

2016 CarswellOnt 6003
Ontario Superior Court of Justice

Wexler v. Carleton Condominium Corp. No. 28

2016 CarswellOnt 6003

Norma Wexler, Plaintiff and Carleton Condominium Corporation #28, Defendant

Raymond H. Gouin D.J.

Heard: April 20, 2015; April 22, 2015; October 8, 2015

Judgment: February 19, 2016

Docket: Ottawa SC-12-121278

Proceedings: Additional reasons, 2015 CarswellOnt 20652, 264 A.C.W.S. (3d) 248 (Ont. S.C.J.)

Counsel: Plaintiff, for herself

Antoni Casalnuovo, for Defendant

Subject: Civil Practice and Procedure; Property

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Real property

X Condominiums

X.14 Miscellaneous

Headnote

Civil practice and procedure

Real property

Raymond H. Gouin D.J.:

1 Following a three day trial, the plaintiff's action was dismissed, The plaintiff's claim was for \$2,525.14, inclusive of the amount of \$2,000.00 for harassment.

2 Section 29 of the *Courts of Justice Act*, R.S.O. 1990, chapter 43 provides as follows:

An award of costs in the Small Claims Court; other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding.

3 Rule 19.01(1) of the Rules of the Small Claims Court provides as follows;

A successful party is entitled to have the party's reasonable disbursements, including any costs of effecting service and expenses for travel, accommodation, photocopying and experts' reports, paid by the unsuccessful party, unless the court orders otherwise.

4 Rule 19.02 of the Rules of the Small Claims Court provides as follows;

Any power under this rule to award costs is subject to section 29 of the Courts of Justice Act, which limits the amount of costs that may be awarded.

5 Rule 19.06 of the Rules of the Small Claims Court provides as follows:

If the Court is satisfied that a party has unduly complicated or prolonged an action or has otherwise acted unreasonably, the court may order the party to pay an amount as compensation to another party.

6 Counsel for the defendant claims costs above 15% of the total amount claimed by the plaintiff. He submits that the defendant is entitled to costs on a full indemnity basis in the amount of \$35,495.82. In the alternative, he claims the amount of \$28,503.38; in the further alternative, he claims the amount of \$14,424.94 on a partial indemnity basis.

7 The plaintiff is the owner of a residential condominium unit. Counsel for the defendant submits that, according to Article X of the Corporation's Declaration, any unit owner shall indemnify the condominium corporation from any loss, costs, damages, injuries or liabilities which may occur as a result of an act or omission of that unit owner. It is further submitted that Article X provides that those costs shall be deemed to be common expenses.

8 In *Peel Condominium Corporation No. 108 v. Young*, 2011 CarswellOnt 1849, Gray J. wrote: "*Once registered, the Declaration has the force of law, at least as far as the unit holders are concerned. It is a sort of Constitution that binds them all, and which the Board of Directors is legally obliged to enforce. There is an interest, in the collective, in having the Declaration enforced ...*" He added: "*... the collective interest in having the Declaration enforced must prevail over the private interest of the [unit owner]*". Based on *Peel Condominium Corporation No. 108 v. Young*, I accept that, when enforcing its Declaration, a condominium corporation must consider the collective interests of all unit owners as opposed to only the private interests of the unit owner who is alleged to be in default of the Declaration.

9 Relying on a decision of the Court of Appeal of Ontario in *York Condominium Corporation No. 382 v. Dvorchik*, 1997 CarswellOnt 219, counsel for the defendant submits that in asking for costs above the 15% limit, he is simply seeking that the indemnification provision of the Declaration be enforced, considering also that the defendant is statutorily required to adhere to the Declaration and is entitled to ask that it be enforced, Hence, he is asking that I allow costs over 15% in the range of the aforesaid amounts.

10 Counsel for the defendant also relies on *Carleton Condominium Corporation No. 396 v. Burdet*, 2015, ONSC 1361 where Kane J. set out section 131(1) of the Courts of Justice Act which provides:

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.

11 *The Condominium Act, 1998* ("Act"), contains specific provisions as to what levels of legal Costs are recoverable by a condominium corporation. Cost entitlement under the Act is not limited to the cost provisions under s. 131 of the CJA. As such, counsel for the defendants submits that the defendants is therefore entitled to costs above 15%, and for an amount in the aforesaid range. I accept that the rationale behind *Carleton Condominium Corporation No. 396 v. Burdet* and other similar decisions is that if the condominium corporation is not awarded full indemnity as to costs when defending an action successfully, the costs of defending that action is actually to the detriment of all other unit owners. That is where an injustice lies if the condominium corporation cannot obtain full indemnity for the costs of successfully defending an action.

12 Counsel for the defendant submits that *Carleton Condominium Corporation No. 396 v. Burdet* also decided that where accusations of bad faith and/or misconduct have been raised but not proven, a higher scale of costs can be awarded.

13 Counsel for the defendant submits that the plaintiff presented several documents at trial that had not been produced before trial. I allowed the plaintiff to produce those documents as I wanted to ensure that all the facts were before me; she was not assisted by a lawyer and did not know the rules of the court. I could not know whether the facts that those documents were supposed to disclose were relevant or not to the claim unless they were before me. However, as it turned out, those documents did not support her claim.

14 Counsel for the defendant submits that, as the plaintiff was not organized in her presentation at trial, the trial was unduly prolonged. For these reasons, counsel for the defendant submits that costs should be in excess of the 15% allowable pursuant to the *Courts of Justice Act*.

15 Counsel for the defendant submits that I can declare that the plaintiff's action was vexatious therefore permitting me to award costs on a higher scale than what is contemplated in the *Courts of Justice Act*. He submits further that the plaintiff's action had no merit and a message should therefore be sent that the burden of public's resources should have consequences which the plaintiff should bear.

16 The fact that the plaintiff did not prove her case despite given ample opportunity to do so, and considering that she was also allowed to introduce several documents which she claimed were necessary to her claim, is not conclusive in itself of a vexatious claim. The fact that the plaintiff has two other claims against this defendant is not evidence that she is a vexatious litigant as I do not know the facts of those two other actions.

17 The award of costs is a discretionary matter under section 131 of the *Courts of Justice Act*. There are factors to be considered in exercising discretion in awarding costs. I am required to consider what is fair and reasonable in fixing costs; *Boucher v. Public Accountants Council (Ontario) (2004), 71 O.R. (3d) (C.A.)*.

18 While I have no doubt that counsel for the defendant prepared extensively for trial, I hesitate to award costs in the amount of \$35,495.82 or even \$28,503.38 as submitted by him. I recognize that the plaintiff was not prepared for trial and that she was disorganized; this directly contributed to unnecessarily prolonging the trial. As such, and because her action was dismissed and because the condominium corporation has a Declaration, By-Laws and Rules providing for full indemnity, and especially because it would be unfair that the unit owners should bear all the costs of this litigation when the condominium corporation is unnecessarily sued, I allow costs in the amount of \$20,000.00, inclusive of HST and disbursements, In arriving at this conclusion, I have also considered the principle of proportionality.

19 I do not know what the plaintiff originally thought the cost consequences could be if she failed to prove her case, but she must have known that there were consequences. In fact, she should have known that costs payable by an unsuccessful party to the successful party are a feature of litigation. She could not have expected the costs to be zero if she lost.

20 The plaintiff shall therefore pay costs to the defendant in the amount of \$20,000.00.

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