

SUPREME COURT OF YUKON

Citation: *Simon v. Poirier*, 2020 YKSC 34

Date: 20200821
S.C. No. 18-A0029
Registry: Whitehorse

BETWEEN

MIREILLE RACHELLE SIMON

PLAINTIFF

AND

MICHAEL MARTIN POIRIER

DEFENDANT

Before Madam Justice E.M. Campbell

Appearances:
Gary W. Whittle

Counsel for the Plaintiff
No one appearing for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application to assess pre-judgment interest, post-judgment interest as well as special costs awarded to the plaintiff by the court. The plaintiff also seeks costs of this application on a solicitor-client basis (special costs).

[2] Default judgment was granted in favour of the plaintiff in this matter. The plaintiff was awarded damages for the torts of conversion and defamation. In addition, pre-judgment interest and post-judgment interest, as per the *Judicature Act*, R.S.Y. 2002, c. 128, (“the Act”), as well as special costs were awarded to the plaintiff (*Simon v. Poirier*, 2019 YKSC 56, “*Simon*”).

ISSUES

[3] The issues raised in this application relate to the assessment of pre-judgment interest, post-judgment interest and special costs. As stated, the plaintiff also seeks costs of this application on a solicitor-client basis (special costs).

PRE-JUDGMENT INTEREST

[4] On October 29, 2019, I awarded damages to the plaintiff for the tort of conversion and defamation as follows:

(i) for the tort of conversion:

- special damages in the amount of \$600;
- general damages in the amount of \$500;
- aggravated damages in the amount of \$2,500; and
- punitive damages in the amount of \$10,000.

(ii) for the tort of defamation:

- general damages in the amount of \$20,000; and
- aggravated damages in the amount of \$10,000.

(*Simon* at para. 76)

[5] In addition, I awarded to the plaintiff pre-judgment interest at prime rate of interest, as defined by s. 35 of the *Act*.

[6] As per ss. 35(5) of the *Act*, pre-judgment interest is not to be awarded on exemplary or punitive damages. While ss. 35(5) does not specifically refer to aggravated damages, in *Robertson v. Alp*, 2009 YKSC 65, ("*Robertson*") at para. 133, Cooper J. found that, pursuant to the *Act*, pre-judgment interest cannot be awarded on

aggravated damages as it was found that they fall within the same category as exemplary or punitive damages.

[7] The plaintiff relies on the decision of the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, (“*Hill*”) at para. 189 and on *Nazerli v. Mitchell*, 2018 BCCA 104, at para. 77 to submit that pre-judgment interest should be awarded on aggravated damages as they are awarded “at large” in libel cases, and they are, like general or special damages, compensatory in nature.

[8] In *Simon*, at paras. 22 and 23, I indicated, based on *Hill*, that aggravated damages are compensatory in nature whereas punitive or exemplary damages are aimed at punishing the conduct of a defendant.

[9] Furthermore, I note that punitive or exemplary damages are the only type of damages specifically set out in ss. 35(5). Aggravated damages are not specifically included in that section.

[10] Consequently, as I am of the view that aggravated damages do not serve the same purpose as exemplary or punitive damages, I am unable to agree with the conclusion reached in *Robertson*. Instead, I am of the view that ss. 35(5) does not preclude an award of pre-judgment interest on aggravated damages.

[11] However, I note, as pointed out in *Robertson*, that ss. 35(7) of the *Act* confers discretion upon a judge to disallow the award of pre-judgment interest, in respect of the whole or any part of the amount for which judgment is given, if found just to do so in all of the circumstances of a case. Therefore, under the *Act*, a judge may exercise their discretion to disallow pre-judgment interest on any type of damages awarded to a party, including aggravated damages, when it is appropriate to do so.

[12] In this case, I see no reason to not award pre-judgment interest on the amount of aggravated damages I awarded to the plaintiff for the torts of conversion and defamation.

[13] Subsections 35(3) and (4) of the *Act*, set out how pre-judgment interest is to be calculated using the prime interest rate:

35(3) Subject to subsection (7), a person who is entitled to a judgment for the payment of money is entitled to claim and have included in the judgment an award of interest thereon at the prime rate existing for the month preceding the month in which the action was commenced calculated from the date the cause of action arose to the date of judgment.

(4) If the judgment includes an amount for special damages, the interest calculated under subsection (3) shall be calculated on the balance of special damages incurred as totalled at the end of each six month period following the date the cause of action arose and at the date of the judgment.

[14] Subsection 35(7) gives discretion to a judge to disallow pre-judgment interest, to order that interest be paid at a different rate than the prime rate, and/or to allow interest to be paid for a period other than the one provided in s. 35.

[15] The plaintiff filed her statement of claim in this matter on May 29, 2018.

[16] On October 29, 2019, I found that the cause of action in conversion against the defendant arose on or about May 11, 2018 (*Simon*, at paras. 5 and 65). Consequently, 537 days elapsed from the date the cause of action arose to the date of judgment inclusively.

[17] Also, on October 29, 2019, I found that the cause of action in defamation against the defendant arose on or about May 22, 2018. (*Simon*, at paras. 34, 35 and 65). As

such, 526 days elapsed from the date the cause of action arose to the date of judgment inclusively.

[18] The affidavit of Taylor Kennedy filed by the plaintiff in support of her application reports that the prime rate of interest for April of 2018, which is the month preceding the month in which the action was commenced, was 3.45%.

[19] Accordingly, pursuant to ss. 35(3), pre-judgment interest is calculated as follows:

- a) $(\text{amount of judgment}) \times (\text{applicable interest rate}) / (\text{number of days in a year}) = \textit{per diem}$ amount;
- b) $(\textit{per diem}$ amount) \times (number of days allowed) = amount of pre-judgment interest.

[20] As a result, for the tort of conversion, pre-judgment interest on general damages (\$500) and aggravated damages (\$2,500) amounts to \$151.97.

[21] Also, for the tort of defamation, pre-judgment interest on general damages (\$20,000) and aggravated damages (\$10,000) amounts to \$1,491.21.

[22] In addition, pursuant to ss. 35(4) and taking into account my discretion under ss. 35(7), the plaintiff is also entitled to pre-judgment interest on the amount of special damages (\$600) awarded to her for the tort of conversion.

[23] Applying ss. 35(4) and using the formula mentioned above:

- a. For the first six months (from May 11, 2018 to November 11, 2018 inclusively), being 185 days, the calculation of interest amounts to: \$10.36.
- b. For the next six months (from November 12, 2018 to May 12, 2019 inclusively), being 182 days, the calculation of interest amounts to: \$10.19.

- c. For the final period of time (from May, 13, 2019 to October 29, 2019), being 170 days, the calculation of interest amounts to: \$9.52.
- d. As a result, pre-judgment interest on special damages totals \$30.07.

[24] The plaintiff is therefore entitled to a total amount of \$1,673.25 in pre-judgment interest in this matter.

SPECIAL COSTS

[25] On October 29, 2019, I found that the attitude and conduct of the defendant in this matter had been reprehensible and deserved an award of special costs to the plaintiff (*Simon*, at paras. 74, 75 and 77).

[26] Also, as stated by Veale J. in *Golden Ventures Limited Partnership v. Ross Mining Limited and Norman Ross*, 2012 YKSC 18, at para. 10:

[10] ...special costs are not merely a punitive sanction based on misconduct but are also intended “to substantially indemnify a party for costs to which he or she has been put.” See *Everywoman’s Health Care Centre Society v. Bridges* (1991), 54 B.C.L.R. (2d) 294 (C.A.) at para. 16 and *Bradshaw v. Stenner*, 2012 BCSC 237, at para. 9.

[27] The plaintiff submits that the assessment of special costs on a full indemnity basis is justified to achieve the punitive aspect of an award of special costs considering the conduct of the defendant in this matter.

[28] The plaintiff was represented by counsel throughout this case and seeks a total of \$15,045.16 in special costs (solicitor-client costs), which were incurred prior to the issuance of the judgment of October 29, 2019. In support of her position, the plaintiff filed a draft invoice prepared by her lawyer’s firm detailing the fees, disbursements and applicable taxes to be charged to her with respect to this matter. The draft invoice

details the legal work performed and the legal expenses incurred in this action prior to the date of the judgment on damages.

[29] According to the draft invoice:

- a. the fees charged to the plaintiff total: \$13,697.25;
- b. the disbursements charged to the plaintiff total: \$641 (including \$441 of taxable expenses and \$200 of non-taxable expenses); and
- c. the G.S.T. charged to the plaintiff totals: \$706.91.

[30] After review of the draft invoice, I am of the view that the amount of \$641 in disbursements is fully justified.

[31] However, I note that the plaintiff chose to proceed with a *viva voce* hearing with respect to her application for substituted service whereas this type of application is usually pursued via a desk order. The plaintiff's choice increased her legal fees. I am therefore of the view that \$1,000 should be subtracted from the legal fees appearing on the draft invoice, for a new total of \$12,697.25. The amount of GST charged to the plaintiff should also be adjusted based on the revised legal fees. As such, the applicable GST now amounts to \$656.91.

[32] Special costs are therefore assessed at \$13,995.16.

POST-JUDGEMENT INTEREST

[33] Section 36 of the *Act* provides for the award and calculation of post-judgment interest.

[34] More specifically ss. 36(1) to (5) provide that:

36(1) In this section, "prime rate" has the same meaning as in section 35.

(2) A judgment for the payment of money shall bear interest at the prime rate from the day the judgment is pronounced or the date money is payable under the judgment.

(3) During the first six months of a year interest shall be calculated at the prime rate as at January 1 and during the last six months interest shall be calculated at the prime rate as at July 1.

(4) Despite subsection (2), interest in respect of a judgment pronounced before the coming into force of this section shall be calculated from the later the date of the date this section comes into force or the date money is payable under the judgment.

(5) If the court considers it appropriate, it may, on the application of the person affected by, or interested in a judgment vary the rate of interest applicable under this section or set a different date from which the interest shall be calculated.

[35] On October 29, 2019, I awarded post-judgment interest at prime interest rate as per the *Act* (*Simon*, at para. 77).

[36] The question arose as to whether the amount of special costs awarded to the plaintiff is subject to post-judgment interest.

[37] Section 36 does not specifically exclude costs or any type of damages from the calculation of post-judgment interest as opposed to ss. 35(5), which specifically excludes costs and exemplary or punitive damages from the calculation of pre-judgment interest.

[38] In *Gagnon v. Firth*, 2017 YKSC 26, at paras. 35 and 36, the full judgment amount, including costs, was subject to post-judgment interest.

[39] As such, I see no reason to exclude the special costs awarded to the plaintiff from the calculation of post-judgment interest from the date of judgment.

COSTS OF THIS APPLICATION

[40] The plaintiff filed a draft invoice from her lawyer's firm, which amounts to \$4,487.30. The draft invoice sets out the legal fees, disbursements and applicable taxes to be charged to her with respect to this case from the date of the judgment to the date of this application.

[41] The plaintiff submits that: "to achieve the punitive sanction, based upon the facts found at paragraph numbered 74 of *Simon v. Poirier*, the assessment of the special costs as full indemnity is justified".

[42] However, considering the nature of this application as well as the fact that there is no evidence before me that the defendant has continued to conduct himself in a reprehensible manner since October 29, 2019, I am of the view that it is more appropriate to grant a lump sum award to the plaintiff for this application.

[43] Costs in the amount of \$1,500, inclusive of disbursements, will therefore be awarded to the plaintiff for this application.

CONCLUSION

[44] In summary:

- Pre-judgment interest is assessed at \$1,673.25;
 - Special costs are assessed at \$13,995.16;
 - Special costs awarded to the plaintiff are subject to post-judgment interest;
- and

- A lump sum amount of \$1,500 is awarded as costs for this application.

CAMPBELL J.