CITATION: Monk v. Farmers and Muskoka Ins., 2017 ONSC 4511

COURT FILE NO.: CV-11-093

DATE: 25 July 2017

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Diana Lynn Monk, Plaintiff

AND:

Farmers' Mutual Insurance Company (Lindsay), Defendant

AND:

Muskoka Insurance Brokers Ltd., Defendant

BEFORE: E.J. Koke

COUNSEL: David A. Morin, Counsel for the Plaintiff

Martin P. Forget, Counsel, for the Defendant, Farmers' Mutual Insurance Company (Lindsay)

Demetrios Yiokaris, Counsel for the Defendant, Muskoka Insurance Brokers Ltd.

ENDORSEMENT ON COSTS - TRIAL

INTRODUCTION

[1] In late 2008, Ms. Monk sustained damage to her windows and doors following work undertaken by her contractor. On November 14, 2011, she commenced this action against her insurance broker, the defendant Muskoka Insurance Brokers Ltd. ("Muskoka"), and against Farmers' Mutual Insurance Company (Lindsay) ("Farmers"), the insurance company which had provided her with a homeowner's policy of insurance.

[2] On June 15, 2017, the action was dismissed against both defendants following a nine-day trial. The parties have been unable to agree on the costs payable by Ms. Monk in relation to her failed action, and have filed written submissions for the court's consideration.

POSITIONS OF PARTIES

[3] Both defendants claim that costs should be payable to them on a substantial indemnity basis. The plaintiff argues that the award of costs should be modest, and submits that in determining costs the court should place considerable weight on the principles of proportionality and fairness, particularly in view of the fact that damages were assessed at a little under $90,000.

[4] Farmers' calculation of its costs on a substantial indemnity basis is $233,102.45, inclusive of fees, disbursements and taxes. This includes an hourly rate ranging from $310 - $330 for Mr. Martin Forget, lead counsel for Farmers, calculated from the time the suit was commenced in November 2011 through to the conclusion of the case in June 2017. Mr. Forget was called to the bar in 1998. When calculated on a partial indemnity basis, Farmers' costs total $175,195 inclusive, with hourly rates for Mr. Forget ranging from $250 - $275.

[5] I am satisfied that the hourly rate claimed by Farmers for Mr. Forget and for his associates as set out in its bill of costs is fair and accurate, with respect to both its assessment of substantial and partial indemnity costs. I am also satisfied that the number of hours claimed for fees and the disbursements are reasonable when one considers that this was a nine-day trial involving a number of novel and complex legal and factual issues.

[6] Muskoka's calculation of its costs on a substantial indemnity basis is $167,424.02. It calculates its costs on a partial indemnity basis in the amount of $116,455.37. Mr. Demetrios Yiokaris, who was lead counsel for Muskoka was called to the bar in 2002 and claims an hourly rate on a substantial indemnity basis ranging from $275 - $350, calculated from the time the suit was commenced to its conclusion. The hourly rate applied to his services on a partial indemnity basis ranges from $185 - $230.

[7] The plaintiff submits that a portion of the fees claimed by Muskoka relate to preparing and attending on an earlier summary judgment motion (for which costs have previously been determined), but my review of the Costs Outline set out at Tab 2 of Muskoka's submissions confirms that the costs claimed do not include time and disbursements devoted to the motion and subsequent appeal of the motion decision.

[8] In my view, the hours and disbursements claimed in Muskoka's bill of costs are accurate and reasonable as well.

ANALYSIS

[9] The issue for the court to decide is whether this is a case in which costs should be awarded on a substantial indemnity basis, as requested by the defendants, or on a partial indemnity basis or reduced to a lesser amount as requested by the plaintiff to reflect the principles of

proportionality and fairness and the other relevant factors set out in Rule 57 of the *Rules of Civil Procedure.*

[10] The defendants set out a number of reasons for seeking an award of costs based on a substantial indemnity assessment.

[11] Firstly, they submit that in presenting her claim, and after the plaintiff was told that her claim was likely out of time in September 2011, she attempted to mislead her insurer by continuing to refer to her damages as being "discovered" in 2010. This later date was referred to in various documents filed in support of her claim, including a non-waiver agreement, correspondence from her counsel and her proof of loss. These assertions were made notwithstanding the fact that she testified that she had verbally informed her broker as early as January 2009 that she had sustained damages.

[12] The defendants point out that it is well settled that an insurance contract is a contract of mutual utmost good faith which requires an insured to be honest and accurate when presenting a claim. According to the defendants, Ms. Monk breached her duty, choosing instead to mislead her insurer to avoid the consequences of her failure to comply with notice periods in her policy and potential limitation period defences. Her actions are therefore deserving of sanction.

[13] Secondly, Farmers submits that Ms. Monk made unsupported allegations that Farmers was high handed and acted in bad faith in its dealings with her, and used these allegations to make a claim for punitive and aggravated damages. Farmers argues that these allegations were not substantiated at trial and that it is settled that substantial indemnity costs are justified when a party makes unsupported allegations of bad faith.

[14] Muskoka too points out that the plaintiff's allegations against Muskoka and its representatives were serious. Ms. Monk's allegations included allegations of professional negligence and breach of fiduciary duty, allegations which could have had a negative impact on Muskoka's business reputation and the personal and professional reputation of its employees in the community if they had been supported by credible evidence.

[15] Thirdly, Farmers and Muskoka argue that Ms. Monk failed to accept several reasonable offers to settle. As recently as March 2017 Farmers offered to pay $40,000 and Muskoka offered to pay $30,000 to settle the claim, both inclusive of costs.

[16] The defendants argue that the costs claimed by them are or should be within the reasonable expectations of Ms. Monk and that she was aware of the financial risks she faced. They point out that on December 30, 2015 Ms. Monk's counsel advised that as of that date (16 months prior to trial) his client had already incurred significant legal fees.

[17] The plaintiff argues that a proportionate award of costs on a claim that has been assessed at a little under $90,000 should be no more than $50,000.

[18] With respect to the issues of proportionality and fairness, I note that following a successful summary judgment application brought by the defendants in June 2014, the plaintiff made many of the same arguments she now makes when the costs of that motion were determined by this court. The plaintiff argued that these principles required that costs should be reduced, given the modest size of the claim, and suggested that an appropriate award for the defendants for both the motion and the action was $15,000 plus disbursements for Farmers and $10,000 plus disbursements for Muskoka. This court was sympathetic to the plaintiff's arguments and costs of the motion were fixed in the modest amount of $30,000 to Farmers and $20,000 to Muskoka to reflect the principles of proportionality and access to trial, resulting in a total costs award of $50,000.

[19] However, following her successful appeal of the summary judgment decision, the plaintiff then sought $125,000 in partial indemnity costs for costs of the same summary judgment motion from the Court of Appeal. The Court of Appeal awarded her $90,000, which was $40,000 more than the combined amount awarded to the defendants by this court for the same motion.

[20] The Court of Appeal dismissed this court's concerns regarding access to justice and proportionality in the following words at paragraph 5 of its costs decision:

> 5. Those concerns are not relevant here. The appellant is entitled to costs on a partial indemnity basis, which should be fixed at $90,000, inclusive of taxes and disbursements. $55,000 shall be paid by Farmers and $35,000 by Muskoka.
>
> ...see *Monk v. Farmers Mutual Insurance Co. (Lindsay)* [2016] O.J. No. 1090

[21] In my view, the Court of Appeal's decision that the principle of proportionality was not relevant in determining costs payable by the defendants on the summary judgment motion raises an issue as to whether the principle should be considered relevant now in assessing the costs payable by the plaintiff.

[22] The plaintiff also argues that once the meaning of the faulty workmanship exclusion was determined on motion by the Ontario Court of Appeal, the remaining facts and legal issues were not complex and did not warrant double counsel.

[23] In my view, it was not unreasonable for the defendants to engage a second counsel at trial. The interpretation to be attributed to the faulty workmanship exclusion was not finally decided on motion to the Ontario Court of Appeal. The exclusion received further and extensive consideration by the Supreme Court of Canada in *Ledcor Construction Ltd.* v. *Northbridge Indemnity Insurance Co.*, 2016 SCC 37, 2016 CarswellAlta 1699 (S.C.C.) ("*Ledcor*"). The plaintiff relied heavily on this decision in her submissions at trial. For their part, the defendants put forth a vigorous argument that *Ledcor* should be distinguished from the plaintiff's case on the basis that *Ledcor* was decided in the context of a builder's risk policy of insurance. In its reasons for judgment and in its determination that the faulty workmanship exclusion did not

bar Ms. Monk's claim, this court embarked on a lengthy analysis of the *Ledcor* decision. In fact, I believe this is the first reported decision in which the principles set out in *Ledcor* have been applied to a homeowner's policy of insurance.

[24] The plaintiff's entitlement to relief from forfeiture resulting from her failure to comply with statutory condition No. 6 also raised significant and time consuming legal issues, as did the applicability of the "property being worked on" exclusion in Ms. Monk's policy.

[25] The plaintiff also argues Muskoka should only have been concerned with one issue, namely the issue of when Ms. Monk notified Muskoka of the loss and whether she failed to comply with a statutory condition; the causation of the damage, the interpretation and application of the exclusions and the plaintiff's entitlement to relief from forfeiture should have been of no concern to Muskoka.

[26] Again, I disagree. Clearly, the extent of any damage award against Muskoka was contingent on a determination of whether the exclusions in the policy applied to Ms. Monk's claim, and whether she was entitled to relief from forfeiture. If the exclusions applied, then there could be no liability in relation to the broker. Also, if Ms. Monk was entitled to relief from forfeiture, there could be no broker liability.

DECISION

[27] In my view, the defendants make a compelling case that costs should be fixed on a substantial indemnity basis. The plaintiff makes a number of serious allegations of bad faith and breaches of fiduciary duty against the defendants, which she could not support.

[28] However, I am reminded that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant...see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.) and *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.). Furthermore, it remains my view that the proportionality principle is alive and well and should be considered by the court in determining costs in this case.

[29] In summary, this is a modest claim for damages, and in the circumstances I am not prepared to fix costs on a substantial indemnity basis as requested by the defendants. To do so would have the effect of requiring the plaintiff to pay costs totalling more than four times the value of the claim.

[30] In conclusion, I have reviewed and considered the submissions filed by counsel, and their respective replies thereto. I have considered the factors enumerated under Rule 57, including the time spent, the result achieved, and the complexity of the matters, the reasonable

expectations and the conduct of the parties, as well as the application of the principle of proportionality (Rule 10.4(1)). After doing so it is my view that costs assessed on a partial indemnity basis as presented by the defendants represent a fair and reasonable award of costs in the circumstances of this case. I am therefore ordering that the plaintiff pay costs to Farmers totalling $175,000 and costs to Muskoka totalling $115,000. These amounts are inclusive of disbursements and HST.

E.J. Koke (SCJ)

Date: July 25, 2017