

CITATION: Popov v. Jones, 2012 ONSC 2373
COURT FILE NO.: CV-10-398179
DATE: 20120425

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SERGIY POPOV, IGOR)
GOLERKANSKY, VALERI)
GOUREVITCH, LIUDMILA)
GRISHANOV, DZMITRY GRISHANOV,)
GENADY KATS, MICHAEL KHARLAB,)
IOURI LOUKIANOV, GENNADY)
MINSKIY, IRINA OBOTNINA, LARINA)
PLANKOVA, SERGEI TKACH, MARINA)
VINOGRADOV, VLADIMIR)
VINOGRADOV, YURI ZABARA, and)
VADIM ZEVLEVER)

Plaintiffs

– and –

MARCEL JONES, SHAWN JONES,)
BLAKE JONES, 1754338 ONTARIO INC.)
carrying on business as EDVAC CAPITAL)
INVESTMENT, and SUDEESH)
SHIVARATTAN)

Defendants

Vadim Kats, for the Plaintiffs/Respondents

Stephen Turk, for the Defendant/Appellant
Shawn Jones

HEARD: March 29, 2012

B. P. O'MARRA J.

REASONS FOR DECISION

[1] There were three motions before this Court on March 29, 2012:

1. An appeal by the Defendant Shawn Jones from the Order of Master Dash dated November 28, 2011.

2. An application to set aside the Order of Master Dash dated January 12, 2012 striking the pleadings of the Defendants Shawn Jones and Marcel Jones.
3. An application for default judgment brought by the Plaintiffs.

[2] After hearing very thorough submissions on the appeal I advised counsel of the following:

1. I reserved on the appeal decision.
2. The other two motions would be brought on another date after release of my decision on the appeal. I am not seized of those two motions.

THE APPEAL

[3] On November 20, 2011 Master Short ordered as follows:

1. Motion to strike the defences was adjourned to January 12, 2012.
2. As a term of the adjournment the Defendants Marcel Jones and Shawn Jones were to pay costs awarded earlier by Justice C. Brown in the amount of \$10,972.19 plus costs of this motion fixed in the sum of \$4,500.
3. The defences will be struck on January 12, 2012 if the costs awards are not paid.

THE ISSUES

[4] The Appellant submits this is not an appeal of a costs order. Based on the terms of a settlement between the former Defendant Blake Jones and the Plaintiff it is submitted there are in fact no costs owing to the Plaintiff. The Appellant raises other issues that I will address.

[5] The Respondent submits this is an appeal from a costs order that requires leave. They submit leave should not be granted, and if granted the appeal should be dismissed.

CHRONOLOGY

[6] It is necessary to outline in some detail the history of these proceedings.

January 26, 2011 – a motion by Plaintiffs for production of bank records was resisted by the three Jones Defendants. Master Glustein ordered the three Jones Defendants to pay costs of \$11,000.

April 5, 2011 – Appeal from the Order of Master Glustein to the Superior Court. Justice Carole J. Brown reserved until June 22, 2011. Before the end of April, 2011 the Plaintiffs settled all claims against Blake Jones for \$40,000. In written submissions as to costs dated April 5, 2011 counsel

for the Plaintiffs referred to the settlement with Blake Jones. Marcel and Shawn Jones appealed the decision of Master Glustein as to costs on the basis that the award should have apportioned liability rather than joint and several. They also appealed the Order to produce documents.

Blake Jones appealed on the issue of costs only. He submitted the award should have been individual as opposed to joint and several and that his share should have been reduced to \$750 all inclusive.

Counsel for the Plaintiffs provided Justice Brown with a copy of a letter advising that total costs were \$10,972.19 with a minimal portion attributed to Blake Jones of \$803.43

May 10, 2011 – Blake Jones signed an Acknowledgement in case documentary evidence later shows his involvement in the fraud whereby the settlement could be set aside.

May 25, 2011 – Plaintiffs release Blake Jones on payment of \$40,000. That figure is not broken down between damages and costs.

June 22, 2011 – Justice Carole Brown dismisses appeals by Defendants and ordered that the costs of \$11,000 remain joint and several against the three Jones Defendants. Justice Brown invited written submissions as to costs.

August 21, 2011 – After review of written submissions Justice Brown orders costs of \$10,972.19 on a joint and several basis.

October 12, 2011 – Motion before Master Dash to strike the defences of Shawn and Marcel Jones for failure to pay costs. Adjourned at request of Shawn Jones.

October 24, 2011 – Counsel for Shawn Jones requests disclosure of trust ledger of Mr. Kats (counsel for the Plaintiffs) to ascertain whether the \$40,000 settlement funds from Blake Jones went to the Plaintiffs or to counsel for his account in this litigation. Mr. Kats declines such production.

November 28, 2011 – Master Dash orders Marcel and Shawn Jones to pay the costs awarded by Justice Brown by January 11, 2012 as well as \$4,500 costs of the day. Shawn Jones had argued that the \$40,000 paid by Blake Jones in settlement can be attributed to the joint and several costs awards of Master Glustein and Justice Brown. If that is correct there were no outstanding costs.

January 12, 2012 – Master Dash orders that defences of Marcel and Shawn Jones be struck since the costs ordered by Master Glustein and Justice Brown had not been paid. They were given a “last chance” to pay by January 12, 2012 and had not done so. The Master indicated that the Plaintiffs should not be obliged to continue to incur costs while the Defendants are allowed to continue to defend when they have not paid outstanding costs awards.

February 1, 2012 – Appeal scheduled on behalf of Shawn Jones was not perfected so it was adjourned to March 29, 2012.

ANALYSIS

[7] A critical issue in this matter is whether this is an appeal of a costs order. No appeal lies without leave of the Court to which the appeal is to be taken where the appeal is only as to costs that are in the discretion of the Court that made the order for costs.

Courts of Justice Act, s. 133(b)

[8] The Appellant submits that the costs awarded by Justice Brown could or should be deemed to have been paid by Blake Jones as part of his settlement. If correct this would satisfy the joint and several liability of the three Jones Defendants for the costs.

[9] The Appellant submits that the \$40,000 paid by Blake Jones is greater than the \$21,972.19 awarded by Master Glustein and Justice Brown and as the costs were joint and several they have been paid in full, particularly as the release included a release from unpaid costs. He submits, correctly, that the Plaintiffs are not entitled to double recovery.

[10] In very thorough reasons released November 28, 2011 Master Dash made the following findings:

1. The settlement with Blake Jones was unclear as to any contributions towards costs. (Justice Brown received a letter dated April 5, 2011 from Mr. Kats that set costs related to Blake at \$803.43)
2. Whether or not settlement funds were used to pay the Plaintiffs’ legal bills is not conclusive or even evidence that the settlement funds included payment in full of the costs awards.
3. Given the joint and several nature of the costs award outstanding at the time of settlement (Master Glustein’s order of January 26, 2011) and the ambiguous reference in the release including unpaid costs Shawn and Marcel Jones, perhaps unfairly, may take advantage of the payment by Blake which, since it exceeds the \$11,000 ordered, may be taken as attributable to those costs to the extent of \$11,000.

4. The \$10,972.19 awarded by Justice Carole Brown cannot be deemed to be paid by Blake as part of his settlement. At the time of the settlement (April and May of 2011) Brown J. had neither decided the merits of the appeal (June 22, 2011) nor costs on the appeal (August 21, 2011).
5. The release refers to “costs therein not paid”. The costs ordered by Brown J. were not extant then and could not be a court award therein not paid.
6. It defies logic to say that settlement funds paid before the Appeal was even decided, costs awarded or amount of costs determined could possibly include those contingent future unknown costs.
7. The \$10,972.19 ordered by Brown J. remains unpaid and the 3 Jones Defendants are jointly and severally liable. The Plaintiffs are at liberty to enforce that award against any or all of the judgment debtors.
8. The \$11,000 order by Master Glustein cannot be enforced against Marcel and Shawn Jones at this time.

[11] Interlocutory decisions of a Master will only interfered with if there was an error or law, or the Master erred in law or exercised his discretion on the wrong principles or misapprehended the evidence such that there is a palpable or overriding error. The standard of review on an error of law is correctness.

Zeitoun v Economical Insurance Group, [2009] O.J. No. 2003.

[12] Justice Brown was informed of the settlement with Blake Jones before ordering joint and several costs against the three Jones Defendants. The motion before Master Dash on November 28, 2011 was to enforce that order and strike the defences in default.

[13] I agree with the analysis of Master Dash dated November 28, 2011 and do not find that he erred I law, nor did he act on any wrong principles, nor did he misapprehended the evidence.

[14] I agree with the Respondent’s position that this appeal is properly characterized as relating to costs and thus requiring leave.

[15] The four part test for leave to appeal a discretionary costs award is as follows:

- (a) the applicant must identify a good arguable case having enough merit to warrant scrutiny of the Court;
- (b) the issues must be important both to the parties and in general;
- (c) the appeal must have practical utility; and

- (d) the court should consider the effect of the delay in proceedings caused by the appeal.

Rona Inc. v. Sevenridge Developments Ltd., [2002] O.J. No. 3983 (S.C.J.) at para. 5.

[16] The Appellant made no submissions on the leave issue since he characterized the proceedings as not relating to costs. I would not grant leave to appeal this costs award. If leave were granted I would not interfere with the award made.

[17] The Appellant also submitted that the Master purported to act under Rule 60.12(b) to strike out the parties' defences when the applicable and more specific Rule is 57.03(2). He submits that the latter does not apply to costs awarded on appeal and thus the award of Justice Brown could not be used to strike the defences.

[18] Rule 57.03 has been found to apply to appeals of orders arising from motions.
Bank of Nova Scotia v. Gillespie, [2008] O.J. No. 2572 (S.C.J.) para. 5.

RESULT

[19] Appeal dismissed. As to costs of this appeal I will consider brief written submissions (no more than 3 pages) sent to Judicial Administration within 10 days of the release of these reasons.

B. P. O'Marra J.

Released: April 25, 2012

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