CITATION: Waterdown Garden Supplies Ltd. and McHale v. City of Hamilton et al., 2023 ONSC 7276
COURT FILE NO.: CV 21-75130
DATE: 20231229

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
WATERDOWN GARDEN SUPPLIES LTD. 2593860 ONTARIO INC., and GARY McHALE	)	T.D Marshal, Counsel for the Plaintiffs
Plaintiffs/Responding Parties	)	
- and -	)	
CORPORATION OF THE CITY OF HAMILTON, CARLO AMMENDOLIA, CRAIG SAUNDERS, JOHN DOE #1 CORPORATION, JOHN DOE #2 CORPORATION, AND JOHN DOE #3 CORPORATION	)	S. Sullivan, L. Langstaff, S. O'Conner, and A. Huang, Counsel for the Defendants
Defendants/Moving Parties	)	
	)	**HEARD:** December 22, 2023

REASONS – MOTION FOR SECURITY FOR COSTS

The Honourable Justice J. Krawchenko

Introduction

[1] The court heard two motions for Security for Costs brought by the defendants City of Hamilton and Craig Saunders.

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[2] Rule 56 governs these motions. The requested relief is discretionary in nature and if granted, must be just in the circumstances.

Background

[3] I will start by introducing the various players that are related to this case and will provide some basic contextual information relative to the period of time in question. I will also address litigation funding and will conclude with a summary of ongoing litigation, all to better understand what has led us to these motions.

The Players

[4] The plaintiff Waterdown Garden Supplies Ltd. ("WGS") was incorporated in 1979. It carried on business from a location at 1771 Hwy 5, Troy, Ontario ("the property") until December 2018. The property is at the centre of this and other litigation.

[5] The Plaintiff 2593860 Ontario Inc. ("259") holds a mortgage on the property. The sole directing mind and shareholder of 259 is Barry Humphrey ("Humphrey"), who was a former shareholder of WGS.

[6] Gary McHale ("McHale") is currently the sole director and officer of WGS and as of November 2022 its sole shareholder. McHale started with WGS

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as its vice-president in September 2017, was made a director in March 2019 and president effective 1 October 2020.

[7] The City of Hamilton and two of its former employees Craig Saunders ("Saunders") and Carlo Ammendolia ("Ammendolia") are all named as defendants. The plaintiffs allege that in 2018 until mid 2019, the City of Hamilton contracted with Havana Group Supplies Inc ("HGSI") to dump contaminated soil at the property and further that the individually named defendants, Craig Saunders (a City of Hamilton bylaw officer) and Carlo Ammendolia (a City of Hamilton building manager) conspired with HGSI to ensure that HGSI's illegal dumping would not be stopped.

Additional Players of Note and Significant Time Frames

[8] Norma Duquette ("Duquette") and Wim Van Ravenswaay ("Van Ravenswaay") were directors of WGS in 2015. At that same period of time, Van Ravenswaay and Humphrey were shareholders of WGS.

[9] In 2015, the City of Hamilton obtained an order that WGS cease unpermitted dumping at the property. In that same year the City of Hamilton also commenced an application for a permanent injunction against WGS to stop soil dumping and to restore the property.

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[10] As noted above, in or about 2018, HGSI (a non party to this litigation, but a defendant in an action commenced by these same plaintiffs as CV 21-657343) was involved in the alleged dumping of contaminated soil at the property. The plaintiffs have characterized HGSI as a group of fraudsters. Oddly, McHale was a vice president of HGSI during the relevant times to this (and other) actions.

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2018 at the Property

[11] In March 2018, while McHale was both a vice president at WGS and HGSI, WGS leased 2 acres of land at the property to HGSI to screen clean fill to be later shipped for landscaping purposes.

[12] In August 2018, HGSI offered to purchase the property from WGS.

[13] In September 2018, HGSI and WGS entered into two additional leases for 14 acres of land at the property for the temporary storage of soil and for 20 acres for the temporary storage of planted trees.

[14] According to the amended fresh as amended statement of claim, after the offer to purchase the property was made by HGSI to WGS, “management” at WGS “functioned to ensure the purchase of Waterdown occurred.”

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[15] 1350057 Ontario Limited ("135') also not party to this action, but a defendant in CV 21-670678 held a second mortgage on the property for $1,150,000.00 bearing interest at the rate of 20% per annum. This mortgage was in place since 2007. In 2017, this mortgage was renewed for a lower amount of $700,000.00 at a rate of 10% per annum but also included 5,335 shares in WGS. This renewed mortgage went into default. 135 obtained default judgment and was granted leave to issue a Writ of Possession with respect to the property, which it did. In December 2018, 135 gained possession of the property and evicted those who had been occupying the property.

[16] In McHale's affidavit sworn 29 April 2022, he deposed that after the default judgment in favour of 135 was granted, he met with the principals of 135 and arranged to have the mortgage "…paid for by what was then called Havana Group Supplies Ltd. ("HGSI") who had purchased WGS in the fall of 2018 and this was deemed acceptable by all of the involved parties with the mortgage as well as with HGSI."

[17] In summary, in 2018, the property was owned by WGS, was leased to HGSI, was the subject matter of an agreement to purchase between WGS

and HGSI and was ultimately taken over by 135 by virtue of a defaulted charge, a default judgment and an executed writ of possession.

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Litigation Funding

[18] In order to fund this claim, WGS, Humphrey and 259 entered into an agreement in March 2022. In this agreement, Humphrey was referenced as an "investor" in this and other litigation commenced or contemplated by WGS. In the preamble of this agreement it stated that "the investor (Humphreys) has been provided with several options on how to be compensated and has decided to seek a larger share in the legal actions instead of being compensated based on his prior mortgage and loan agreements. In consideration of Investor receiving 20% of the Damages Awarded and in consideration that the 3rd party (i.e. 259) will be paid the outstanding mortgage…" The agreement set out a payment schedule for Humphreys to follow, it also provided for his shares in WGS to be forfeited, and set out penalty provisions in the event of late funding. This agreement also directed that the money advanced by Humphreys be deposited with Zen Mobile ("Zen").

[19] Duquette, the former director of WGS, incorporated Zen just prior to entering into an agreement with WGS and Mr. McHale to also financially

support this and other ongoing WGS litigation. Zen has contracted with WGS to provide “accounting services” and also to pay two (2) million dollars towards the plaintiffs’ legal fees and expenses and also to pay Mr. McHale as a “contractor”. In return, Zen is to receive 40% of the net profits from the litigation. It is noteworthy that Duquette is also the spouse of Van Ravenswaay.

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[20] From the foregoing we see that the responding parties have made arrangements to fund this litigation through a scheme incorporating suspension of debt, forfeiture of shares, granting of shares all in exchange for a percentage of damages received. Key to this is the insulation of funding, by keeping it in the hands of non parties.

<u>Ongoing Litigation</u>

[21] As was noted earlier, the plaintiffs have initiated a number of actions relating to the property.

[22] The following litigation is currently before the courts:

(a) 19 February 2021 –

(i) Plaintiffs WDG and Gary McHale;

(ii) Defendants HGSI et al

(iii) 10 million dollar claim for breach of contract, fraud, fraudulent misrepresentation, conversion of property, unjust enrichment, deceit, breach of trust and of fiduciary duty, threat to property and conspiracy.

(b) 03 September 2021- this current action

(i) Plaintiffs WDG, 259 and Gary McHale;

(ii) Defendants City of Hamilton et. al

(iii) 30 million dollar claim based in negligence and vicarious liability for misfeasance in public office and conspiracy and charter violations.

(c) 21 October 2021 –

(i) Plaintiffs WDG and Gary McHale;

(ii) Defendants 1350057 Ontario Limited et al.;

(iii) 130 million dollars based in negligence, conspiracy, equitable fraud and vicarious liability for actions on the property after 135 gained possession of the lands by way of the executed writ of possession.

(d) 15 August 2022

(i) Plaintiffs WDG and Gary McHale;

(ii) Defendants Corporation of the Town of Oakville et al.;

(iii) 37 million dollar claim based in negligence, conspiracy and charter violation regarding allege transport of soil from Oakville to the property.

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Security of Costs Generally

[23] Having provided the background details, I now turn to the analysis of security for costs.

[24] Rule 56 of the *Rules of Civil Procedure* governs security for costs and sets out the following:

> **56.01** (1) The court, on motion by the defendant or respondent in a proceeding, **may** make such order for security for costs **as is just** where **it appears** that,
>
> (a) the plaintiff or applicant is ordinarily resident outside Ontario;
> (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
> (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
> (e) there is good reason to believe that the action or application is frivolous and vexatious **and** that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
> (f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

[25] On a security for costs motion, the initial onus is upon the defendant/ moving party to demonstrate that it **appears** that one of the six factors

enumerated in this rule exist. At this stage, certainty is not required, simply the appearance that at least one of the factors apply.

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[26] The moving parties argued that subsections (b) through (e) applied in this case. The responding plaintiffs conceded this point.

[27] Notwithstanding this concession and to be thorough, I will touch upon three of the factors.

[28] With regards to (b) *other proceedings for same relief*; it is clear that the plaintiffs have brought similar claims seeking similar damages from similar types of defendants alleging similar misconduct and malfeasance. The plaintiffs argued that these claims were in fact different, as the different defendants found themselves in unique circumstances, and the sources of alleged contaminants came from separate and distinct locations or different loads. On this point, I would rule that the moving parties successfully showed a sufficient **appearance** of similar relief being sought by the same plaintiffs to have met their onus at the first stage.

[29] With regards to (c) *unpaid costs,* the moving parties met the onus showing an unpaid costs award, from my previous order having made costs payable forthwith. On this point, the responding parties indicated having made an

error in believing they had 30 days as opposed to being payable forthwith as a result of a deemed abandonment, however, at the time the motions were heard, the moving party would have met their onus.

[30] With regards to (d), *good reason to believe the plaintiffs have insufficient assets to pay costs,* up until the date of the hearing of these motions, the responding parties argued that they did have sufficient assets at their disposal to pay an adverse costs award. At the hearing, counsel for the corporations and McHale advised the court that they were impecunious. With that change in position, the moving party would have again met their onus.

[31] With the moving parties having met their onus at stage one, the burden shifts to the plaintiff/responding party to demonstrate why a security for costs order would be unfair at the second stage.

[32] As noted earlier, the responding parties raised their collective impecuniosity for the first time at the return of this motion and this coupled with their argument that their claim had merit, was the basis for their claim that security for costs would not be just.

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[33] On the issue of the alleged impecuniosity, as was stated in the *Coastline Corporation Ltd. et al. v. Canaccord Capital Corporation et al. 2009, Can LII 21758,* the evidentiary threshold for impecuniosity is high, and simple bald statements unsupported by detail are not sufficient.

[34] In this case, at the very least, the responding parties should have provided up-to-date full financial disclosure to support their claimed impecuniosity, which they did not do.

[35] What the evidentiary record did contain was evidence of substantial and regular litigation funding by Humphreys and Zen. It also showed that WGS "income from rental of property" was being directed to Zen for use by WGS as required. This evidence supports a finding that although there appears to be sufficient assets to cover costs, the plaintiffs have arranged their affairs to protect the assets and to shelter them in the hands of non parties in order to make it difficult to enforce a costs award.

[36] On the evidence filed and submissions made, this court finds that:

a. the plaintiffs are not impecunious, and

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b. that they have arranged their affairs through Humphreys and Zen to essentially shelter assets and to keeps funds available to them at arms length

[37] Notwithstanding my findings above, a determination on these motions still requires that the court "take a step back" and take a holistic approach as was set out by the Court of Appeal in *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, wherein the Court of Appeal said:

> [19] In determining whether an order should be made for security for costs, the "overarching principle to be applied to all the circumstances is the justness of the order sought": *Pickard,* at para. 17 and *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, 2017 ONCA 556, at para. 4.
>
> …
>
> [22] In deciding motions for security for costs judges are obliged to first consider the specific provisions of the Rules governing those motions and then effectively to take a step back and **consider the justness of the order sought in all the circumstances of the case**, with the interests of justice at the forefront. While the motion judge concluded that an order for security for costs would be just, with respect, she failed to undertake the second part of that analysis. The failure to consider all the circumstances of the case and conduct a holistic analysis of the critical overarching principle on the motion before her constitutes an error in principle. It therefore falls to this panel to conduct the necessary analysis of the justness of the order sought.
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> …
>
> [24] Courts in Ontario have attempted to articulate the factors to be considered in determining the justness of security for costs orders. **They have identified such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns, and the public importance of the**

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> **litigation**. [citations omitted]
>
> [25] While this case law is of some assistance, each case must be considered on its own facts. It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. **The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made**. [emphasis added]

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[38] Being guided by the overriding interest of justice, I conclude that a security for costs award is warranted and is just, for the following reasons:

a) The issue of an inability to pay costs due to impecuniosity was never raised until the hearing of this motion and even so, without any supporting evidence. It appeared to be employed strategically as opposed to reflecting the true state of affairs for the plaintiffs.

b) This court has found that as part of their litigation plan, the plaintiffs and their investors structured their financial affairs in such a manner as to ensure that assets and funding belonging to or available to them, were out of reach. Such a structure as seen in this case warrants a security for costs order.

c) Contrary to how the responding parties had cast this claim as a David v. Goliath/ Deep Pocket v. Underfunded Aggrieved Party scenario, it is quite the opposite. The evidence appeared to show an investor supported, for profit enterprise, in numerous, somewhat connected pieces of litigation, including this case. This did not engage an access to justice analysis.

d) With regards to the merits of the claim, examinations for discovery have not been conducted and it is too early in these proceedings to comment on them.

e) While the claim does engage issues of public importance in the way of accountability for contamination, that will be determined at a trial on the merits. At this stage, it is of public importance that this order be put into place to ensure confidence in our court system.

f) The plaintiffs appear to have the ability to raise funds for security for costs from their available resources.

Conclusion

[39] For these reasons, the motions for security for costs are granted.

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[40] The amounts for security for costs requested by both parties on a partial indemnity basis are dated, as the motions have taken almost two years to be heard. Neither moving party has requested to increase these amounts. I find the quantum of these costs to be reasonable for purposes of establishing the appropriate security.

[41] This court orders that, by 26 April 2024, the plaintiffs shall pay into court, as security for costs, the following amounts:

a. With regards to the City of Hamilton - $252,560.00;

b. With regards to Craig Saunders the amount of $124,416.00.

[42] If the security for costs are not paid into court by the deadline set, the plaintiffs' action is stayed until these funds are paid.

[43] If the parties cannot agree on costs of these motions,

(a) The moving parties shall serve and file their brief written submission of no more than 4 pages double space, in addition to any relevant offers and draft bills of costs by no later than 19 January 2024;

(b) The responding parties shall serve and file their brief written submission of no more than 4 pages double space, in addition to any

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relevant offers and draft bills of costs by no later than 02 February 2024;

(c) If required, the moving parties may serve and file a brief reply of no more than 2 pages double spaced by no later than 09 February 2024.

Justice J. Krawchenko

Released: 29 December 2023

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B E T W E E N:

WATERDOWN GARDEN SUPPLIES LTD. 2593860 ONTARIO INC., and GARY McHALE

Plaintiffs

- and –

CORPORATION OF THE CITY OF HAMILTON, CARLO AMMENDOLIA, CRAIG SAUNDERS, JOHN DOE #1 CORPORATION, JOHN DOE #2 CORPORATION, AND JOHN DOE #3 CORPORATION

Defendants

REASONS FOR MOTION

Justice Krawchenko

Released: 29 December 2023