

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Dempsey v. Pagefreezer Software Inc.*, 2023 NSCA 60

**Date:** 20230824

**Docket:** CA 525687

**Registry:** Halifax

**Between:**

Nathan K. Dempsey

Appellant

v.

Pagefreezer Software Inc. and Michael Riedijk

Respondents

**Judge:** Carole A. Beaton, J.A.

**Motion Heard:** August 24, 2023, in Halifax, Nova Scotia in Chambers

**Written Decision:** August 25, 2023

**Held:** Motion granted. Security for costs ordered in the amount of \$2,500.

**Counsel:** Nathan K. Dempsey, self-represented appellant  
Noah Entwisle, counsel for the respondents

**Decision:**

[1] The appellant Mr. Dempsey seeks to overturn a July 21, 2023 decision made by Justice P. Rosinski in the Supreme Court of Nova Scotia (*Dempsey v. Pagefreezer Software Inc.*, 2023 NSSC 240). That decision denied his request for stay of an execution order. The execution order arises from judgments secured by the respondents in the Province of British Columbia, and subsequently registered in this province pursuant to the *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c.30 (“the Act”) on April 17, 2023. Mr. Dempsey filed his Notice of Appeal in this Court on July 28, 2023.

[2] The execution order Mr. Dempsey sought to have stayed has its genesis in two costs orders imposed upon him in the British Columbia Court of Appeal (“BCCA”) totalling \$41,271.63. The Supreme Court of Nova Scotia issued the execution order permitting the respondents to collect against those awards on April 27, 2023.

[3] The respondents made a motion before me in chambers, pursuant to *Civil Procedure Rule* 90.42, seeking an order requiring Mr. Dempsey to file \$2,500 security for costs in the appeal proceeding. Mr. Dempsey opposed the motion. At the close of the hearing I advised the motion was granted, with reasons to follow. These are my reasons.

[4] *Civil Procedure Rule* 90.42 provides:

**90.42 Security for costs**

(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.

(2) A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[5] The respondents argue Mr. Dempsey should be required to deposit security for costs because he has not paid the outstanding costs awards of the BCCA. The respondents acknowledge Mr. Dempsey has paid the \$500 costs imposed by Justice Rosinski pursuant to the order now under appeal. Nonetheless, they maintain, Mr. Dempsey’s ongoing failure to pay the BCCA costs, the history of his disregard for court orders imposed in British Columbia and the fact the British Columbia Supreme Court has declared Mr. Dempsey to be a vexatious litigant

during the course of the litigation in British Columbia, all justify requiring security for costs in the appeal.

[6] In response to the motion, Mr. Dempsey says he is not required to pay costs in relation to the BCCA matters on the basis he is now pursuing an appeal of the British Columbia proceedings to the Supreme Court of Canada. I disagree. Commencement of an appeal does not automatically act as a stay of an order. Regardless, Mr. Dempsey also made clear that should he be required to pay security for costs he is able to do so; in other words, there is no financial barrier to him meeting such an obligation.

[7] Requiring an appellant to post security for costs is a discretionary decision (*Withenshaw v. Withenshaw*, 2022 NSCA 62 at para. 6). The onus is on the respondents to persuade the court they have established “special circumstances” which should then cause the court to exercise its discretion in their favor. The test to be applied was explained in *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40, where Beveridge, JA wrote:

[6] There are a variety of scenarios that may constitute “special circumstances”. There is no need to list them. All bear on the issue of the degree of risk that if the appellant is unsuccessful the respondent will be unable to collect his costs on the appeal. In *Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.*, 2005 NSCA 44, Fichaud J.A. emphasized, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute “special circumstances”. He wrote:

[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 [citations omitted].

[7] However, the demonstration of special circumstances does not equate to an automatic order of security for costs. It is a necessary condition that must be satisfied, but the court maintains a discretion not to make such an order, if the order would prevent a good faith appellant who is truly without resources from being able to prosecute an arguable appeal. This has sometimes been expressed as a need to be cautious before granting such an order lest a party be effectively denied their right to appeal merely as a result of impecuniosity (*2301072 Nova*

*Scotia Ltd. v. Lienaux*, 2007 NSCA 28, at para. 6; *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 52).

[Emphasis added]

[8] In this case, the fact the underlying judgment has not been satisfied takes on a heightened significance given, as the respondents argue, the very judgment they seek to enforce in this jurisdiction is borne out of unsatisfied costs orders made in the BCCA.

[9] The court maintains its discretion not to require security for costs if it would prevent a good faith appellant, otherwise lacking in sufficient resources, from being able to proceed with an arguable appeal (*Murphy v. Ibrahim*, 2022 NSCA 75 at para. 46).

[10] Given Mr. Dempsey’s representations to the Court about his ability to pay, this is clearly not a case in which the Court needs to be concerned that an order for security for costs would result in an impecunious appellant losing the opportunity to advance a reasonable appeal.

[11] All of the circumstances before me justify the respondents’ concerns Mr. Dempsey has “acted in an insolvent manner toward the respondent” (*Williams Lake Conservation Company v. Chebucto Community Council of Halifax Regional Municipality*, 2005 NSCA 44 at para. 11), thus fuelling doubt about the prospect of recovery should the respondents be awarded costs in the appeal.

[12] Mr. Dempsey’s designation as a vexatious litigant in British Columbia, and the history of the matters leading to the execution order now appealed, do not instill optimism that he would, if unsuccessful on the appeal, adhere to any costs order this Court might impose.

[13] I am satisfied the respondents have established the existence of special circumstances, and that requiring Mr. Dempsey to deposit security for costs does not create any procedural imbalance as between the parties or otherwise impede Mr. Dempsey’s opportunity to appeal.

[14] The motion for security for costs is granted. Each party will bear their own costs on the motion. An order will issue requiring Mr. Dempsey to deposit with the court security in the amount of \$2,500 payable on or before September 5, 2023,

at 12:00 p.m. (Atlantic). In the event the monies are not deposited by that date and time, then an order will issue forthwith dismissing the appeal.

Beaton, J.A.