**CITATION**: Vallie Construction Inc. v. Carol Minaker, 2012 ONSC 4577
**Court File No.** 09-CV-371831
Release Date: August 08,2012



**SUPERIOR COURT OF JUSTICE**
**IN THE MATTER OF THE CONSTRUCTION LIEN ACT, R.S.O. 1990, C.c.30**

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| **B E T W E E N:** | ) | |
| **VALLIE CONSTRUCTION INC.** | ) | **Ms. Angela Assuras, for the Plaintiff and Defendant by Counterclaim** |
| **Plaintiff** | ) | |
| **- AND -** | ) | |
| **CAROL MINAKER** | ) | **Mr. Lorne Levine, for the Defendant and Plaintiff by counterclaim (not counsel at trial)** |
| **Defendant** | ) | |

**Heard: On Written submissions**

**MASTER SANDLER**

**[1]** My Reasons ruling on the substantive issues in this action were released on May 18, 2012. At para. [249], p.223, I dealt with the issue of costs and made a preliminary ruling that since success was divided, there should be no order as to costs. However, I reserved the right of both parties to make written submissions on this issue,

especially if there had been rule 49 offers to settle. I asked for a costs submission from plaintiff's counsel, to be served and filed within 20 days of May 18 and any reply submission within 15 days thereafter. Twenty days following May 18 was, at the latest, June 8, 2012.

**[2]** I also dealt with the issue of pre-judgment interest at para. [248], p. 222, and fixed a rate of 3.3% in accordance with s. 128(1) of the C.J.A., with a total pre-judgment interest award of $1326.70 up to May 18 (from Feb.5/09-date of statement of claim-to May 18/12--3 years and 102 days), and $1.10 per day thereafter until the formal report is signed by me. I also fixed the post-judgment interest rate at 1.3% in para. [250], p.224 of my Reasons, in accordance with s. 129(1) of the Courts of Justice Act. I did not make a provision for further submissions on pre- and post-judgment interest issues as I did not think there would be any controversy about them but since these issues were not addressed by counsel during argument, further submissions are appropriate and have now been received and must now be addressed by me.

**The Defendant's First-Delivered Submission**

**[3]** Sometime prior to June 11, 2012, the defendant terminated the retainer of her then lawyer-of-record. Then, in a letter dated June 11, following 20 days after the said May 18 date and with no costs submissions having been received from plaintiff's counsel, she wrote to the court making five submissions on what she called "troubling findings which are difficult to understand". These "findings" dealt with substantive issues in the case and are set out at various places in my trial Reasons. This part of this letter is a violation of Rule 1.09 dealing with a restriction on communications with the court, and is not in accordance with what I permitted as to further submissions. All I allowed in my trial Reasons, at para. [249], were further communications dealing with costs. I therefore will ignore what is written on pages 1 and 2 of this letter.

**[4]** As noted above, since as of June 11-12, no costs submissions had been delivered by plaintiff's counsel, Minaker, now acting in person, was entitled to make submissions on costs and these submissions are contained on pages 3 to 5 of her said letter. In summary, her submissions are outlined in the following paragraphs.

**[5]** Firstly, she submits that the claim should have been brought in Small Claims Court (S.C.C.). Had it been brought in that court, it "would most definitely have been settled within the 1st year" and "in turn, legal fees on both sides would have been substantially less" and she "would have been allowed to present information which was to have been part of Phase 2 of this Trial", and the prejudgment interest rate would have been lower at "0.5%", and there was "divided success". I deal with this submission later in these Reasons, at para.'s [38]-[42], where I note that the defendant's new lawyer, Mr. Levine, also makes this submission. I reject this submission.

**[6]** Further, she sets out a chronology of how this case moved through the Superior Court, from the start of this action on Feb. 5, 2009 through to the first mediation session on Dec. 22, 2009, and thereafter, through to Jan. 4, 2011 when the case came up before Justice Stinson for trial at which time he directed that this case be referred to a master at Toronto for trial, and then through to May 18, 2012 when I released my Reasons for Judgment. She argues that the court system allowed this case to "drag on and on" and was "inefficient". I assume this point goes to the number of hours that both lawyers had to spend in conducting this case and therefore, the large amount of costs to her, both party-and-party and lawyer-client, and also goes to the issue of the period of time during which prejudgment interest is to run. This submission has no merit. The plaintiff should not be penalized for any perceived systemic delay that the defendant believes exists. As a matter of fact, the time this case took, from the issuance of the statement of claim until the end of the trial before me, 2 years and 7 months in all, is quite reasonable.

**[7]** Further, she refers to "several offers to settle" that were made by her to Vallie but apparently, because no others are described by her, only one was ever made **in writing**, being an offer to settle dated Feb. 18, 2010, for $12,000 inclusive of claim, interest and costs. What she fails to disclose in her submission is that this offer was **revoked** by a letter from her then lawyer dated April 7, 2010, which is revealed in the plaintiff's reply submission. I deal with this submission later in these Reasons at para. [44] where I note that Mr. Levine also makes this same submission. I reject this submission.

**[8]** Lastly, she makes certain submissions on my award of pre-judgment interest. On p. 3 of her submission letter, she argues that the pre-judgment interest rate should not be 3.3%, as I allowed, but rather, at best, 2.5% which is the rate for the first quarter of 2009 according to the relevant "chart". She noted that the statement of claim was issued on Feb. 5, 2009, which was in the first quarter of 2009 and contends that this is the proper applicable rate.. Thereafter, the rate dropped to 1.3% in the second quarter and was at or below 1% for all of 2010, and has been at 1.3% all through 2011 and 2012 right up to the present. She therefore asks, as her first position, that the rate be averaged at 1.1% and that this rate be used to calculate the award of pre-judgment interest. She also claims, as I noted above, that there was great delay in the court system's handling of this case and therefore, much of the time from Feb. 5/09 to May 18/12 should be ignored in calculating the pre-judgment interest award. In my trial Reasons, I calculated the award of interest on the basis of 3 years and 102 days from Feb. 5/09 up to May 18/12. She implies that some of this elapsed time should be excluded because of systemic delay but does not suggest what this excluded time period should be. I would think she would be satisfied with a one year exclusion, thus making the awarded pre-judgment interest period one of only 2 years and 102 days during this period of Feb. 5/09 to May 18/12. This would

reduce the pre-judgment interest award by $404.83 leaving a balance of $921.87 rather than $1326.70.

**[9]** I deal with these arguments about pre-judgment interest later in these Reasons, beginning at para. [58].

**[10]** In her said letter, she also asks about "payment by instalments", and how payment is to be made, and how she can get back her exhibits. She now has a new lawyer-of-record, Mr. Levine, and he can advise her on these questions. Rule 59.07 may be resorted to if a final informal payment procedure cannot be worked out between Mr. Levine and Ms. Assuras. The release of those exhibits that belong to her can only be returned once the appeal period has gone by and there has been no appeal and plaintiff's counsel consents to such release.

**The Plaintiff's Submissions**

**[11]** The plaintiff's Costs Submissions are dated June 13, 2012 and were received late in the day on June 13. The plaintiff makes a number of submissions which I now summarize as follows.

**[12]** First and foremost, since the plaintiff was successful in part, costs should follow the event. Since the plaintiff succeeded in proving that some money was owing by the defendant to the plaintiff, (albeit only about 33% of its original claim), it should be awarded its costs.

**[13]** In addition, it is submitted that the plaintiff was successful on the critical issues, namely, whether or not the plaintiff properly terminated the contract when it wasn't paid anything on the requested instalment of Oct. 28, and whether or not the plaintiff wrongfully abandoned the contract and was in breach of contract as the defendant alleged, and whether or not the plaintiff was entitled to be paid by way of instalments. (On this last-mentioned issue, I note that there

was no issue about whether the plaintiff was entitled generally to be paid in instalments. The only issue was whether the plaintiff was entitled to be paid the 6th instalment when she was asked for it on Oct.28, and how much that instalment should have been for, and whether she was obliged to try and negotiate a reasonable amount for this instalment payment rather than refusing to pay any further amount at that time. On this last issue, the defendant lost.) So again, the plaintiff argues that it should get its partial indemnity costs as claimed.

**[14]** In addition, it is submitted that the defendant was largely unsuccessful on her counterclaim so the plaintiff should get its claimed costs. The defendant was claiming $50,000 (not $100,000- see my explanation below at para. [38]); she recovered $1500. (On this point, I note that originally, her counterclaim was to be tried in Phase 2 but I refused to allow this Phase to proceed for the reasons set out at para's [232] to [244] of my Reasons, and I assessed a value of $1500 for the counterclaim, at para. [245], without hearing all Minaker's evidence on all the alleged deficiencies. This was done by me in an effort to arrive at a fair result without burdensome costs to the parties and without overburdening the court's limited resources. This result was not requested by plaintiff's counsel. The plaintiff can hardly claim credit for it and the defendant should not be penalized because I chose to adopt this solution.)

**[15]** As an alternative, it is submitted that the court should **apportion costs** and the plaintiff should be awarded costs of the action, and the defendant should be awarded costs **on the specific issues on which she was successful.** I will set out my ruling on this submission at this point in these Reasons rather than wait until I have described all the plaintiff's submissions to facilitate the overall understanding of these Reasons.

**[16]** What plaintiff's counsel suggests here is called a "distributive costs order". But the Court of Appeal has ruled that such an order is rarely, if ever, appropriate: see Oakville Storage & Forwarders Ltd. v. CNR (1991), 5 O.R. (3d) 1, (Ont. C.A.) and Skye v. Mathews (1996), 47 C.P.C. (3d) 322, (Ont. C.A.).

**[17]** However, see Laven Associates Ltd. v. Price (1993), 20 C.P.C. (3d) 86 (Ont. Gen. Div.) where, because the plaintiff's recovery on its claim of $73,785 was reduced by just over 10% of that claim because of the defendant's success of $7605 out of a claimed amount of $94,140 on its counterclaim, the court ruled that a 10% reduction in the costs that otherwise would have been awarded to the plaintiff was appropriate. In that case, also a construction contract case, the plaintiff was claiming $73,785 for landscaping services **and recovered the full amount it had claimed**. The defendant claimed that the work was done improperly, and that it had overcharged for some items, and that the defendant had to hire others to repair alleged defects in the plaintiff's work. These allegations raised 15 issues, some of which contained several elements. The defendants counterclaimed for $94,140; they were successful on 3 items to the extent of $7605 (which was just over 10% of the plaintiff's claim) and this amount was accordingly set-off against the plaintiff's claim. Sheard J. observed that lawsuits such as the one he was dealing with, (and as I am dealing with), in which there are several separate issues, present problems in dealing fairly with costs. He discussed the principle of distributive costs and noted the judgment of the Court of Appeal in the Oakville case, supra, which ruled that such an order was what he termed "generally outdated". He held that it would not be a just result if the plaintiff were to recover its full costs which would include time spent on issues which were decided against it. He felt that about 10% of the time of the trial was spent on issues on which the plaintiff was unsuccessful. He referred to Rules 57.01(1) and 57.01(4) and reduced the plaintiff's costs award by 10%. The facts in that case are quite different from the facts in the case before

me where the plaintiff has only recovered just over 36% of its claim before taking into account the defendant's allowed counterclaim of $1500, and 33% after netting out the allowed counterclaim.

**[18]** I also faced a difficult issue of costs, where success was divided in a construction contract/lien case, in Peter Lombardi Construction Inc. v. Colonnade Investments Inc. (2001), 6 C.L.R. (3d) 244 at pp. 254-2588, para.'s 54-70. In that case, where there were two related actions by the same plaintiff against related corporate defendants represented by the same counsel, over two related construction projects, and where the plaintiff recovered 66% of its claim on one project and 85% of its claim on the other project, I allowed the plaintiff 80% of its costs overall with the reduction of 20% being given as a credit to the defendants to reflect the success they had on various issues.

**[19]** In construction cases, it is often the case that the plaintiff-contractor claims a certain amount as owing on a contract but only recovers a reduced amount, either because the actual contract amount owing is found to be less than the amount claimed because of findings on what amount or amounts were actually agreed to by the parties, or because of rulings that are made favourable to the defendant-owner on disputed payments (usually cash payments), or because claims by the contractor for "extras" are disallowed for one reason or another, or because of a allowed set-off to, or counterclaim by, the defendant for actual or anticipated costs to repair deficiencies. In such cases, the court allows a set-off or applies Rule 27.09(3) to give judgment for the net balance. In these situations, a court could allow the plaintiff to recover its full costs, **or** could allow the plaintiff to recover a certain percentage of its costs based on the percentage that the recovery bears to the amount claimed, **or** could possibly award costs partially to the plaintiff and partially to the defendant based on which party was successful on which issues or on what ultimate amounts each recovered on their respective claims, **or** could allow no costs to either

the plaintiff or the defendant where it can be said that success was divided. To what extent success was "divided" would, in my view, be the critical question to be answered. The above-noted types of costs orders are expressly authorized by rules 57.01(1) (a) and (b) and 57.01 (4) (a) and (b). I think that Carthy J.A. in the Oakville case, supra, when discussing his criticism of "distributive" costs orders, was referring to costs orders that are based on an "issue-by-issue" analysis of success as between plaintiff and defendant. The other possible costs-orders choices, above-mentioned, can be seen in many reported cases to have been made from time to time and are expressly authorized by the above-noted costs rules. Which costs ruling choice is made is ultimately in the discretion of the trial court. But the choice would clearly be influenced by the **extent to which a trial court has reduced the plaintiff's final claimed amount, as set forth at the opening of trial, by its rulings.** I mention the amount being claimed "at the opening of trial" because often, the **amount claimed in the statement of claim** has been **lowered** by plaintiff's counsel during the discovery process or during the preparation-for-trial phase and the defendant has been advised in a timely way. In my example, the plaintiff's claim has been reduced by the trial court either because of adverse court rulings on plaintiff's final claim, or because of court rulings in favour of the defendant's set-off or counterclaim, or both. I emphasize that I am, in this case, dealing with a construction contract claim where specific liquidated claims are being made. There may well be different considerations where a court is dealing with other types of damage claims such as tort claims where general damages are claimed, or breach-of-contract claims where general damages are claimed, or wrongful dismissal claims, where, in each case, the plaintiff is successful on liability issues but not successful to the extent of 100% of its claimed amount of damages. In the present case, the plaintiff was ultimately successful to the extent of only 33% of its opening-of-trial claim and the defendant was successful in resisting 67% of this claim. (As noted earlier, these percentages take into account the plaintiff's final recovery after netting out the award on the counterclaim.)

**[20]** Accordingly, I rule against the plaintiff's alternative submission that costs should be apportioned and awarded on some sort of "issue-by-issue" basis. This submission is probably being made by plaintiff's counsel because the plaintiff **succeeded on the key issue** of **whose fault it was that this contract was terminated** before final completion of the renovation, and because it also succeeded on **some** of the other numerous issues that had to be ruled on, all as set forth in my trial Reasons.



## The Conduct of the Defendant-Rule 57.01(1)(e),(g),(i)

**[21]** In a further submission, the plaintiff relies on Rules 57.01(1) (e) and (g) and (i) and certain described conduct of the defendant to support its claim for costs.

**[22]** Firstly, plaintiff's counsel argues that the trial was prolonged by the defendant raising issues that were irrelevant or untenable; these are detailed at para. 3 on page 2 of the plaintiff's costs submissions. While these issues were ultimately unsuccessful, I do not agree that raising them was improper.

**[23]** Secondly, she argues that the defendant made serious and unfounded accusations that the plaintiff's witnesses were "deceitful" and were "liars" and were "dishonest" and these accusations were never proven. Again, the defendant's complained-of conduct did not fall outside of what is permitted in contesting a lawsuit. As has been said many times before, a lawsuit is not a "tea-party".

**[24]** Thirdly, she argues that the defendant was "hostile" and refused to answer proper questions on cross-examination, and testified that key documents (both hers and the plaintiff's) that went against her oral testimony were "mistakes". This conduct goes to issues of, and my

findings on, credibility, but I am not going to rely on this complained-of conduct in deciding what my costs order should be.

**[25]** Fourthly, she argues that the defendant tendered irrelevant expert evidence that had to be rebutted by the plaintiff's expert evidence. Further, the defendant's expert evidence was unsatisfactory and the details are set out at para.6, p.3 of the plaintiff's costs submission. Reliance is placed on what I said in my reasons about this evidence. However, I think that the defendant was entitled to raise issues about the value of the plaintiff's work that was done, as these issues go to the question of the measure of damages to which the plaintiff was entitled. I will not rely on this conduct in deciding what my costs order should be.

**[26]** Fifthly, she argues that the defendant wrongly objected to the plaintiff's use of a "chart" prepared by plaintiff's counsel as an "aide memoire" for the court. There is no merit in this submission.

**[27]** Sixthly, she argues that the conduct of the defendant prior to the litigation commencing is worthy of sanction when it comes to costs. she notes that the court found that the plaintiff was entitled to be paid $13,000 to $14,000 as of Oct. 28, 2008, that the plaintiff was willing to negotiate about this amount to around $10,000, and was willing to finish the job if a reduced amount had been paid, but the defendant refused to negotiate and compromise resulting in this lengthly and costly litigation. Again, I will not take this conduct into account in deciding on my costs ruling. The defendant was wrong in what she did but this conduct is not deserving of extra sanctions when it comes to costs aside from a consideration of who won and who lost.

**[28]** Seventhly, she argues about the conduct of the defendant during the litigation. The defendant's counterclaim was unmeritorious. And she should have sued for her claim in the Small Claims Court rather than

asserting an unmeritorious counterclaim for $50,000 in Superior Court. There is no merit in this submission. Once the plaintiff started its action for $37,000+/- in the Superior Court, which was the right court, keeping in mind that, as of Feb./2009, the jurisdiction of the Small Claims Court was limited to claims for $10,000 or less, the defendant was correct in asserting her claim as a counterclaim in this action. Any other approach would have resulted in an unsatisfactory multiplicity of proceedings.

**[29]** Eighthly, she argues that the defendant refused efforts by plaintiff's counsel to narrow the issues. And Minaker failed to prepare a Scott Schedule or respond to the plaintiff's Scott Schedule as ordered by the court. Here, the plaintiff relies on the factors set forth in Rule 57.01(1) (e) and (i). Again, this conduct is not worthy of sanction as to costs in this case. If the plaintiff's counsel felt that the defendant had not complied with my orders for trial management, she could have moved for the appropriate relief.

**[30]** Ninthly, she argues that the defendant forced the plaintiff to call a witness from York University to prove defendant's work attendance record for the period in question rather than obtain the record herself and admit it without further formal proof. Here again, the plaintiff relies on Rule 57.01(1) (g). Again, this conduct is not worthy of a costs sanction in this case.

**[31]** Tenthly, she argues that the plaintiff made some pre-trial offers to settle (no specifics given) but acknowledges that none were less than the amount awarded. And the defendant refused the plaintiff's efforts to meet to discuss settlement. After the first day of trial, (Sept. 12/2011), the plaintiff offered in writing to settle for $18,000 inclusive of interest and costs, to be paid by Sept.30, and this offer was open for acceptance until 1 minute after the cross-examination of the defendant was to begin. It was not accepted. The plaintiff further notes that the defendant made an offer to settle on Feb.18, 2010 that

the defendant would pay $12,000 inclusive of interest and costs but this offer was revoked on April 7, 2010. This offer was made just after a rule 76 pre-trial was held on Jan.18, 2010 whereat the trial was fixed to start on June 7, 2010, but was later adjourned to start on Jan. 4, 2011. The plaintiff further notes that the plaintiff recovered $12,267.45 plus pre-judgment interest of $1326.70 up to May 18, 2012=$13,594.15 plus about another $100 interest up to Aug. 18, 2012 (by which time the formal Report should be signed). By this submission, I assume that the plaintiff is arguing that it recovered **more than** this offer, without taking into consideration any possible award of costs. However, it seems to me that the plaintiff would have been much better off if it had accepted this offer during the period that it was open for acceptance--Feb.18 to Apr.6, 2010--(almost 2 months) keeping in mind its own legal fees and disbursements incurred since Apr. 6, 2010 that it has paid or will have to pay as detailed in the Bill of Costs attached to its Costs Submission. Presumably, plaintiff's counsel has set out these offers to settle in her submission because of the provision in the opening words of Rule 57.01 (1) that a court can consider, inter alia, "any offer to settle…made in writing". But, in my view, these offers don't help the plaintiff as it attempts to obtain a costs order in its favour.

**The Plaintiff's Bill of Costs and Actual Claim for Costs**

**[32]** The Bill of Costs is attached as part of the Costs Submission. The plaintiff's counsel spent about 177 hours up to the end of the trial. Her hourly rate to her client is shown as $330/hr. Her total "Fees" claim is $33,357 so her partial indemnity rate appears to be ($33,357 divided by 177=) about $188.50/hr. GST/HST on this "Fees" amount is $1667.85. I note that part of this case was in the GST regime and part in the HST regime which started on July 1, 2010 but how this amount of $1667.85 is calculated is not shown. The total of these amounts is $35,024.85.

**[33]** As to disbursements, plaintiff's counsel claims $6375 for the expert reports and for the expert testimony in their affidavits and at trial, plus a further $6055.88 for miscellaneous disbursements, plus GST/HST on these of $712.95, for a total of $13,143.03. Total fees and disbursements and GST/HST =$48,167.88. This Bill is said to be on a "Partial Indemnity Scale". But on p. 5 of the plaintiff's Costs Submission, the plaintiff's counsel requests costs of only "$22,000 inclusive". So the actual claim for costs is about 45% of what the Bill of Costs shows but no explanation is given for this claimed amount of $22,000. Perhalps counsel is recognizing that since the plaintiff only recovered 33% of its claim, it should get only 48% of its costs. Of course, I have not accepted that the proper amount for 100% of the costs is $48,167.88 as claimed. Keeping in mind the general principles that govern the quantification of costs as laid down in the leading well-known and oft-cited Court of Appeal cases, I think this amount claimed of $48,167.88 is far too high as a starting point before starting to reduce it by an appropriate percentage, be it 48% or 33% or some other percentage. However, it will only become necessary to determine the proper quantum of costs if I come to the conclusion that my preliminary ruling should be changed and that the plaintiff should recover any amount for costs.

**The Submissions of the Defendant's New Lawyer-Dated June 25, 2012**

**[34]** The defendant retained a new lawyer, Mr. Lorne Levine, just prior to June 22, 2012 and a Notice of Change of Lawyer was served and filed on or about June 26-27. Mr. Levine delivered defendant's cost submissions on June 26. These are in addition to his client's own submissions of June 11 above-described. The defendant has therefore delivered two sets of costs submissions but, under the circumstances, I will consider this second submission which directly responds to the plaintiff's submissions of June 13.

**[35]** Mr. Levine submits that there should be no order as to costs and makes eight points.

**[36]** Firstly, he submits that the plaintiff recovered only about 1/3 of its original claim, that my preliminary ruling was correct, and that there should be no order as to costs. My response is as follows. The exact amounts of the original claim, and the recovered amount, and the percentages of success and failure, and the degree of success of the defendant, have already been detailed above. This divided success was the main factor that I took into account in arriving at my preliminary ruling at para. [249] of my trial Reasons.

**[37]** Secondly, he submits that the defendant on Oct. 27, 2008, as shown by her e-mail of that date, knew that $12,147.38 would be required to be paid to complete the project which amount is very close to the $12,267.45 amount that the plaintiff recovered. The problem with this observation is that the defendant at no time ever offered to actually pay over this amount of $12,147.38, or any lesser amount, thus leading to what I have found to be the rightful termination of the contract on Oct.28-29-30, 2008, as detailed in my Reasons.

**[38]** Thirdly, he submits that the plaintiff should have taken steps to transfer this action to the Small Claims Court (S.C.C.) once the monetary jurisdiction of that court was increased to $25,000 as of Jan. 1, 2010, since the true value of the plaintiff's claim has been shown to be only $12,147.38. My response is as follows. As to the transfer of Superior Court actions to the S.C.C., s. 23(2) of the C.J.A. allows the local registrar of the Superior Court to transfer a Superior Court action to the S.C.C. if the claim **is within**, or possibly, as in this case, **becomes within** the S.C.C. jurisdiction **and if all parties consent.** Here, the original claim was $37,549 and the new S.C.C. jurisdiction was increased to $25,000 only as of Jan. 1, 2010, some 11 months **after** the statement of claim had been issued. But there was a counterclaim of $50,000. (Plaintiff's counsel asserts in her reply submission, at para. 3, p.2, that the counterclaim was $100,000 but I

have re-read the defendant's pleading and I think a fair interpretation is that she was claiming $50,000 even though the sum of $50,000 is mentioned twice.) This counterclaim was the basic amount for Simplified Procedure claims and counterclaims as of April, 2009, when the defendant delivered her statement of defence and counterclaim. Looking at the relevant S.C.C. Regulation, O. Reg. 439/08 and Form 10A, what is called a counterclaim in the Superior Court is called a "Defendant's Claim" in that court and, prior to Jan. 1, 2010, the jurisdictional limit was $10,000, and after that date was $25,000, so this counterclaim of $50,000 **could not have been heard** in the S.C.C. and so a transfer under s. 23(2) could not have been made even if the plaintiff had been willing to reduce its claim to $25,000 or less after Jan. 1, 2010. There is nothing to show that had the plaintiff been willing to reduce its claim, the defendant would also have agreed to reduce her counterclaim accordingly.

**[39]** As to transfers by court order, the cases of Shoppers Trust v. Mann Taxi (1993), 16 O.R. (3d) 192 and Graves v. Avis Rent A Car (1993), 21 C.P.C.(3d) 391 hold that a judge of the Superior Court has inherent jurisdiction to transfer a Superior Court action to the S.C.C. without the consent of all parties, i.e., where one party objects. But in both those cases, the **amount actually claimed was within** the jurisdiction of the Superior Court when the actions were commenced but thereafter, the jurisdiction of the S.C.C. was increased to **exceed** the amounts being claimed and so, the courts there held that the actions should be transferred. However, in the present case, the amount actually claimed **always exceeded** the jurisdiction of the S.C.C. even after it was increased to $25,000. So until it was decided, after the trial here, that the amount claimed was too high and that the proper amount of the claim was only a net of $12,147, it could not have been known that the proper amount of the plaintiff's claim would have been within the jurisdiction of the S.C.C. And again, there is no evidence that the defendant would not have objected to such a transfer, especially in the light of her $50,000 counterclaim. The problem of a counterclaim that exceeded the

S.C.C. jurisdiction was not considered in either of the above-noted "transfer" cases.

**[40]** As well, the impact of a large counterclaim was not considered or indeed relevant in the "transfer" case of Ali v. Schrauwen [2010] O.J. No. 1671; 2011 ONSC 2158, a decision of Master MacLeod dated Apr. 2, 2011. There, as here, the plaintiff was claiming an amount **in excess of the then limit** of the S.C.C., namely, damages of $31,000 and properly started his action in the Superior Court under the Simplified Procedure at a time (Nov,/08) when the S.C.C. jurisdiction was $10,000. After the S.C.C. jurisdiction was increased to $25,000, (Jan. 1, 2010), the plaintiff decided, sometime in 2011, after his case had been listed for trial and pre-tried, and after a fixed trial date had been cancelled by the court, to limit his claim to $25,000 and to seek to transfer his action to S.C.C. He planned to act in person in that court and probably, one of his motivations for the transfer, was the cost of his lawyer's legal fees in the Superior Court action. One of the defendants objected to the transfer based on a potential delay in the trial if a transfer were ordered, and based on a concern about the costs to date that would be thrown away, and based on what was argued to be the less rigorous evidentiary requirements in the S.C.C., and based on the limits on recovering costs in the S.C C.-15% of the amount of the recovery. Master MacLeod made the order notwithstanding. But in that case, the plaintiff **abandoned** his claim in excess of $25,000 and **there was no counterclaim** to worry about so that case is quite different from the one before me. Here, with the claim and counterclaim left intact, a court could not have ordered a transfer to the S.C.C.

**[41]** Regrettably, Mr. Levine just makes a bald submission that the plaintiff should have taken steps to transfer this action to the S.C.C. without referring me to any of the governing statutory or caselaw, as I have set out above, which show that this could not be done without major reductions to the claim and counterclaim. And, of course, such reductions could not have been compelled to be made.

**[42]** Further, there were attendances by both parties and their lawyers before Master Brott and Justices Himel and Roberts for settlement purposes, and before Justice Stinson for trial, and, as far as I am aware, at no time did the defendant ask or even suggest that this case be transferred to the S.C.C. If the defendant thought this is what should be done, she should have at least raised it before one of these courts who might have been able to persuade both parties to reduce their claims so the case could be transferred. I therefore reject this submission.

**[43]** Fourthly, he submits that the plaintiff's record-keeping and billing methods and "invoicing" were confusing to the defendant and that this was a major cause of the payment dispute. My comment here is that if she really was confused by the invoices, called "receipts", all she had to do was ask for clarification from the plaintiff. There is no evidence that she asked for clarification and was refused or that had she asked, she would have been refused. There is evidence that she didn't pay much attention to the plaintiff's documentation until her Oct. 27 e-mail. There is no merit to this submission.

**[44]** Fifthly, Mr. Levine relies on the defendant's offer to settle for $12,000, described above, and **concedes**, in his submission, that it was **withdrawn**, but he fails to disclose that it was withdrawn on April 7, 2010, less than 2 months later, and 2 months before the original trial date of June 7, 2010, and that no further offers were forthcoming from April 7, 2010 to the actual start date of the trial before me on Sept.12, 2011. I am not relying on this ineffective offer of the defendant to deprive the plaintiff of its costs even though the offered amount compares well with the plaintiff actual recovery.

**[45]** Sixthly, Mr. Levine relies on rule 57.05(1) which provides that "If the plaintiff recovers an amount within the monetary jurisdiction of the Small Claims Court, the court may order that the plaintiff shall not recover any costs".

**[46]** Mr. Levine further relies on a costs decision of Justice D.A. Broad in Shakur v. Mitchell Plastics [2012] O.J. No. 1345; 2012 ONSC 1780, a costs endorsement dated March 16, 2012. In that case, the plaintiff was making a claim for damages for wrongful dismissal. It is not clear from the reasons how much the plaintiff was claiming but it **seems that it was well in excess** of the then S.C.C. limit of $10,000 as of April, 2009 when the action was started. The plaintiff properly started a Simplified Procedure claim. As noted earlier, the S.C.C. jurisdiction was increased to $25,000 as of Jan. 1, 2010. The trial before Justice Broad took place either in early 2012 or late 2011; exactly when is not clear. But, in any event, the plaintiff actually recovered $12,514 which was well within the new $25,000 S.C.C. jurisdictional limit as it became on Jan. 1, 2010, about 2 years before the trial. And so the plaintiff did recover an amount within the jurisdiction of the S.C.C. even though, when the action was started, the recovered amount was not within the then S.C.C. $10,000 jurisdictional limit. So even if the plaintiff there, in April/2009, assessed his claim at somewhere between $12,000 and $13,000, which range would have covered his actual recovery of $12,514, he still could not have started his action in the S.C.C. But Justice Broad stated, in para.1 of his reasons, that the plaintiff should have considered transferring his Superior Court action to the S.C.C., sometime **after** Jan. 1, 2010. Presumably, Broad J. had in mind a transfer either under s. 23(2)(b), C.J.A., if the plaintiff abandoned his claim in excess of $25,000 or by a motion to a judge, relying on the Shoppers and Graves cases, above noted. He held that "There does not appear to be any exception [in Rule 57.05(1)] for cases which were commenced prior to the increase in the jurisdiction of the Small Claims Court."

**[47]** He further held that "…the policy behind Rule 57.05(1) applies regardless of when the action was commenced, in reference to the change in monetary jurisdiction of the Small Claims Court." He noted that the policy is based on the fact that… "The Superior Court

of Justice is currently overburdened with cases"… and… " Parties should not be rewarded with costs in matters that should have been properly brought in another forum designed to handle claims of a specific magnitude or monetary value, such as the Ontario Small Claims Court."

**[48]** He further held that the recovered amount in the case before him was not even close to the line of the monetary jurisdiction of the S.C.C., i.e. was well **below** $25,000. He further held that if a plaintiff has made a deliberate decision to bring or continue (his emphasis) the proceedings in the Superior Court where it is clear that the S.C.C. has jurisdiction, then save in exceptional circumstances, the plaintiff should recover no costs.

**[49]** He further held that… "The rules on costs are designed, at least in part, to encourage parties to realistically assess the merits and value of their cases as early as possible in the process in order to relieve the burden of the costs of litigation, if possible, not only on the parties, but on the public."

**[50]** For all the above reasons, he ordered, pursuant to Rule 57.05(1) that there be no costs. The plaintiff was seeking costs of $21,409.07.

**[51]** I have also considered a discussion of this rule in the text, The Law of Costs, Second Ed., by Mark Orkin, Can. Law Book, Vol. 1, Ch.2, para. 210., "Costs Where Action Brought In Wrong Court", at pp. 2-153 to 2-154.3 and the myriad of cases cited in footnotes 693 to 703.2.

**Plaintiff's Cost Submissions in Response to the Defendant's Cost Submissions Dated June 25, 2012 (the Levine Submissions)**

**[52]** Ms. Assuras responds to Mr. Levine's submission that I described above, in para. [47], that suggests that Minaker was always willing to

pay $12,147.38 and that the plaintiff was not willing to accept that instalment payment. Her response is in para.'s 1 and 2 of her response submission but it is not necessary for me to summarize what she says since I have not accepted Mr. Levine's submission.

**[53]** Ms. Assuras responds to Mr. Levine's submission about the failure of the plaintiff to transfer its action to the S.C.C. by arguing that this would have led to the plaintiff's claim being tried in the S.C.C. but the counterclaim being tried in the Superior Court and describes the problems this would have created. I have already rejected Mr. Levine's submission on this point so it is not necessary to comment on Ms. Assuras' point, set out in para. 3 of her submission, but she does there recognize the problem that Minaker's counterclaim would cause in a transfer attempt and that Minaker could not be compelled to have her $50,000 counterclaim tried in the lower court.

**[54]** Ms. Assuras responds to Mr. Levine's submission on the application of Rule 57.05(1) by arguing that it would be unfair to apply this rule to deprive the plaintiff of its costs when the action, including the counterclaim, **could not have been started in or transferred to** the S.C.C. She further submits that the case of Shakur v. Mitchell relied on by Mr. Levine is distinguishable because there, there was no counterclaim at all, let alone one for an amount in excess of the S.C.C.'s jurisdiction. I note that **if** there had been no counterclaim in the present case, the case would have been exactly like the Shakur case because, after the S.C.C. jurisdiction was increased to $25,000, the plaintiff here should have assessed the value and merits of its $37,000-odd claim, and reduced it to under $25,000, since it was only worth $12,000-odd as it turned out, and moved it to the lower court. This is what rule 57.05(1) is designed to encourage plaintiffs to do. But here, that could not have been done.

**[55]** Ms Assuras further responds to Mr. Levine's reliance on Rule 57.05(1) by arguing that there is a discretion as to whether to apply it or not as is shown by the use of the word "may" in the rule. And there

are cases where costs, even significant costs, were awarded even though the ultimate recovery was within the S.C.C.'s jurisdiction. The critical factor is whether it was reasonable for the plaintiff here to have continued its action in the Superior Court after Jan. 1, 2010. While Ms. Assuras does not expressly say so, I think that, keeping in mind the myriad of issues that were in play, just those raised by the plaintiff's claim and the defendant's statement of defence and ignoring the counterclaim, and the amount of testimonial and documentary evidence that was tendered at trial, and the length of time this trial took at 5 days just for the cross-examinations and argument, and the fact that it would have taken in my view 10 days ( Stinson J. thought 6 to 8 days) if no order had been made by me for all the direct evidence to be given by affidavit, and how problematic it would have been for the S.C.C. to try such a long case, and the expertise of the masters at Toronto who do construction lien work to deal with this kind of house renovation case (even though this was not a construction lien case), which expertise was recognized and relied on by Justice Stinson as the reason why he referred this case for trial to the Master at Toronto, I find that it was reasonable for the plaintiff to continue this action in this court after Jan. 1, 2010 and therefore, I will not deprive the plaintiff of its costs because of rule 57.05(1).

**[56]** Ms. Assuras replies, in para.'s 5 and 6 of her reply submission, to Mr. Levine's points about offers to settle and what he says are claims for "minimal amounts" that are set out in his Submission, at para. 2(h) and by me above at para. [44]. She describes the plaintiff's attempts at settlement and notes that the defendant's one offer to settle was withdrawn. I have already ruled, at para. [44] above, that the offers that were made, or were not made, are not a valid reason in this case to deprive the plaintiff of its costs.

**[57]** Having considered all the costs submissions as above described, I have come to the conclusion that my preliminary ruling as to why the plaintiff should not recover any costs should stand. I exercise my

discretion as to costs under s. 131(1) of the Courts of Justice Act based, as I have previously said, on what I see as **divided success** and on the often-applied ruling that there be no costs in cases where success has been divided.



**Issues Relating To Pre-Judgment Interest**

**[58]** Mr. Levine, in his letter of June 26, 2012, that accompanied his Costs Submissions, submits that I was in error in awarding a pre-judgment interest rate of 3.3% and that I should have set the rate at 2.5% pursuant to sections 127(1) and 128(1) of the Courts of Justice Act and the "chart" for pre-judgment interest rates for causes of action arising after Oct. 23, 1989 which he enclosed. He argued that since the statement of claim was issued on Feb.5, 2009, I should have used the 2.5% rate that is shown for the "first quarter" of 2009. His client made the same submission, as I have set forth at para. [8] above. But Mr. Levine has misread s.127(1) which defines "prejudgment interest rate" to mean "the bank rate at the end of the first day of the last month of the quarter preceding (my emphasis) the quarter in which the proceeding was commenced…" Therefore, I am to use the rate for the quarter preceding the first quarter of 2009, which is the last quarter of 2008, and that rate is 3.3% and so my choice of rate was correct.

**[59]** Ms. Assuras also made a further submission by letter dated July 10, 201 on the rate of pre-judgment interest that I should use, responding to Mr. Levine's (erroneous) submission. She argues that my choice of 3.3% was correct because s. 128(1) of the Act entitles the plaintiff to seek pre-judgment interest from the date the cause of action arose and, in this case, it was Oct. 28, 2008, and it is this date, and not the date the statement of claim was issued (Feb. 9, 2009) that matters when choosing the rate.. She notes that the "chart" rate for the last quarter of 2008 is 3.3%. This submission confuses the "rate" of prejudgment interest with the date **when** pre-judgment interest is to start. S. 128(1), in dealing with **when** pre-judgment interest is to

start, provides that it is to be "calculated from the date the cause of action arose…" In my Reasons of May 18, at para. [248], I started the pre-judgment interest calculation on Feb. 5, 2009, the date the statement of claim was issued. I did this because this is my usual start date for pre-judgment interest because of the difficulty in some cases of trying to figure out when the cause of action arose. Also, I had heard no submissions from counsel on pre-judgment interest as these issues and costs issues are usually dealt with once the trial reasons have been released. Also, in this case, the time frame between when the cause of action arose and the date the statement of claim was issued was only about 97 days. The per diem pre-judgment interest amount is $1.10 so the spread is 97 x $1.10=$106.70, a trivial amount when all the other issues in this case are considered. And Ms. Assuras has never complained about my interest start date of Feb. 5/09. But the point is that Ms. Assuras has got the **right** rate for the **wrong** reason. As noted above, the correct statutory rate is 3.3% being the rate for the quarter preceding the quarter in which the action was started.

**[60]** As I have noted above, at para. [9] of these reasons, the defendant in her June 11, 2012 letter requested, inter alia, that I average out the quarterly rates that run from a high of what she says ought to have been 2.5% but what should , in fact, be 3.3%, to a low of 1.3% (all as per the "chart"). This works out, she claims, to be an **average** of 1.1% but is really, based on my calculation, 1.24%. The difference between the presumtive statutory rate of 3.3% and 1.24% is 2.06%. Neither Ms. Assuras nor Mr. Levine made any submissions on this averaging request.

**[61]** The relevant statutory provisions for allowing interest at a rate lower than that provided for in s. 128(1) are ss. 130(1)(b) and 130(2)(a) of the Courts of Justice Act.

**[62]** The leading case on this topic is Novakovic v. Kapusniak [2008] O.J. No.1890, ONCA 381 (Ont. C.A.). There, the pre-judgment rates for the 5-year period from Dec. 2000, when the action was commenced, to Sept. 2005, the date of judgment, fluctuated between a high of 6% in Dec. 2000 to a low, in 2002, of 2.3%. The average for the time period in question was 3.4%.

**[63]** The court held as follows:

> "Trial judges sometimes average prejudgment interest rates over the time period between the commencement of the action and the obtaining of judgment. This is particularly appropriate where the prejudgment interest rates fluctuate widely. The onus is, however, on the parties seeking a different rate than that imposed by the statute to justify the imposition of that different rate. I do not think the fluctuations in issue in this case are sufficient to hold that some averaging of the prejudgment interest rate was essential. Clearly, the trial judge could have averaged the rate, but, in my view, she did not err in not so doing."

**[64]** See also Data General (Canada) Ltd. v. Molnar Systems Group Inc. (1992) 6 O.R. (3d) 409; 3 C.P.C. (3d) 180 (Ont. C.A.) where the statutory rate of 13% was reduced to 11% because the interest rate during the relevant period was often substantially below the statutory rate.

**[65]** And see Graham v. Rourke (1991) 75 O.R. (2d) 622 (Ont. C.A.). There, the trial judge fixed the pre-judgment interest rate at the statutory rate of 12% and declined to set the rate at a lower figure. The Court of Appeal held that a trial judge must exercise a discretion in determining the appropriate pre-judgment rate under s. 130 of the Courts of Justice Act. However, a party is prima facie entitled to pre-judgment interest at the rate prescribed in ss. 127 and 128 of the Act. The onus is on the party seeking a higher or lower rate to justify a

deviation from the "presumptive rate". The court relied on its earlier judgment in Spencer v. Rosati (1985), 50 O.R. (2d) 661; 1 C.P.C.(2d) 301, at pp. 664-65 O.R.

**[66]** In the Graham v. Rourke case, there was a 4% fluctuation in the relevant rates during the operative time period but the key factor was said to be the extent of the fluctuation. In that case, the rates fluctuated between 9% and 12%. The average rate was 10.85% so there was a difference of 1.15% between the statutory rate and the average rate. Both the trial judge and the Court of Appeal held that the relatively mild fluctuations and the small difference between the two possible rates did not merit a departure from the statutory presumptive rate.

**[67]** In the present case, the presumptive statutory rate is 3.3%. The average rate is 1.24%. The deviation is therefore 2.06%. I find that the fluctuations over the period from late 2008, at 3.3%, to the current rate of 1.3%, as can be seen from the "chart", are relatively mild, and the difference between the two possible rates of 3.3% and 1.24% is small. Accordingly, I refuse to exercise my discretion under ss. 130(1)(b) and 130(2)(a) to allow a pre-judgment interest rate lower that the presumptive statutory rate.

**[68]** I should note that there was nothing in the circumstances of this case or the conduct of the plaintiff that should be taken into account under s. 130(2)(b) or (f) as a basis for lowering the statutory rate.

**Conclusion**

**[69]** My rulings in para.'s [247], [248] and [249] of my trial Reasons are thus confirmed. My directions as to the preparation of the formal Report, set out in para. [250], should be reviewed by counsel. I bring to Mr. Levine's attention, the cases of Chrysler Credit Canada Ltd. v.

734925 Ontario Ltd. (1991), 5 O.R. (3d) 65 (Master) and Folkes v. Greensleeves, [2002] O.J. No.1231; 159 O.A.C. 99 at para. 31 (Ont. C.A.) about approving draft orders. The pre-judgment interest amount set out in para. [248] of my trial Reasons must be updated. From May 19 to Aug.22 is an additional 96 days @ $1.10/day=$105.60 so that the total interest amount will be $1326.70+$105.60=$1432.30. Again, the post-judgment interest rate will be 1.3% and will start from the date of the report onwards. The date of my Report will be Aug.22 which is the earliest date I can sign the report as I am away on holidays from Aug.9 to 21.

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Master David H. Sandler

DHS/dhs
Released: August 9, 2012

CITATION: VALLIE CONSTRUCTION INC. v. CAROL MINAKER
2012 ONSC 4577
Court File Number 09-CV-371831
Release Date: August 09, 2012



ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

VALLIE CONSTRUCTION INC.
PLAINTIFF

AND

CAROL MINAKER
DEFENDANT

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REASONS FOR JUDGMENT
ON COSTS ETC.

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MASTER D.H. SANDLER

RELEASED: AUGUST 09, 2012