

CITATION: ██████████ v. Surface Excavation Inc., 2017 ONSC 5808  
 COURT FILE NO.: 21170/16  
 DATE: 2017/09/29

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

██████████

Plaintiff

)  
 )  
 )  
 ) K. Alexander, for the Plaintiff  
 )

- and -

Surface Excavation Inc.

Defendant

)  
 ) H. Syed, for the Defendant  
 )  
 )  
 )

) HEARD: September 20, 2017  
 )

DECISION ON COSTS

R. Y. TREMBLAY J.

Overview

[1] The defendant, Surface Excavation Inc. (“Surface Excavation”) successfully brought a motion to remove a certificate of pending litigation (“CPL”) and caution that had been registered against its lands by the plaintiff, ██████████. I granted the motion on December 22, 2016, as I was satisfied, based on the evidence before me, that ██████████ did not have a reasonable claim to an interest in the lands in question. Surface Excavation is now seeking its costs of that motion.

[2] The issue of costs was originally scheduled to be argued on January 12, 2017. However, it was adjourned to March 9, 2017, as ██████████ was required to hire a new lawyer to make submissions on his behalf. The matter was further adjourned at that time when it was confirmed that ██████████ would seek that any costs, which may be ordered against him, be paid by his former lawyer, Todd Lever, pursuant to Rule 57.07 of the *Rules of Civil Procedure* (“the Rules”).

[3] The adjournment was required to ensure that Mr. Lever was put on notice that the court would be asked to consider such an order and to provide him with a reasonable opportunity to make representations to the court.

[4] Having satisfied myself that Mr. Lever had been put on notice of his potential liability for costs and given a reasonable opportunity to make representations to the court, I proceeded to hear costs submissions on September 20, 2017.

[5] Surface Excavation is seeking costs totalling \$26,802.47. [REDACTED] takes the position that no costs should be ordered and, in the alternative, that any costs ordered payable by him on the motion be made payable by Mr. Lever personally.

#### Issues

[6] The issues that I must decide are as follows:

1. Should Surface Excavation be awarded costs?
2. In the affirmative, what amount of costs would be fair and reasonable for [REDACTED] to pay in these particular proceedings?
3. Should Mr. Lever be liable for any costs awarded against [REDACTED] under Rule 57.07?

#### The Law

[7] Section 131 of the *Courts of Justice Act* R.S.O. c. C.43 makes all costs in the absolute discretion of the court:

131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[8] Rule 57.01(1) of the Rules provides further guidance to the court in determining costs by enumerating a series of factors it may consider in addition to the result of the proceeding and any offer to settle made in writing.

[9] Rule 1.04 (1.1) requires the court to consider the principle of proportionality in applying the rules by making orders that are proportionate to the importance and complexity of the issues and the amount involved in the proceedings.

[10] In *Boucher v. Public Accountants Council for the Province of Ontario* [2004] O.J. No. 2634; 71 O.R. (3d) 291; 2004 CanLII 14579, the Ontario Court of Appeal clearly stated that the overall objective is to fix an amount of costs 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.

[11] Under Rule 49.10, the court must also consider the costs consequences of a failure of a party to accept an offer to settle made pursuant to Rule 49. Although not expressly provided by the Rules, where the plaintiff fails to accept a significant offer to settle by the defendant and the action is then dismissed, the Court of Appeal held in *S. & A. Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243 (C.A.), that the defendant should be awarded partial indemnity costs to

the date of the offer and substantial indemnity costs thereafter. Nevertheless, the trial judge retains a discretion simply to award partial indemnity costs to the defendant in such circumstances.

[12] Rule 57.07 provides that a lawyer may be held responsible for costs where the lawyer has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default (*Rand Estate v. Lenton*, [2009] O.J. No. 1173, 46 E.T.R. (3d) 183 (C.A.)).

[13] In exercising its discretion to order costs against a solicitor, the court should use extreme caution. These awards must only be made sparingly, with care and discretion, only in clear cases, and not simply because the conduct of a lawyer may appear to fall within the circumstances described in Rule 57.07(1) (*Galganov v. Russell (Township)*, [2012] O.J. No. 1679, 2012 ONCA 410 (Ont. C.A.)). Rule 57.07 is, therefore, to be used only in exceptional circumstances.

### **Analysis**

#### Should Surface Excavation be awarded costs?

[14] I find that Surface Excavation was the successful party and is entitled to the costs of the motion.

#### What amount of costs would be fair and reasonable for ██████████ to pay in these particular proceedings?

[15] Surface Excavation's lawyer is a senior counsel. In the circumstances, I find that his rate of \$350 per hour is quite reasonable.

[16] This matter was of significant importance and had some urgency for Surface Excavation as the registration of the CPL and caution on the title was preventing it from completing the sale of its lands. The fact that the CPL was withdrawn and immediately replaced by a caution and that the related action had been started in the District of Kenora added some complexity to the proceeding. I note, however, that ██████████, through counsel, consented to the motion being brought and heard in the City of Timmins and to transfer the proceedings to this jurisdiction. These issues, therefore, did not have to be argued by counsel for Surface Excavation.

[17] The lawyer for Surface Excavation had to appear in court on two occasions in order to have the CPL and caution removed. He filed an affidavit and a factum in support of the motion. Furthermore, he had to file a supplementary affidavit and factum as a result of the CPL being withdrawn and immediately replaced by a caution six days prior to the date scheduled for the hearing of the motion. ██████████ did not file any responding materials requiring a reply, and the motion ended up being uncontested.

[18] Surface Excavation is requesting costs on a full indemnity basis. This translates into 63.7 hours at the hourly rate of \$350.00 for fees totalling \$22,295. I note that only 54.3 hours, representing fees of \$19,005, were billed subsequent to the discovery that a CPL had been registered on title. That is, therefore, the total hours that I will consider in fixing costs.

[19] I find that the lawyer for Surface Excavation spent slightly more hours on this proceeding than ██████████ could reasonably have expected in the circumstances and, accordingly, I will reduce the billable hours from 54.3 to 46. I find this to be fair and reasonable.

[20] Surface Excavation is requesting costs on a full indemnity basis. Elevated costs are warranted in only two circumstances: first, where there is an offer to settle under Rule 49.10; and second, on a clear finding of reprehensible, scandalous or outrageous conduct on the part of the party against which the costs award is being made.

[21] Surface Excavation made a formal written offer to settle the motion on December 7, 2016, which remained open for acceptance until the commencement of the hearing of the motion on December 8, 2016. It offered ██████████ first mortgage security (in an amount agreed upon or directed by the court on a reference) on the subjected lands except for the parts that were the subject-matter of the sale to the City of Timmins in exchange for the caution being removed from title forthwith. This offer, which would have provided ██████████ with a much better result than what he eventually obtained, was not accepted.

[22] I note, however, that the offer was not made seven days prior to the start of the hearing as required by Rule 49.10(1) (a) and, therefore, does not attract the costs consequences at Rule 49.10.

[23] As for the conduct of ██████████, I am not satisfied that it was as reprehensible, scandalous or outrageous as to justify substantial indemnity costs. While there was no legal basis upon which ██████████ could register a CPL on Surface Excavation's land when he did so, it was withdrawn well before the hearing of the motion (albeit immediately replaced by a caution). While the registering of the CPL was improper and unjustified, these actions do not, in my view, meet the threshold required for awarding substantial indemnity costs.

[24] I am mindful, as well, that any damages suffered by Surface Excavation as a result of the improper registration of the CPL may be recovered in this action.

[25] In my view, the failure on the part of ██████████ to accept what I find to be a reasonable offer to resolve the proceeding and the fact that there was clearly no legal basis upon which the CPL could be registered on title in this matter support an award of costs that is at the high end of the partial indemnity scale.

[26] As a result, Surface Excavation will be compensated for 46 hours at \$231/hour (66% of its lawyer's actual hourly rate) representing \$10,626 in fees + \$1,381.38 (HST) + \$567.92 in disbursements for a total costs award of \$12,575.30.

Should Mr. Lever be liable for any costs awarded against ██████████ under Rule 57.07?

[27] ██████████ indicates in his affidavit that he was advised by his present lawyer of the following in late February 2017 and had no knowledge of these facts prior to that time:

- (a) That his former lawyer, Mr. Lever, had placed a CPL on the property that is the subject of the litigation and discharged it thereafter and placed a caution on the same property immediately thereafter;

- (b) That Surface Excavation had brought a motion in this matter and served materials upon Mr. Lever;
- (c) That Surface Excavation had served on Mr. Lever an offer to settle the proceedings and/or the motion at any time;
- (d) That Surface Excavation's motion was scheduled for December 8 and was heard on December 22, 2016;
- (e) That the court adjourned the motion on December 8 in part to allow the parties to file further materials;
- (f) That neither Mr. Lever nor anyone from his office attended court on December 22, 2016, or filed any materials on his behalf and that further materials were delivered to Mr. Lever for the motion by Surface Excavation;
- (g) That the motion was returned to court on January 12, 2017;
- (h) That the court had made an order or endorsement in this matter at any time; and
- (i) That on January 12, 2017, the motion was scheduled to return to court on March 9, 2017.

[28] No one appeared before me to make representations as to costs on Mr. Lever's behalf, nor did he file any responding materials. The version of events described by ██████████ in his affidavit is, therefore, for the most part unchallenged.

[29] The transcript of the examination of Brittany Silvestri, a lawyer who was in the process of joining Mr. Lever's law firm in November 2016 and who had some involvement in this matter, was filed as an Exhibit.

[30] I am satisfied from reading the transcript of Ms. Silvestri's examination that ██████████ was aware that there was a motion returnable in court on December 8, 2016. I am not satisfied, however, that he knew the particulars of the motion. Ms. Silvestri's examination did not otherwise contradict any of the facts stated by ██████████ in his affidavit.

[31] In addition to the fact that the evidence presented by ██████████ is essentially uncontradicted, there are a number of other factors that lead me to conclude, on a balance of probabilities, that it is factually accurate:

- (a) The fact that communications by the new lawyer retained by ██████████ for transference of the file went unanswered by Mr. Lever;
- (b) The fact that a CPL was not requested in the statement claim issued in this matter;
- (c) The fact that Ms. Silvestri was incorrectly listed as solicitor for ██████████ on the statement of claim which was issued in this matter without her knowledge or consent;

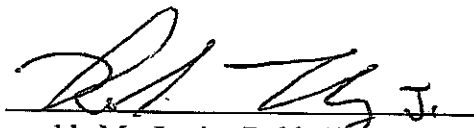
- (d) The fact that Ms. Silvestri noted that Mr. Lever was “not well” and had mental health issues when she travelled to Timmins to join his firm on November 26, 2016;
- (e) The fact that Ms. Silvestri indicated that Mr. Lever had a conflict of interest in this matter;
- (f) The fact that it was brought to my attention in the course of these proceedings that, subsequent to these events, Mr. Lever’s licence to practise law was suspended effective January 27, 2017.

[32] Having concluded that the events likely unfolded as described by ██████████, Mr. Lever clearly, in my view, failed to carry out his professional duties in these proceedings as he acted without instructions and without the approval of his client, particularly with respect to the registration of the CPL and caution and Surface Excavation’s offer to settle. His actions led directly to the costs incurred by Surface Excavation. As a result, I find that this is one of these exceptional cases where a lawyer shall bear liability for the costs incurred by a party.

**Conclusion**

[33] Accordingly, I order Mr. Lever to pay personally to Surface Excavation the costs of this motion that I have fixed at \$12,575.30 inclusive of HST and disbursements within thirty (30) days pursuant to Rule 57.07(1) (c).

[34] It is with some reluctance that I am making this order as I have reason to suspect that Mr. Lever’s conduct was the result of the mental health issues he was dealing with at the time. However, Surface Excavation is entitled to its costs and, in the circumstances described above, it would simply be unfair for ██████████ to have to pay them.



The Honourable Mr. Justice Robin ~~W.~~ Tremblay

**CITATION:** Robert Desmarais and Surface Excavation Inc., 2017 ONSC 5808  
**COURT FILE NO.:** 21170/16  
**DATE:** 2017/09/29

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**Robert Desmarais**

**- and -**

**Surface Excavation Inc.**

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**DECISION ON COSTS**

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**TREMBLAY, J.**

**Released: September 29, 2017**