

Case Name:

Borzecki v. Elay Gate Signs

Between

**Daniel Borzecki, Plaintiff, and
Elay Gate Signs, Crescent Commercial Corporation
and Kosmor Contractors Inc., Defendants, and
Shiner Kideckel Zweig, Third Party**

[2006] O.J. No. 2490

Court File No. 03-CV-246417CM3A

Ontario Superior Court of Justice

P.M. Perell J.

Heard: June 7, 2006.

Judgment: June 14, 2006.

(16 paras.)

Civil procedure -- Costs -- Determination of costs for the defendant's successful motion for summary judgment -- The summary judgment was granted dismissing the plaintiff's action and the other defendants' crossclaims -- Costs were on a partial indemnity scale and the plaintiff and unsuccessful defendants were equally liable for the costs -- The defendant received \$23,384 in costs.

Counsel:

Joseph Faust for the Plaintiff

Clay Hunter for the Defendant Crescent Commercial Corporation

Linda Matthews for the Defendant Kosmor Contractors Inc.

Stuart Wright for the Third Party

COSTS ENDORSEMENT

1 P.M. PERELL J. (endorsement):-- The Defendant Kosmor Contracting Inc. ("Kosmor") brought a motion for summary judgment for a dismissal of the claim of the Plaintiff, Daniel Borzecki, and the crossclaims of the Defendants Crescent Commercial Corporation ("Crescent") and Elay Gate Signs ("Elay Gate") against Kosmor. This motion was resisted by Mr. Borzecki and Crescent, and it was not opposed by Elay Gate, which did not participate in the hearing of the motion for a summary judgment.

2 In my Reasons for Judgment dated February 20, 2006, I granted Kosmor's motion for summary judgment and I invited the parties to make submissions as to the form of the judgment, the matter of the third party proceedings, and the costs of the motion.

3 I was provided with written submissions from Kosmor and Crescent and I heard oral submissions on June 7, 2006 on behalf of Mr. Borzecki, Kosmor, Crescent, and the Third Party, Shiner Kideckel, Zweig. Once again, Elay Gates did not participate.

4 As to the form of judgment, Shiner Kideckel, Zweig consented to the third party claim being dismissed without costs and no objection was made by any party to the draft judgment that was filed with the Court.

5 A judgment should issue in the form of the draft, and contemporaneously with the release of this Costs Endorsement, I will sign the judgment.

6 The parties argued about three issues: (1) Who should be liable for the costs of both the motion and also of the action and crossclaims being dismissed against Kosmor? (2) Should the costs be awarded on a partial indemnity basis or on a substantial indemnity basis; and (3) What quantum of costs should be awarded?

7 I will address these issues in a different order, beginning with the matter of the scale of costs. In my opinion, as the successful party, Kosmor is entitled to costs on a partial indemnity scale. This is the normal award made to a successful party, and there was nothing that occurred during these proceedings that would justify the Court exercising its discretion to make an extraordinary award.

8 Turning to the issue of who should pay costs, several factors should be noted. First, technically speaking, it should be noted that separate actions are being dismissed. The Plaintiff's action against Kosmor is being dismissed. The crossclaims against Kosmor are being dismissed, and Kosmor's third party claim is being dismissed. Second, although separate proceedings are being dismissed, from Kosmor's perspective, practically speaking, it has been one proceeding. Visualize, both Mr. Borzecki and Crescent claimed that Kosmor was the party liable for Mr. Borzecki's injuries and together they joined forces to resist Kosmor's motion. Third, all the claims and defences are tied to the same set of facts and thus, for instance, discovery in the main action is discovery in the crossclaims. Fourth, the liability of Crescent and Elay Gate, if any, to Mr. Borzecki remain to be determined. Fifth, the liability for costs amongst Mr. Borzecki, Crescent, and Elay Gate remain to be determined.

9 In all these circumstances, it appears to me that all the unsuccessful parties that is, Mr. Borzecki, Crescent and Eley Gate should all be treated in the same way and that they should be jointly and severally liable to the successful Kosmor for its costs in the action, which costs include Kosmor's costs of the motion for summary judgment. I do not believe it is productive or fair to carve out the costs of the motion for summary judgment from the costs of the action.

10 I leave it to the discretion of the trial judge to determine whether the costs paid to Kosmor may be a part of the costs claimed by the successful party in the main action.

11 Kosmor's claim for costs of the action (including the costs of the motion for summary judgment) is \$26,317.70 plus GST of \$1,842.24 and disbursements in the amount of \$3,001.55.

12 This claim for costs is based on Kosmor's counsel calculating her hourly rate at \$210.00, which is the "discount rate" she charges her client and which she submits is well below the industry standard. She submits that the same rate of \$210.00 per hour should be charged regardless of whether costs are awarded on a partial indemnity scale or a substantial indemnity scale.

13 The submission, in effect, is that where counsel's hourly rate for legal services is below what might be charged on a partial indemnity scale, then in awarding costs on a partial indemnity scale, it is appropriate not to further discount counsel's hourly rate to reflect the difference between partial and substantial indemnity costs. The result then would, of course, be that the hourly rate for a partial indemnity would be a substantial, indeed a complete indemnity.

14 In *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.* (2002) 17 C.P.C. (5th) 334 (S.C.J.), Nordheimer, J. considered this problem of whether a party obliged to pay costs can benefit from the special arrangements made between the party entitled to costs and his or her lawyer. Nordheimer, J. stated in paragraph 16 of his judgment:

As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

15 I agree with Justice Nordheimer's approach because it respects the purposes in the administration of justice of there being different scales of costs. Accordingly, I would in all the circumstances of this case, reduce the hourly rate to \$170, which I believe to be fair and reasonable to the unsuccessful parties. It is not necessary to adjust the charges of the assistant lawyers or para-legal assistants involved in the case. The resulting adjustment is a reduction of \$2,933.50 in the claim for costs on a partial indemnity scale.

16 With this adjustment, the claim for costs on a partial indemnity scale is appropriate, and I therefore award Kosmor \$23,384.20 plus GST of \$1,636.89 and disbursements in the amount of \$3,001.55.

P.M. PERELL J.

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