NOVA SCOTIA COURT OF APPEAL
Citation: ***Fotherby v. Cowan***, 2012 NSCA 77

Date: 20120717
Docket: CA 392849
Registry: Halifax

Between:

Lynne Fotherby and Brilyn Bed & Breakfast and Nature Tours

Appellants (Respondents on the Motion)

v.

Brent Cowan and Tiffany Property Ventures Limited

Respondents (Applicants on the Motion)

Judge:	The Honourable Justice Joel Fichaud
Motion Heard:	July 12, 2012, in Halifax, Nova Scotia, in Chambers
Held:	Security for costs of $1,500 ordered, with costs of the motion quantified at $500 in the cause
Counsel:	Ezra B. Van Gelder, for the Applicants on the motion (Respondents on the appeal) Lynne Fotherby, on her own behalf

Reasons for judgment:

[1] Ms. Fotherby sued her landlord, Tiffany Property Ventures Limited, and Tiffany's principal, Mr. Cowan, for negligent misrepresentation and other causes of action. Tiffany counter claimed for unpaid rent and property taxes under the Lease, occupation rent and damages for degradation of the leased premises. Justice Moir of the Supreme Court of Nova Scotia, by summary judgment on evidence under Rule 13.04, dismissed Ms. Fotherby's actions and gave Tiffany judgment on the counterclaim (2012 NSSC 182). The judgment on the counter claim was for $4,290 rent under the Lease, $9,200 occupation rent and $7,839 taxes. The judge awarded Tiffany costs of $10,000.

[2] Ms. Fotherby appealed to the Court of Appeal. She says that the judge erred by dismissing her action and by giving judgment on the counterclaim. The appeal is scheduled for November 22, 2012.

[3] Tiffany moved for security for costs to be posted by Ms. Fotherby related to the appeal. I heard that motion on July 12, 2012.

Background

[4] I will summarize the background facts, as found by Justice Moir.

[5] Ms. Fotherby and her husband operate an unincorporated proprietorship, Brilyn Bed & Breakfast and Nature Tours. Ms. Fotherby and Tiffany signed a Lease of premises at 1246 Ketch Harbour Road in Halifax. The Lease operated from August 1, 2010 for a term of one year. It had an option to renew for another year, but the option was not exercised.

[6] One month after signing the Lease, Ms. Fotherby did not pay her rent. By January 2011, $2,175 was due. Tiffany agreed to forbear its remedies in return for Ms. Fotherby's agreement to pay the arrears. Ms. Fotherby again defaulted in July 2011. Tiffany gave notice to quit as of August 31, 2011. Ms. Fotherby remained in possession after that date, without paying rent. For the over-holding period, Justice Moir calculated occupation rent at the Lease rate. Justice Moir said (para 59):

> There is no dispute about the amount of rent in arrears.

[7] Ms. Fotherby's defence to Tiffany's rent claim was to set off her rent arrears against the amount of her damages claimed in her civil action. In the proceeding before Justice Moir, and in her response to Tiffany's motion for security before me, Ms. Fotherby submitted that, before she signed the Lease, Mr. Cowan under-represented the amount of municipal taxes that would be assessed against the property. This allegation premised much of Ms. Fotherby's claim against Tiffany. On that point, Justice Moir concluded: (1) there was "no evidentiary foundation" for this alleged misrepresentation, (2) there was no suggestion of a misrepresentation as to an existing fact - the current taxes - and (3) any promise or prediction of future taxes was subsumed by the later contract. The later Lease did not warrant a quantified level of taxes and said that Ms. Fotherby would pay "all general property taxes during the Lease term".

[8] After reviewing all of Ms. Fotherby's claims, Justice Moir concluded:

> [85] There was nothing to set-off against the arrears of rent and the amount due for taxes. The lack of evidence supporting any set-off is such that I must conclude there is no genuine issue requiring a trial on that subject.

[9] Ms. Fotherby's affidavit of July 9, 2012 for this motion, includes nothing to persuade me that the background facts are other than as set out above.

Security for Costs - Principles

[10] Rule 90.42 says:

> **Security for costs**
>
> **90.42** (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.

[11] *Disabled Consumer Society of Colchester v. Burris*, 2009 NSCA 21, summarized the principles that govern the exercise of the judge's discretion under Rule 90.42(1):

[11] The case law from this court, discussing the principles governing security, derives from the former *Rule* 62.13, replaced by *Rule* 90.42 on January 1, 2009. The former *Rule* 62.13(1) permitted a judge to order security for costs "as the judge considers just". In my view, the test has not changed, and the case law under the former *Rule* 62.13 applies to this application under the new *Rule* 90.42.

[12] The starting principle is that security for costs on appeal is ordered only where the evidence shows "special circumstances". *Frost v. Herman* (1976), 18 NSR (2d) 167 (CA) at p. 168 per Macdonald, J.A., which has been followed in many later rulings of this court.

[13] The meaning of "special circumstances" may differ with the context. DCS' concern is that Ms. Burris will be unable to satisfy any costs award, including appeal costs if her appeal fails. As stated in *Williams Lake Conservation Co. v. Chebucto Community Council of Halifax (Regional Municipality)*, 2005 NSCA 44, at ¶ 11:

> [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances". It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman*, at ¶ 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at ¶ 4-5; *Leddicote*, at ¶ 15-16; *White*, at ¶ 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at ¶ 7; *Smith v. Heron*, at ¶ 15-17; *Jessome v. Walsh*, at ¶ 16-19.

[14] Balanced with that principle is a concern that the security for costs not deny access to justice. In *Smith v. Michelin North America (Canada) Inc*, 2008 NSCA 52, Justice Cromwell said:

> In exercising the discretion to make an order for security, the court proceeds with caution because of the risk that the order may effectively stifle the appeal.

Where security would prevent the prosecution of an arguable appeal, and no other circumstances justified security, this court has denied security for appeal costs: *Crandall v. Atlantic School of Theology* (1993), 122 NSR (2d) 359 (CA), at ¶ 3 per Jones JA; *Ryan v. Ryan* 2000 NSCA 10, at ¶ 38-41 per Pugsley, J.A.

See also *Disabled Consumer Society*, paras 19-21.

Application of Principles

[12] A respondent who seeks security for costs must show special circumstances. Tiffany says the special circumstances are that, without security, there is a significant risk that, if Ms. Fotherby's appeal fails, Ms. Fotherby would not satisfy an award of costs for the appeal.

[13] As noted in the authorities cited above, security for costs should not be just an implement for the respondent to stifle an arguable appeal. When security would prevent the prosecution of an arguable appeal, and no other circumstances justify security, then security should be denied.

[14] That is not a factor here. There is no evidence in Ms. Fotherby's affidavit that a requirement to post security for costs, at the level I will consider, would disable Ms. Fotherby's ability to prosecute her appeal. To the contrary, her affidavit says:

> 4. I state that I was and always have been able to obtain financing for this property ...
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> 5. I state that the Respondents attempt to claim that I show insolvency yet I paid everything due to the Respondents right up till they breached the contract, the last payment being made on June 24, 2011 on schedule and only stopped making payment when the Respondents breached the contract, refused to remedy and at that time I enforced an Agreement clause that allowed me to stop payments to prevent further loss.

[15] The judgment under appeal orders Ms. Fotherby to pay over $21,000 debt plus $10,000 costs. She has not paid. There is no stay of execution. On June 5, 2012, Justice Beveridge dismissed Ms. Fotherby's motion for a stay (2012 NSCA 59). So Tiffany may seek to execute. But the respondent's right to execute on the judgment under appeal does not automatically entitle the respondent to an order for security for costs on that appeal. Rather, the test of "special circumstances" requires that the appellant be shown to have exhibited some act of insolvency. That the respondent genuinely contests her obligation to pay, and seeks to test that point in the Court of Appeal, is not, by itself, an act of insolvency.

[16] The Lease says:

> If there is a default with respect to any of Landlord's covenants, warranties or representations under this Lease, and if the default continues more than fifteen (15) days after notice in writing from Tenant to Landlord specifying the default, Tenant may, at its option and without affecting any other remedy hereunder, cure such default and deduct the cost thereof from the next accruing installment or installments of rent payable hereunder until Tenant shall have been fully reimbursed for such expenditures.

[17] Ms. Fotherby alleges that Tiffany breached its obligations, and that, under this provision, Ms. Fotherby was entitled to withhold rent to reimburse her costs of curing the default. Justice Moir found that Tiffany did not breach the Lease. There is nothing in Ms. Fotherby's affidavit for this motion which persuades me that Tiffany breached the Lease. But it is not for a chambers judge to assess the merits of the appeal. That is a matter for the panel of this Court on the appeal proper.

[18] I decline to use Ms. Fotherby's mere failure to satisfy the judgment under appeal as a basis for an order that she post security for costs to appeal that order.

[19] But there is more to it than just the order under appeal.

[20] Ms. Fotherby has been in this situation before. *Gilbert v. Fotherby*, 2007 NSSC 211 is a decision of Justice Robertson. The decision recites that Ms. Fotherby and her husband were parties to a Lease-to-Own Agreement of a property, owned by a Mr. and Mrs. Gilbert, in Eastern Passage, Halifax Regional Municipality. According to the decision:

> [8] The defendant Lynn Fotherby took possession of the Property on April 1, 2006 and paid the $3100 fee to Mr. Richard Comeau the real estate agent. The defendant Brian Fotherby also moved into the Property. The defendant further paid $1550 in two cheques for rent for the month of May 2006. However, the defendant Lynn Fotherby has made no further payments from June 1, 2006 to present.
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> [9] On July 1, 2006, the plaintiffs served on the defendants at the Property a Notice to Quit the Property. The defendants refused to leave and remain in the Property to this day.

The date of Justice Robertson's decision was July 4, 2007. The Gilberts sued the Fotherbys on the Lease-to-Own Agreement. The Fotherbys, representing themselves, defended and counterclaimed that the Gilberts

> ... have caused the defendants to "experience financial loss in her business, damage to her reputation within the business community and damage to her reputation in the community as a whole"... . [quoted in Justice Robertson's decision, para 72]

Justice Robertson (para 72) characterized these claims as "unspecified allegations which contain no facts, respecting the plaintiffs alleged acts or omissions, causing such loss". Justice Robertson granted summary judgment to the Gilberts on the basis that neither the Fotherbys' Defence nor their Counterclaim contained an arguable issue to be tried. Justice Robertson issued an order in November 2007, that Ms. Fotherby and her husband pay to the Gilberts $3,100 damages plus interest from July 1, 2006, plus costs of $6,555.31.

[21] At the hearing of the motion before me, Ms. Fotherby acknowledged that the Gilberts' judgment remains unsatisfied.

[22] The failure to pay debts as they become due is often treated as an act of insolvency. The similarity of pattern gives Tiffany every reason for concern that a judgment for costs in this appeal would elicit the same inattention as the Gilberts' judgment debt has received. Ms. Fotherby's failure to pay the Gilberts' debt for over four years, in my view, suffices to establish the special circumstances for an order for security for costs.

Quantum of Security

[23] Mr. Cowan's affidavit for the motion says little that assists me to calculate Tiffany's potential costs.

[24] Justice Moir ordered costs of $10,000. The Court of Appeal's occasional benchmark of 40% would mean $4,000. This appears to be an uncomplicated appeal from a brief contested motion. I think it quite possible that the successful party on this appeal will receive an award for taxable costs of under $4,000.

[25] Security for costs in the Court of Appeal usually is below the anticipated taxable award on appeal. The judge, when quantifying security, must balance the respondent's concern about costs with the appellant's right of access to an appeal court.

[26] I would order Ms. Fotherby to post security for appeal costs of $1,500. The security should be posted by August 31, 2012.

[27] I quantify the costs of this motion at $500, payable in the cause.

Fichaud, J.A.