

CITATION: 1502300 Ontario Inc. v. Kanellos 2024 ONSC 4452
COURT FILE NO.: CV-23-695099
MOTION HEARD: 20240712

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1502300 Ontario Inc., Plaintiff

AND:

Speros Kanellos, Defendant

BEFORE: Associate Justice Jolley

COUNSEL: Anna Husa, counsel for the moving party defendant

Terrence Lui, counsel for the responding party plaintiff

HEARD: 12 July 2024

REASONS FOR DECISION

[1] The defendant seeks an order requiring the plaintiff to post security for costs. The defendant relies on rule 56.01(1)(d), which provides that a court may make such order as is just where it appears that the plaintiff is a corporation or a nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets in Ontario to pay the costs of the defendant.

Analysis

[2] I am satisfied that the defendant has established that there is good reason to believe the plaintiff has insufficient assets in Ontario to pay the defendant's costs. The plaintiff is a sole purpose corporation which sold its only asset, property located at 1992 Queen Street East, Toronto, in August 2023. It used the net proceeds of just over \$2 million to pay off its debts, leaving it with a balance in its bank account of \$9,830.47. The plaintiff showed negative retained earnings for its last year of tax filings in 2023.

[3] The plaintiff argues that it is impecunious. If it is able to demonstrate impecuniosity, it can resist a motion for security for costs by showing that its claim is not plainly devoid of merit. If it does not establish impecuniosity, it must meet a higher standard, namely that the case has a good chance of success (*Air Palace v Abdel* 2021 ONSC 7882 at paragraph 27(c)).

[4] The plaintiff's financial disclosure obligation requires "robust particularity" (*Morton v. Canada*, 2005 CanLII 6052 (ON SC), at paragraph 32.) The evidentiary threshold is high and convincing proof of impecuniosity must be presented (*Al Masri v. Baberakubona*,

2010 ONSC 562, at paragraph 19. The plaintiff must tender "complete and accurate disclosure of the Plaintiff's income, assets, expenses, liabilities and borrowing ability, with full supporting documentation for each category where available or an explanation where not available." (*Shuter v. Toronto Dominion Bank*, 2007 CanLII 37475 (ON SC) at paragraph 76)

[5] The court in *Air Palace* stated at subparagraph 27(f) (citations omitted),

"A corporate plaintiff who claims impecuniosity must demonstrate that it is genuinely impecunious and cannot raise security for costs from its shareholders and associates; that is, it must demonstrate that its principals do not have sufficient assets. Evidence as to the "personal means" of the principals of the corporation is required to meet this onus. A corporate plaintiff must provide substantial evidence about the ability of its shareholders or others with an interest in the litigation to post security. A bare assertion that no funds are available will not suffice. A security for costs motion requires a "rigorous standard" of financial disclosure."

[6] This was also noted in *Marvello Construction v. Santos et al.*, 2017 ONSC 3913, paragraph 14, relied on in *Hagshama Canada 9 Gold Ltd. v. Decade Urban Communities Corp.* 2021 ONSC 5150 at paragraph 21:

"14 A corporate plaintiff that claims impecuniosity must show not only that does it not have assets but also that it cannot raise security for costs from its shareholders and associates. Evidence as to the personal means of the principals of the corporation is required to meet this onus. A corporate plaintiff must provide "substantial evidence about the ability of its shareholders or others with an interest in the litigation to post security". Consequently, as I stated in *Renuity v. Balsam Lake Green Energy* 2017 ONSC 3022 at paragraph 11, full financial disclosure requires the plaintiff to establish for itself and its shareholders and principals the amount and source of all income, a description of all assets including values, a list of all liabilities and other significant expenses, an indication of the extent of the ability to borrow funds, and details of any assets disposed of or encumbered since the cause of action arose."

[7] I do not find the evidence filed on this motion sufficiently robust to meet this test. In his responding affidavit sworn 26 June 2024, the principal of the plaintiff, John Hronakis, deposed that he used his savings and also borrowed money to attempt to remediate the property and worked with a contractor to do the work. As a result, he could not look for work as an HVAC apprentice and earned no income. He continues to pay off the corporation's debts and lives in the basement of the home of his deceased mother, with his special needs brother living upstairs. He states that the plaintiff is impecunious.

[8] The affidavit contains no evidence about who the plaintiff's shareholders are, no specifics of Mr. Hronakis' current income or assets, including whether he owns his now deceased mother's home and no evidence of any attempt to borrow funds.

- [9] While there is not robust disclosure about Mr. Hronakis' assets, he has provided an investment account in his name with a balance of \$156,408.77. It appears this account was only created in April 2024 and Mr. Hronakis was able to deposit that full amount into that account upon opening. The only additional information provided about these funds is Mr. Hronakis' statement that if he takes money out of that account now, he will lose more money. The basis for that statement is not provided. It is also unclear as the funds were just deposited into the account and the shares in the account purchased only a few months before that assertion was made. Given that Mr. Hronakis, as the "controlling mind", and at least being a person "with an interest in the litigation", is the likely beneficiary of any award in the plaintiff's favour, there is nothing inappropriate about requiring him to provide the funds for the plaintiff to post security for it to proceed with this action.
- [10] Not having demonstrated that it is impecunious, to avoid an award for security for costs, the plaintiff must demonstrate that it has a good chance of success at trial. The extent to which the merits may be properly considered varies depending on the nature of the case. If the case is complex or turns on credibility, it is generally not appropriate to assess the merits at this interlocutory stage (see *Coastline Corp. v Cannacord Capital Corp.* 2009 CanLII 21758 (ON SC) at paragraph 7(vii)).
- [11] The plaintiff alleges that the defendant, its solicitor, was negligent in allowing the plaintiff as landlord to sign a lease without a personal guarantee from the tenant and in failing to disclose that he was related to the principal of the tenant and acted for the tenant in the lease negotiations. The defendant denies each of these allegations and also raises a limitations defence. He argues that these have been live issues since 2019 when the former tenant sued this plaintiff and that this 2023 action is out of time.
- [12] What the defendant explained to the plaintiff concerning the terms of the lease, concerning the refusal of the tenant's principal to provide a personal guarantee and concerning the defendant's relationship with the tenant will be a matter of credibility, something that cannot be determined on this motion. The evidence on the personal guarantee provides an example. The claim alleges that the plaintiff's leases always contained a personal guarantee and that the defendant removed that term in this case but led the plaintiff to believe the lease was the same as its usual standard lease. In its affidavit, the plaintiff admits that the defendant told him that the tenant was not willing to provide a personal guarantee. The defendant deposed that he told the plaintiff of this specifically, sent the plaintiff the lease to review in advance and then reviewed the contents of the lease with the plaintiff before the plaintiff signed it.
- [13] The plaintiff also argued that its lack of assets was due to the defendant's actions. Similar to the conclusion in *Hagshama, supra* at paragraph 28, I cannot conclude that the plaintiff's financial position is a direct result of the defendant's conduct. This action is in the pre-discovery phase and there are numerous disputed issues of fact and credibility. There is no obvious direct nexus between the plaintiff's lack of funds and the defendant's alleged conduct, such as a refusal to pay a liquidated debt.

- [14] Given the issues of credibility surrounding the parties' evidence of what they disclosed and were told and when, I find the merits to be neutral for the purposes of this motion
- [15] There is also evidence to suggest that the defendant may succeed on its limitation period defence as the conflicts issue appears to have been front and centre by April 2019.
- [16] Lastly, the plaintiff argued that the defendant's delay in bringing this motion is fatal. I disagree. Until August 2023, the plaintiff had an asset, the Queen Street property. It was only when it sold that asset that the question of its ability to satisfy a costs award arose. The defendant proceeded to prepare a motion for summary judgment, based on its limitation period defence, to attempt to have the matter determined on an expedited basis. After the court's endorsement of 29 February 2024 directing this action to trial together with the tenant's action against the plaintiff, a summary disposition was off the table and the defendant served this motion record in April 2024. I find there has been no delay in bringing this motion. Even if there had been delay, the plaintiff has suffered no prejudice – it has taken few steps and incurred no expense in this action, which has not even proceeded to discoveries.
- [17] As directed in *Yaiguaje v Chevron Corporation* 2017 ONCA 827, after having considered the specific provisions of the Rules, I am required to step back and consider the justness of the order sought in all the circumstances of the case. In doing so, I find it is just to require the plaintiff to post security for costs. It is a shell company. It has not established that it is impecunious for the purposes of this motion. I cannot find the case has a good chance of success, based on the evidence before me, on which I concluded the merits to be a neutral factor.

Quantum of Costs

- [18] In the usual course, costs would be ordered paid as each step of the litigation proceeded. In this case, the plaintiff has put this action on a fast track, making the time frame of the steps quite compressed. This action was started in February 2023. While discoveries have yet to take place, at the request of the plaintiff, in February 2024, the action was ordered to be tried in February 2025, so that it can be heard together with the former tenant's action against the plaintiff landlord, commenced in October 2019, and the landlord's counterclaim.
- [19] While the plaintiff was entitled to seek this expedited schedule, it is relevant to the timing of the required payments.
- [20] The defendant provided a detailed bill of costs. I have reviewed the bill of costs and find it quite reasonable. To date, not including this motion, it has incurred costs on a partial indemnity basis, inclusive of HST and disbursements of \$17,999.01. From that amount, I have deducted the costs related to the abandoned summary judgment motion. The plaintiff shall post security for the steps incurred to date in the all-inclusive amount of \$13,729.22 within 30 days of the release of this decision.

- [21] The defendant has estimated its all-inclusive costs for future steps at \$72,944.33. These include costs for examinations for discovery (fixed by the February 2024 endorsement for April 2024 but delayed due to the plaintiff's refusal to attend based on a production objection), undertakings, expert reports (due July 15, 2024 but likely delayed due to delayed discovery), mediation (by 31 October 2024) and pretrial (9 December 2024). The estimated costs of these steps total a reasonable \$16,195.72 inclusive of HST. The plaintiff shall post security for that amount by 30 September 2024.
- [22] The defendant then estimated its trial preparation and eight day trial costs at \$33,720. Again, the estimate seems fair and reasonable. For instance, 56 hours has been allocated for an eight day trial, which would cover the precise court time but not time referenced in the bill of costs for written argument or for any related steps outside the courtroom during the trial. The plaintiff shall post security for these trial costs in the amount of \$38,103.60, inclusive of HST, by 15 January 2025.
- [23] The plaintiff will post security for the defendant's estimated future disbursements of \$18,645 by 31 December 2024. These include the costs of transcripts, an expert's report, fee for expert testimony, mediation fees and sundry smaller disbursements.
- [24] The defendant seeks costs of the motion in the all inclusive amount of \$5,556.78 on a partial indemnity basis. This amount is dwarfed by the plaintiff's bill of costs for the motion which totals \$23,759.49 on a partial indemnity basis. The plaintiff shall pay the defendant his costs of the motion in the amount of \$5,556.78 within 30 days of the release of this decision. Order to go in terms of the draft which I have signed.

Associate Justice Jolley

Date: 12 August 2024