

**CITATION:** 2496300 Ontario Inc. v. Farm Mutual Reinsurance Plan Inc., 2023 ONSC5178  
**COURT FILE NO.:** CV-18-609080  
**DATE:** September 13, 2023

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** 2496300 Ontario Inc. v. Farm Mutual Reinsurance Plan Inc.;

**BEFORE:** ASSOCIATE JUSTICE C. WIEBE

**COUNSEL:** Atrisha Lewis and Christine Windsor for Farm Mutual Reinsurance Plan Inc.  
("FMRP");  
Sunira Chaudhri, Shelby Matthews and Tiana Perricone for 2496300 Ontario Inc.  
("249");

**HEARD:** September 7, 2023.

**REASONS FOR DECISION**

[1] The defendant, FMRP, brings this motion for an order requiring the plaintiff, 249, to post security for FMRP's costs of this action in the amount of \$214,122.60. FMRP relies upon Rule 56.01(1)(d), namely the rule which specifies that a court may order security for costs "as is just" where it appears that the plaintiff is a corporation and "there is good reason to believe" that the plaintiff has insufficient assets in Ontario to pay the defendant's costs.

[2] 249 resists the motion. It does not dispute that FMRP has established the first part of the test. It does not assert that it is impecunious. It argues that it would not be just to order the requested security for the following reasons: FMRP delayed unreasonably in bringing the motion; FMRP caused 249's insufficiency of assets by failing to pay properly in lieu of notice upon the termination of the subject contract; and 249 has a good chance of success in its claim.

**BACKGROUND**

[3] The motion material shows the following undisputed facts.

[4] Prior to 2016 FMRP had janitorial service contracts with three companies formed by the principals of 249, Kenneth Winer and Patricia Newdorf, stretching back to the mid-1990s. The two were married and had children, and did the work required by these contracts. They are now apart.

[5] 249 was incorporated by Mr. Winer and Ms. Neudorf on December 16, 2015. On January 20, 2016 FMRP entered into a written contract with 249 whereby 249 would perform property management services for FMRP at its premises at 350 Pinebush Road, Cambridge, Ontario from January 1, 2026 to December 31, 2016, and for successive one year terms until the termination of the contract. The contract specified that 249 would receive a fixed fee every month, and that the

contract could be terminated by either party on 30 days written notice or by remitting the equivalent in payment in leu of notice. Mr. Winer and Ms. Neudorf signed the contract for 249 turning down the chance to get independent legal advice.

[6] On September 15, 2017 FMRP terminated the contract giving a 45 day written notice. In addition, FMRP offered a collateral contract which offered 249 the equivalent of three months' worth of fees for staying on call for an additional 30 days. 249 rejected this collateral contract.

[7] On November 16, 2018 249 commenced this action seeking \$550,000 in damages for wrongful dismissal and breach of contract, which amount represents compensation for 24 months of notice. On January 7, 2019, using a law firm other than its present one, FMRP delivered a statement of defence.

[8] On May 1, 2019 249 was dissolved under the *Business Corporations Act* for failing to file a "notice of change." Ms. Neudorf learned of this dissolution in 2020 but did nothing about it thinking it was a scam. 249 did not inform FMRP of this dissolution. The parties prepared and exchanged affidavits of documents and productions.

[9] In August, 2022 FMRP hired its present lawyers. There was correspondence about having Mr. Winer and Ms. Neudorf added as plaintiffs. That addition did not take place. In January, 2023 examinations for discovery were scheduled for April, 2023.

[10] In January, 2023, FMRP's law firm also did a corporate search of 249, as was its normal practice in preparing for discoveries. 249 produced supplementary affidavits of documents in January and February, 2023.

[11] On April 10, 2023, shortly before the scheduled discoveries, FMRP's lawyers examined the corporate search, became aware of the 249 dissolution and informed 249 accordingly by letter raising concerns for the first time about 249's ability to pay costs.

[12] On April 12, 2023 249 was revived. The discoveries proceeded. The issue of the sufficiency of 249's assets to pay costs was canvassed with Ms. Neudorf at discovery.

[13] On May 5, 2023 FMRP commenced this motion. On May 29, 2023 I was assigned this long motion. I convened a case conference that took place on June 2, 2023, where I scheduled this motion.

## **RULING**

[14] Having reviewed the evidence and heard and read the submissions of counsel, I have decided to require that 249 post security for costs. The following are my reasons.

### ***Motion foundation***

[15] This is a motion pursuant to Rule 56.01(1)(d). As stated earlier, the issue of whether there is good reason to believe that 249 has insufficient assets in Ontario to pay FMRP's costs is not disputed by 249. Given Ms. Neudorf's admission at discovery that 249 has no assets and no "large sums of money," this is a reasonable position to take. Therefore, the onus shifts to 249 to prove that

it would be unjust to order security for costs; see *Know Your City Inc. v. The Corporation of the City of Brantford*, 2020 ONSC 7364 (CanLII) (Div. Ct.) at paragraph 16.

[16] 249 also admits that it is not impecunious. That would also be a reasonable position, as it would appear that both Mr. Winer and Ms. Neudorf, the principals behind 249, have not insignificant assets in their own names.

[17] Therefore, without significant assets of its own but not impecunious, 249 “must meet a high threshold to satisfy the court of its chances of success” to avoid an order for security for costs; see *Know Your City Inc., op. cit.*, paragraph 16. The rationale for this is, if the plaintiff is not impecunious but has no assets of its own, there is not the concern that the plaintiff will be unable to carry forward with the action in the face of an order for security for costs, and the court should deny the defendant the benefit of security for costs only if “the claim has a good chance of success;” see *Zeitoun v. Economical Insurance Group*, 2008 CanLII 20996 (ON SCDC) at paragraph 50. I will discuss later whether this threshold has been met by 249.

### ***Motion delay***

[18] 249 raised another issue as to the justice of the motion. It alleged that there was an unreasonable delay in bringing this motion, and argues that it would be unjust to order security for costs as a result.

[19] This argument has merit. The event that triggered this motion was the defendant’s knowledge of the dissolution of 249. Such a dissolution has been found to be a relevant factor in determining whether there is good reason to believe that the corporate plaintiff has sufficient assets to pay costs; see *City Commercial Realty (Canada) Ltd. v. Bakich*, [2005] O.J. No. 6443 at paragraph 12. However, FMRP did not obtain and review a corporate profile report for 249 for almost four years after the company was dissolved, and then only as a part of the routine preparation for discoveries by its lawyers.

[20] FMRP argued that this delay is reasonable as it did not know and 249 did not advise FMRP of the dissolution. I do not accept this justification for the delay. FMRP should have known all along that it was unlikely 249 had significant assets as 249 was incorporated a month before it contracted with FMRP in January, 2015. FMRP also should have known that 249 had no other purpose than providing janitorial services to FRMP and perhaps a few other companies, thereby making it unlikely all along that the company had any significant assets. FMRP should have been more vigilant in its investigations. It was not. There was no evidence of a material change in circumstances that would justify the delay in bringing this motion; *James Bay Resources Limited v. Mak Mera Nigeria Limited et al*, 2022 ONSC 5711 (CanLII) at paragraph 42.

[21] In the 47 months between the dissolution of 249 and the discovery of the dissolution by FMRP, 249 invested over \$66,000 in legal costs to advance this action by serving a discovery plan, preparing and serving affidavits of documents and supplementary affidavits of documents. I am not prepared to deny the motion in its entirety as I am not satisfied that 249 will be thwarted in its efforts to carry forward with a reasonable order for security for costs. However, what I will do is at minimum order security for costs for only future events and then at a significant discount. Limiting the security to future events on account of an unreasonable delay in bringing the motions is what

Master McAfee (now Associate Justice McAfee) suggested in *1417217 Ontario Inc. v. River Trail Estates Inc.*, 2019 CarswellOnt 2055 at paragraph 27. I will apply that comment here.

### ***Causation***

[22] 249 argues also that its present financial situation is the direct result of the plaintiff's status as a contractor dependent on FMRP over a long period of time, and the defendant's failure to pay reasonable notice damages as alleged. In short, 249 relies upon the merits of its pleaded cause of action to argue that its financial straits were "caused" by FMRP. This is a circular argument. It fails if FMRP proves its defence to the action. I will therefore move on the merits of the case.

[23] I make one comment here about the conduct of counsel. Counsel for 249 argued in their factum that no court has awarded security for costs in wrongful dismissal actions with allegations that the plaintiff is a dependent contractor. No corroboration was given for that bald statement of the law. Counsel for 249 also stated in oral argument that FMRP required that 249 be created as a condition of contracting with Mr. Winer and Ms. Neudorf. She retracted that statement when she could give no proof for it. Counsel must be careful not to make uncorroborated statements to the court as otherwise they will personally lose credibility.

### ***Merits***

[24] 249's primary position is that its case indeed "has a good chance of success," and that an order for security for costs should not be made as a result.

[25] As stated by Master Glustein (now Justice Glustein) in *Coastline Corp. v. Canaccord Capital Corp.* 2009 CarswellOnt 2312 at paragraph 7, the court on a motion for security for costs should not embark on an analysis similar to what is required on a motion for summary judgment. The analysis should focus on the pleadings with recourse to the evidence filed in the motion plus, in appropriate cases, excerpts from examinations for discovery. Where the case turns on credibility, an assessment of the merits at an interlocutory stage is not appropriate.

[26] This case turns largely on the enforceability of the January 20, 2016 written contract between 249 and FMRP. It is undisputed that this document was signed by all parties, including Mr. Winer and Ms. Neudorf. Ms. Neudorf conceded at discovery that 249 was given an opportunity to get independent legal advice and turned it down.

[27] FMRP relies primarily on the contents of this written contract document. The document specified that 249 is an independent contractor. It specified the duration of the contract and the fee 249 would be paid. It specified the tasks 249 was to perform. Most importantly, it specified that the contract could be terminated on 30 day written notice or by payment of the equivalent in leu of notice. It specified that it was the only agreement between the parties. After 17 months FMRP purported to terminate the contract in accordance with its terms.

[28] 249 argues that this contract document will clearly be set aside by the court. I am not convinced. 249 argues that there is no consideration for this contract. It relies on court decisions where there was a clearly determined existing employment relationship and there was the signing of a contract document presented by the employer imposing new and more onerous terms. In these

decisions, the court found understandably that the document could not be enforced due to a lack of consideration. How can there be new consideration when the employee's employment does not change? That was the finding of the courts in *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 44783 (ONCA) at paragraph 32 and *Holland v. Hostopia.com Inc.*, 2015 ONCA 762 at paragraphs 50 to 52.

[29] The problem for 249 is that the evidence on this motion was not at all clear as to whether there was an existing employment relationship when the January 20, 2016 contract was signed. Mr. Winer and Ms. Neudorf in their affidavits conceded that the Winer family "billed FMRP through" three previous corporations over the course of their work for FMRP. In his affidavit, Jeff Consitt, an FMRP Senior Vice President, stated that FMRP had agreements for property management services with these previous companies. None of these previous agreements were produced.

[30] Ms. Chaudri argued that there were in fact no previous written contracts with these companies; but there was no evidence supporting that bald statement. Ms. Lewis in fact hotly disputed the truth of that statement. There was no evidence as to what was contained in these previous agreements and when the terms of these previous agreements came to an end.

[31] Given the onus on the plaintiff to prove "a good chance of success" to avoid security for costs, I draw an adverse inference against 249 as a result. I infer for the purpose of this motion that there were previous written contracts with the previous Winer companies, and that the terms of these previous contracts were probably the same as or similar to the terms of the January 20, 2016 agreement, namely that the previous Winer companies were specified to be independent contractors with fixed fee compensations and fixed terms of service. I also infer that the term of the last previous contract came to an end when the January 20, 2016 contract was signed. There was no evidence as to whether these previous agreements will not be enforced due to lack of consideration.

[32] As a result, it is not at all clear to me, based on the evidence in this motion or lack thereof, that there was no consideration for the January 20, 2016 contract and that that contract will undoubtedly be set aside.

[33] 249 argued at length that all the trappings of a dependent contractor applied to it, namely exclusivity of service, economic dependence and lack of control over the work done. The law is clear that a dependent contractor is entitled to the same notice of termination or payment in lieu of notice that an employee is; see *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79 at paragraph 19.

[34] My only comment is that if the January 20, 2016 agreement is not overturned, its terms undoubtedly at minimum colour this argument. The agreement specifies that 249 is an independent contractor. It purports to give 249 the right to work for others and specifies that 249 must manage and control its own work force. Mostly importantly, as discussed, the agreement gives FMRP the right to terminate the contract on 30 written notice. FMRP relies on these terms.

[35] I, therefore, conclude that 249 has failed to establish in this motion that it has "a good chance of success" in this action. It seeks to overturn the January 20, 2016 agreement and may have difficulty doing so.

[36] As a result, I am driven to the conclusion that there must be security for the FMRP prospective costs.

## QUANTUM

[37] FMRP has incurred \$67,221.60 in costs prior to this motion. For the reasons stated earlier concerning the delay of this motion, I am not prepared order security for these costs.

[38] FMRP seeks \$146,901 security for partial indemnity costs for future events, namely the mandatory mediation, the pretrial conference, preparation for trial and the trial itself. It filed a litigation plan showing these prospective partial indemnity costs. The anticipated trial is stated to be five days in length.

[39] I am not prepared to order security for costs in that amount. The FMRP litigation plan shows time spent by both Ms. Lewis and Ms. Windsor on the mediation, pretrial conference, trial preparation and trial. The partial indemnity rates shown are about twice as large as those shown for the plaintiff's lawyers in its costs outline filed for this motion.

[40] The security for costs should correlate to what may be ordered in costs against 249. This is not a large and complex case. The trial should not be longer than four days. The reasonable expectation of 249 in the event it is ordered to pay costs is, in my view, more in line with what its lawyers would charge in hourly rates. I also believe that there is unnecessary duplication of work shown between the two lawyers in the FRMP litigation plan.

[41] As a result, I believe that the FMRP claim for security for prospective costs should at minimum be cut in half, namely down to \$73,000. There must then be a further reduction on account of the unreasonable FMRP delay in bringing this motion.

[42] As to a reasonable quantum of security, I take guidance from what Master Graham (now Associate Justice Graham) did in *1921628 Ontario Inc. v Liu*, 2021 ONSC 3399 (CanLII). On a claim of about \$400,000, he granted the defendant security for costs for the future mediation, pretrial conference and trial (estimated to be five days) in the total amount of \$33,292.84. I note that the indicated hourly rates for legal services were less than what appear here.

[43] I take guidance from what Associate Justice McAfee suggested in *1417217 Ontario Inc., op. cit.*, paragraph 27. In that case, the claim was in excess of \$5 million and the defendant was seeking \$217,802.56 in partial indemnity costs security. Associate Justice McAfee denied the motion in part because of the delay in bringing the motion and in part because the merits of the claim.

[44] Her Honour stated that, had she ordered security for costs, she would have ordered \$65,000 in security for costs for only future events, namely, like this case, the mandatory mediation, pretrial conference and trial. She said she would have ordered that \$5,000 of this be paid no later than 60 days before the mediation, \$5,000 to be paid no later than 60 days before the pretrial conference and the balance, \$55,000, to be paid no later than 90 days before trial.

[45] Considering all of this, I have decided that 249 must post security for FMRP's future partial indemnity costs in the amount of **\$50,000**, to be paid as follows:

- \$5,000 to be posted no later than 60 days prior to the mandatory mediation,

- \$5,000 to be posted no later than 60 days prior to the pretrial conference, and
- the remainder, \$40,000, to be posted no later than 90 days before the trial.

[46] I believe that is a reasonable order of security for costs in the circumstances.

### **MOTION COSTS**

[47] Concerning the costs of this motion, the parties filed costs outlines. The FMRP costs outline shows \$73,009.87 in actual costs, \$65,807.75 in substantial indemnity costs and \$44,201.42 in partial indemnity costs. Ms. Lewis stated that FMRP seeks the partial indemnity amount of \$44,201.42 in the event FMRP succeeds on this motion.

[48] The 249 costs outline shows actual costs of \$54,156.64 in actual costs, \$44,777.64 in substantial indemnity costs, and \$33,477.64 in partial indemnity costs. Ms. Chandri stated that 249 seeks the partial indemnity amount of \$33,477.64 in the event 249 succeeds on this motion.

[49] Both lawyers confirmed that no offers to settle this motion were exchanged. I, therefore, believe I have enough to make an award of costs. FMRP succeeded on this motion and deserves costs. However, it only succeeded in having a fraction of what it wanted in security ordered to be posted. I believe that the motion costs award should reflect this proportion of success.

[50] I, therefore, order that 249 pay FMRP **\$15,000** in partial indemnity costs in 30 days from today.

**Date:** September 13, 2023

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**ASSOCIATE JUSTICE C. WIEBE**