

Case Name:
Hamilton v. Home Depot of Canada Inc.

**RE: Kenneth Hamilton, and
Home Depot of Canada Inc.**

[2009] O.J. No. 2786

Court File No. 07-281-SR

Ontario Superior Court of Justice

R.M. Thompson J.

June 4, 2009.

(22 paras.)

Civil litigation -- Civil procedure -- Trials -- Mistrials -- Costs -- Particular orders -- Special orders -- For reprehensible or inefficient conduct -- Determination of costs following declaration of mistrial -- The plaintiff discharged his counsel following five days of trial and informed the judge that he had filed a complaint alleging judicial bias -- The judge declared a mistrial -- The court ruled that the mistrial was solely caused by the plaintiff and thus he was wholly responsible for costs thrown away as a result -- The defendant was awarded costs fixed at \$55,000.

Counsel:

Kenneth Hamilton: self-represented.

Martin P. Forget: for the Defendant.

COSTS RULING

1 R.M. THOMPSON J.:-- The litigation in this matter arises from the purchase by Mr. Hamilton of a set of kitchen cabinets from Home Depot. Mr. Hamilton was not satisfied with the cupboards provided or the manner of their installation. Home Depot disagreed with Mr. Hamilton's assessment.

2 A pre-trial was held but settlement was not achieved.

3 The trial commenced on April 1, 2009 and continued on April 20, 21, 22, 23, 2009. Concerned with cost consequences arising from the length of trial time being consumed relative to any possible monetary damage award, I requested on April 23, 2009 that counsel for the plaintiff and defendant provide me with their respective client's claim for costs to that date in the event that they were successful in the trial. I did so to bring to bear on the mind of the litigants that the costs of litigation were getting out of hand when viewed against any possible benefits.

4 Upon the commencement of court on April 28, 2009, I expected to hear further evidence and possibly before the end of the day, argument by counsel. That did not occur.

5 Mr. Ian Robertson, who had represented Mr. Hamilton throughout, advised me upon the opening of court that Mr. Hamilton had discharged him and that Mr. Hamilton wished to represent himself.

6 I advised Mr. Hamilton that what he proposed to do, that is represent himself after five days of trial, was a foolish move. Mr. Hamilton responded: "Against Mr. Robertson's wishes sir, I filed a complaint with the Judicial Council and directly with Justice Durno on Friday. I find it difficult to believe, after seeing the zoo that took place in here last week, that you can be an impartial adjudicator. As such, I'm not prepared to proceed with you presiding. Hence, to save myself a bit of money, as you alluded to last week, until we bring this motion back again."

7 Asked if he intended to continue to act for himself, Mr. Hamilton responded: "No." Mr. Hamilton asked for an adjournment until he received a decision from the Judicial Council. That request was denied.

8 My first reaction was to somehow try to salvage the trial. Upon reflection, I came to the conclusion that I could not do so.

9 The issue was not simply that Mr. Hamilton had filed a complaint with the Canadian Judicial Council but rather the timing of when he told me of that fact. By advising me of this complaint in the midst of this trial, Mr. Hamilton had put me in an untenable position. If I continued to preside over the trial to its conclusion and rendered a decision, either party might reasonably be under the apprehension that such a decision, either consciously or subconsciously, had been affected by my knowing that a complaint had been lodged with the Judicial Council.

10 I can state emphatically that being advised that complaint had been lodged against me would not have affected any decision I would have made but that is not the point.

11 Throughout the course of discussions in court on April 28, 2009, Mr. Hamilton made it quite clear that he did not want me to continue presiding over this trial or any subsequent trial.

12 After full discussion with Mr. Hamilton and counsel for Home Depot, I concluded that the only option open to me was to declare a mistrial and I did so.

13 Apparently Mr. Hamilton, against the advice of his counsel, made a complaint to the Judicial Council. Had he simply done that the trial would have continued to its conclusion. The complaint would not have been disclosed to me by the Regional Senior Justice nor by the Judicial Council until the conclusion of the trial and after my decision had been released. After my decision was rendered, it would be open to the Judicial Council to censure me if they found that I had misconducted myself or the Court of Appeal to correct any error I might have made. Had this been the way the matter unfolded it could not be said that my decision was affected by my being reported to the Judicial Council for the simple reason that I would have had no knowledge of that fact.

14 Mr. Hamilton, having made his complaint to the Judicial Council, then decided to act on his own behalf. This was not a wise choice on his part. However, it was his choice to make. Having made that decision, Mr. Hamilton is responsible for subsequent decisions.

15 For whatever reason Mr. Hamilton chose to divulge that he had made a complaint against me to the Judicial Council. As a result a mistrial was declared.

16 The mistrial was solely caused by the actions of Mr. Hamilton.

17 It is accepted that generally a party who has caused a mistrial should bear the costs thrown away as a result of the declaration of a mistrial.

18 The end result is that both parties have spent considerable legal costs for absolutely nothing. Any trial will have to start over from square one. The difference between the plaintiff and the defendant is that this result was not the fault of the defendant but rather the direct result of the actions of the plaintiff. There is no reason that the plaintiff should not compensate the defendant for their wasted legal expenses.

19 The defendant has submitted its costs outline which covers the time period subsequent to the pre-trial conference to the end of the trial. Not all but certainly a substantial majority of the legal expenses were for naught. I note that I am not assessing costs on a partial or substantial indemnity basis but rather am determining an appropriate amount to compensate one party for legal costs thrown away.

20 I have determined that an appropriate amount to compensate the defendant for the actions of the plaintiff would be the sum of \$55,000 inclusive of disbursements and GST.

21 The retrial in this matter has been rescheduled for March 2010. It is only appropriate that the defendant should be in the same relative place (concerning legal expenses), as it was prior to the commencement of this trial. Accordingly, the plaintiff must pay the defendant the compensation of \$55,000 by September 1, 2009. The matter is adjourned to the Assignment Court in Walkerton which will be held on September 8, 2009.

22 If the compensation has been paid by September 1, 2009 the trial date of March 2010 will be confirmed at the Assignment Court on September 8, 2009. If the compensation has not been paid then the plaintiff's action will be dismissed on September 8, 2009. I am bringing this matter back before the Assignment Court on September 8, 2009 so that the trial date can be confirmed or reallocated as the case may be. I do so because the retrial date has necessitated the scheduling of an out-of-jurisdiction judge.

R.M. THOMPSON J.

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