action *without costs* with knowledge at the time that she never intended on suing these defendants.
- [11] Further, I am not comforted by the fact that the plaintiff made a subsequent offer to settle the motion on the basis of discontinuing the action with all parties' costs to be assessed, which I will address below.
- [12] Essentially, the personal defendants were put to significant expense by the plaintiff, to learn much later after being served with her motion to discontinue without costs that she never intended to make a claim against them. To make matters worse, neither of her two offers included a term to pay them at least some of their costs.
- [13] Notably, I have not increased MTCC's costs due to this factor as it is my understanding that the MTCC personal defendants were members of the board of directors and defended by the condominium corporation.

**Feizal Satchu and Parul Gupta**

- [14] These defendants shall be entitled to partial indemnity costs of this action in the amount of \$12,500 inclusive of disbursements and HST. In granting this amount, I considered the same factors as set out above with respect to the MTCC defendants. They did not make a crossclaim; therefore, their involvement in this action is at an end. I further considered the fact that they were represented by counsel until August 2014 and thereafter represented themselves.

[15] In addition, I increased their costs slightly for the same reasons given in the paragraphs above regarding Samir and Renu Gupta, with respect to the plaintiff's admission.

### **Costs of the Motion**

[16] I reject the plaintiff's submission that she is entitled to costs of the motion pursuant to rule 49.10(1). The plaintiff submits that she was successful on the motion and that the result was as favourable as or more favourable than the terms of her offer to settle dated October 3, 2014. The offer to settle provided that the defendants would consent to a discontinuance of the action and that "all parties costs of this action shall be assessed." Firstly, I am uncertain of the meaning of that term. Does it mean that all parties will pay his or her own costs after assessment? Or does it mean that whatever party's costs are greater, the other party or parties will pay the difference between the higher costs and the lower costs? Secondly, the term states "costs of this action". Pursuant to my endorsement dated February 25, 2015, the plaintiff was not successful on all relief sought. The action was ordered to be discontinued, as sought by the plaintiff, but not on a without costs basis, as sought. The defendants were awarded their costs of the action and the motion. For those reasons, it is my view that the plaintiff has not met her burden under rule 49.10(3) of proving that the order is as favourable as the terms of the offer to settle.

[17] Therefore, the defendants shall be entitled to their costs of the motion on a partial indemnity scale as follows:

- (a) To MTCC the sum of \$4,500 inclusive of disbursements and HST;
- (b) To Samir Gupta and Renu Gupta the sum of \$3,000 inclusive of disbursements and HST;
- (c) To Feizal Satchu and Parul Gupta the sum of \$750.

[18] I granted a larger award to MTCC as they appeared to take "the lead" on the motion with Mr. Tompkins making the majority of the submissions.

[19] I awarded a minimal amount to Feizal Satchu and Parul Gupta recognizing that they represented themselves. The award is essentially a token amount to indemnify them for their time in preparing, serving and filing responding material, attendance at the motion, and preparing, serving and filing costs submissions.

### **Conclusion**

[20] The plaintiff shall pay the defendants for their costs of the motion and the action the following:

- (a) To MTCC, the amounts of \$15,000 plus \$4,500, for a total sum of \$19,500;

- (b) To Samir Gupta and Renu Gupta, the amounts of \$17,500 and \$3,000, for a total sum of \$20,500;
- (c) To Feizal Satchu and Parul Gupta, the amounts of \$12,500 and \$750, for a total sum of \$13,250.

[21] These costs shall be payable within 120 days.

March 30, 2015

(original signed)  
Master Lou Ann Pope