CITATION: River Park Non-Profit Housing Corporation (Windsor) v. Ontario (Transportation), 2022 ONSC 3927
COURT FILE NO.: CV-18-26034-B1
DATE: 20220630

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
River Park Non-Profit Housing Corporation (Windsor) Plaintiff	No appearance on behalf of the Plaintiff
– and –	
Her Majesty the Queen in Right of Ontario, as prescribed by the Minister of Transportation for the Province of Ontario; Her Majesty the Queen in Right of Ontario, as prescribed by the Minister of Infrastructure, as represented by the Ontario Infrastructure and Lands; Oscar Construction Company Limited; Archon Architects Incorporated; Settimo Tom Vilardi; The Corporation of the Town of LaSalle; Haddad Morgan and Associates Ltd.; William Tape; Fieldcraft Engineering Ltd.; Mark Kurzuk aka M.J.K. Kurzak; and John Doe Building Inspector Defendants	No appearances on behalf of the Defendants
– and –	
Sure Seal Roofing & Siding; Eagle Heating & Cooling Inc.; L Mailloux Construction (2000) Inc.; and Leo Mailloux Construction Inc. Third Parties	*Tobin B. Horton*, for the Third Parties, L Mailloux Construction (2000) Inc. and Leo Mailloux Construction Inc.
– and –	
Royal & Sun Alliance Insurance Company of Canada Fourth Party	*Mark M. O'Donnell* and *Cameron L. Foster*, for the Fourth Party
	HEARD: March 21, 2022

REASONS ON COSTS ASSESSMENT HEARING

CAREY J.

[1] The underlying action in this costs dispute between the third and fourth parties was brought by the plaintiff River Park Non-Profit Housing Corporation (Windsor) ("River

Park") over alleged losses sustained by it due to the relocation and building of a sub-division, mainly the Trillium Court Non-Profit Housing Relocation Project. There were multiple defendants named in the claim, including Oscar Construction Company Limited ("Oscar"), as the general contractor for the work. Among the subcontractors were Leo Mailloux Construction Inc. ("Mailloux") retained for excavating work under the contract. Mailloux was added as a third party.

[2] On October 9, 2019, Mailloux issued a fourth party claim against Royal & Sun Alliance Insurance Company of Canada ("RSA"). In due course, a notice of intent to defend was filed by RSA followed by the service of a fourth party statement of defence (December 13, 2019). No reply to the defence was made and a further six months passed without any demand for particulars or terms of the policies by the third party. The fourth party served their affidavit of documents, including copies of the CGL policy and Builders Risk Policy (November 30, 2020). RSA requested mediation and filed a mediation brief, to which RSA said they received no response. Mediation was conducted over two days (May 12-13, 2021).

[3] The third party served a notice of discontinuance that did not address costs thrown away by RSA. Counsel for RSA promptly wrote to the case manager (Howard J.) who confirmed that the costs motion could proceed outside of case management.

[4] RSA's position is that they were required to vigorously defend an action with potential large liability without there ever being any basis for the fourth party claim. They say they are entitled to their full costs from the third party. The third party said that if RSA had only provided a copy of the policy in place for Mailloux when requested, this litigation would not have been necessary. In addition, it asserts that RSA intentionally over-defended and the costs incurred are unreasonable. Included in that assertion is a complaint that RSA used very senior counsel when the legal work could have been performed at a much lower rate by junior counsel. Essentially, counsel for Mailloux argued that if RSA was convinced from the start that there was no basis for the claim, they had no reason to so actively participate in the proceedings and use such an experienced lawyer to do so.

[5] RSA responds that there was never any onus on them prior to the issuance of the claim to provide a copy of the policy that should have been in the hands of the insured in any event. The onus was on Mailloux to have a basis for the fourth party claim before putting RSA to the time and expense of defending a claim for which there was never any legal basis, as evidenced by the eventual notice of withdrawal. This occurred 624 days after the fourth party's statement of defence was filed and 107 days following mediation.

Analysis

[6] RSA, the fourth party, was facing potential liability for a significant amount of money. It was the third party who added RSA as a fourth party. It was Mailloux, and only Mailloux, that knew what evidence it had to support that decision. If Mailloux had no

evidence, it was improper for RSA to be added and, in my view, Mailloux should be responsible for RSA's full cost of defence.

[7] If Mailloux believed, on the information they had, that RSA could be liable, then it should be no surprise that RSA took the case seriously and defended the action accordingly. Mailloux was silent in response to RSA's fourth party defence. Mailloux was silent in response to the request to dismiss the action against RSA. It is not, in my view, appropriate for Mailloux to now complain that the action was defended too vigorously after filing a withdrawal without addressing the costs incurred by RSA. I find that this is an appropriate case for a costs assessment.

[8] The conduct of a client's litigation is entirely in the domain of the instructing client. There is nothing in the material filed in this case that would lead me to conclude that the fees charged to RSA were inappropriate or exorbitant. It would be contrary to RSA counsel's professional obligations to their client to not pursue the fulsome defence of their client's interest because of their belief in their ultimate success. That is counsel's duty. The suggestion that counsel built up costs intentionally is without foundation.

[9] Clearly, the third party's action in refusing to respond to reasonable and persistent requests to dismiss the action contributed to the fourth party's costs. The dismissal of the fourth party claim without any input on costs from counsel for RSA is a telling step, that speaks volumes to this court about the strategic nature of the third party adding the fourth party. It is conduct that is appropriately addressed with a costs award that will discourage similar behaviour in the future.

[10] Costs to the fourth party, Royal & Sun Alliance Insurance Company of Canada, per the bill of costs filed and assessed here at $23,190.47, inclusive of HST and disbursements, plus costs of this motion for assessment to the applicant fourth party set at $3,000 inclusive of HST and disbursements.

Thomas J. Carey
Justice

Released: June 30, 2022

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River Park Non-Profit Housing Corporation (Windsor)

Plaintiff

– and –

Her Majesty the Queen in Right of Ontario, as prescribed by the Minister of Transportation for the Province of Ontario; Her Majesty the Queen in Right of Ontario, as prescribed by the Minister of Infrastructure, as represented by the Ontario Infrastructure and Lands; Oscar Construction Company Limited; Archon Architects Incorporated; Settimo Tom Vilardi; The Corporation of the Town of LaSalle; Haddad Morgan and Associates Ltd.; William Tape; Fieldcraft Engineering Ltd.; Mark Kurzuk aka M.J.K. Kurzak; and John Doe Building Inspector

Defendants

– and –

Sure Seal Roofing & Siding; Eagle Heating & Cooling Inc.; L Mailloux Construction (2000) Inc.; and Leo Mailloux Construction Inc.

Third Parties

– and –

Royal & Sun Alliance Insurance Company of Canada

Fourth Party

REASONS ON COSTS ASSESSMENT HEARING

Carey J.

Released: June 30, 2022