

CITATION: Moore v. Kemgni, 2022 ONSC 4722
COURT FILE NO.: CV-21-86202
DATE: 2022/08/15

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN: DEIRDRE MOORE, Plaintiff

-and-

PAULE KEMGNI and JONATHAN KISKA, Defendants

BEFORE: Justice Heather J. Williams

COUNSEL: Plaintiff, Self-Represented

Anne Tardif and Francois Guay-Racine, for the Defendant Dr. Kemgni

Charlotte S. Watson, for the Defendant Mr. Kiska

HEARD: In writing

COSTS ENDORSEMENT

[1] Dr. Kemgni, a physician, sought a stay of Ms. Moore’s claim against her on the basis that Ontario lacks jurisdiction or, if Ontario has jurisdiction, that Ontario is not the proper forum for the proceeding, Quebec being the more appropriate forum.

[2] Dr. Kemgni had conducted a court-ordered psychiatric assessment of Ms. Moore in a Quebec hospital in 2019. Ms. Moore alleged that Dr. Kemgni had been negligent in several respects, in part because Dr. Kemgni had ignored Ms. Moore and in part because Dr. Kemgni had relied on information provided by the defendant Mr. Kiska when she knew that Ms. Moore and Mr. Kiska were involved in an acrimonious divorce proceeding.

[3] In an endorsement dated April 7, 2022, I granted Dr. Kemgni’s motion and stayed Ms. Moore’s action.

[4] Dr. Kemgni now seeks partial indemnity costs of the motion in the amount of \$12,474.77, inclusive of disbursements and HST.

[5] Ms. Moore, who is self-represented, also seeks costs of the motion. In the alternative, Ms. Moore asks that costs be reserved until the conclusion of the action against Dr. Kemgni. I understand this to refer to the conclusion of the action Ms. Moore has now started against Dr. Kemgni in Quebec, as Dr. Kemgni's involvement in this action, the action before me, has now been concluded.

[6] Ms. Moore opposes Dr. Kemgni's request for costs. In her written costs submissions, Ms. Moore described the hourly rates charged by Dr. Kemgni's counsel as "highway robbery". Ms. Moore also said, correctly, that in a case in which she was involved last year, a judge had determined that it would be cold-hearted, meaningless and mean to award costs against her.

[7] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, provides that the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court. Although discretionary, a court must fix costs on a principled basis. (*Davies v. Clarington*, 2009 ONCA 722, at para. 40.) Rule 57.01(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, sets out the factors the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing, in exercising its discretion under section 131 of the *Courts of Justice Act* to award costs. The Court of Appeal has made it clear that the fixing of costs does not begin and end with a calculation of hours times rates. It says the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay rather than an amount fixed by the actual costs incurred by the successful litigant. (*Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.), at para. 26.)

[8] I am satisfied that, as the successful party in this case, Dr. Kemgni is entitled to costs. There is no reason to award costs on a basis other than partial indemnity and Dr. Kemgni does not suggest otherwise. There is no basis for awarding Ms. Moore either costs or a \$5,000 "bad faith" payment she has requested or for waiting until Ms. Moore's Quebec action against Dr. Kemgni has been concluded before awarding costs in this action.

[9] Turning to the relevant factors under Rule 57.01(1), I do not consider the partial indemnity hourly rates charged by Dr. Kemgni's counsel (\$240 for Ms. Tardif, who was called to the Bar in 2006 and \$135 for Mr. Guay-Racine who is a 2019 call) to be unreasonable. Mr. Guay-Racine's hours were more than twice those of Ms. Tardif, suggesting work was properly delegated to the less expensive professional. Dr. Kemgni's counsel characterized the issues before the court as moderately complex while Ms. Moore described the motion as complex. I do not consider the time spent by Dr. Kemgni's counsel to be excessive in relation to the complexity of the issues. Further, Dr. Kemgni's counsel prepared court documents in French but then, as a courtesy, provided Ms. Moore with English translations and did not claim time for the translation.

[10] Ms. Moore is correct that in December 2021, one of my judicial colleagues refused to make a costs award against her, saying that to do so would be "cold-hearted, meaningless and just mean." The comments were made in the context of a Divisional Court appeal in a child protection case. The judge described Ms. Moore as a victim of her mental health problems. I am not without sympathy for Ms. Moore, and I am sure that she has limited financial resources. That said, I do not consider my colleague's comment in the child protection appeal to have been intended to give Ms. Moore *carte blanche* to initiate and pursue future legal proceedings without costs consequences. The case before me is not comparable to the child protection appeal: The case before me did not relate to Ms. Moore's children. Further, Ms. Moore could have consented to Dr. Kemgni's motion and started an action against Dr. Kemgni in Quebec months earlier than she did. Instead, Ms. Moore chose to oppose Dr. Kemgni's motion. I also note that in the child protection appeal, a different judge on the Divisional Court panel would have awarded \$18,000 in costs against Ms. Moore.

[11] For these reasons, I find that an award of partial indemnity costs against Ms. Moore is appropriate. In the circumstances, I consider \$10,000, inclusive of disbursements and HST, to be a fair and reasonable amount for Ms. Moore, as the unsuccessful party, to be ordered to pay.

Disposition

[12] Ms. Moore shall pay Dr. Kemgni partial indemnity costs in the amount \$10,000, inclusive of disbursements and HST.

A handwritten signature in black ink, appearing to read "H. J. Williams", written over a horizontal line.

Justice H. J. Williams

Date: August 15, 2022

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BETWEEN: DEIRDRE MOORE, Plaintiffs

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BEFORE: Madam Justice Heather J. Williams

COUNSEL: Plaintiff, Self-Represented

Anne Tardif and Francois Guay-Racine,
for the Defendant Dr. Kemgni

Charlotte S. Watson, for the Defendant
Mr. Kiska

COSTS ENDORSEMENT

Justice Heather J. Williams

Released: August 11, 2022