

Case Name:

Laudon v. Roberts

**RE: Laudon, and
Roberts and Sullivan**

[2007] O.J. No. 1283

156 A.C.W.S. (3d) 541

Court File No. 02-B5188

Ontario Superior Court of Justice

A.J. Stong J.

April 5, 2007.

(22 paras.)

Counsel:

K. Ralston, for the plaintiff.

M. Forget, for the defendant Sullivan.

R.A.N. Heyd, for the defendant Roberts.

ENDORSEMENT

1 A.J. STONG J.:-- On Monday March 27, 2006, the parties selected the jury for the trial. Following jury selection, the plaintiff brought three pre-trial motions seeking relief (a) to refer to demonstrative evidence during his opening to the jury, (b) to call more than 3 experts, and (c) to call the plaintiff out of order.

2 Rulings were made on the first two issues and the ruling on the third was adjourned until the next day.

3 On Tuesday March 28, the ruling on the third issue was given and then the plaintiff served the defendants' counsel 35 invoices in reference to Mr. Laudon's loss of income claim. On consent of the parties the trial was adjourned until the following Thursday to permit Mr. Sullivan's counsel the

opportunity to assess his options including the possibility of having Mr. Laudon re-attend for further examination for discovery.

4 On Thursday March 30 the parties attended court and on consent the court ordered the continued examination for discovery of Mr. Laudon to be conducted that afternoon.

5 On Friday March 31, the parties attended for trial expecting the opening presentations to the jury to be made. The opening comments by the court were circulated among counsel for their perusal and comment prior to the jury being called in. After a brief adjournment for counsel to consider the court's opening comments the court reconvened and counsel made submissions on the Court's opening comments to the jury.

6 During the course of submissions, Mr. Ralston, counsel for the plaintiff, referred to the Mary Carter agreement entered into between the plaintiff and the defendant Roberts and inadvertently revealed the amount paid by Mr. Roberts to the plaintiff pursuant to that agreement. Mr. Forget, counsel for the defendant Sullivan, sought the recusal of this trial judge in light of the information that was disclosed.

7 The Court recused itself from the trial and ordered the parties to attend before the Regional Senior Justice to ascertain the availability of a different judge to continue with the trial.

8 The parties appeared before Shaughnessy RSJ on April 4 but no judge was available for the trial.

9 On April 5, the parties attended before the court and the jury was discharged. The matter was then adjourned to the fall sittings commencing on October 10, 2006.

10 The defendant Sullivan is seeking his costs thrown away as a result of the mistrial declared on April 5, 2006.

11 There is no issue that the mistrial was caused entirely by Mr. Ralston, counsel for the plaintiff and that is cause for entitlement of an award of the costs of preparation, attendance at court and disbursements wasted as a result.

12 The test that I apply to the consideration of costs in these circumstances is a three part test in the form of the following question; what costs have been reasonably expended, but rendered useless by the opposite party's conduct?

13 It is significant in this consideration that the trial had not begun. The court was called on to render decisions on three pre-trial motions. The matter is set down for trial commencing on April 9, 2007 and the parties have agreed that the rulings on the three motions will apply to the new trial before a different judge.

14 Mr. Heyd, counsel for the defendant, Roberts who entered the Mary Carter agreement with the plaintiff seeks costs thrown away in the amount of \$13,155.68. Payment has been made to the plaintiff in accordance with the Mary Carter agreement and the counterclaim by the defendant Roberts has been withdrawn. Mr. Roberts' interests in the up coming trial are limited to his presence at the opening and closing arguments at the trial and giving his own testimony at trial.

15 By the terms of the Mary Carter agreement Mr. Roberts was "to seek no costs from the plaintiff". In the circumstances, this court is not disposed to award costs to the defendant Roberts as a result of the mistrial triggered by the plaintiff's counsel.

16 A review of the defendant Sullivan's bill of costs totalling \$100,493.60 reveals a combination of costs wasted and costs not thrown away. Indeed, Mr. Forget submits that of the \$73,571.50 billed for preparation one half can be attributed to costs thrown away as a result of the trial not proceeding. Mr. Ralston on behalf of the plaintiff allows that at least \$16,600.00 ought to be allowed for costs thrown away if the court intends to exercise its discretion and allow for them.

17 It becomes exceedingly difficult to determine from Sullivan's bill of costs, the actual amounts that were in fact thrown away by the defendant as a result of the plaintiff's counsel's actions. The bill demonstrates an unreasonable duplication of services in some instances where more than one junior counsel worked on the file. In others, counsel's dockets do not particularize how the services rendered were applied and as a result it is difficult to ascertain which services were wasted and which, although not used, would still benefit counsel at a subsequent trial and to what extent.

18 Costs of interviewing witnesses and making summaries of the evidence would have been incurred in any event and cannot be regarded as thrown away, although this court recognizes that those witnessed will have to be interviewed again in preparation for trial but surely not as extensively as in the first interview.

19 The lion's share of the preparation done by the defendant Sullivan for trial is not lost. The trial will still proceed. One wonders why the preparation done in the early months of 2006 prior to the trial would have been lost due to the mistrial. In addition, the concentration of effort immediately prior to the trial could have been expected as a result of the defendant Sullivan becoming aware at the last minute of the Mary Carter arrangement between the plaintiff and the defendant Roberts. While that would have caused the counsel for Sullivan more work in terms of preparing to examine different witnesses surely that work is not lost or wasted and can hardly be charge to the plaintiff in these circumstances. That work is still useful to the plaintiff in the upcoming trial.

20 It is difficult to determine with any degree of exactitude which costs are truly thrown away. It may well be that there are costs that will be thrown away and that can be determined only after the fact. By fixing an amount now which I regard as an amount that covers the costs thrown away is not to preclude a revisiting of this issue at the end of the trial. Even if the defendant successfully defends at trial, it may be that a review of the costs incurred in preparation prior to that trial will show that, in fact there were more costs thrown away than I have found, in which case I leave it to the trial judge to determine whether those further costs could be recoverable. The same precision of determining costs thrown away at this time is not as present as it would be to someone making the same determination after the trail.

21 I make the following award of costs thrown away by the defendant Sullivan in the circumstances:

For preparation, for attendances at court that were not fruitful in relation to conducting the trial and for disbursements the amount of \$20,000.00 in total.

22 The amount is to be paid forthwith to the defendant Sullivan by the plaintiff Laudon.

A.J. STONG J.

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