

COURT OF APPEAL FOR ONTARIO

CITATION: Preiano v. Cirillo, 2024 ONCA 312

DATE: 20240424

DOCKET: COA-22-CV-0281

Roberts, Sossin and Dawe JJ.A.

BETWEEN

Sonia Preiano and Gianluca Preiano

Plaintiffs (Respondents)

and

Antonia Cirillo by her litigation guardian, Grace Cirillo and The Estate of
Giuseppe Cirillo

Defendants (Appellants)

Grace Cirillo, acting in person as Estate Trustee for the appellant, The Estate of
Giuseppe Cirillo, and as Litigation Guardian for the appellant, Antonia Cirillo

Tyler H. McLean, for the respondents

Heard: in writing

On appeal from the judgment of Justice Jamie K. Trimble of the Superior Court of
Justice, dated August 29, 2022, with reasons reported at 2022 ONSC 4945.

COSTS ENDORSEMENT

[1] On March 21, 2024, we allowed the appeal in part, reduced the damages awarded to the respondents from \$975,000 to \$45,000 (both net of the \$25,000 deposit paid by the respondents), and set aside the trial judge's awards to the respondents of \$111,309.65 for prejudgment interest and \$136,971.02 for costs on a substantial indemnity basis. We invited the parties to submit by March 28, 2024,

brief written submissions regarding prejudgment interest and costs, if they could not agree on these amounts. We received submissions by the deadline from only the respondents. We allowed an extension of time to Ms. Cirillo and have now received her submissions.

[2] The respondents submit that the appellants are entitled to their costs of the appeal in the all-inclusive amount of \$15,000. They submit that the prejudgment interest rate should be fixed at 1.3% from the date of the breached closing on November 20, 2013 to the August 29, 2022 date of judgment, and that they should be awarded the amount of \$7,990.55. The latter amount represents 3,205 days times the *per diem* rate of \$2.49. They say that notwithstanding the reduction of their damages, they were still the successful parties at trial and that they are entitled to their costs in the amount awarded by the trial judge because of the appellants' allegedly "egregious" conduct throughout the litigation, their failure to make an offer to settle, and their failure to appeal the costs order.

[3] The appellants have submitted a bill of costs in the amount of \$38,198.32, including \$6,960.60 for disbursements for their appeal costs. This represents the actual amount that the appellants have been billed by counsel assisting them with their appeal. The appellants are not entitled to their full indemnity costs of the appeal. Moreover, there is some duplication of effort among the counsel retained by the appellants. We agree that the amount of \$15,000 is fair and proportionate and within the reasonable contemplation of the respondents for the appellants'

partial indemnity costs of the appeal. The amount of \$15,000 for the appellants' appeal costs shall be deducted from the amount ordered to be paid by the appellants to the respondents as their trial costs, as fixed below.

[4] With respect to the calculation of the prejudgment interest presented by the respondents, we agree with the proposed commencement date for prejudgment interest, the calculation of the number of days, and 1.3% prejudgment rate, which are in accordance with ss. 127 and 128(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. However, the respondents calculated their \$2.49 per diem rate on the basis that they were awarded damages in the amount of \$70,000. As we indicated in para. 22 of our March 21, 2024 Reasons for Decision, the respondents are entitled to prejudgment interest on the reduced damages amount of \$45,000 – \$70,000 less their \$25,000 deposit – and accumulated interest on the \$25,000 deposit. The correct per diem amount for the \$45,000 net damages award is \$1.60. We calculate prejudgment interest on \$45,000 in the amount of \$5,128 (3,205 days times the *per diem* amount of \$1.60).

[5] With respect to the trial costs, we are not persuaded that the respondents are entitled to the same award of costs granted by the trial judge. A more proportionate approach to trial time should have been taken given the uncertainty of the respondents' claim for specific performance and the more modest amount of damages to which they were entitled had the damages calculation been correctly carried out. Nor do we agree that the appellants were required to seek

leave to appeal the costs award given that they appealed the judgment. We allowed the judgment in part and ordered that the costs order be set aside. The amount of the trial costs must therefore be considered anew.

[6] In exercising our discretion under s. 131 of the *Courts of Justice Act*, we have considered the factors set out in r. 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the overarching principles that costs must be fair, proportionate, and reasonable and reflect the reasonable contemplation of the losing party. An important factor here is the respondents' changed success. The outcome of the nine-day trial has dramatically changed on appeal in that we reduced the damages by 93 percent to \$70,000, less the \$25,000 deposit.

[7] The reduction in damages is not, however, the dispositive factor here given the particular findings of the trial judge in his costs endorsement that are unaffected by the reduction in the quantum of damages awarded. Specifically, although this was a hard-fought battle on both sides with no offers to settle, we have taken into account the trial judge's findings about Ms. Cirillo's conduct of the litigation that he found lengthened the trial and increased costs, and about her particularly egregious behaviour, for example, her inappropriate remarks to the trial judge and the respondents about bribery, and her veiled threats against the respondents. We see no basis to disturb the trial judge's findings that were open to him on the record. As such, we agree that costs should be assessed on a substantial indemnity scale. Moreover, we see no error in the trial judge's conclusion, based on his findings,

that Ms. Cirillo should bear responsibility for costs with her father's estate and her mother in the manner provided for in his costs disposition.

[8] In all the circumstances, we conclude that the fair, proportionate, and reasonable amount within the appellants' contemplation for costs of the trial is \$75,000. The appellants shall pay to the respondents a net amount of \$60,000 for their trial costs, inclusive of all amounts, after the deduction of the amount of \$15,000 for the appellants' appeal costs.

"L.B. Roberts J.A."

"L. Sossin J.A."

"J. Dawe J.A."