

Case Name:

TGA General Contracting and Restoration Inc. v. Cirillo

**IN THE MATTER OF the Construction Lien Act, R.S.O. 1990,
chapter C.30, as amended**

Between

**TGA General Contracting and Restoration Inc., Plaintiffs, and
Francesco Cirillo, also known as Frank Cirillo, Liberata
Cirillo, Defendants**

And between

**Francesco Cirillo a.k.a. as Frank Cirillo and Liberata
Cirillo, Plaintiffs, and
The Wawanesa Mutual Insurance Company, Defendant**

[2009] O.J. No. 5367

Court File Nos. 76153/05, 75585/05

Ontario Superior Court of Justice
Newmarket, Ontario

G.P. DiTomaso J.

Heard: May 26-29 and September 4, 2009.

Judgment: December 15, 2009.

(60 paras.)

Counsel:

M.F. Cooper, for TGA General Contracting and Restoration Inc.

Francesco Cirillo, self-represented.

M. Forget, for The Wawanesa Mutual Insurance Company.

REASONS FOR DECISION ON COSTS

G.P. DiTOMASO J.:--

THE PROCEEDINGS

1 This dispute arose regarding a fire which occurred on March 7, 2004 at the Cirillo's residential property located at 473 Woodbridge Avenue in Woodbridge, Ontario.

2 Two actions were commenced stemming from this fire loss. These actions were tried together at a trial lasting five days - May 26 to May 29, 2009 for the evidence and September 4, 2009 for final submissions. Reasons for Judgment were released on October 15, 2009.

3 In the first action (the TGA action), TGA commenced Construction Lien proceedings advancing a claim for unpaid work and materials in the amount of \$152,961.06 together with a claim for unjust enrichment. The Cirillos denied owing any money to TGA and if any money was found owing, then Wawanesa, (the insurer for the Cirillos) ought to pay TGA.

4 In the second action (the Cirillo action) the Cirillos sued Wawanesa for any money owed to TGA regarding the repairs to the Cirillo house which was damaged by the fire. The claim was based on the Cirillos' policy of insurance with Wawanesa to cover the cost of such repairs. Wawanesa denied owing the Cirillos any money for repairs as the Cirillos were indemnified to the extent of the policy and as the Cirillos' claim for building coverage had been settled. Wawanesa asserted that it had no contractual or any other obligation to pay TGA. TGA was Cirillos' contractor and the dispute regarding outstanding payment was solely between the Cirillos and TGA and did not involve Wawanesa.

5 The Cirillos had also claimed that Wawanesa relied upon under-valued scope of work and pricing for the house repairs. They were underpaid on their claim for building coverage by Wawanesa and sought further payment from their insurer for all the repairs effected by TGA. The Cirillos claimed the Guarantee Replacement Cost (GRC) provision of their policy of insurance with Wawanesa supported their claim for additional payment. Wawanesa denied that any such interpretation of the policy gave rise to the Cirillos' claim.

RESULT AT TRIAL

6 The two actions were ordered to be tried together. After trial, my reasons for judgment were released October 15, 2009. In the TGA action, the plaintiff was entirely successful obtaining judgment against Frank Cirillo and Liberata Cirillo in the amount of \$152,961.06. See page 20 CONCLUSION at paragraphs 106, 107 and 108, REASONS FOR JUDGMENT.

7 In the Cirillo action, Wawanesa was entirely successful in defending the Cirillo claims with the result that the Cirillo action was dismissed. See page 30 CONCLUSION paragraph 171 REASONS FOR JUDGMENT. I gave lengthy reasons and made numerous findings on the evidence which overwhelmingly supported the conclusions arrived at regarding both the TGA and Cirillo actions.

8 We now come to the issue of costs. All parties agreed that costs would be determined by way of written submissions. The parties have delivered their written submissions pursuant to my directions in respect of the TGA action and I have reviewed same together with my Reasons for Judgment dated October 15, 2009.

COSTS - TGA ACTION

9 As TGA was entirely successful in its action against the Cirillos, I find that TGA is entitled to its costs.

10 There are two issues. Firstly, the appropriate scale of costs and secondly, quantum.

11 In respect of the scale of costs, TGA submits that it is entitled to its costs on a substantial indemnity scale in the amount of \$88,197.61, or in the alternative, costs on a partial indemnity scale in the amount of \$62,519.59.

12 TGA submits that the number of factors set out in subrule 57.01(1) of the *Rules of Civil Procedure* support a claim for substantial indemnity costs. At the heart of the submission is the allegation that the conduct of the Cirillos tended to lengthen unnecessarily the duration of the proceeding. They failed to provide answers to undertakings which resulted in their action being struck from the trial list on April 23, 2008.

13 The TGA action was placed on the trial list for the October 2008 sittings. The trial did not proceed at that time due to lack of court availability. The TGA action was rescheduled for February 2009.

14 In February 2009, TGA was prepared to commence trial. However on the trial date, the Cirillos, without any previous written notice to TGA, took the position that the trial of the TGA action ought not to proceed without trial together with the Cirillo action. Justice Lauwers ordered the trial of both actions in the May 2009 sittings, peremptory on the Cirillos.

15 TGA submits that it expended significant resources in preparing for the trial of the TGA action, as it had every belief that it was to proceed in February 2009. Not only did TGA have to prepare for the February 2009 trial date, but it also had to prepare for the May 2009 trial as well.

16 The Cirillos submit that the delay in respect of the October 2008 trial date was due to systemic causes only and not as a result of any delay on the part of the Cirillos. The failure to answer undertakings did not delay the trial. There was a proper order made that the two actions be tried together for the May 2009 sittings. Wawanesa was not prepared to proceed on February 9, 2009 and this caused delay.

17 Further, the Cirillos have submitted that a number of different lawyers have acted on the TGA file resulting in duplication. Discovery time should be reduced by 50%. There should be no costs on Wawanesa's motion to strike and costs should be awarded on a partial indemnity scale. The Cirillos submit that the fair amount for a four day trial should be no more than \$10,000 and that the disbursements are excessive and should be no more than \$3,000.

18 The Cirillos submit that the total costs on a substantial indemnity basis plus disbursement should be no more than \$20,000 all inclusive. There were no representations made with respect to the quantum of partial indemnity costs.

19 I am not persuaded that the conduct of the Cirillos attracts costs on a substantial indemnity scale. Although I am critical of their actions which caused their action to be struck from the list in April 2008, the TGA action was not reached at the October 2008 sittings because of any fault on the part of the Cirillos. The case could not be reached.

20 However, the TGA action was rescheduled for February 2009 and TGA prepared to commence trial. Without any prior notice, the Cirillos attended and submitted that the TGA action and the Cirillo action should be tried together. Notwithstanding that Justice Lauwers ordered that these actions be tried together, I find that TGA prepared not only for the February 2009 trial date but also the May 2009 trial. Arguably, there was some duplication involved in the preparation for trial for the October 2008 sittings, February 2009 date and May 2009 date. Some duplication is systemic and

not attributable to the Cirillos' conduct. However, other preparation is entirely related to the conduct of the Cirillos resulting in the traversal of this matter from February 2009 to the May 2009 sittings.

21 I have considered carefully the Cirillos' conduct and in the end have concluded that costs of TGA shall be awarded on a partial indemnity scale. I have taken into account that at various points in time the Cirillos have been self-represented which may have caused them some difficulty in understanding the proper procedure. Nevertheless, I also take into account that while the Cirillos were self-represented, this factor does not confer upon them any advantageous or elevated status over that enjoyed by a represented litigant. I find the Cirillos' conduct not so egregious that would attract substantial indemnity costs.

22 The next issue then becomes one of quantum.

23 TGA claims total fees on a partial indemnity scale in the amount of \$53,789.75. The total disbursements claimed are in the amount of \$5,823.93 together with GST in the amount of \$2,905.91. The total amount claimed for costs by TGA on a partial indemnity scale is the sum of \$62,519.59.

24 The only submissions received from the Cirillos relate to the general comments reflected above and that the total costs on a substantial indemnity basis plus disbursements should not be more than \$20,000 all inclusive. The Cirillos submit that the trial bill of costs is excessive and that the discovery time be reduced by 50 percent and awarded on a partial indemnity scale. The only specific reference to partial indemnity costs relates to the said discovery time.

25 I have reviewed TGA's Bill of Costs. I find from June 9, 2005 until September 2009 there were four lawyers and one clerk involved in this matter. The lawyer time is broken down as follows:

M.W.	7.3 hours
L.B.	95.6 hours
E.H.	7.8 hours
M.C.	176.9 hours
Total lawyers time	287.6 hours
Law Clerk	42.6 hours
Total Law Clerk's time	42.6 hours

26 For the most part I do not have any difficulty with the hourly rate charged for L.B. and M.C. I do have difficulty in respect of the hourly rates of M.H. and E.H. and have made the necessary discount in respect of their participation on the file. The real concern involves the number of hours devoted to this matter which I find has resulted in unnecessary duplication at various stages of the proceedings. I have also given consideration to Mr. Cooper (M.C.) attending at the trial throughout and the necessity and degree of involvement when it came to the conduct of the Cirillo action. While it can be said that counsel for Wawanesa participated fully in the Cirillo action at trial and to some considerable extent regarding the TGA claim, the same cannot be said for the involvement of Mr. Cooper throughout this trial. His participation as counsel for TGA was to a very large measure restricted to the prosecution of the TGA claim and to some very limited extent to his participation in the Cirillo action against Wawanesa.

27 I have reviewed the Bill of Costs submitted by TGA. Taking into account the amount in issue, the nature of the proceedings, the conduct of the parties, the involvement of numerous plaintiffs'

counsel at various stages and the connection between the TGA and the Cirillo actions, I have considered each heading of claim set out in the Bill of Costs. I have considered the duplication involved both as a result of numerous lawyers having carriage of this matter and the duplication of time on the file attributable to not only the involvement of said numerous counsel but also as a result of the conduct of the Cirillos. For these reasons, I have discounted the amount of TGA's Bill of Costs claimed on a partial indemnity scale as follows:

Pleadings

28 I have reduced the amount claimed for pleadings from \$1,892.40 to \$1,500.

Pretrials

29 I understand there were four pretrials as well as the preparation of the Scott Schedule.

30 I have reduced the amount claimed from \$5,411.80 to \$3,500.

Discoveries

31 I have taken into account that some considerable time on the examination for discovery were devoted to issues relating to Wawanesa. I have discounted the amount claimed for discoveries in the amount of \$8,596.50 to \$5,500.

Motion to Amend Pleadings brought by Wawanesa

32 The amount claimed is \$195.30 which I reduce to \$100.

Motion to Strike Action from Trial List brought by Wawanesa

33 The amount claimed is \$1,465.50. This amount is excessive given the motion was brought by Wawanesa who prepared the motion materials. I would discount the amount claimed from \$1,465.50 to \$400.

Trial and Related Motions

34 The amount claimed for fees is the sum of \$32,434.25. The amount of lawyers' time is slightly more than \$32,000. The claim involves three lawyers with the bulk of the time attributed to services provided by Mr. Cooper. Those hours total 170.8 hours. The total lawyers hours claimed in respect of this heading is 181.4 hours. These hours are excessive. While Mr. Cooper attended at trial throughout, his attendance did not always relate to the TGA claim. There was also some duplication as a result of two other lawyers involved regarding trial matters. Although I have no doubt that the time was spent in respect of trial matters at the hourly rate claimed, I find that the sum of \$32,434.25 to be excessive. I would fix the costs in the amount of \$25,000.

Miscellaneous

35 This heading involves communications with the client and opposing counsel. The amount claimed is \$3,794. I would discount this sum to \$1,300.

36 Accordingly, I would fix fees inclusive of GST in the amount of \$39,000.

Disbursements

37 Disbursements claimed are in the amount of \$5,823.93. There is some duplication in respect of the disbursements claimed particularly in regards to facsimiles and photocopies. I would fix total disbursements claimed in the amount of \$5,500.

38 In determining the quantum of costs, I have exercised my discretion with a view to the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure*. In doing so, I have been guided by the overarching principle of what is fair and reasonable under the circumstances. The costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs to the successful litigant. The fixing of costs does not begin or end with the calculation of hours times rate. The overall objective is to fix an amount that is fair and reasonable, having regard to the broad range of factors in Rule 57. An award of costs is not merely a mathematical exercise or a mathematical calculation. Simply multiplying the number of hours by a particular hourly rate does not necessarily produce a fair and reasonable result in respect of the determination of costs. See *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (Ont.C.A.); *Moon v. Sher*, [2004] O.J. No. 4651 (Ont.C.A.); *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 (Ont.C.A.). To do so in this case would not produce a fair and reasonable result.

39 As for the reasonable expectations of the parties, the nature of the TGA case and the issues raised by both TGA and the Cirillos in the companion Cirillo action could not generate anything but significant costs. It was within the knowledge and comprehension of the parties that proceeding with this case to trial together with the Cirillo action would be an expensive proposition and that significant costs would be claimed and eventually fixed by me. Those costs were within the reasonable expectations of the parties. The assertion by the Cirillos that substantial indemnity costs in the TGA action should not be more than \$20,000 all inclusive is unrealistic and is entirely rejected by this court.

DISPOSITION

40 In respect of the TGA claim for costs, I fix total costs in the amount of \$44,500 inclusive of fees, disbursements and GST payable by Francesco Cirillo and Liberata Cirillo to TGA General Contracting & Restoration Inc. within 60 days of this order.

COSTS - CIRILLO ACTION

41 Wawanesa was entirely successful in respect of the Cirillo action which was dismissed without costs.

42 Wawanesa claims partial indemnity costs in the amount of \$68,576.08.

43 In preparing for trial, Wawanesa's counsel reviewed extensive documentation and interviewed all the witnesses. Further, Wawanesa's counsel prepared extensively for the cross-examination of the Cirillos and all of the Cirillo witnesses which were necessary to undermine the Cirillos' claims. Further, Wawanesa's counsel prepared document briefs which assisted the trial judge and the progress of the trial.

44 Wawanesa set out the factors to be considered when awarding costs per rule 57.01(1) of the *Rules of Civil Procedure*. Considering the amount claimed and recovered as required by Rule 57.01(1)(a) and (b) the Cirillos claimed \$200,000 and recovered nothing. Considering the complexity and importance as required by Rule 57.01(c) and (d), the facts were complex and addressed significant damage issues.

45 Throughout the trial Mr. Forget, counsel for Wawanesa, was assisted by several associates and law clerks. It is asserted that the rates charged are consistent with the ranges provided by the Rules

Committee and are more than reasonable under the circumstances. The disbursements totalled some \$6,452.41 as detailed in the Costs Outline.

46 Although directed to do so by my Reasons for Judgment, the Cirillos did not serve and file any written submissions on costs in respect of the Cirillo action. A further time extension was granted unilaterally to file their material. Notwithstanding, the Cirillos failed to file any materials on costs regarding their action. Accordingly, the costs claimed by Wawanesa were unchallenged by the Cirillos.

47 I find that Wawanesa is entitled to its partial indemnity costs. The only issue remaining is one of quantum.

48 I have reviewed the Costs Outline submitted on behalf of Wawanesa. Wawanesa claims fees in the amount of \$59,165.40 together with GST in the amount of \$2,958.27. Disbursements are claimed in the amount of \$6,452.41 for total costs claimed in the amount of \$68,576.08.

49 I have reviewed the disbursements. The largest element contained in the disbursements relate to examination fees/court reports regarding which I do not have any difficulty. The second largest amount relates to outside printing and photo copies. Again, I do not have any difficulty with these charges as they relate largely to the preparation of document briefs which were made exhibits on the trial and copies of which were provided to the court for the assistance of the trial judge. I find the disbursements to be fair and reasonable and fix same in the amount of \$6,452.41.

50 More problematic is the amount claimed for fees in the amount of \$59,165.40. In this regard I am guided by the materials submitted by counsel for Wawanesa which include copies of a very detailed client ledger from May 19, 2005 to October 28, 2009. No Bill of Costs was filed. Rather, various fee items are broken down in the costs outline. What is found is a summary of services provided, the lawyer or clerk providing those services, the number of hours and the hourly rate. Totals involving time spent and by whom were not provided to the court which required me to analyze the total lawyers' time and total clerks' time without the assistance of any such summary from counsel.

51 While I have no difficulty with the partial indemnity rates set out in the Costs Outline, I do find the number of hours spent on this case problematic. I find the number of hours and the services reflected in those hours speak to excess and duplication.

52 Wawanesa's costs submissions reveal that six lawyers and three law clerks worked on this file. The total lawyers' time is as follows:

M.F.	215.1 hours
P.S	62.9
S.D.	46.3
S.K.	5.1
A.D.	42.9
S.M.	8.4
TOTAL	380.7 hours

53 Total clerks' time is as follows:

M.C.	4.7
A.F.	120.4

B.S. 2.1
 TOTAL 127.2 hours

54 The total combined lawyers' and clerks' time spent on this file is 507.9 hours.

55 The lead counsel on this file was Mr. Forget who docketed 215.1 hours. While I do not doubt he and the other lawyers and law clerks docketed the time that they did, I return to those guiding principles set out at paragraphs 38 and 39 herein. The overall objective is to fix an amount for fees that is fair and reasonable having regard to the broad range of factors set out in rule 57 and having regard to consideration of proportionality and application of common sense.

56 Once again, a fair and reasonable assessment of costs is not determined by a simple mathematical exercise of hours times hourly rate.

57 Just as I have considered duplication involved in assessing the TGA costs, I also note that there existed an element of duplication defending the Cirillo claim as there were some common themes running through both actions. I did find Mr. Forget's participation throughout the trial in both the TGA action and the Cirillo action necessary despite the excessive hours spent and some of the duplication that I have noted.

58 For this reason, I assess the fees claimed on behalf of Wawanesa to be higher than those fees ultimately awarded to TGA.

59 Accordingly, after applying the appropriate discount to lawyers' and clerks' time I fix Wawanesa's fees in the amount of \$49,000 inclusive of GST. I find said amount to be a fair and reasonable amount given the issues in both cases, the participation of Wawanesa's counsel in both cases, the overall complexity in respect of the claim against Wawanesa, the amount at stake and the ultimate result.

DISPOSITION

60 In respect of the Wawanesa claim for costs in the Cirillo action, I fix total costs in the amount of \$55,452.41 inclusive of fees, disbursements and GST payable by Francesco Cirillo and Liberata Cirillo to the Wawanesa Mutual Insurance Company within 60 days of this order.

G.P. DiTOMASO J.

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