

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Probert Construction Inc., Plaintiff/Defendant by Counterclaim
AND:
Trez MR Holdings (Ontario) Ltd., Defendant/Plaintiff by Counterclaim
BEFORE: MacNeil J.
COUNSEL: *P. Bakos* – Lawyer for the Plaintiff/Responding Party
P. Holdsworth – Lawyer for the Defendant/Moving Party
HEARD: December 9, 2022 (via Zoom videoconference)

REASONS FOR DECISION

OVERVIEW

- [1] The Defendant/Plaintiff by Counterclaim, Trez MR Holdings (Ontario) Ltd. (“Trez”), made two separate motions, one filed in the within action (“the Strasburg Action”) and the second in a related proceeding, CV-21-944 (“the Lucan Action”), seeking an order:
- (a) that Antonio Bertucci (“Mr. Bertucci”), the representative of the Plaintiff/Defendant by Counterclaim, Probert Construction Inc. (“Probert”), answer undertakings given on his cross-examination held pursuant to section 40 of the *Construction Act*, R.S.O. 1990, c. C.30 (“the *Construction Act*”), on May 13, 2022;
 - (b) that Mr. Bertucci answer questions refused or taken under advisement on his cross-examination;
 - (c) that Mr. Bertucci re-attend on behalf of Probert for further oral examination on all answers provided in response to undertakings and questions refused or taken under advisement;
 - (d) granting leave to bring the within motion for security for costs; and
 - (e) that Probert pay security for costs into court in respect of the Strasburg Action in the amount of \$57,412.02, and in respect of the Lucan Action in the amount of \$144,258.90.
- [2] Prior to the hearing of the motions, the examination issues as described in items (a), (b), and (c) above were resolved. As a result, the only issues argued before me were:

- (i) Should Trez be granted leave to bring the within motion for security for costs?
- (ii) If so, should Probert be ordered to pay security for costs?

BACKGROUND

- [3] This matter relates to two construction lien actions commenced by Probert in respect of claims for payment for labour and materials supplied to the improvement of two separate properties: 581 Strasburg Road, Kitchener (“the Strasburg Property”); and 144 Lucan Street, Waterloo (“the Lucan Property”).
- [4] On April 9, 2021, Probert registered liens on title to both properties. Those lien claims were perfected on or about July 16, 2021 with the serving and filing of statements of claim.
- [5] Trez took steps to vacate the liens in both actions. On or about May 5, 2021, Trez obtained an order vacating the Strasburg lien by depositing certified funds in the amount of \$287,060.09, plus the sum of \$57,412.02 as security for costs. And, on or about August 12, 2021, Trez obtained an order vacating the Lucan lien by depositing certified funds in the amount of \$721,294.50, plus the sum of \$144,258.90 as security for costs.
- [6] Trez also discharged two other liens against the Lucan Property. One, registered by Probert’s subcontractor, Regulus Structures Inc. (“Regulus”), in the amount of \$35,376.54; and the second, registered by a subcontractor of Regulus, Scott Chambers (“Chambers”), in the amount of \$77,817.45. Trez paid a total of \$141,492.49, inclusive of \$28,298.50 as security for costs, to vacate these liens. Trez asserts that it paid Probert, in trust, for the work performed by Regulus and Chambers and that Probert failed to pay them as it was required to do.
- [7] Trez contends that Probert has failed to pay other subcontractors as well – Green Construction Inc. (“Green Construction”), Delta Elevator Co. Ltd. and Oxford Interiors – that supplied labour and materials to the Lucan project. Trez learned of Probert’s failure to pay its subcontractors after Trez had advanced, on February 23, 2021, almost \$60,000.00 to Probert as an advance against the payment of a draw. In late April 2021, Trez paid Green Construction \$116,710.00 for claims it may have had for payment from Probert, in order to avoid a further lien being registered on the Lucan Property.
- [8] On January 5, 2022, Trez served its defence and counterclaim to the Lucan Action and, on February 22, 2022, Trez served its defence and counterclaim to the Strasburg Action.
- [9] By email dated July 22, 2022, counsel for Trez wrote to Probert’s counsel stating that Trez had good reason to believe Probert may have insufficient assets in Ontario to satisfy an adverse award of costs in the Strasburg and Lucan Actions. He requested that Probert provide information to show that it has sufficient assets, failing which Trez would bring a motion for security for costs. Trez submits that Probert’s counsel did not respond to this request.

[10] On August 17, 2022, Trez served the within notices of motion.

ISSUES

[11] The following issues are to be determined:

- a. Should Trez be granted leave to bring the within security for costs motion?
- b. If so, should Probert be ordered to pay security for costs?

ANALYSIS

(a) Should Trez be granted leave to bring the within security for costs motion?

[12] Pursuant to Rule 56.01(1)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court may make an order for security for costs as is just where it appears that the plaintiff is a corporation and there is good reason to believe that it has insufficient assets in Ontario to pay the costs of the defendant.

[13] The purpose of security for costs is “to even the playing field by ensuring that an ‘insolvent plaintiff should not be given risk-free opportunities to pursue litigation’”: see *Proxema Ltd. v. Birock Investments Inc.*, 2016 ONSC 5686, at para. 15.

[14] Trez requires leave to bring its motion for security for costs by virtue of s. 13 of O. Reg. 302/18: Procedures for Actions Under Part VIII, made under the *Construction Act*. Section 13 reads:

13. Interlocutory steps, other than those provided for under the Act, shall not be taken without the consent of the court on proof that the steps are necessary or would expedite the resolution of the issues in dispute.

[15] Where it is shown that there is good reason to believe that a corporate plaintiff does not have sufficient assets in Ontario to pay the defendant’s costs, the defendant has met the test of “necessity” for leave under (what is now) s. 13 of O. Reg. 302/18: see *Proxema*, at para. 14.

[16] In *City Commercial Realty (Canada) Ltd. v. Bakich*, [2005] O.J. No. 6443, 2005 CarswellOnt 10512 (Ont. C.A.) (In Chambers), at paras. 7-9, Lang J.A. discussed the issue of what satisfies the “good reason to believe” threshold as follows:

- 7 Under rule 56.01(1)(d), the moving party is not required to establish that a corporation has insufficient assets to pay costs, but only to establish that there is good reason to believe that the corporation has insufficient assets to pay the costs. As Philp J. noted in *737071 Ontario Inc. v. Min-A-Mart Ltd.*, [1996] O.J. No. 1173 (Ont. Gen. Div.) at para. 5: “This lighter onus is based on the belief that it would be unfair to insist that the defendant prove something that is within the knowledge of the plaintiff.”

- 8 Even though the onus is a reduced one, the moving party must still provide enough information about the corporation to raise a belief of insufficiency that goes beyond mere conjecture, hunch, or speculation. As Master Haberman said in *Websports Technologies Inc. v. Cryptologic Inc.* (2004), [2003] O.J. No. 5455 (Ont. Master) at para. 8:

While all agree that this subrule places a higher onus on corporate plaintiffs, the phrase “good reason to believe” must have some meaning. In my view, it involves something more than a hunch or a concern. There must be some evidence placed before the court from which the court can accept that the concern is genuine and that it is based on proven facts regarding the corporation’s current financial circumstances. A bald assertion that a party has insufficient assets, on its own, cannot satisfy the first part of the test. If that was all that was required, motions of this kind would be brought to “test the waters”, in all cases where a plaintiff corporation alleges that the defendant’s action has caused it to sustain a significant loss, with no information as to the state of a company’s financial affairs and no legitimate basis for concern. The 2-part test, with the initial onus on the moving party, is intended to discourage parties from bringing these costly motions without actual grounds. While the moving party need not go so far as to prove that there are insufficient assets, they must, at least, prove facts from which a court can conclude that there is good reason to believe that that is the case.

- 9 To support an insufficiency of assets, it has been said that the moving party must raise a reasonable belief that the corporation is without “real, substantial and exigible” assets: *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, [1994] A.J. No. 313 (Alta. Q.B.). In *671122 Ontario Ltd.*, *supra*, this court quoted with approval the Divisional Court’s reasons holding that it is proper “to consider critically the quality as well as the sufficiency of the assets presently held and whether or not they are bona fide assets of the company”. To be sufficient, the corporation’s assets may be tangible or intangible but must be of such a nature that their realizable net value is sufficient to meet the amount of costs to be secured.

- [17] As well, in *Wilson Young & Associates Inc. v. Carleton University et al*, 2020 ONSC 4542 (CanLII), at para. 47, Master Fortier discussed the quality of evidence required on this sort of motion:

Even though the onus on a motion for security for costs under rule 56.01(1)(d), is a reduced one, the defendant must nevertheless provide enough information about the corporation to raise a belief of insufficiency that “goes beyond mere conjecture, hunch, or speculation”. The Defendants must show “indicia of insolvency” or “instability, “such as a failure to make corporate filings, unpaid judgments or liabilities, a temporary dissolution, a significant disposition of assets” or a shell company. [Citations omitted.]

Position of Trez

- [18] Counsel for Trez argues that there is good reason to believe that Probert has insufficient assets in Ontario, and that the test of “necessity” has been met, based on the following facts and grounds:
- (i) Probert’s subcontractors have registered liens against the Lucan Property and commenced actions alleging that Probert has failed to pay them for work done.
 - (ii) Probert has failed to diligently prosecute either the Strasburg Action or the Lucan Action since perfecting the lien claims in July 2021.
 - (iii) Probert has refused to produce, or delayed in producing, relevant documents to substantiate its lien claims in the Strasburg Action and the Lucan Action.
 - (iv) Probert’s “previous need for an advance on Draw 14”.
 - (v) Probert has not provided Trez with information to substantiate that it has sufficient assets.
 - (vi) Trez has posted security and/or paid directly over \$1.15 million relating to Probert’s lien claims and claims made by Probert’s subcontractors.

Position of Probert

- [19] Probert argues that Trez has failed to show either necessity or that the motion would expedite the resolution of the issues in dispute. It argues that the evidence does not establish that there is good reason to believe that Probert has insufficient assets in Ontario to satisfy Trez’s costs. To the contrary, it contends that the affidavit evidence of Mr. Bertucci establishes that Probert “currently has several ongoing projects in the Province of Ontario ... significant accounts receivables on several of its ongoing and past projects... [and] owns construction heavy equipment, scaffolds and several tools, all of which are in the Province of Ontario”. It submits that the court should accept Mr. Bertucci’s evidence in this regard since he was not contradicted or challenged on cross-examination. Probert further submits that it was not obliged to provide its financial information when requested for same by Trez’s counsel. Rather, it must only provide such information if Trez meets its onus of satisfying the court that there is good reason to believe that Probert has insufficient assets which, it submits, Trez has not. As well, Probert argues that it has brought a counterclaim on the same facts as the main action and that the law is settled that security for costs will not be awarded in such situations: *European Flooring Contract Services Ltd. v Toddglen ILofts et al.*, 2013 ONSC 6445 (CanLII), at paras. 33-34. Finally, Probert submits that Trez has not provided a bill of costs to support the amount it is seeking in security.

Discussion

- [20] Trez must first satisfy the court that it appears there is good reason to believe that Probert has insufficient assets in Ontario to pay Trez's costs if it is ultimately successful. If Trez establishes good reason to believe that Probert lacks sufficient assets, it will have met its threshold onus and it will also have established necessity and be entitled to leave. Following that, the onus shifts to Probert to demonstrate that an order for security for costs would be unjust.
- [21] In my view, the evidence provided by Trez does not rise above mere speculation. Apart from the inferences that Trez draws from the fact of the lien claims made against Probert, there is no material evidence as to Probert's insufficiency of assets. There is no evidence of insolvency or instability, such as unsatisfied judgments or liabilities, or that Probert has failed to meet its financial obligations in ways other than the disputed lien claims. There is no evidence of any investigation made into Probert's financial status, including title searches or corporate filings.
- [22] While very general in nature, Mr. Bertucci's evidence as it relates to Probert continuing to operate and having assets in Ontario was uncontroverted. The fact that there are lien claims against it is not disputed by Probert. I accept Probert's submission that the existence of such liens is not, in and of itself, evidence of insufficient funds, and that there can be valid reasons for contractors and subcontractors to disagree on payment and for lien claims to be filed.
- [23] For the foregoing reasons, I find that Trez has not met its onus to show that there is "good reason to believe" that Probert has insufficient assets to satisfy a costs order. As a result, the evidentiary burden does not shift to Probert to show that it has sufficient assets or to show that it is impecunious and it would be unjust for its action not to be allowed to proceed.
- [24] Accordingly, leave is refused to Trez to bring the motion for security for costs.

(b) If so, should Probert be ordered to pay security for costs?

[25] Given my refusal to grant leave for the security for costs motion, it is not necessary for me to address this second issue.

DISPOSITION

[26] The motion for security for costs is dismissed, without prejudice to Trez being able to make another motion in the future on further and better evidence.

COSTS

[27] Given the divided success on the entirety of the two motions, I find that it is fair and reasonable for the parties to each bear their own costs of the motions and so no costs are awarded.

MacNEIL J.

Released: March 3, 2023