

COURT FILE NO.: CV – 23- 00001807-0000
CV – 23-00000094-0000

SUPERIOR COURT OF JUSTICE – ONTARIO

7755 Hurontario Street, Brampton ON L6W 4T6

RE: PACE, Mariella
PACE, Gino, applicants

AND:

PACE Angela, respondent

BEFORE: Justice Emery

COUNSEL: Y. D. Payne, for the applicants PACE, Mariella and PACE, Gino
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T. H. McLean, for the respondent
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HEARD: In writing

COSTS ENDORSEMENT

- [1] The Application of Mariella and Gino was judicially determined with Angela's Application in my Reasons for Judgment released at 2014 ONSC 6741 on December 4, 2024. I gave Judgment for the applicants in each Application to order the named respondent(s) to formally pass accounts as an attorney for property of their mother, Pietra Pace for the period commencing August 20, 2020 to her death on June 12, 2023. The respondents were also directed to give a specific accounting as to certain transactions or property dealings during Pietra's lifetime.
- [2] As the applicants were all successful in obtaining Judgment particular to their Applications, I encouraged the parties to settle the costs of the Applications between them. If they could not, I invited the parties to make submissions on costs in writing.

- [3] I have now received the submissions from the parties. This costs decision awards costs for both Applications.

Positions of the parties

- [4] Mariella and Gino filed a joint submission seeking costs on a substantial indemnity basis from Angela in the amount of \$55,000. Angela filed a responding submission in which she acknowledged that the parties had agreed to the amount of costs on a *give-get* basis of \$40,000 on a partial indemnity scale. Angela takes the position that, as the applicant(s) on both Applications were successful, costs should be a wash.
- [5] There was an exchange of letters where Mariella and Gino offered to pay Angela \$10,000, which they increased to \$15,000 in October 2023. Angela's lawyer wrote back to propose that Angela receive the first \$35,000 from their mother's estate, among with other terms. This settlement position was again advanced by Angela's lawyer in May 2024. Neither of these proposals contemplated a requirement that any party formally pass accounts even though that was the remedy requested in their respective Applications.
- [6] On June 7, 2024, Mariella and Gino made an Offer to Settle under Rule 49 to pay Angela \$15,000 and to provide an accounting solely by them.
- [7] On June 12, 2024, Angela served an Offer to Settle proposing that Mariella and Gino pay \$30,000 within 7 days, and to provide the accounting they had offered.

Discussion

- [8] A judge has the discretion to award costs of a proceeding under s. 131(1) of the *Courts of Justice Act*, subject to a statute or rules of court. The *Rules of Civil Procedure* are the rules of court that apply to the costs of the two Applications here. The rules that apply include, but are not limited to, Rule 49 governing offers to settle, and Rule 57.01 generally.

- [9] The first issue on a costs claim is to determine which of the parties is entitled to a costs award. The general rule in civil litigation matters before the Ontario courts is that costs follow the event. That rule has developed under common law and means that the successful party is entitled to recover costs from the unsuccessful party, unless there is very good reason to make a different order. This principle was recently confirmed by the Court of Appeal in *Ehsaan v. Zare*, 2018 ONCA 453, at para. 10.
- [10] The Court of Appeal in *Fong v. Chan*, 1999 CanLII 2052 at para. 22 confirmed that the modern rules for costs are designed to reinforce three fundamental purposes: (1) to partially indemnify successful litigants; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants. See also *Serra v. Serra*, 2009 ONCA 395, at para. 8.
- [11] Whatever grievances that were harboured by any one sibling against another were carried forward when they all became attorneys for property after Pietra was declared unable to manage her affairs on August 20, 2020. New complaints arose, lawyers became involved, and letters were written in 2021 and 2022. Litigation soon followed. The parties in these proceedings made costs an issue when they brought their private disputes into a public forum.
- [12] It is apparent from the submissions and attachments tendered that both sides attempted to resolve this unpleasant dispute between themselves prior to the hearing of the Applications on July 10, 2024. After the Applications were commenced in 2023, the parties submit that they made good faith attempts to resolve matters. Mariella and Gino state that they made numerous proposals, offering to pass accounts themselves and offering to pay Angela to end the litigation to no avail.
- [13] Mariella and Gino now rely on their Offer to Settle dated June 7, 2024 to make their claim for costs on a substantial indemnity basis. They made that Offer in the context of Angela's Application, in which they offered to provide a breakdown and

description of all estate transactions in which they were involved during the relevant period, and payment to Angela of \$15,000. In exchange, Mariella and Gino proposed that the parties would release each other from the claims made in either Application and consent to the dismissal of those Applications on a without costs basis.

- [14] Mariella and Gino submit that this Offer entitles them to substantial indemnity costs under Rule 49.10 as it would have not required Angela to pass accounts, and it would have provided her with a monetary payment which they say was “her true focus”.
- [15] Angela argues that the Offer to Settle dated June 7, 2024 was not effective as its terms did not line up with one or more “of the claims in the proceeding” as required by Rule 49.02(1). Angela submits that it is only when the terms of an offer line up with claims made in the proceeding that the court can determine if the offer was “as favourable as” or more favourable than the judgment: *Lawson v. Vierson*, 2012 ONCS 25, at para. 21. Angela concedes that her Offer to Settle dated June 12, 2024 is modelled after Mariella and Gino’s offer and is ineffective for the same reason.
- [16] Angela also argues that terms must be clear for the court to determine if the party relying on the offer has met the burden of making an offer that is applicable to the case under Rule 49.10(3). It was held in *Elbakhiet v. Palmer*, 2024 ONCA 544 at para. 22-28 that lack of clarity may invalidate the applicability of an offer to settle.
- [17] The Offer to Settle dated June 7, 2024 did not address the formal passing accounts that the Judgment requires of each side to this dispute. The terms of the offer did not “line up” with the relief requested by Mariella and Gino in their Application. The Offer to Settle did not meet the requirements of Rule 49.02(1) for this reason.
- [18] I conclude that both Offers to Settle do not apply under Rule 49.10 as they contain terms that are different than what was claimed by the applicant(s) in both Applications. Neither contain terms that equate to the result achieved on judgment.

Therefore, I find there is no basis for the court to consider either Offer to Settle to determine who was the successful party or to award elevated costs measured by this rule.

- [19] I am still left with the guidance that Rule 57.01 provides to me when exercising my discretion to determine which of the parties, if any, are entitled to costs. I may consider the factors set out in Rule 57.01(1) in addition to the result of the proceeding and *any offer to settle*, provided it is made in writing, when deciding entitlement and amount.
- [20] It is clear to me that Mariella and Gino tried to settle this dispute with Angela by offering to provide a breakdown of various transactions as well as to pay her an amount starting at \$10,000, later increased to \$15,000 in 2023. Angela would have also avoided the cost and her own exposure to an Order to pass accounts and the potential liability an accounting might reveal if she had accepted that offer. Instead, she has obtained an Order that Mariella and Gino provide an accounting of their management of Pietra's affairs as attorneys and of specific dealings and transactions, but she had a similar Order made against her.
- [21] I began my Reasons for Judgement with the observation that there are three siblings and two Applications in this litigation. Now I expand on that view by recognizing that the Applications were moderately complex, and the importance of the issues were significant to the parties. However, I find that Angela unduly lengthened these proceedings by turning over every stone to search for wrongdoing on the part of her sister and brother. As an example of claims made by Angela that have drawn out the time and expense in this case, Mariella and Gino describe how Angela was convinced that Mariella had used over \$100,000 of Pietra's funds to purchase a condominium in Florida. This allegation was later withdrawn after examinations in this litigation.
- [22] I have considered these circumstances under the factors set out in Rule 57.01(1) and conclude that Mariella and Gino were the more successful parties in the

litigation. They are therefore awarded their costs of the Applications. These costs are payable by Angela to indemnify them for the legal expense incurred to defend against her application and to bring their own.

- [23] The appellate courts have held that amount the court awards for costs must be fair and reasonable: *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (Ont. C.A.). These costs should be measured with reference to what amount the other party could reasonably expect to pay in costs if unsuccessful. I find that the \$40,000 the parties agreed upon as a fair and reasonable amount for partial indemnity costs is appropriate. This amount is supported by Mariella and Gino's Bill of Costs, and satisfies the purposes that costs are intended to serve. I therefore find that a costs award in this amount is fair and reasonable in the circumstances.

Conclusion

- [24] Mariella Pace and Gino Pace are jointly awarded their costs of both Applications to date in the amount of \$40,000. In the event the estate of Pietra Pace has not been distributed, these costs shall be paid in equal proportions from Angela's share of the estate to Mariella and to Gino when any partial distribution is made. If the estate has already been distributed, then these costs are payable by Angela directly within 60 days.



Released: April 29, 2025

Emery J.