Citation: Nash v Nash, 2019 MBCA 31 Date: 20190401
Dockets: AI18-30-09016;
AI18-30-09023

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***J. R. Nash***
JAMES ROBERT NASH	)	*on his own behalf*
	)	
(Plaintiff) Appellant/Respondent	)	***R. J. Nash***
	)	*on his own behalf*
- and -	)	
	)	*Appeals heard:*
RONALD JOHN NASH	)	***November 30, 2018***
	)	
(Defendant) Respondent/Appellant	)	*Judgment delivered:*
	)	***April 1, 2019***

PFUETZNER JA

[1] The parties to this appeal are brothers. Each appeals from an order of the motion judge granting summary judgment on certain claims of the plaintiff and awarding him costs.

Background

[2] Prior to their falling out, the parties had a close relationship for many years.

[3] Between 2007 and 2013, the plaintiff transferred about $80,000 of his own funds to the defendant. Most of the funds were derived from inheritances from the plaintiff's mother and aunt. The transfers were made on the understanding that the defendant would "hold this money in trust . . . and manage it in the plaintiff's best interests." Although this agreement was not

reduced to writing, its terms are not in dispute. The plaintiff made the transfers for the purpose of preserving his entitlement to social assistance. The motion judge referred to the funds as the "Trust Money" throughout his endorsement on the summary judgment motion.

[4] The defendant placed the Trust Money into bank deposits in his own name and paid tax on the income produced.

[5] At the plaintiff's request, in 2014, the defendant made a payment to Chapel Lawn Funeral Home for a pre-paid funeral contract for the plaintiff. The defendant also paid for the plaintiff's moving costs.

[6] On December 11, 2014, the plaintiff executed a General Power of Attorney naming the defendant as his attorney.

[7] In February 2015, the plaintiff requested that the defendant return the Trust Money to him. The defendant refused, claiming that to do so would not be in the plaintiff's best interests due to his history of mental illness and irresponsible spending. In his efforts to regain control of the Trust Money, the plaintiff retained counsel. The plaintiff borrowed funds from CitiFinancial Canada Inc. in order to pay his counsel's retainer.

[8] The plaintiff's counsel attempted to have the defendant return the Trust Money to the plaintiff. On May 2, 2016, the plaintiff's counsel advised the defendant that the plaintiff's psychiatrist "has provided his professional opinion that our client is able to handle his personal and financial affairs. We are prepared to meet with you and provide you with a copy of a letter prepared by [the psychiatrist]".

[9] After these attempts failed, in September 2016, the plaintiff issued a statement of claim against the defendant under r 20A of the Manitoba, *Court*

of Queen's Bench Rules, Man Reg 553/88. In the statement of claim, the plaintiff sought the return of the Trust Money, together with interest, from February 2015; reimbursement of interest charged to the plaintiff by CitiFinancial Canada Inc. on its loan to the plaintiff; an accounting of the defendant's use of the Trust Money; pre- and post-judgment interest; and costs.

[10] In his statement of defence, the defendant conceded that he had agreed to hold the Trust Money in trust for the plaintiff but asserted that he had the power to deal with the funds as he, "in his sole discretion, considered to be reasonable in the circumstances, in order to protect the Plaintiff".

[11] In February of 2017, the plaintiff's psychiatrist issued a letter stating that the plaintiff was "of sound mind and quite able to manage his financial and medical/psychiatric affairs." A copy of that letter was disclosed to the defendant in April 2017.

[12] Three case conferences were held. By the third case conference, the plaintiff had filed a motion for summary judgment and was self-represented. The defendant was represented by counsel on the summary judgment motion and at the subsequent cost hearing.

The Summary Judgment Motion

[13] In his endorsement, the motion judge characterised the plaintiff's claim as a "claim for damages flowing from the conduct of the defendant who was acting as his power of attorney." The motion judge noted that the defendant had conceded that "there is no issue that the Trust Money properly belongs to the plaintiff".

[14] The motion judge considered the following claims and dealt with

them as follows:

- He granted summary judgment on the plaintiff's claim for the return of the remaining Trust Money in the amount of $73,506.88.

- He granted summary judgment on the plaintiff's claim for damages for loss of opportunity to invest from February 2015 in the amount of $10,000.

- He granted summary judgment on the plaintiff's claim for damages for the interest he paid on the loan from CitiFinancial Canada Inc. in the amount of $4,455.

- He denied summary judgment on the plaintiff's claim for punitive damages "for a tort [the plaintiff] defined as 'elder abuse'" as he was "not satisfied that the evidence of the plaintiff . . . is sufficient to show that the defence offered by the defendant must fail".

[15] This last claim was not articulated in the statement of claim. I will comment further on this later in these reasons.

[16] After receiving the endorsement, the parties were unable to agree on costs. Accordingly, the motion judge held a hearing on costs and issued a further endorsement awarding the plaintiff solicitor-and-client costs for the period from May 2, 2016, until he became self-represented on March 13, 2017, and awarding party-and-party costs to the plaintiff for the period of time after he was self-represented. The total amount of costs ordered was $3,926.25 inclusive of taxes and disbursements. In making his decision, the motion judge stated that the defendant "knew or ought to have known that there was no legal or factual basis" to refuse to return the Trust Money after

the "existence of the expert medical opinion was disclosed by the plaintiff's lawyer by email on May 2, 2016".

The Appeals

[17] Both the plaintiff and the defendant appeal the motion judge's order.

[18] The plaintiff seeks an additional damage award of $75,000 for "elder abuse" and that the costs award be increased to an amount between $14,500 and $16,000.

[19] While the defendant concedes that the plaintiff is entitled to the Trust Money, he disputes the other damage awards and the costs award. He argues that he was entitled to withhold payment of the Trust Money to the plaintiff until he was satisfied that the General Power of Attorney dated December 11, 2014 was revoked. He argues that he never received satisfactory evidence of its revocation.

Issues

[20] It is important to recall that this was a motion for summary judgment. In that context, this appeal raises three essential issues:

- First, whether the motion judge erred in granting summary judgment on the plaintiff's claim for general damages. If the motion judge did not so err, a subsidiary issue is whether the motion judge erred in his assessment of the damages.

- Second, whether the motion judge erred in denying summary judgment in respect of the plaintiff's claim for punitive damages for elder abuse.

- Third, whether the motion judge erred in awarding costs to the plaintiff partly on a solicitor-and-client basis and partly on a party-and-party basis.

Analysis

Claims for Damages Granted by Motion Judge

[21] In reviewing a judge's decision to grant summary judgment, an appellate court is not to step into the judge's shoes and re-hear the motion. Rather, the appellate court must show deference to the judge's decision unless it arose from a reversible error of fact or of law, or is so clearly wrong as to amount to an injustice. Questions of law are reviewed on a standard of correctness and questions of fact or mixed fact and law on a standard of palpable and overriding error (see *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at paras 22-28).

[22] The motion judge instructed himself on the test for summary judgment with reference to *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61, where Freedman JA wrote (at paras 14-15):

> The test is to the same effect regardless of whether the moving party is the plaintiff or the defendant.
>
> When a plaintiff moves, he must prove, on a *prima facie* basis, that his action will succeed. If he meets that burden, then the defendant has the burden to establish that there is a genuine issue for determination. If he fails to do so, summary judgment granting the claim will follow.

[23] At both the summary judgment motion and at the hearing of this appeal, the defendant argued that he was justified in retaining the Trust Money until he had both proof of the plaintiff's capacity and proof that the General

Power of Attorney had been revoked. Essentially, the defendant's position is that, until he had those things, he should only be liable to the plaintiff for the amount of the Trust Money remaining in the sum of $73,506.88, but not for damages for lost opportunity to invest or for interest on the loan incurred by the plaintiff to fund his legal fees.

[24] After the plaintiff demanded the return of the Trust Money in February 2015, the defendant became extremely concerned about his duties and potential liability under the General Power of Attorney. This is evidenced from the record of correspondence between the parties' then counsel, the endorsement on the summary judgment motion and the argument of the defendant on the appeal. The record contains multiple examples of the defendant requesting confirmation, in the form of a "revocation letter", that the General Power of Attorney had been revoked. He was unwilling to accept the plaintiff's counsel's assurances that he had been "removed as [the plaintiff's] . . . Attorney (with respect to his Power of Attorney)" and that "as of December 9, 2015, . . . you . . . [do not] have any obligation pursuant to the . . . Power of Attorney".

[25] As previously mentioned, the motion judge characterised the plaintiff's claim as relating to the defendant's conduct in "acting as his power of attorney." The apparent relevance of the General Power of Attorney is also reflected in the motion judge's order which declared that the General Power of Attorney was "terminated as of December 9, 2015."

[26] However, it is clear from the facts found by the motion judge and from the record that the defendant was not acting pursuant to the General Power of Attorney with respect to the Trust Money. The Trust Money was transferred to the defendant, well before the General Power of Attorney was

executed, on the basis of the defendant's agreement to hold the funds for the benefit of the plaintiff. Accordingly, the defendant was holding the Trust Money in trust for the plaintiff.

[27] The defendant agreed to minimal duties when he accepted the trust, other than to invest the Trust Money and return it to the plaintiff when asked. As such, the trust was close to being a "bare" trust. A trustee under a bare trust was described by Hall, VC, in *Christie v Ovington* (1875), 1 Ch D 279 (H Ct J (Eng)), as (at p 281): "a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction".

[28] The Trust Money was held in bank deposits in the defendant's name, consistent with the defendant holding legal title as trustee for the plaintiff. As stated in Donovan WM Waters, Mark Gillen & Lionel Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2012), in order for a trust to be properly constituted, "The trust property must be vested in the trustee" (at ch 6.I). The subsequent execution of the General Power of Attorney had no effect on this arrangement.

[29] If the defendant was managing the Trust Money pursuant to the General Power of Attorney, the Trust Money would have been held in the name of the plaintiff and his financial institution would have relied on the General Power of Attorney for the defendant's authority. I note that the plaintiff's intended purpose of divesting himself of legal title to the Trust Money so as to maintain his qualification for social assistance would have been defeated if the Trust Money remained in his name.

[30] All of this is to say that the focus of the parties and the motion judge

on the status of the General Power of Attorney was unnecessary. It was simply irrelevant to the arrangement between the parties in respect of the Trust Money.

[31] At the end of the day, however, there is no basis for this Court to intervene in the motion judge's order that the defendant pay the Trust Money to the plaintiff. The terms of the trust provided that the defendant would return the Trust Money to the plaintiff when directed to do so. Indeed, by the time of the hearing of the summary judgment motion, the defendant had agreed to return the Trust Money. The motion judge found that there was no genuine issue for trial respecting the return of the Trust Money and, in doing so, he made no reversible error of fact or law and the decision is not so clearly wrong as to amount to an injustice.

[32] I now turn to the motion judge's granting of summary judgment on the claims for loss of opportunity to invest and for interest paid on the plaintiff's loan from CitiFinancial Canada Inc. While the defendant disputed liability, the record shows that the parties basically agreed on the mathematical calculation of both heads of damages.

[33] The motion judge ordered damages of $10,000 for loss of opportunity to invest from February 2015 (the date that the plaintiff demanded the return of the Trust Money). An issue was raised that damages should be payable only from May 2, 2016, the time that the defendant was advised that the plaintiff's psychiatrist had provided an opinion that he had the capacity to manage his financial affairs. As I will explain, I would not accede to that argument.

[34] An appellate court must show deference to a judge's assessment of damages unless the judge has made an error in law or principle, has come to

a conclusion without evidence or has made an award that is wholly erroneous by being either inordinately low or inordinately high in the circumstances (see *Dansereau v The City of Winnipeg*, 2014 MBCA 18 at para 6).

[35] Generally speaking, a trustee who breaches the terms of his or her trust, however innocently, is strictly liable for all damages that flow from that breach (see *Waters* at ch 25.I-25.II). In this case, the defendant's breach was the failure to return the Trust Money to the plaintiff on demand. Accordingly, the motion judge's award of damages for loss of opportunity to invest from the date that the plaintiff demanded the Trust Money is consistent with the general principle of strict trustee liability. Even accepting the defendant's assertions that, in retaining the funds, he was acting in good faith and in what he considered to be in the plaintiff's best interests, I am not convinced that the motion judge erred in principle in ordering damages from the date that the plaintiff demanded the return of the Trust Money or that the award is otherwise "wholly erroneous" (*Dansereau* at para 6).

[36] Similarly, I am not persuaded that there is any basis to interfere with the motion judge's order that the defendant pay damages to the plaintiff in the amount of the interest he paid on the loan from CitiFinancial Canada Inc.

Denial of Summary Judgment on Punitive Damages Claim

[37] As mentioned earlier, the plaintiff did not amend his statement of claim to include a claim for punitive damages for elder abuse. This claim was described by him in his motion for summary judgment as "ELDER ABUSE DAMAGES FOR ABUSING ME & HARASSING ME SINCE February 2015. . . . I the Plaintiff AM EXPERIENCING LOSS ENJOYMENT OF LIFE ON A DAILY BASIS & INCREASING STRESS OVER THIS MATTER". The amount claimed by the plaintiff brought the

proceedings out of the dollar limit for expedited actions under r 20A.

[38] The summary judgment motion was filed prior to the third case conference. The case conference judge did not order the plaintiff to amend his statement of claim to include the new claim. This should have been done. In dealing with self-represented parties, the courts must seek to achieve balance and fairness to all parties (see *Dewing v Kostiuk et al*, 2017 MBCA 22 at paras 18, 21). Requiring a self-represented plaintiff to include a new claim in his statement of claim prior to setting down a motion for summary judgment is not an onerous task. However, failing to do so risks forcing a defendant to defend a summary judgment motion on a claim that does not appear in the statement of claim and of which the defendant has insufficient notice. The courts must not forget the importance of the pleadings in civil matters, even when self-represented litigants are involved (see *Jones v Bank of Nova Scotia*, 2018 BCCA 381 at para 38).

[39] In argument before the motion judge, the plaintiff sought an award of $150,000 and characterised the claim as one for punitive damages for conduct amounting to "elder abuse", stating:

> I am open to the court simply saying they use, they wish to use the word "punitive damage" to indicate what they think of how the defendant has treated me, the plaintiff, since February 19th, 2015.
>
> I will leave it up to the court how to deal with this issue. I would really like the court to award the damages using the word "elder abuse."

[40] As previously noted, the motion judge declined to grant summary judgment damages on the basis of a novel tort of "elder abuse". In addition, after reviewing the law on when the "exceptional remedy" of punitive damages is available, he found, in essence, that the plaintiff was not able to

establish a prima facie case that the conduct of the defendant was such to attract an award of punitive damages.

[41] In my view, in dismissing the plaintiff's motion for summary judgment on his claim for punitive damages, the motion judge did not make any reversible error of fact or law, nor was the decision so clearly wrong as to amount to an injustice.

Costs Awarded by the Motion Judge

[42] Appellate courts will very rarely intervene in costs awards. A judge's decision on costs has been described as "quintessentially discretionary" (*Nolan v Kerry (Canada) Inc*, 2009 SCC 39 at para 126), and as being generally "insulated from appellate review" (*Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 49). However, a costs award can be set aside on appellate review "if it is based on an error in principle or is plainly wrong" (*ibid*; see also *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27; and *232 Kennedy Street Ltd v King Insurance Brokers (2002) Ltd*, 2009 MBCA 22 at para 14).

[43] The motion judge instructed himself on the test for awarding solicitor-and-client costs, citing *Young v Young*, [1993] 4 SCR 3 (at p 134): "solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties"; and *Fouillard v Ellice (Rural Municipality)*, 2007 MBCA 108 (at para 55): "rare and exceptional circumstances where the conduct of the other party is unconscionable." See also *Judges of the Provincial Court (Man) v Manitoba et al*, 2013 MBCA 74 at para 177.

[44] However, there are other principles from the case law (beyond the general statements of the law referred to by the motion judge) relevant to awarding solicitor-and-client costs, including:

- Solicitor-and-client costs are generally intended to censure behaviour related to the conduct of the litigation alone and not to the conduct which might have been the subject of punitive damages (see *Norberg v Wynrib*, [1992] 2 SCR 226 at 317 (per Sopinka J, dissenting but not on this point); and *Siemens v Bawolin*, 2002 SKCA 84 at para 118).

- A defendant is entitled to defend an action and to put a plaintiff to the proof of his case. There is no obligation to settle an action. The fact that the issue of liability is not contested at trial or the defendant does not give evidence should not in itself result in an award of solicitor-and-client costs (see *Gerula v Flores* (1995), 126 DLR (4th) 506 at 528-29 (Ont CA); and *Hunt v TD Securities Inc* (2003), 229 DLR (4th) 609 at paras 133, 153 (Ont CA)).

- Proper grounds for the award of solicitor-and-client costs would arise where the defendant's acts are a deliberate attempt to frustrate the proceedings by fraud or deception or where the conduct is calculated to harm the plaintiff (see *Gerula* at pp 528-29; and *Hunt* at para 133).

[45] The above principles are applicable in the context of a breach of trust case. Historically, the costs of all parties in estate and trust litigation matters were paid out of the estate or trust fund, with those of the executor or trustee paid on a solicitor-and-client basis. However, the courts have more recently adopted the normal civil litigation costs rules for most estate and trust

litigation cases. Currently, instances where all parties' costs are paid out of the estate are limited to circumstances where certain public policy concerns are at play—none of which are relevant in the case at bar (see *McAuley v Genaille*, 2017 MBCA 69 at para 83).

[46] The issue is whether the motion judge appropriately exercised his discretion in ordering solicitor-and-client costs to the plaintiff for the period from May 2, 2016, until he became self-represented on March 13, 2017, on the facts of this case.

[47] In support of his decision to award solicitor-and-client costs, the motion judge made the following findings regarding the conduct of the defendant:

- "[T]he defendant was over-zealous in his action to protect the plaintiff's best interests."
- There was "no basis to sustain the defendant's position".
- "[T]he defendant can offer no acceptable response for his decision to continue to act under the power of attorney and to force this matter into the courts."
- "Making a bald assertion that the opposing party is mentally unstable or unable to manage his or her personal affairs without proof and then continuing to aggressively defend that position in the face of credible evidence to the contrary is something that should trigger an award of solicitor-client costs."

[48] In my view, the motion judge erred when he said that the defendant made a "bald assertion" that the plaintiff was mentally unstable or unable to

manage his personal affairs "without proof". The record before the motion judge included an affidavit from the defendant attesting to his personal knowledge of the plaintiff's mental-health issues, which "began to take serious form in the mid 1980s, and persist to the present day", resulting in the plaintiff being "hospitalized and placed in psychiatric care multiple times." This evidence was effectively unchallenged. The defendant also stated that he "did not believe that [the plaintiff] was capable of managing his financial affairs, and that I wanted to help".

[49] There were no findings by the motion judge that the defendant's conduct in defending the claim brought against him by the plaintiff was in the nature of a deliberate attempt to frustrate the proceedings by fraud or deception or was calculated to harm the plaintiff.

[50] In my respectful view, the motion judge erred in principle in awarding solicitor-and-client costs in the circumstances. The motion judge's essential criticism of the defendant's conduct is that he failed to capitulate to the plaintiff and, as a result, the plaintiff was required to institute legal proceedings to enforce his claim. This is directly contrary to the principles stated above that a defendant has no obligation to settle and is entitled to put a plaintiff to the proof of his case without facing an award of solicitor-and-client costs.

[51] As previously noted, the motion judge awarded party-and-party costs to the plaintiff for the period of time after he became self-represented in the amount of $2,000, plus disbursements. This amount is very close to the amount that would have been payable as party-and-party costs under the applicable tariff: $2,750.

[52] This Court, in *232 Kennedy Street*, summarised the purposes served

by an award of party-and-party costs (at para 35):

> – to indemnify the successful litigant, on a partial basis, for legal costs incurred or, in the case of a self-represented litigant, for lost opportunity;
>
> – to encourage settlements by having all litigants, whether represented or not, address the issue of costs;
>
> – to discourage and sanction frivolous actions or defences, unnecessary steps in litigation and inappropriate behaviour by ensuring that all litigants, whether represented or not, have recourse to, or are subject to, an award of costs; and
>
> – to facilitate access to justice.
>
> [emphasis added]

[53] Hamilton JA provided additional direction on the issue of lost opportunity at para 37 (quoting from *Fong v Chan* (1999), 181 DLR (4th) 614 (Ont CA) (at para 26)): "(t)he self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case". Nor is it a "condition precedent" (*ibid*) to a costs award that the self-represented litigant has "incurred an opportunity cost by forgoing remunerative activity" (*ibid*, quoting from *Fong* at para 26). Importantly, she concluded (*ibid*):

> While opportunity cost may often be the crucial consideration in the assessment of costs for a self-represented litigant, it remains just one factor to consider. I am also of the view that it should be the rare occasion when lost opportunity causes an award of costs to come close to what would otherwise be the applicable tariff if counsel were involved.
>
> [emphasis added]

[54] After referring to *232 Kennedy Street*, the motion judge concluded:

> This is one of the rare occasions when lost opportunity should cause an award of costs to a self-represented litigant to come close to the applicable tariff. This is not simply a case where there was no merit to the defence but rather a case where there was demonstrable proof readily available to the defendant that his statement of defence had no foundation in fact or in law. The defendant should have settled the case when the existence of the medical report was known to him, and I must sanction the inappropriate and abusive use of the legal system to make allegations of mental incompetence against the plaintiff when the defendant knew or ought to have known that there was no legal or factual basis to sustain to such a defence. The plaintiff was forced to prosecute a claim for money justly owing to him and suffer the indignity of being called mentally unstable and incompetent in the absence of any proof and was forced by the defendant to continue the litigation even after he produced evidence to the contrary.
>
> [emphasis added]

[55] In my view, the motion judge erred in referring to "lost opportunity" as justifying an award of costs close to the tariff and then reciting, in support, his negative conclusions regarding the defendant's conduct. Moreover, there is nothing in the record to indicate that the plaintiff "incurred an opportunity cost by forgoing remunerative activity" (see para 53 above). At the time of the summary judgment motion hearing, the plaintiff was aged 70 and there was unchallenged evidence in the record that he had "been unable to maintain consistent or any employment over the last 30 years."

[56] The findings that the motion judge relied upon to award party-and-party costs close to the tariff (something that Hamilton JA referred to in *232 Kennedy Street* as a "rare occasion" (at para 37)) echo the findings that he relied upon to award solicitor-and-client costs, an award considered to be "rare and exceptional" (*Fouillard* at para 55).

[57] As previously explained, the defendant's conduct did not justify an award of solicitor-and-client costs. For essentially the same reasons, in my view, the motion judge erred in principle in making a costs award to a self-represented party who suffered no opportunity cost in an amount that is close to three-quarters of the tariff.

[58] The total costs of $3,926.25 awarded by the motion judge were calculated as follows:

- solicitor-and-client costs $875.00
- GST and PST on solicitor-and-client costs 113.75
- disbursements inclusive of tax 52.50
- party-and-party costs 2,000.00
- GST and PST on party-and-party costs 260.00
- disbursements inclusive of tax 400.00
- court filing fees 225.00

Total: $3,926.25

[59] I note that the sum of $875.00 ordered for solicitor-and-client costs represents the amount actually paid by the plaintiff to his counsel during the period after May 1, 2016. While the plaintiff's counsel billed him fees well in excess of that amount, the plaintiff did not pay him.

[60] Taking into account the somewhat unusual circumstances of this case, I would award costs of $437.50 in place of the motion judge's solicitor-and-client costs award of $875. I would reduce the party-and-party costs award from $2,000 to $250. There was no basis for the motion judge to have ordered GST and PST on the party-and-party costs awarded to the plaintiff as a self-represented litigant. Accordingly, the total costs award will be $1,421.88 calculated as follows:

- party-and-party costs from May 2, 2016 to March 13, 2017 ..... $437.50
- GST and PST on party-and-party costs 56.88
- disbursements inclusive of tax 52.50
- party-and-party costs from March 14, 2017 ..... 250.00
- GST and PST on party-and-party costs 0.00
- disbursements inclusive of tax 400.00
- court filing fees 225.00

Total: $1,421.88

Costs of the Appeal and Chambers Motions

[61] The parties appeared twice in chambers on preliminary motions. The chambers judge reserved costs on those motions in the cause to the panel hearing the appeal.

[62] At the hearing of the appeal, neither party made submissions on the costs of the appeal and the chambers motions. After the appeal, the Court received written submissions on costs from the plaintiff which I have considered.

[63] The plaintiff is unsuccessful on all of his grounds of appeal. The defendant is successful on his appeal of the costs award but not on his remaining grounds of appeal.

[64] In light of the partial success of the defendant and the fact that both parties are self-represented on the appeal, I would order total costs to the defendant on the appeal (including costs of the two chambers motions) of $421.88 which is inclusive of disbursements.

[65] At the hearing of the appeal, the Court was advised that the plaintiff had been paid all amounts owing to him by the defendant under the motion

judge's order with the exception of the costs awarded by the motion judge.

[66] The costs of the appeal owing to the defendant in the amount of $421.88 shall be deducted from the costs of the summary judgment motion of $1,421.88 owing by the defendant to the plaintiff.

Conclusion

[67] The plaintiff's appeal is dismissed.

[68] The defendant's appeal is allowed, in part, to reduce the motion judge's costs award from $3,926.25 to $1,421.88 inclusive of disbursements and tax.

[69] Costs of the appeal and the chambers motions in the total amount of $421.88 are payable to the defendant and shall be deducted from the costs of $1,421.88 payable to the plaintiff.

[70] Accordingly, the net amount payable by the defendant to the plaintiff is $1,000.

Pfuetzner JA

I agree: Mainella JA

I agree: leMaistre JA