

Date: 20250110
Docket: CI 20-01-28741
(Winnipeg Centre)
Indexed as: Private Trading Group, LLC v.
The Government of Manitoba et al.
Cited as: 2025 MBKB 4

COURT OF KING'S BENCH OF MANITOBA

B E T W E N:

PRIVATE TRADING GROUP, LLC,)	<u>Peter N. Mantas</u>
)	<u>Jo Colledge-Miller</u>
plaintiff,)	for the plaintiff
)	
- and -)	
)	<u>Dean G. Giles</u>
THE GOVERNMENT OF MANITOBA and)	<u>Ari M. Hanson</u>
SCOTT SINCLAIR,)	for the defendants
defendants.)	
)	<u>Judgment Delivered:</u>
)	January 10, 2025

GRAMMOND J.

INTRODUCTION

[1] The defendants sought an order that the plaintiff be required to post security for costs in this matter, given that it is ordinarily resident outside the Province of Manitoba and, according to the defendants, does not have assets in Manitoba.

[2] The plaintiff resisted the motion on the basis that the goods which form the subject matter of this litigation, which are medical respiratory masks, (the "Masks") are under the possession and control of the defendants, and therefore can and should serve as security for costs.

[3] After hearing the motion, I granted the relief sought with written reasons to follow. These are those reasons.

BACKGROUND

[4] In this litigation, the plaintiff seeks judgment against the defendants in the principal sum of \$6 million USD, representing the balance owing under an April 2020 sales transaction pursuant to which the plaintiff supplied the Masks to the defendants.

[5] The defendant the Government of Manitoba (the "Government") denies liability on the basis that the Masks were not fit for their intended purpose, such that the Government did not receive that for which it bargained. In addition, by counterclaim, the Government seeks from the plaintiff repayment of the sum of \$13 million USD that it paid prior to delivery of the Masks.

[6] The parties agree that the Government has in its possession more than 4.9 million of the Masks, which are currently held in storage.

THE LAW

[7] The Court of King's Bench Rules, with respect to the payment of security for costs, provide as follows:

WHERE AVAILABLE

56.01 The court, on motion in a proceeding may make such order for security for costs as in the particular circumstances of the case is just, including where the plaintiff or applicant,

(a) is ordinarily resident outside Manitoba;

...

(d) is a corporation or a nominal plaintiff, and there is good reason to believe that insufficient assets will be available in Manitoba to pay costs, if ordered to do so;

...

AMOUNT AND FORM OF SECURITY AND TIME FOR FURNISHING

56.04 The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court.

[8] In ***Park Avenue Furniture Corp. v. Gandhi***, 1990 CanLII 11065 (MBKB), 63 Man. R. (2d) 167, the court stated:

The basis for the rule regarding the payment of security for costs in an action by a non-resident plaintiff is that it ensures the payment of costs to the defendant should he be successful in his defence of the action. It obligates a plaintiff to pay security for costs where the plaintiff resides outside the jurisdiction of the court and would be beyond its jurisdiction to answer to the question of costs should the action fail.

...

The rules of this court governing security for costs were designed and passed in order to provide for a convenient and simple method of enforcing judgments for costs against non-resident litigants. Although an award of costs is always in the discretion of the judge, it should only be in clear circumstances and in appropriate cases that a judge should exercise that discretion against ordering security for costs.

[9] In ***Crozier v. Wellair Concepts Inc. et al.***, 1997 CanLII 23015 (MBKB), 122 Man. R. (2d) 208, the court stated:

[13] But the onus is on the plaintiff once it is established that the plaintiff is a non-resident and without assets in Manitoba that the plaintiff should not put up security for costs (*Park Avenue Furniture Corp. v. Gandhi et al.* (1990), 63 Man. R. (2d) 167 (Hewak, C.J.Q.B.). The defendants have a prima facie right to security for costs unless the plaintiff can establish assets in the reciprocating province of British Columbia where a judgment for costs recovered in Manitoba can readily be realized under the *Reciprocal Enforcement of Judgments Act*, R.S.M. 1987, c. J-20, or it can be established that her impecuniosity will result in her being denied access to our courts on a meritorious action. This, as I have indicated, she has failed to do.

ANALYSIS

[10] The parties agreed that in this case the defendants have demonstrated a *prima facie* entitlement to security for costs, and that the plaintiff bore the onus on this

motion to show that payment of security for costs was unnecessary. The parties have also agreed that if security was ordered, the amount of \$81,480.00 should be posted.

[11] The law is clear that a factor for consideration on this type of motion is whether the plaintiff has any assets in Manitoba that would be available to satisfy a judgment for costs¹. The specific issue on this motion is whether the Masks can and should serve as security for costs. There is very little jurisprudence available on the question of whether the goods at issue in a claim can serve as security.

[12] The defendants pointed to ***Buckeye Incubator Co. v. Rice Const, Co. Ltd.***, 1963 CanLII 202 (ONSC), [1963] 2 O.R. 195-198, where the court considered a series of contracts arising out of the sale of poultry equipment. The court stated:

The only attempt made to satisfy [the] requirement [that the plaintiff has assets within the jurisdiction] is the contention of the plaintiff that under the conditional sale contracts mentioned it is the owner of the chattels which are the subject of this action and therefore it can properly be said to have assets here. I cannot agree. Before the subject matter of an action can be considered as good security, it must be established that in the event the plaintiff is unsuccessful in the action, it will be of sufficient value and available to satisfy any judgment against the plaintiff for costs:

Kevorkian v. Burney, [1937] 4 All E.R. 468. In this case should the plaintiff be unsuccessful in the action and the defendant be successful in its counterclaim, in sorting out things thereafter there may well be nothing left for the plaintiff.

[13] The plaintiff pointed to ***Azulev, S.A. v. Tilerama Ltd. Ltd.***, [1999] O.J. No. 2765 (QL), 1999 CarswellOnt 1305, where the court stated that it was inappropriate to order security to be posted for a variety of reasons including:

10(c) ... there is an asset of the Plaintiff in Ontario. This is the shipment of tiles which is in the control of the defendant. Although the defendant contends that the shipment was not what was ordered and it did not arrive in good condition, it

¹ ***Debono v. Smith***, 1989 CanLII 7278 (MBKB), 62 Man. R. (2d) (98).

does not state what value it has or what was done with it. It would be manifestly unfair to require a foreign plaintiff who had shipped goods to Ontario and not been paid to post security for costs when the defendant retains possession of the goods.

[14] In this case, the issue at the heart of the dispute is whether the Masks were fit for the intended purpose and whether the Government got that for which it bargained. Those issues will be determined at trial.

[15] Having said that, on the strength of the commentary in *Buckeye* and *Azulev*, I accept as a basic principle that goods which are the subject of litigation and are situated within the jurisdiction in question can be considered an asset of the plaintiff in the context of a motion for security for costs, subject to the considerations set out below.

[16] First, the nature of the relief sought and the respective positions of the parties should be considered, including whether the goods at issue are indeed the property of the plaintiff.

[17] In this case, the plaintiff has sought a monetary judgment representing the unpaid balance owing for the Masks, but it has not asserted any rights of ownership relative to the Masks. Having said that, if the plaintiff's claim fails, I would presume that in so deciding the court would have concluded that the Masks were not fit for their intended purpose and that the Government was not obligated to pay for them in full. In that event, the parties agreed (as do I, because it would follow logically), that the Government would not be entitled to keep the Masks, and ownership thereof would revert to the plaintiff. I accept, therefore, for the purposes of this motion, that if the plaintiff's claim fails, it would be considered the owner of the Masks.

[18] In addition, the defendants' counsel advised that the Masks are being stored in Manitoba, and as such I accept that if the claim is dismissed, the Masks would constitute an asset of the plaintiff in this jurisdiction. In that context, the Masks could serve as security for costs.

[19] The second consideration to which the court should have regard is the nature and value of the asset, to determine whether the security is adequate.

[20] The plaintiff's affiant deposed that the Masks have value both as N95 respirators and as non-medical respirators. He also stated that if the Government sold the Masks for "two cents per mask or \$0.40 per box (an amount that is significantly less than their worth), they would realize more than the amount they are asking [the plaintiff] to post as security for costs". In other words, if the Government sold the Masks in its possession for \$0.02 each, it would recoup over \$98,000.00².

[21] The plaintiff's affiant also deposed that he had not been provided with pictures of the Masks that displayed their expiry date, but that even if they had passed their stated expiry date, he understood that various government entities (including the Government of Canada) have advised that N95 masks can still be used if they have been stored correctly and do not show signs of deterioration.

[22] The plaintiff argued that the defendants are responsible for any diminution in the value of the Masks, because they have maintained possession and control of the Masks for years. In addition, the plaintiff submitted that the defendants bore the evidentiary

² I note that this calculation does not take into account any brokerage fees or other expenses that may be incurred in connection with the sale of the Masks.

burden of establishing the value of the Masks, because they have custody of them, whereas the plaintiff does not have knowledge of where the Masks are stored and has been denied physical access to the Masks. In addition, since the Government has kept the Masks in storage, the court should infer that they have some value.

[23] The defendants denied that the Masks have any value, and the individual defendant deposed that some of the Masks have a stated “shelf life” of two years, which has expired. The defendants also argued that according to health authorities, masks past their expiration date should be used only in times of increased demand and decreased supply, when no unexpired option exists, and only if certain other conditions are met. In addition, the defendants submitted that at examinations for discovery, the plaintiff was offered physical access to the Masks.

[24] For the purposes of this motion, I have no reason to doubt that the Masks have a limited shelf life, which is relevant to their monetary value. Similarly, I have no reason to doubt that the basic economic principle of supply and demand applies to the value of the Masks. The plaintiff supplied the Masks in April and May 2020, near the beginning of the Covid-19 pandemic when demand for masks was high, and as such, their value was presumably enhanced at that time. Conversely, after the pandemic ended, I presume that the value of the Masks diminished, given increased supply and reduced demand.

[25] Having said that, I have no conclusive evidence of the current value of the Masks. The plaintiff asserts that they are worth more than \$0.02 each and the defendants assert that they are valueless, but neither side took steps to obtain a

specific and/or objective valuation of the Masks. I appreciate that the plaintiff is not in physical possession of the Masks, but I expect that it could have obtained some form of valuation given that it is in the business of supplying medical masks, and bore the onus of proof on this motion.

[26] I will add that if, after a trial, the court concludes that the Masks were not fit for the purpose and the plaintiff's claim is dismissed, it does not necessarily follow that the Masks have no monetary value. Rather, the actual value of the Masks would become known only if they were listed for sale and a willing buyer emerged.

[27] In addition, I have concluded that the facts in ***Azulev*** are distinguishable from this case for two reasons. The first reason is that ***Azulev*** was a "simplified case", in which the amount at issue was approximately \$9,000.00, to which the court referred in support of its denial of the motion for security for costs. The second reason is that the defendant in ***Azulev*** had not paid for the goods. Here, the Government made a significant partial payment for the Masks, of \$13 million USD, and as such the fairness concerns that arose in ***Azulev*** do not apply here. For the purposes of this motion, I reject the plaintiff's submission that the Government has sought some form of double recovery by retaining possession of the Masks in storage while arguing that they are not required to remit full payment to the plaintiff.

[28] In these circumstances, and given the lack of evidence before me as to the current value of the Masks, I am not satisfied on a balance of probabilities that their value exceeds the amount sought by the defendants as security for costs.

[29] For the foregoing reasons, an order for security for costs is just in all of the circumstances of this case, and I have exercised my discretion to grant the defendants' motion. At the hearing, counsel advised that if security for costs was ordered, they expected to be able to agree upon a payment schedule, and they have since done so.

[30] If the costs of this motion cannot be agreed upon, counsel may seek an appearance to make submissions.

J.