

CITATION: Delmar International Inc. v. DRP Transportation, 2016 ONSC 5390
COURT FILE NO.: CV-11-103553-SR
DATE: 20160826

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Delmar International Inc., Plaintiff

AND:

DRP Transportation, Defendant

BEFORE: Justice M.L. Edwards

COUNSEL: Richard Arblaster, Counsel for the Plaintiff

Dale Pickard, Self-Represented Defendant

HEARD: In Writing

COSTS ENDORSEMENT

Introduction

- [1] On January 28, 2016, the plaintiff sought approval of the referee's report dated June 10, 2015. As I indicated in my brief handwritten Endorsement, the defendant had unreservedly approved the referee's report as to form and content on June 10, 2015. The respondent on the motion before me took issue with some of the rulings made by the referee. As I indicated in my handwritten Endorsement those issues may ultimately be the subject matter of an appeal, but given that the referee's report had been approved as to form and content I did not entertain those submissions and the referee's report was approved. In my handwritten Endorsement I advised the parties to file their costs submissions, which unfortunately while filed by the parties were lost by the Court. What follows is my Costs Ruling.
- [2] The report of the referee granted the plaintiff judgment in the amount of \$51,339.37, which together with interest of \$1,494.03 gave the plaintiff judgment for just under \$53,000.00. The issue of the costs of the action were to be dealt with by Howden J., or in his absence by another judge. Justice Howden is now retired, and I am now dealing with the costs of the action as well as the costs of the motion before me on January 28, 2016.
- [3] The plaintiff, in its costs submissions, seeks costs on a partial indemnity basis of \$36,304.74. The plaintiff's actual costs, inclusive of disbursements detailed in its Bill of Costs, comes to approximately \$50,000.00.
- [4] Counsel for the plaintiff, in his written costs submissions, refers to various offers made by the plaintiff. The first offer was made on January 17, 2012 for \$66,000.00 all-

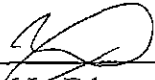
inclusive. On September 18, 2013, the plaintiff submitted an offer to settle the action on the basis of a payment of \$54,000.00 all-inclusive. The actual amount awarded by the referee in his report was \$52,833.40, which was inclusive of prejudgment interest.

- [5] It is clear to me from the plaintiff's offers that reasonable attempts were made by the plaintiff to settle the action. In fact, if the plaintiff's second offer of \$54,000.00 had been accepted by the defendant, the defendant would have been in a far better position than it now finds itself, facing a judgment of approximately \$53,000.00 plus post-judgment interest, plus costs.
- [6] The defendant, in its written costs submissions, suggests that the Court should exercise its discretion and not allow the plaintiff any costs, and in fact suggests that the defendant should be entitled to its costs for "time lost for work and disbursements" totalling approximately \$6,000.00. In support of its submission the defendant suggests that the plaintiff made "no reasonable offers".

Analysis

- [7] I fail to see how the defendant can suggest that the plaintiff did not make any reasonable offers, given the offer to settle on September 18, 2013 for \$54,000.00 all-inclusive. While the plaintiff's offer may not technically have met the requirements of Rule 49, it is clear to me that the offer was a reasonable offer taking into account the ultimate amount awarded by the referee.
- [8] In exercising the discretion that I do, I have taken into account all of the factors required by Rule 57.01. I have also taken into account the guidance provided to this Court by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA), which requires the Court to take into account what the losing party might reasonably expect to pay if the losing party was ultimately found unsuccessful. In this case I have been given little assistance by the defendant in terms of what it might reasonably have expected to pay, other than the suggestion that the defendant lost time from work which together with disbursements totals approximately \$6,000.00.
- [9] The defendant, in its costs submissions, does not seriously question the hours expended by counsel for the plaintiff as set forth in the plaintiff's costs submissions.
- [10] In addition to the factors the Court is required to take into account under Rule 57, the Court also has to consider the amount of costs sought in relation to the totality of the amount awarded by the referee. The principle of proportionality is one that to a significant extent guides this Court in its ultimate disposition. I have also taken into account the reasonableness of the attempts made by the plaintiff to settle the action with the two offers that it made to the defendant.

[11] Taking all of the aforementioned factors into account, I am ordering that the defendant pay to the plaintiff costs which I am fixing in the amount of \$30,000.00 inclusive of HST and disbursements. These costs are payable within 30 days.


Justice M.L. Edwards

Date: August 26, 2016