

COURT OF APPEAL FOR ONTARIO

CITATION: 806480 Ontario Limited v. RNG Equipment Inc., 2014 ONCA 796

DATE: 20141112

DOCKET: M44170 (C58077)

Laskin, Pepall and Pardu JJ.A.

BETWEEN

806480 Ontario Limited cob as Ken's Sunoco Service

Plaintiff (Appellant)

and

RNG Equipment Inc. and ZCL Composites Inc.

Defendants (Respondent)

John H. McNair, for the appellant

John W. Makins, for the respondent

Heard: in writing

On a motion to vary the judgment of this court awarding costs to the appellant in the agreed sum of \$8000.

ENDORSEMENT

[1] The respondent moves to vary the judgment of this court awarding costs to the appellant "in the agreed sum of \$8000". The appellant was successful in overturning a decision of a motion judge refusing to set aside the administrative dismissal of his action. There are two arguments advanced on this motion. Firstly, the respondent says costs should not follow the event, because it was in no way at fault in the unfolding of the events. For the same reason, it submits

that it should be awarded the costs originally granted to it as the successful party on the motion, in the sum of \$7800. Secondly, the respondent asserts that it did not agree to costs fixed at \$8000, and that it should have been given an opportunity to make submissions on costs.

[2] The argument on appeal turned on the motion judge's application of the criteria for setting aside an administrative dismissal: the length and reason for the delay, the presence or absence of a good faith intention to pursue the action, any prejudice suffered by the opposite party and the justice of the case. At the conclusion of the hearing, the court allowed the appeal, with reasons to follow, and invited submissions as to costs.

[3] The digital recording of the appeal discloses the following submissions:

Appellant: We do not have an entire agreement. Here is the situation. My friend, I think, wishes to address submissions to you that the appellant should be denied its costs. If you are minded, as I urge, to award the appellant its costs of the appeal, we have agreed upon the appropriate quantum.

Court: Alright. And what about the motion costs?

Appellant: We are not seeking to recover the costs of the motion before Justice Goodman but it is my respectful submission that the appellant ought to recover its costs of this appeal.

Court: What's the number that you have agreed on?

Appellant: \$8,000 all inclusive.

Court: So Mr. Blay's point is no costs in the circumstances?

Respondent: That's our submission, Your Honour. Simply put, we wouldn't be here were this not for the delinquency of Mr. Cudmore in the first place

[4] Following the hearing, the Court observed that while the status notice sent to the appellant on September 13, 2012 provided that the action would be dismissed unless it was set down or otherwise terminated within 90 days of service of the status notice, the Registrar's order dismissing the action for delay was made on December 4, 2012, before the 90 days had expired.

[5] The Court invited the parties to make further written submissions on this point, unnoticed by counsel on the motion, the motion judge, and counsel on the appeal. Ultimately the respondent agreed that the dismissal of the action should be set aside as of right.

[6] The respondent submits that the appellant should have noticed the untimely dismissal by the Registrar. Had the appellant brought this to the attention of the motion judge, or the respondent, the respondent would have consented to setting aside the dismissal, and the appeal would have been unnecessary.

[7] These circumstances do not justify a departure from the usual rule that costs should follow the event. Had the respondent noticed the untimely dismissal, it could have consented immediately to the relief sought.

[8] Finally, as the digital recording makes clear, counsel for the respondent signified his agreement to the amount of costs, but took the position that there should be no costs awarded, despite the appellant's success. We see no reason to vary the order of this court granting costs to the successful party on appeal in the amount agreed to. No costs of the motion below were awarded to either party, reflecting the responsibility each bore for the outcome.

[9] While the moving party here requested an oral hearing of this motion, given the nature of the issue, the Court elected to deal with the motion in writing.

[10] Counsel may make written submissions as to the costs of this motion, due from the moving party within 10 days, and from the respondent on the motion within 10 days thereafter.

“John Laskin J.A.”

“S.E. Pepall J.A.”

“G. Pardu J.A.”