Case Name:

Tupper v. Van Rooy

RE: Diane Tupper, and
Helen Jacqueline Van Rooy et al.

[2007] O.J. No. 610

155 A.C.W.S. (3d) 534

Court File No. 02-CV-236494 CM1

Ontario Superior Court of Justice

F.J.C. Newbould J.

Heard: January 25, 2007.
Judgment: February 16, 2007.

(11 paras.)

Counsel:

Richard M. Bogoroch for the plaintiff

Martin P. Forget for the defendant

ENDORSEMENT

1 F.J.C. NEWBOULD J.:-- On January 25, 2007 I released my endorsement in this matter dismissing a motion by the plaintiff to set aside an order of Pitt J. dated November 6, 2006. The motion was brought on the basis that the defendant Van Rooy had filed a false and misleading affidavit in the motion heard by Pitt J. I ordered costs to be paid by the plaintiff to Van Rooy. I have now received cost submissions from both parties.

2 Van Rooy claims costs on a substantial indemnity basis on the grounds that the plaintiff alleged, but failed to establish, that she had filed a false affidavit. In my view, Van Rooy is clearly entitled to costs on a substantial indemnity basis. The allegation of a false affidavit is an allegation that the deponent of the affidavit has practised fraud on the court. This allegation of improper con-

duct is prejudicial to the character or reputation of the deponent and is precisely the kind of allegation which, if not proven, commands in order for costs on a substantial indemnity basis. The motion was brought on the basis of a financial statement delivered by Van Rooy pursuant to the order of Pitt J. without any investigation of the nature of the assets disclosed in the financial statement. The statement in her affidavit that was alleged to be false was a statement that she was unable to pay the cost order McWatt J. It was not possible to conclude from the financial statement alone that the statement in her affidavit was false and, as further evidence became available, it was clear that the statement in her affidavit was not false. It would appear to me that the plaintiff in bringing the motion was engaged in hardball tactics.

3 Van Rooy has claimed costs of the motion heard and decided by Master Abrams on January 23, 2007. In my view she is not entitled to include the costs for that motion. In her endorsement, Master Abrams stated that cost submissions could be made to her. The matter of costs for that motion is still before Master Abrams.

4 The plaintiff contends that there should be no costs awarded for the work done prior to January 8, 2007 because on that day Morawetz J. made a cost order dealing with skirmishes prior to the motion that I heard. Morawetz J. ordered that costs for that day fixed at $1000 be payable by Van Rooy in recognition of the fact that in his view the motion should have preceded that day. The plaintiff contends that all of the work on the motion heard by me that was done prior to the order of Morawetz J. was covered by his cost order. I do not accept that submission. The cost order of Morawetz J. was clearly a cost order for that day only. VanRooy is entitled to all proper charges for the work on the motion prior to January 8, 2006 but not entitled to costs of the attendance on that day before Morawetz J.

5 The plaintiff contends that the cross-examinations on affidavits that took place before the motion was heard by Master Abrams should not be payable. I do not accept that submission. The motion before Master Abrams was brought by the plaintiff arising out of alleged failures to answer proper questions put to Ms. Sim on her affidavit and an alleged failure by Van Rooy to attend to be cross examined on her affidavit. As stated, the costs of the motion before Master Abrams are to be dealt with by her. However, the work involved in preparing the affidavit material and cross-examinations that gave rise to the motion can be, and are to be, included in the costs ordered by me to be paid.

6 The plaintiff contends that portions of the affidavit of Ms. Sim were irrelevant or improper and that the work involved in preparing those portions should be excluded from the costs ordered to be paid. I do not accept that submission. If the plaintiff wished to raise that issue, it should have been raised by way of a motion to strike portions of the affidavit as being irrelevant or improper. The plaintiff did not do so. Whether something is irrelevant is debatable, certainly in advance of a motion, and often afterwards as well. I am not prepared to second-guess counsel for Van Rooy in this regard.

7 The plaintiff contends that the proceedings were lengthened by Van Rooy bringing a motion for security for costs. The motion for security for costs was adjourned when the matter came before me. I agree that the cost order should not include any work done by the solicitors for Van Rooy in connection with the motion for security for costs. I understand from the cost submissions made on behalf of VanRooy that they have not included any work for the motion for security for costs in their costs request.

8 The hourly rate claimed on a substantial indemnity basis for Mr. Forget, called in 1998, and Linda Matthews, called in 1997, is $240 and for Ms. Sim, called in 2002, is $175. The plaintiff points out that Rule 1.03(1) defines substantial indemnity costs to mean costs that are 1.5 times what would otherwise be awarded, and that no partial indemnity rates have been provided to calculate the substantial indemnity rate to be allowed. Technically the plaintiff is correct. However, I would not act on this submission. Two-thirds of the hourly rates claimed would be $180 for Mr. Forget and Ms. Matthews and $116 for Ms. Sims. These rates are modest indeed for today's litigation, as are the hourly rates claimed on a substantial indemnity basis. I accept the hourly rates claimed.

9 Van Rooy asks that the costs be payable within 30 days of the cost order to be made. I do not think that is the right thing to do. There is a cost order of McWatt J. outstanding against her, which, at the request of Van Rooy, was ordered by Pitt J. to be payable 30 days after the new trial. The costs ordered by me to be paid should be set off against the cost order of McWattJ.

10 Van Rooy claims disbursements of $624.77. These appear reasonable and are allowed.

11 I cannot tell from the material contained as Appendix A to the costs outline submitted on behalf of Van Rooy what the calculation of the fees should be to reflect my decision on costs and set out in this endorsement. If counsel can agree on the quantum of fees, I will make an endorsement accordingly. If they cannot, counsel for Van Rooy is to submit a revised outline of costs clearly identifying the work that I have indicated is to be allowed. So there can be no misunderstanding, all the work claimed is allowed except for the work which I have indicated in this endorsement is not allowed. The revised outline of costs is to be received by me within 20 days and the plaintiff will have 5 days to make any brief submissions regarding the revised outline of costs. Neither side is to make any further submissions as to whether various items of costs should be allowed. The exercise is solely to identify clearly the work that I have ordered should be covered by my cost order.

F.J.C. NEWBOULD J.

cp/e/qlbxm/qlpwb/qlesm