

2009 CarswellOnt 4984
Ontario Superior Court of Justice

DiBattista*Gambin Developments Ltd. v. Legacy Staffing Services Inc.

2009 CarswellOnt 4984, 179 A.C.W.S. (3d) 1045

DiBattista*Gambin Developments Ltd. (Plaintiff) and Legacy Staffing Services Inc., David Richards, Vanessa Richards and Temps Plus (Defendants)

M. Forestell J.

Heard: May 15, 27, 2009
Judgment: August 25, 2009
Docket: 07-CV-329635SR

Proceedings: additional reasons to *DiBattista*Gambin Developments Ltd. v. Legacy Staffing Services Inc.* (2009), 2009 CarswellOnt 3274 (Ont. S.C.J.)

Counsel: Charles C. Chang for Plaintiff
Shawn M. Philbert for Defendant, Vanessa Richards

Subject: Civil Practice and Procedure

Table of Authorities

Cases considered by M. Forestell J.:

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, (sub nom. *Boucher v. Public Accountants Council for the Province of Ontario*) 71 O.R. (3d) 291 (Ont. C.A.) — followed

Zesta Engineering Ltd. v. Cloutier (2002), 164 O.A.C. 234, 2002 CarswellOnt 3221, 2003 C.L.L.C. 210-010, 21 C.C.E.L. (3d) 164 (Ont. C.A.) — followed

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01(1) — referred to

ADDITIONAL REASONS to judgment reported at *DiBattista*Gambin Developments Ltd. v. Legacy Staffing Services Inc.* (2009), 2009 CarswellOnt 3274 (Ont. S.C.J.), concerning costs.

M. Forestell J.:

1 In my Reasons, released June 8, 2009 in this matter, I indicated that if the parties were unable to agree on costs, I would consider written submissions from both parties. The Defendant has submitted a costs outline in this matter which reflects legal fees and disbursements totaling \$20,011.95 (on a full recovery basis).

2 The Plaintiff submits that there should be no costs awarded or alternatively that there is no basis for full recovery costs and that the reasonable costs of the motion are in the range of \$2,500.00.

3 The Defendant Vanessa Richards brought the motion to set aside the default judgment, noting in default and finding of contempt. She was wholly successful on the motion. The defendant had filed affidavits setting out her address and the fact that she had not been served with the statement of claim. She was not cross-examined on her affidavits. The Plaintiff relied on the affidavits of its process servers. These did not support personal service but service on an address associated with the other defendant. No further details were sought by the Plaintiffs from the process servers. The Plaintiffs filed no factum or Book of Authorities on the motion. Counsel for the plaintiff in oral argument was unable to point to any authority capable of supporting his position that the default judgment should not be set aside. In my view this was because there was no such authority and the position taken by the Plaintiff was untenable in law.

4 Under Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 I must consider, *inter alia*, the conduct of any party that tended to shorten or lengthen unnecessarily the duration of any proceeding. In this case, the conduct of the Plaintiff clearly lengthened the proceedings unnecessarily. The Plaintiff should bear the costs of the motion and those costs must reflect the additional costs occasioned by the unreasonable position taken by the Plaintiff.

5 As Armstrong J.A. has explained in *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.) the fixing of costs involves more than merely a calculation using the hours docketed and the costs grid. As Armstrong J.A. put it at para. 24 of *Boucher*, "it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable". He reiterated what the Court had said in *Zesta Engineering Ltd. v. Cloutier* (2002), 164 O.A.C. 234 (Ont. C.A.) at para. 4: "In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant."

6 In this case, the defendant seeks to recover the "exact measure" of the actual costs. While the conduct of the Plaintiffs should result in costs consequences, I do not agree that the amount claimed of approximately \$20,000.00 is a fair and reasonable amount in the circumstances of a fairly straightforward motion.

7 I have considered the written submissions of both parties and, in particular the following factors: (1) the defendant's success in the matter; (2) the fact that the motion required counsel to attend for a day and a half; (3) the importance of the matter to the defendant; (4) the experience level of counsel; and, (5) the conduct of the Plaintiff in prolonging the motion.

8 Applying the approach taken in *Boucher* and *Zesta Engineering Ltd.* I conclude that the amount of \$7,500.00 is reasonable in all of the circumstances. Disbursements of \$354.00 have been requested but no details have been provided in spite of the submissions of the Plaintiff. In the circumstances I make no award for disbursements.

9 In the result, I order costs fixed at \$7,500.00 for legal fees, plus G.S.T., payable by the Plaintiff to the Defendant within 30 days.

Order accordingly.