CITATION: Tina Jayne Duncan v. Marnee Buckles, 2021 ONSC **291**
COURT FILE NO.: CV-18-594616-0000
DATE: 20210202

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
TINA JAYNE DUNCAN	)	*Gwendolyn L. Adrian*, for the Plaintiff (Moving Party)
	)	
Plaintiff (Moving Party)	)	
	)	
– and –	)	
	)	
MARNEE BUCKLES and ROBERT LEPP a.k.a. BOB LEPP	)	*Andrea Gonsalves* and *Carlo Di Carlo*, for the Defendant, Marnee Buckles
	)	
Defendants (Responding Party)	)	
	)	
	)	
	)	
	)	**HEARD:** January 14, 2021

PAPAGEORGIOU J.

[1] This is a motion for summary judgment brought by the plaintiff, Tina Jayne Duncan (the "plaintiff" or "Duncan"). Duncan and the defendant, Marnee Buckles (the "defendant" or "Buckles"), were involved in a series of legal proceedings, most of which have been either resolved, adjudicated or abandoned. There is only one minor issue remaining: Duncan claims $1,412.50 in damages, plus the costs of this proceeding. This may be the smallest claim ever decided by the Superior Court and in my view, the reason this claim remains outstanding speaks volumes about this bitter and unfortunate dispute.

Background

[2] Duncan and Buckles were neighbours. Duncan lived at 43 Wells Avenue ("43 Wells") and Buckles lived at 47 Wells Avenue ("47 Wells"). Their various disputes arose over the property line which separated 47 Wells and 43 Wells.

The Fence

[3] Sometime in 2017, Duncan erected a gate and a fence (collectively the "Fence") on 43 Wells after she purchased a dog. Buckles objected to the Fence alleging that:

a. The Fence was on Buckles' property; and

b. The Fence prevented Buckles from repairing or maintaining her property.

The Alleged Defamation

[4] Buckles obtained some assistance from an advocate, the defendant Robert Lepp ("Lepp"). Duncan alleged that Buckles and Lepp began an online campaign against her related to this property dispute. On February 9, 2018, Duncan issued a Notice under the *Libel and Slander Act*, R.S.O. 1990, c. L.12 in response.

The Small Claims Court Action

[5] On February 21, 2018, Buckles also commenced a Small Claims Court Action against Buckles claiming damages for loss in property value.

The Superior Court Action

[6] On March 23, 2018, Duncan then commenced this action in Superior Court seeking declarations in respect of her property rights and damages for defamation.

The Motion to Stay the Small Claims Court Action

[7] Duncan brought an unsuccessful motion to stay the Small Claims Court action on the basis that the Court did not have any jurisdiction to determine property rights. The Court permitted Buckles to amend her claim in the Small Claims Court Action to withdraw the claim in respect of her property rights, but otherwise the Action was allowed to proceed.

[8] The Small Claims Court trial then proceeded on October 29, 2018 and was dismissed and presumably, costs of that proceeding were dealt with in that court.

The Motions for Judgment in the Superior Court Action

Default Judgment against Lepp

[9] The plaintiff noted Lepp in default and moved for judgment against him while Lepp moved to set aside the noting in default. On September 11, 2019, Schabas J. dismissed Lepp's motion to set aside the noting in default.

[10] On May 25, 2020, Favreau J. awarded the plaintiff judgment against Lepp for defamation including awards of aggravated and punitive damages. Lepp's attempts to appeal these decisions were either abandoned or dismissed.

The Motion for Summary Judgment against Buckles

[11] Duncan moved for summary judgment as against Buckles by delivering motion materials in or around February 2019.

[12] Buckles responded by seeking leave to amend her Statement of Defence and in doing so sought to add declarations regarding property rights even though she had made significant admissions on this issue. Nevertheless, Buckles obtained leave.

[13] The motion was originally scheduled to be argued in August 2019, but did not proceed because of Buckles' amendment motion.

[14] Buckles sold 47 Wells.

[15] Duncan sold 43 Wells.

[16] The property interest issue claims are now moot.

[17] As well, Duncan asserts that Favreau J.'s decision, which ruled that Lepp had defamed her, provided her with exoneration and in the interests of moving forward, Duncan has agreed to withdraw her defamation lawsuit as well as the rest of her claim against Buckles except for the claim described below.

The Remaining Issues

[18] The only substantive issue that remains between Duncan and Buckles is who is responsible for the costs of removing and replacing a portion of the Fence. The parties have agreed to have this one issue decided, either way, by summary judgment.

Analysis

What is the test on a summary judgment motion?

[19] In accordance with r. 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), the court shall grant summary judgment if:

> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

[20] In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and a judge may exercise any of the following powers under r. 20.04(2.1): (1) weighing the evidence; (2) evaluating the credibility of a deponent; and (3) drawing any reasonable inference from the evidence.

[21] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49, succinctly explained when there will be no genuine issue for trial:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process: (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[22] In order to defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party on a summary judgment motion cannot rest solely on allegations in a pleading. Each side must "put their best foot forward" with respect to the existence or non-existence of material issues to be tried: *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, at para. 9.

[23] Furthermore, "the motion judge is entitled to presume that the evidentiary record is complete and there will be nothing further if the issue were to go to trial": *Tim Ludwig Professional Corporation v. BDO Canada LLP*, 2017 ONCA 292, 137 O.R. (3d) 570, at para. 54. Parties must present sufficiently precise evidence to show there is a genuine issue for trial: "A summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial": *Diao v. Zhao*, 2017 ONSC 5511, at para. 18.

[24] I have determined that there is no genuine issue requiring a trial on the remaining issue in this case based on the evidence filed on the motion, much of which is uncontroverted. I have determined that there is sufficient evidence to fairly and justly adjudicate the issues in dispute, and a summary judgment motion is an affordable and proportionate procedure.

Costs of Removing the Fence

The Costs to Remove and Replace the Fence

[25] As noted above, Buckles complained that the Fence prevented her from repairing and maintaining a gas line as required by Enbridge, which tagged Ms. Buckle's gas line as posing a safety risk on January 28, 2018. It is undisputed that the Fence blocked access to the gas line for Buckle's home.

[26] On February 2, 2018, Buckles sent Duncan's counsel an email advising that she was "aiming to have help next Tuesday Feb 6 to get the [Fence] down that surrounds the gas line…The

gas company will arrive Thursday Feb 8 if I can get the [Fence down in time….Thank you for your offer of having another contractor remove and put the fence back up. I will remove the fence at my cost for now" (emphasis added).

[27] Bylaw 5754-15 of the Town of Aurora (the "Bylaw") provides as follows:

> 2.1 The owner may enter onto adjoining land for the purpose of making repairs or alterations to any building, fence or other structure on the land of the owner but only to the extent necessary to carry out the repairs or alternations….
>
> 5.1 Every owner who exercises his or her rights to enter onto the adjoining land pursuant to this by-law shall, in so far as practicable, restore the adjoining land to its original condition and shall provide compensation for any damages caused by the entry or by anything done on the adjoining land.

[28] Duncan says that she proceeded to remove and replace the Fence at a cost of $1,412.50. She says that Buckles is liable to compensate her for these costs because of the Bylaw as well as Buckles' agreement to remove the Fence at her own cost.

[29] However, this claim cannot succeed for the following reasons.

The pleadings

[30] Although the Notice of Motion claimed payment of this amount as special damages, the pleading does not make any reference or specifically claim these damages, and it is too late at this stage for the plaintiff to amend here Statement of Claim: *Midland Resources Holding Limited v. Shtaif*, 2017 ONCA 320, 135 O.R. (3d) 481; *Cosentino v. Dominaco Developments Inc*., 2018 ONSC 5056, aff'd 2019 ONCA 426.

The Bylaw does not require reimbursement

[31] In any event, the Bylaw, properly interpreted, does not support the plaintiff's claim. The Bylaw gave Buckles the legal right to enter (or have authorized agents or contractors enter) onto Duncan's property to make repairs. The Bylaw further provided that, in exercising that right,

Buckles had the obligation to restore Duncan's property to its original condition and if necessary, compensate Duncan for any damage caused by the entry or by anything done on her land. These circumstances do not apply here. Although Buckles explicitly advised Duncan that she, Buckles, would hire her own contractor to remove the Fence and put it back up at her expense, Duncan made the unilateral decision to hire her own contractor. There is no evidence that she apprised Buckles of the estimated cost or sought her agreement before doing so. There is no evidence that the amount Duncan claims is reasonable in light of the work required to be done. The Bylaw does not entitle an adjoining landowner to hire her own contractor, incur costs never reviewed with their neighbour and then provide grounds for a civil cause of action to recover these costs.

[32] In my view, Duncan cannot rely on the Bylaw to seek reimbursement in these circumstances for her own decision to hire her own contractor. There is good reason for this: requiring the owner who enters onto the adjoining land to pay to restore the property ensures that the costs incurred are no more than is necessary in light of the damage and work done. To permit the adjoining landowner to do the work and then claim whatever they want is susceptible to abuse.

[33] Buckles also points out that Duncan has failed to provide any proof of payment. Duncan relies upon her affidavit which states that she paid the amount as well as an estimate given to her. Had the above issues not been present, I would not have dismissed this motion on this basis. The amount is low, and it is reasonable that the worker merely gave Duncan an estimate which Buckles paid without requiring an invoice. She has provided sufficient evidence of her payment of this invoice through her sworn testimony which was never cross-examined on.

[34] I am dismissing Duncan's motion for summary judgment in its entirety, and also dismissing the Action altogether given Duncan's submission during the motion that she has abandoned all aspects of this claim except for this one issue, which I have determined in Buckles' favour.

Costs

[35] The more important issue in this case, and I believe the reason why the $1,412.50 claim was never resolved, is the issue of the costs of the entire proceeding now that Duncan does not wish to pursue it.

[36] The main issue in this litigation was with respect to the defamation claim. The majority of the Statement of Claim and efforts in respect of the summary judgment motion were in respect of this issue, although there were also claims of nuisance, trespass, invasion of privacy and the claim for a declaration of property interests. I do not view Duncan's claim for a declaration over her property rights a significant a part of the claim, and the fact that it has been rendered moot both parties moving does not mean that she was successful in that claim in any event.

[37] A great deal of time in the facta filed on the summary judgment motion was devoted to the merits of Duncan's claims. Given that Duncan commenced this proceeding, made these claims and abandoned them, I do not view the merits as relevant to this costs decision. Rule 37.09 entitles a respondent to the costs of an abandoned summary judgment motion and r. 23.05(1) entitles a party to an action which has been discontinued to make a motion for the costs of the action. The clear intention of the *Rules* is to provide compensation to persons who are forced to expend costs on proceedings which the moving party then determines it does not wish to pursue.

[38] Duncan brought a proceeding which Buckles had to respond to, and having abandoned most of it and lost the only part argued, Duncan is the unsuccessful party. Duncan's action has been brought to an end, with little or nothing to show for it.

[39] In my view, Buckles is the successful party in this litigation and presumptively entitled to her costs.

[40] Buckles seeks costs in respect of the summary judgment motion (which included the defamation claim which was abandoned) in the amount of $24,746.17 on a substantial indemnity basis plus costs of the action on a partial indemnity basis in the amount of $11,280.12. Regarding the costs of the summary judgment motion, this includes success on the only issue determined as well as costs thrown away of the portion of the summary judgment motion related to the defamation claim.

[41] In evaluating the appropriate quantum of costs, I am taking into account the following factors in r. 57.01 and expressed in the case law.

a. Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), costs are in the discretion of the court. Rule 57 sets out the factors which courts should have regard to when awarding costs. The main overall objective is "to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant": *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 26.

   The following is a comparison of the parties bill of costs:

	Duncan	Buckles
SJ SI	16,554.50	24,746.17
SJ PI	9,932.70	20,532.40
Action SI	24,454.34	14,734.12
Action PI	16,985.42	11,280.28

b. The total fees expended by the parties are comparable (although one expended more on the action and one more on the summary judgment motion) and therefore the fees expended by Buckles were within Duncan's reasonable contemplation;

c. Duncan claimed $81,412.50 as well as various declarations and has recovered nothing.

d. The proceeding was not as complex as commercial litigation but had many different claims and components, as well as a messy procedural history and evidentiary record. Duncan's affidavit had 104 exhibits and spanned 3 volumes totaling nearly 1,300 pages.

e. Duncan escalated costs and duration of the proceeding through several steps. Duncan brought the motion in February 2019 and then after it was fully briefed, she did not pursue it for over a year until Buckles threatened to bring a motion for a declaration that it had been abandoned. Thereafter Duncan chose to only proceed with the claim for $1,412.50. In my view, it is a reasonable inference that Duncan realized her claim had no merit after she received Buckles' response to the summary judgment motion. In my view, continuing with the claim for $1,412.50, which was so unimportant it had never even been specifically pleaded, was a strategic step taken to try to achieve some success to avoid paying the costs of the summary judgment motion. Buckles proposed that it be heard in writing, but Duncan again drove up costs by insisting on an oral hearing.

f. Buckles claims substantial indemnity costs of the motion in the amount of $24,746.17, on the basis of r. 49.10 offer made, but having carefully reviewed this rule, it does not entitle her to this.

[42] Given all of the circumstances, I view Buckles' claim for partial indemnity costs of the motion in the amount of $20,532.40 and her partial indemnity costs of the action in the amount of $11,280.12 fair and reasonable.

[43] In conclusion:

a. This action is dismissed;

b. Buckles is entitled to costs of the summary judgment motion in the amount of $20,532.40 and the costs of the action in the amount of $11,280.12 for a total of $31,812.52

c. This costs order bears interest at the rates set out in the *CJA*.

Papageorgiou J.

Released: February 2, 2021

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SUPERIOR COURT OF JUSTICE

BETWEEN:

TINA JAYNE DUNCAN

Plaintiff (Moving Party)

- And –

MARNEE BUCKLES and ROBERT LEPP a.k.a. BOB LEPP

Defendants (Responding Party)

REASONS FOR JUDGMENT

Papageorgiou J.

Released: Feb 2, 2021