Case Name:

Mark v. Bhangari

RE: Ken Mark, Plaintiff, and
Saliman Bhangari and Somdat Bhangari, Defendants

[2010] O.J. No. 3608

2010 ONSC 4638

Court File No. 06-CV-322383PD2

Ontario Superior Court of Justice

D.A. Wilson J.

Heard: By written submissions.
Judgment: August 25, 2010.

(14 paras.)

Counsel:

Alexander M. Voudouris, for the Plaintiff.

Martin P. Forget, for the Defendants.

COSTS ENDORSEMENT

1 D.A. WILSON J.:-- By written reasons released July 15, 2010, I granted the defendants' motion for Summary Judgment and dismissed the plaintiff's action. I indicated that if costs could not be agreed upon, I would receive written submissions, following which I would fix the costs. I have received counsel's submissions and reviewed them.

2 This is an action arising out of a bicycle accident that occurred in November of 2000 when the Plaintiff allegedly struck a metal stump located on the lawn of the defendants, which it was subsequently learned, was owned by the City of Toronto. I found that the defendants were ***not*** occupiers within the meaning of the *Occupier's Liability Act* and thus, there was no genuine issue for trial and granted the summary judgment motion brought by the defendants.

3 The successful party, Bhangari, seeks costs on a partial indemnity scale in the amount of $37,317.67. It is submitted by counsel that significant costs were expended defending the action, including attending 2 days of discovery, and obtaining a survey of the property which was served on the solicitor for the plaintiff in November of 2009. Mr. Forget concedes that until the survey was secured, it was not clear that the defendants did not own the property where the incident occurred. However, he submits that after this step was taken, it ought to have been clear to the solicitor for the plaintiff that his action had no chance of success. Instead, Plaintiff's counsel opposed the motion, arguing it raised a novel issue of law and further, that Bhangari had admitted at his discovery that he was an occupier. This required the solicitor for the defendants to incur additional fees and forced the motion on to a full hearing, where the plaintiff's position was rejected.

4 In response, counsel for the plaintiff argues that it was not "plain and obvious" that the defendants were not occupiers of the property in question and it was arguable that they could fall within the special circumstances set out in the case law and thus, it was reasonable for the plaintiff to oppose the motion. Further, in the Plaintiff's written submissions an affidavit of the Plaintiff was included, which deposes that Mr. Mark is impecunious and this is a factor that the court ought to take into consideration. He suffered the loss of a finger in the accident which impairs his ability to work as an electrician. It is argued that this is an appropriate case for no order as to costs or in the alternative, the quantum of costs ordered ought to be vastly reduced.

Analysis

5 The Court has a broad discretion when determining the issue of costs Prior to January 2010, the former rule indicated that if a party moved for summary judgment unsuccessfully, the general outcome was that substantial indemnity costs would be ordered against it. The new rule 20.06 states that the court may fix costs of a motion for summary judgment on a substantial indemnity basis if the court is of the view that a party acted unreasonably by making or responding to the motion or if a party acted in bad faith. I do not view the conduct of the Plaintiff as being unreasonable or in bad faith. In the case before me, I am satisfied that the appropriate scale of costs is that of partial indemnity.

6 Rule 57 enumerates the factors that the court may take into consideration when exercising its discretion to award costs. These include the amount of costs that an unsuccessful party could reasonably expect to pay, the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding, and the complexity of the proceeding. I am mindful of the application of the principle of proportionality.

7 In my view, the Plaintiff's position was dramatically different after service of the survey in November 2009. Until that point, both parties were under the mistaken impression that the metal stump that allegedly caused the Plaintiff's fall from his bicycle was on property owned by Bhangari. After it became clear that the area was, in fact, owned by the city which is not a party to the action, the solicitor for the plaintiff ought to have given serious consideration to the chances of success of the action against Bhangari. This did not occur and legal fees were expended in drafting the Summary Judgment motion materials.

8 Many cases, both in the Superior Court and in the Court of Appeal, have considered the issue of whether a party is an occupier as contemplated under the Act. Counsel for the Plaintiff is experienced in the area of personal injury and is familiar with this area of the law. It ought to have been clear to the solicitor for the plaintiff that the defendants' summary judgment motion stood a very

good chance of success on the evidence before the court. Obviously, if the Plaintiff wishes to take the gamble and see what the result of the motion would be, that was his prerogative, but he must be prepared to bear the cost consequences of that decision.

9 I agree with the position of the defence that impecuniosity is no answer to an argument on costs. Certainly, a party's financial situation is a factor that a court may consider when deciding the issue of costs but it is not determinative. I agree with the comments of Justice Mesbur in *Amaral v. Canadian Musical Reproduction Rights Agency Limited*, [2007] O.J. No. 3512 (S.C.J.) where she noted, "Not only do plaintiffs have a choice as to whether to start litigation, they also have choices as to when to begin it, how to conduct it and whether to settle it. All of these factors bear on the issue of costs ..."

10 Parties cannot expect to be immune from an order of costs based on their limited financial resources. If this were the case, parties would be free to conduct litigation as they wished without fear of reprisal in the form of adverse costs orders and this would be contrary to the philosophy of the *Rules* as well as to their requirements. Mr. Mark chose to "roll the dice" on the summary judgment motion and he lost. He must now bear the cost consequences of his decision.

11 I have reviewed the costs outline and the dockets of the defendants. I have taken into account the principles set forth by the Court of Appeal in *Boucher v. Public Accountant Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant.

12 In my view, the amount of fees is on the high side given the nature of this action. There is some duplication, particularly with the preparation of the motion material. I say this not in a critical fashion because there is necessarily some duplication when junior lawyers work on a file where the senior solicitor has carriage and will be the one arguing the motion. However, the amount sought may be described as being beyond what Mr. Mark might reasonably have expected to pay should he be unsuccessful in his opposition to the summary judgment motion.

13 Having considered the relevant factors set out in Rule 57.01, I am of the opinion that an appropriate award of costs of the action on a partial indemnity basis is $25,000.00 inclusive of GST and disbursements.

Order

14 The Plaintiff is to pay to the defendants the sum of $25,000.00 in costs within 30 days of the release of these reasons.

D.A. WILSON J.

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