Citation: *16142 Yukon Inc. v. Bergeron General Contracting Ltd. and Steve Bergeron,* 2012 YKSM 5

Date: 20120629
Docket: 09-WL013
Registry: Watson Lake

IN THE SMALL CLAIMS COURT OF YUKON
Before: Her Honour Judge Ruddy

16142 Yukon Inc.

Plaintiff

v.

Bergeron General Contracting Ltd.
and Steve Bergeron

Defendant

Appearances:
Sarah D. Hansen — Counsel for Plaintiff
James Tucker — Counsel for Defendant

REASONS FOR JUDGMENT

[1] The defendant, Bergeron General Contracting Ltd., owned and operated by Steven Bergeron, has brought an application for costs, seeking reimbursement of counsel fees and disbursements as the successful party in a dispute over payment for work done at the defendant's company's Watson Lake industrial property between 2006 and 2009.

[2] My trial decision is reported at *16142 Yukon Inc. v. Bergeron General Contracting Ltd. and Steve Bergeron*, 2011 YKSM 5. In it, I dismissed the plaintiff's claim against Bergeron General Contracting Ltd., largely on the basis of

my adverse findings with respect to the credibility of the plaintiff's witnesses and documents. Specifically, I found there to be significant credibility issues with the evidence of both Mr. Peters, the owner of 16142 Yukon Inc., and Yvon Goupil, the equipment operator supervisor for the plaintiff company. More importantly for the purposes of this decision, I found that Mr. Bergeron's signature had been forged by the plaintiff on a number of invoices in an attempt to strengthen the plaintiff's case.

Legislative Framework:

[3] The Yukon Territorial Court, from which the Small Claims Court is constituted, is a statutory court. Its jurisdiction is defined by statute, and its costs jurisdiction is therefore limited to what is contemplated by the *Small Claims Court Act,* R.S.Y. 2002, c. 204 and *Regulations.*

[4] Counsel for the defendant is seeking increased counsel fees pursuant to s. 58 of the *Small Claims Court Regulations*, OIC 1995/152 as amended by OIC 2011/04. He is also claiming disbursements under s. 74 of the same *Regulations.* The relevant sections are included below:

> *Counsel fee*
> 58(1) Where the amount of the claim is more than $1,500 exclusive of interest and costs, the court may allow as counsel fee at trial,
> (a) if the successful party is represented by a lawyer
> (i) an amount up to $250, where the amount of the claim is less than $10,000, or
> (ii) an amount up to $500, where the amount of the claim is $10,000 or more; or
> (b) if the successful party is represented by a student-at-law
> (i) an amount up to $150, where the amount of the claim is less than $10,000, or

> (ii) an amount up to $250, where the amount of the claim is $10,000 or more.
>
> (2) Despite subsection (1), the court may allow counsel fees that exceed the amounts set out in subsection (1) where there are special circumstances.
>
> …
>
> *Costs*
> 74.(1) The successful party is entitled to be paid his or her disbursements, as assessed by the clerk of the court, by the unsuccessful party unless the court orders otherwise.
>
> (2) The clerk's assessment of disbursements under subsection (1) is subject to review by the court.

The Position of the Defendant (Applicant):

[5] Counsel for the defendant has submitted a bill of costs for counsel fees and disbursements paid by the defendant to defend the claim brought by the plaintiff. The account is broken down as follows: 1. Counsel fees in the amount of $16,191.10, representing 50.7 hours of work at a rate of $300/hour, and 2.8 hours of assistant time billed at $75/hour, and 2. Disbursements in the amount of $789.70. The applicant seeks full reimbursement of his costs in the amount of $16,980.80.

[6] The contentious issue on this application is the counsel fee claimed, as it is obviously significantly more than the ‘amount up to $500’ prescribed by s. 58(1) of the Regulations. The defendant takes the position that the court has the ability to make an order for the payment of all or some of these fees because of the discretion given in s. 58(2), which allows counsel fees above the 58(1) amount where there are ‘special circumstances’.

[7] Counsel for Mr. Bergeron says that special circumstances exist in this case because the plaintiff's conduct was reprehensible and essentially amounted to an abuse of the court's process. Specifically, he points to the plaintiff's untruthful testimony and his forging of the defendant's signature on an exhibit.

[8] He further argues that the jurisdiction to award increased counsel fees in special circumstances under s. 58(2) gives the Small Claims Court the discretion to award costs on a substantial indemnity basis analogous to the ability of superior courts to award special costs.

The Position of the Plaintiff (Respondent):

[9] The defendant's position is opposed by the plaintiff, who has now also retained counsel. The plaintiff's counsel says that the defendant is essentially seeking a special costs award, and, although it provides a measure of discretion in awarding higher counsel fees, s. 58(2) of the *Regulations* does not give the court special costs jurisdiction. She further argues that special costs are inconsistent with the defined purpose of the Small Claims Court. Lastly, she asserts that there has been no reprehensible conduct on the part of the plaintiff that would warrant special costs or that would justify an increase to the prescribed counsel fees on the basis of special circumstances.

[10] Counsel for the plaintiff also notes that the claim was filed before the amendments to the *Regulations* were in force and suggests that this would make the amended sections inapplicable to this case. While she did not strenuously argue the point and the defendant did not respond to it, I would note that the B.C.

Court of Appeal has laid out the preferred approach to take in *Laye v. College of Psychologists of British Columbia* (1998), 114 B.C.A.C. 201:

> As a general rule, where legislation fixes a new scale of costs, the scale of costs applicable is that in place at the date of the assessment: Association of *Professional Engineers and Geoscientists of British Columbia v. Mah* (1995), 9 B.C.L.R. (3d) 224 (C.A.).

Analysis

[11] I start from the premise that the Small Claims Court is, generally speaking, intended to provide a less expensive, simplified and faster alternative to civil litigation in superior courts. According to s. 3 of the *Small Claims Court Act,* the Court "shall hear and determine in a summary way all questions of law and fact and may make any order that is considered just". In an age where litigation is often prohibitively expensive, the Small Claims Court is meant to provide an accessible forum for the resolution of disputes that involve relatively small dollar amounts that do not justify recourse to the more expensive and procedurally complex Supreme Court process. Often this means parties represent themselves. As well, even where there is legal counsel involved, as noted by Cozens J. in *B & K Electric Ltd. v. Rupert*, 2008 YKSM 4, the Court should be a forum in which litigants can bring and defend claims without the fear that an unsuccessful suit means shouldering the other parties legal fees (see para. 38).

[12] While this is certainly the general rule, as has previously been noted, s. 58(2), as amended on January 6, 2011, now allows the court to award increased counsel fees in special circumstances.

[13] The primary issue to be determined is what is meant by 'special circumstances', and whether any such circumstances exist in this case to justify an award of increased counsel fees. While the defendant argues that special circumstances ought to be seen as equivalent to special costs, the plaintiff suggests that special circumstances considerations may include the complexity of the case, the length of trial, or a claim that well exceeds the monetary jurisdiction of the court, where the amount in excess has been abandoned.

[14] To date, there have been no reported decisions applying s. 58(2). However, in *Whitehorse (City) v. Cunning*, 2009 YKSC 48, the Yukon Supreme Court considered the meaning of special circumstances in the context of an appeal against an award of $1,000 costs plus travel disbursements of counsel pursuant to s. 38(2) of the *Regulations.*

[15] Section 38(2) sets out the jurisdiction of the Small Claims Court to award costs with respect to applications. At the time of the *Cunning* decision, s. 38 read as follows:

> 38(1) No costs are recoverable in respect of a motion except that, where the court is satisfied that a motion should not have been brought or should not have been opposed, or was necessary because of the default of a party, the court may fix the costs of the motion and order them to be paid immediately.
>
> (2) The cost of a motion fixed by the court under subsection (1) shall not exceed $50 unless there are special circumstances.

[16] On January 6, 2011, s. 38 was amended by replacing 'motion' with 'application' and increasing the prescribed maximum to $250. It otherwise

remains the same.

[17] In the *Cunning* decision, Johnson J. concluded that s. 38(2) of the *Regulations* gives the presiding Small Claims Court judge "a wide discretion in awarding costs". He considered the jurisdiction in the following terms:

> [95] … The 'special circumstances' contemplated in the *Regulation* clothe the Small Claims Court with discretion similar to a Supreme Court Judge to express disapproval of the actions of one of the parties by awarding the other party increased costs. One option is to award the equivalent of solicitor-client costs. However, courts only use this option to sanction outrageous or high-handed conduct and rarely use it. It is more common for a court to increase party-party costs.

[18] Counsel for the plaintiff argues that *Cunning* is distinguishable on the basis that it is applicable only to disbursements relating to motions or applications. In my view, the wording of s. 38(2) is not limited to disbursements. Indeed, the *Cunning* case involved an award of $1,000 in addition to travel disbursements (see *Cunning v. Whitehorse (City),* 2009 YKSM 1). Furthermore, while the section is specific to application costs, the wording and approach are similar to that used in s. 58 with respect to counsel fees at trial. Each prescribes a maximum amount which can be exceeded only in 'special circumstances'. The deliberate use of the same phrase in both sections can only lead to the conclusion that the Legislature intended that a decision to exceed the prescribed amounts under either section would involve similar considerations.

[19] Counsel for the plaintiff also argues that Johnson J.'s comments reproduced above are *obiter.* With respect, I disagree. The appellant had argued that there were no special circumstances present to trigger a higher

award of costs. A consideration of the meaning of special circumstances and the authority conferred upon the presiding Small Claims Court judge by the use of those words was, in my view, a necessary element of Johnson J.'s decision. I am hard pressed to see how one could review the exercise of statutory authority without first considering the nature and extent of the authority conferred by statute.

[20] What I take from Johnson J.'s comments in the *Cunning* decision is that the jurisdiction of a Small Claims Court judge to award increased legal fees in special circumstances is analogous to the broad jurisdiction of a superior court to award special costs. This does not, in my view, mean that it is appropriate to adopt the complex and technical costs regime of superior court litigation. Such an approach would be contrary to the purposes and goals of the Small Claims Court as articulated above. Rather, it means that a Small Claims Court judge may look to superior court case law relating to special costs awards for guidance in determining what may amount to special circumstances sufficient to justify an award of increased legal fees pursuant to s. 58(2).

[21] Counsel have filed a number of cases outlining circumstances in which special costs have been considered. As a general starting point, special costs are awarded in circumstances where one party has engaged in conduct deserving of rebuke. In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 45 B.C.A.C. 222, Lambert J.A. considered the standard of conduct required to warrant an award of special costs:

> [17]… [I]t is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung,* the word reprehensible is a word of wide meaning. It encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[22] The cases filed indicate a broad range of circumstances amounting to reprehensible conduct giving rise to an award of special costs, including putting the court into motion wrongly, improper conduct of the proceedings themselves, or improper allegations of fraud.

[23] In this case, the defendant asserts that two aspects of the plaintiff's conduct are deserving of rebuke: 1) the plaintiff was untruthful in its oral evidence, and; 2) the plaintiff deliberately attempted to mislead the court by submitting documents with the signature of the defendant forged on them.

[24] In general, an adverse finding of credibility, alone, would be insufficient to warrant an award of special costs. See *O'Cadlaigh v. Madiuk*, [1991] B.C.J. No. 2521 (S.C.) and *Creed v. Creed*, 2003 BCSC 1425.

[25] While I had significant concerns about the credibility of both Mr. Peters and Mr. Goupil, sufficient to reject their evidence, my findings in this regard do not amount to special circumstances justifying an award of increased legal fees. In so concluding, I adopt the comments of Lowry J. in *Creed v. Creed*:

> [7] I do not consider that there is in this case any sound basis on which to award special costs. Very often, conflicts in credibility are what make for a trial. Both parties then mount the best case they can. That may entail challenging the reliability of documentation and certainly the veracity of testimony offered. But it does not follow that the party whose case has been rejected is then necessarily exposed to an order for special costs. Indeed, if it were otherwise, there could be an award of special costs in almost every case where one party's evidence has been preferred over another, on the basis that the unsuccessful party was attempting to mislead the court warranting sanction for conduct that could be said to be reprehensible.

[26] Conversely, cases of fabricated evidence or document falsification, particularly where intended to mislead the court, have resulted in special costs awards (see e.g. *Hundley v. Garnier,* 2011 BCSC 1317). Counsel for the plaintiff relies on *Olive Hospitality Inc. v. Woo,* 2008 BCSC 615 to argue that, in order to attract a special costs award, the documents in question must be fundamental to a question at issue or create or perpetuate a dispute, and she says that the falsified documents here do not meet that threshold. In *Olive Hospitality,* the falsified documents were characterized as "peripheral and [occupying] only a small portion of the time at trial", and, accordingly they did not justify an award of special costs. In my view, the facts of this case fall closer to the threshold required for a special costs award.

[27] In this case, I concluded that the plaintiff had forged Mr. Bergeron's signature on a number of invoices in an attempt to strengthen the plaintiff's case. As the copies of the invoices filed with the plaintiff's original claim do not have the forged signatures present on the originals proffered at trial, I have no difficulty concluding that this was a clear attempt by the plaintiff to mislead the court to

gain an advantage in the litigation, and the invoices cannot be said to have been 'peripheral' to his meeting his burden of proof. Nor do I have any difficulty concluding that the plaintiff's actions amount to reprehensible conduct deserving of rebuke and amount to special circumstances warranting an award of increased counsel fees pursuant to s. 58(2).

[28] However, in fixing the appropriate amount, it must be remembered that while analogous, special circumstances are not special costs. Any increased award must balance the need to send a clear message that such conduct will not be tolerated with the goals and purposes of the Small Claims Court, specifically the need to ensure that the Court remains an accessible and cost-efficient forum for lay persons without the risk of potentially high costs awards. An award equivalent to special costs does not strike the appropriate balance in these circumstances.

[29] Furthermore, while the defendant was certainly within his rights to retain counsel to assist him, I note the matter was neither lengthy nor complex. Indeed, the case did not involve any legal principles and it turned entirely on its facts. An award in the amount sought by the defendant would be excessive in all of the circumstances.

[30] In the result, having considered the plaintiff's conduct, the goals and purposes of the Small Claims Court and the nature and complexity of the case, I find that $5,000 is the appropriate amount to be awarded to the defendant pursuant to sections 58(2) and 74(1) of the *Regulations.* Accordingly, I order that

the plaintiff pay to the defendant the sum of $5,000, inclusive of both enhanced counsel fees and disbursements.

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RUDDY, T.C.J.