

ONTARIO

SUPERIOR COURT OF JUSTICE

LUCY BOYADJIAN	)	Ian A. Little, for the Plaintiff
)	
Plaintiff)	
)	
- and -)	
)	
THE REGIONAL MUNICIPALITY OF	)	Zohar R. Levy, for the Defendants, The
DURHAM, THE CORPORATION OF	)	Regional Municipality of Durham and The
THE TOWN OF AJAX, MATTHEW	)	Corporation of the Town of Ajax
LAPENSEE and HEATHER LAPENSEE)	
	)	Shanti Barclay, for the Defendants, Matthew
Defendants	)	Lapensee and Heather Lapensee
)	
)	
	)	Jillian Van Allen, for the Intervenor, LawPro
)	
)	
	)	Ian Little, Agent for Ontario Health
	)	Insurance Plan
)	
)	
	)	HEARD: In-Writing

COSTS RULING

GILMORE J.:

Overview

- [1] This motion was heard October 6, 2016 with reasons delivered November 1, 2016. The plaintiff's motion to amend her claim and increase damages and her motion to withdraw certain statements made by her former counsel at a status hearing were dismissed.
- [2] The defendants' cross motion for amendments to the statement of claim was allowed.
- [3] In this somewhat factually unusual case, the plaintiff's former counsel, Mr. Kirkor Apel, made certain statements during the course of a status hearing on April 28, 2015. I found that the plaintiff was bound by those statements.

- [4] The plaintiff's new counsel sought to set aside those statements and increase the plaintiff's damages claim. As the plaintiff was bound by Mr. Apel's statements, the relief for the requested amendments was dismissed.
- [5] The parties have now provided written costs submissions as requested.

The Positions of the Parties


- [6] The individual defendants (Mr. and Mrs. Lapensee) seek \$18,237.15 in costs. They request this amount on the basis of their success. They also reminded the court that on September 22, 2016 all parties received LawPro's position on behalf of Mr. Apel that the plaintiff was bound by Mr. Apel's statements. These defendants suggested a teleconference to discuss a narrowing of the issues. The co-defendants agreed but plaintiff did not.
- [7] On November 11, 2016 the individual defendants offered to settle costs for \$10,000 before drafting their costs submissions. That offer was rejected by the plaintiff. These defendants suggest that the costs be awarded against the plaintiff and not Mr. Apel. The plaintiff may recover such costs in her negligence action against Mr. Apel.
- [8] The municipal defendants (Durham Region and the Town of Ajax) seek partial indemnity costs of \$5725.90 and take no issue whether the costs are paid by the plaintiff or Mr. Apel. The claim for costs is grounded in their success and the amount sought being a reasonable and fair amount for a pleadings motion.
- [9] The plaintiff seeks her costs of this motion only from Mr. Apel. She reminds the court that this was not a typical pleadings motion and that it was necessary for all parties in the circumstances to have clarification of what the plaintiff was entitled to claim. The plaintiff was essentially "caught in the middle" and the motions were necessary.
- [10] As such the plaintiff seeks a total of \$7726.16 as against Mr. Apel only. While Mr. Apel was not before the court as plaintiff's counsel on these motions he is, by virtue of Rule 37.07(1), a person affected by the orders sought and should be made responsible for the costs.
- [11] LawPro on behalf of Mr. Apel submits that it has not been given a reasonable opportunity to respond to the original motion or the costs submissions as Mr. Apel was precluded from delivering a responding affidavit to the plaintiff's allegations by lawyer-client confidentiality and privilege. Mr. Apel should not be ordered to pay any costs on this motion.

Ruling and Analysis

- [12] This motion was important to the parties as the plaintiff sought to triple her original claim for damages. Certain issues which arose after the service of the motion should have shortened the matter. For example, it was clear from the transcripts filed that the issue related to loss of income should have been decided on consent. As well, once LawPro's
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position was made clear concerning the status of Mr. Apel's statements, a further narrowing of the issues should have taken place.

- [13] The defendants had clear success and, as indicated above, the motion should have been shortened in some aspects. As such, the defendants are entitled to their costs.
- [14] I agree with the plaintiff that the amount sought by the individual defendants is high notwithstanding the somewhat unique factual circumstances. Costs of \$5000 are awarded to both the municipal and individual defendants (for a total of \$10,000) payable by the plaintiff. This costs award is made without prejudice to the plaintiff pursuing such amount in her negligence claim against Mr. Apel.
- [15] I do not order costs against Mr. Apel as sought by the plaintiff. Mr. Apel was unable to adequately respond to the motions or these costs submissions given the lawyer-client confidentiality restraints to which he was subject. It would be unfair to require him to pay costs without allowing an adequate response. The plaintiff retains the right to pursue costs awarded against her in this motion in her negligence claim.



Madam Justice C.A. Gilmore

Released: January 4, 2017

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LUCY BOYADJIAN

Plaintiff

- and -

THE REGIONAL MUNICIPALITY OF DURHAM,
THE CORPORATION OF THE TOWN OF AJAX,
MATTHEW LAPENSEE and HEATHER LAPENSEE

Defendants

COSTS RULING

Madam Justice C.A. Gilmore

Released: January 4, 2017