

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: EASTWOOD HOME INC

Plaintiff

AND:

ELAINE PROCOPIO, FEDERICO PROCOPIO and DAVID ISSONBORG

Defendants

BEFORE: Koehnen J.

COUNSEL: *Matthew Armstrong* for the plaintiff

Marshall Reinhart for the defendants Elaine Procopio and Frederico Procopio

No one appearing for the defendant David Issonborg

HEARD: In writing

COSTS ENDORSEMENT

[1] The plaintiff seeks costs of an action in which it was entirely successful at trial and obtained a judgment of \$100,671.39. The reasons for judgment are indexed as *Eastwood Home Inc. v. Procopio et al.*, 2023 ONSC 5522.

- [2] The Plaintiff seeks costs against the Procopios, jointly and severally in the amount of \$96,330.12. This reflects the plaintiff's partial-indemnity costs until February 15, 2023 when the Plaintiff served a Rule 49 Offer to Settle and substantial-indemnity costs from February 16, 2023 onwards plus disbursements of \$10,232.65.
- [3] In addition, the plaintiff seeks costs and disbursements of \$1,865.52 against the defendant Issonborg in relation to noting him in default and obtaining default judgment against him.
- [4] Finally, the plaintiff asks me to award punitive damages of \$30,000 against Issonborg which the plaintiff claimed in its statement of claim but which I did not address in my reasons for judgment.
- [5] The Procopios submit that the plaintiff should bear at least some responsibility for costs because of his failure to monitor Issonborg's progress on the project and the payments made by the Procopios. I do not accept this as a basis for denying or limiting the plaintiff's costs. It essentially is a repetition of a defence which I did not accept at trial.
- [6] The Procopios also rely on *Boucher v. Public Accountants Council for the Province of Ontario*,¹ for the proposition that the fundamental object of a costs award is to make an award that is fair and reasonable in all the circumstances and is within the reasonable expectation of the party being required to pay it. In this regard the Procopios submit that the plaintiff's bill of costs records time of 224.3 hours which they submit is excessive and

¹ *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA).

out of proportion to amount of the claim. They contrast this to their own lawyer who recorded approximately 100 hours.

[7] I do not find the simple comparison of hours persuasive. Courts have often acknowledged that a plaintiff's costs often significantly exceed those of defendants because it is the plaintiff who bears the burden of proof.²

[8] In addition, in this case the plaintiff bore the costs for a number of steps which the defendants did not, including, preparing two pleadings (a statement of claim and a defence to counterclaim), case law research which the Procopios' bill of costs does not include, the discovery plan, the trial record, the pre-trial report to trial judge, without-prejudice correspondence for purpose of settlement, the joint book of documents, the statement of agreed facts, a book of authorities (which the Procopios did not submit) and a notice of intention regarding business records.

[9] Plaintiff's counsel was well prepared and made efficient use of trial time. That sort of efficiency and preparation take time. In my view, the number of hours spent was not excessive. Courts have recognized that fees larger than claim do not, in and of themselves, render a cost award inappropriate.³ Indeed, when dealing with small amounts, fees are

² Infor v Centrilogic, 2023 ONSC 3375 at para. 13 (citing Gardner v. Hann, [2012] O.J. No. 1440 at para 42; Hanisch v. McKean, 2013 ONSC 5086, [2013] O.J. No. 3599 at para 59; Frazer v. Haukioja, [2008] O.J. 5306 at para 18 – 20; Shearer v. Sewchand, [2013] ONSC 6760 at para. 24, 30-32, 40-41; Cheesman et al v Credit Valley Hospital et al, 2020 ONSC 1729 at para. 89.)

³ Infor v Centrilogic, 2023 ONSC 3375 at para. 4 (citing A & A Steelseal Waterproofing Inc. v. Kalovski, 2010 ONSC 2652 at para 21).

regularly disproportionately large in comparison to the claim. That is a reality of the economics of litigation and does not reflect excessive billing by counsel.

[10] The plaintiff notes that it was entirely successful in its claim against the Procopios and that the Procopios were entirely unsuccessful in their counterclaim against the plaintiff and in their claim of set off. The matter was of high importance for the plaintiff given that it is as a small business.

[11] The plaintiff served several settlement offers beginning as early as December 14, 2022. The plaintiff's result at trial was more beneficial to it than any of its settlement offers.

[12] When serving the settlement offer of December 14, 2022, the plaintiff drew the attention of the Procopios and their lawyer to the authorities on which the court relied in awarding judgment against the Procopios (*C.P. Ships* and *Potvin*) as well as to some of the key evidence given by the Procopios on discovery. Plaintiff's counsel also warned the Procopios that if the matter proceeded to trial, the Procopios would face an adverse costs award of at least \$70,000. It cannot therefore be said that the amount of the plaintiff's costs come as a complete surprise to the Procopios.

[13] The offer of December 14, 2022 expired before trial and therefore does not necessarily attract the cost consequences of Rule 49.10. Although the plaintiff submits that the court has discretion to consider this offer pursuant to Rule 49.13, I am not inclined to do so other

than to consider the fact that the plaintiff provided the Procopios with information when serving the settlement offer which showed the offer to be reasonable.⁴

[14] The plaintiff served a further offer to settle on February 15, 2023 which did not expire until after the commencement of the trial. It offered to settle the action for a payment of \$75,000, plus pre-judgment interest, plus partial-indemnity costs up until February 15, 2023. The judgment at trial was more favourable to the plaintiff than the terms of that offer. I see no valid reason for which that offer should not attract the cost consequences of Rule 49.

[15] The plaintiff appears to have calculated its partial indemnity costs at 65% of its actual costs. As a general rule, partial indemnity costs should not exceed 60% of actual costs.⁵

[16] I would award the plaintiff costs on a partial indemnity basis up February 15, 2023 calculated at 60% of actual costs. That comes to \$33,996. In addition, the plaintiff should have its costs after the settlement offer on a substantial indemnity scale calculated at 90% of actual costs or \$38,261.25. When HST is added to both amounts, the total arrived at is \$81,650.69. The plaintiff is also entitled to its disbursements of \$10,232.65 for a total costs award of \$91,883.34.

[17] That cost award is enforceable against both Issonborg and the Procopios. Although strictly speaking Issonborg may not have led the plaintiff to incur those costs given that he allowed

⁴ Higashi v. Chiarot, 2022 ONSC 5182 at paras. 40.

⁵ Inter-Leasing, Inc. v. Ontario (Revenue), 2014 ONCA 683 at para 5

default judgment to be signed against him, it was Issonborg's conduct that led to the whole issue arising in the first place.

[18] In addition, Issonborg alone will be liable for the costs of \$1,865.52 the plaintiff incurred in obtaining judgment against him.

[19] As noted earlier, I did not address the issue of punitive damages in my reasons. I am satisfied that an award of punitive damages of \$30,000 should issue against Mr. Issonborg. His conduct amounted to outright theft. It is also conduct that put the Procopios at a severe disadvantage and led to the judgment against them. I would divide the \$30,000 award against Issonborg for punitive damages between the plaintiffs and the Procopios. That is to say that each will be entitled to recover punitive damages of up to \$15,000 from Issonborg.

Date: May 9, 2024

A handwritten signature in blue ink, appearing to read 'J. Koehnen', is written over a horizontal line.

Koehnen J.