IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Letendre v. SYSCO Food Services of Atlantic Canada, 2008 NSSC 105

Date: 20080403
Docket: S.H. No. 285864
Registry: Halifax

Between:

Paul L. Letendre

Plaintiff

and

SYSCO Food Services of Atlantic Canada,
a body corporate

Defendant

D E C I S I O N

Revised decision:	Names of counsel were reversed on the original decision. This decision replaces the previously distributed decision.
Judge:	The Honourable Justice Gerald R P Moir
Heard:	3 April 2008 at Halifax
Written Decision:	Oral decision transcribed and signed on 17 April 2008
Counsel:	Mr. Andrew Taillon for the Plaintiff Mr. Grant Machum and Mr. James Chipman for the Defendant

Moir, J. (orally):

[1] Mr. Letendre sued his former employer for wrongful dismissal. The employer moved to security for costs in the amount of $44,750 and today it submitted that security for $30,000 may be sufficient.

[2] Documents exhibited to an affidavit of counsel indicate that there is a genuine contest about liability.

[3] Mr. Letendre's affidavit shows that he has no assets available in Nova Scotia for realization on an order for costs. It also shows that he has significant assets in Massachusetts.

[4] He has savings of $20,000 US, which he has earmarked for legal fees. Otherwise, his assets are not easily liquidated without expense. They consist of $150,000 US in retirement savings plans and equity of $72,000 in a condominium owned by him and his wife. I have no evidence about his borrowing power.

[5] Mr. Letendre has provided the defendant with his undertaking "not to contest any order for costs" made by this court in connection with the trial of this action. Through his counsel, he represented to the court that Mr. Letendre will not contest the enforcement of an order for costs in Massachusetts or any other place where he has assets.

[6] According to his affidavit, Mr. Letendre started working for SYSCO Food Service in Massachusetts in 1985. He transferred to Toronto in 2004 and to Halifax in 2005. The employment came to an end in 2007 and, as a result, a non-competition provision in a stock option plan prevented Mr. Letendre from working in his field for a competitor in Atlantic Canada and, possibly, the Toronto area. Also, his work permit was predicated on his working for SYSCO. The affidavit suggests the termination forced Mr. Letendre to leave Nova Scotia and return to Massachusetts where he earns a comfortable, but lesser, income.

[7] Mr. Chipman points out that the non-competition provision includes reference to waiver by the employee. I agree with Mr. Taillon's submission on this point. It is unlikely that an employee who considered himself wrongfully dismissed would make a request for a waiver, and less likely if the employer's position was that the employee was dismissed for cause. On the evidence before

me, I find that the termination did force Mr. Letendre to move from Nova Scotia in order to earn an income.

[8] The affidavit indicates that Mr. Letendre suffered financial losses on account of the move to Massachusetts. There is nothing before me to counteract Mr. Letendre's evidence on the move or on his income and assets.

[9] There is nothing before me to suggest that the law of the Commonwealth of Massachusetts on recovery under a Nova Scotia judgment is different from the law of Nova Scotia on recovery under a Massachusetts judgment. However, Mr. Machum, counsel of record for SYSCO, does in his brief refer me to N.S. Reg. 142/ of 1973, which shows that only Canadian provinces and territories are reciprocating states under the *Reciprocal Enforcement of Judgments Act*.

[10] Mr. Taillon refers to a decision of the Supreme Judicial Court of Massachusetts to show that a Nova Scotia judgment could be enforceable in Massachusetts. Mr. Chipman objects on the ground that foreign law must be proved. I am proceeding on the basis that I should not find Massachusetts' law on the basis of references to Massachusetts case law only.

[11] Mr. Machum's brief points out that the application could have been made *ex parte* under Rule 42.01(2). He says the defendant chose an interlocutory application under Rule 42.01(1) out of courtesy. I wish though to make it clear that I do not take 42.01(2) to indicate anything about the discretion under 42.01(1). Had there been an *ex parte* order, the discretion under 42.01(1) could still be raised through Rule 37.13.

[12] Rule 42.01(1) gives the court a broad discretion to order security for costs "whenever it deems it just". The Rule provides examples of circumstances in which it may be just to do so, and first among them is "a plaintiff resides out of the jurisdiction". Both parties refer me to the leading case in Nova Scotia, *Wall* v. *Horn Abbot Ltd.*, [1999] N.S.J. 124 (C.A.). Mr. Taillon refers me to para. 50 where Justice Cromwell sounds a note of caution about security for costs:

> An order for security has another significant feature. It requires the plaintiff to post security for a debt which has not yet been determined to exist; the order may be made before there has been any determination that the plaintiff is liable for costs. In this respect, it is a form of execution before judgment. Moreover, the

> order is made at the interlocutory stage, that is, before there has been any determination of the merits of the plaintiff's case at trial.

[13] Both briefs refer to paras. 53 and 54:

> The examples given in Rule 40.01(1)(a)-(i) are instructive; while they do not limit the discretion to order security, they illustrate some of the sorts of factors relevant to its exercise.
>
> One such factor is whether the plaintiff or the persons for whose benefit the litigation is being pursued are artificially insulated from the risk of a costs award. For example, plaintiffs who are not resident in the jurisdiction are mentioned in Rule 42.02(1)(a) and (b). Orders for security against such plaintiffs have a long history.... Their rationale was that an unsuccessful "foreign" plaintiff, if ordered to pay costs, would not be "in reach" of the Court for the service of process in relation to costs....

[14] I am also grateful for Mr. Machum's reference to the helpful summary provided by Associate Chief Justice Smith in *Emmanual* v. *Sampson Enterprises Ltd.*, [2007] N.S.J. 395 (S.C.) at para. 9. Omitting her references to authorities, she writes as follows:

> (1) Civil Procedure Rule 42.01 gives the Court a broad discretion whether to order security for costs. There is no automatic entitlement to security if the case falls within one of the examples set out in Civil Procedure Rule 42.01. Conversely, security can be ordered even if the case does not fall within one of the examples set out in the Rule.
>
> (2) Even where the Defendant is *prima facie* entitled to security, the courts are reluctant to order it if the Plaintiff establishes that the Order will, in effect, prevent the claim from going forward.
>
> (3) The Court must be cautious not to turn the power to order security for costs into the imposition of a means test for access to the courts. Further, Orders for security for costs should not be used to keep persons of modest means out of court.
>
> (4) Where impecuniosity is relied upon to defend against an Order for security for costs there must be more than a "blanket and empty assertion of impecuniosity." A Plaintiff who alleges impecuniosity and who suggests that an Order for security for costs will stifle the action must establish this

> by detailed evidence of its financial position including not only its income, assets and liabilities, but also its capacity to raise security.
>
> (5) Where an Order for security for costs will prevent a Plaintiff from proceeding with its claim, the Order should only be made where the claim obviously has no merit, bearing in mind the difficulties of making that assessment at an interlocutory stage.
>
> (6) The granting of an Order for security for costs is subject to the judge being satisfied that "it is just" to make the Order in the circumstances of the case. The factors that will enter into this consideration may vary depending on the circumstances of each case.

[15] Mr. Chipman referred to the opening lines of para. 2 in *Wall*:.

> The case requires consideration of two fundamental values in our system of litigation. The first is that everyone should be able to have their day in court; the second that defendants must have reasonable protection from claims that have no merit.

The case before me is a little different from *Wall*, in that Mr. Letendre does not suggest that he cannot pursue his case if substantial security for costs is required. He says it would be a hardship, and would cause injustice in other ways than preclusion of the claim.

[16] Both briefs also refer me to the decision of Justice LeBlanc in *6048668 Canada Inc.* v. *Chaston*, [2007] N.S.J. 146 (S.C.). The plaintiff corporation was resident in Quebec. It was registered to conduct business in Nova Scotia but does not appear to have assets in the province. Like Massachusetts, Quebec is not a reciprocating state under the *Reciprocal Enforcement of Judgments Act*. Justice LeBlanc made reference to article 3155 of the *Code Civil du Quebec* on enforcement of foreign judgments. He also relied on the principle in *Morguard Investment Limited* v. *De savoye*, [1990] S.C.J. 135. The principle in *Morguard* applies only to Canadian superior courts. However, a perhaps weaker but nonetheless significant principle applies in the relationship between a Canadian court and the Superior Court of Massachusetts: *Pembina County Water Resource District* v. *Manitoba*, [2005] F.C. 1226 (Prothonotary) at para. 19. Furthermore, there is nothing before me to suggest that the status of a foreign judgment as a cause of action under our common law is not also a part of the common law of the Commonwealth of Massachusetts. I do not say it is, but neither can I say it is not.

[17] Justice LeBlanc concluded at para. 18:

> Although the defendant/applicant argued that it would be [difficult] to enforce the judgment obtained in Nova Scotia in the province of Quebec, there is no specific evidence before me to support his contention. ... I cannot simply base my decision on a bare assertion.

[18] As already said, this is not a case for refusing to order security for costs on the basis that the order would prevent the plaintiff from advancing the claim. However, I find that this is a case in which the plaintiff would suffer a serious hardship under such an order. Mr. Letendre will incur significant expenses in advancing his claim. He is right to earmark his $20,000 in savings for that purpose. Therefore, an order for security for costs at any significant level will require him to get and service a loan or, if he cannot do that, liquidate a retirement savings plan or the equity in the family home.

[19] I am not prepared to conclude on “bare assertion”, to use Justice LeBlanc’s phrase, that recovery in Massachusetts would be difficult. It is a nearby American State with whom this province does much commerce.

[20] Because of the employment contract at issue in this proceeding, Mr. Letendre could not work in Nova Scotia. Whether he or the employer terminated the employment contract, and whether there was just cause if the employer did so, the termination still caused him to have to leave Nova Scotia. The cause Mr. Letendre advances is wrongful termination. In all the circumstances, it would be unjust to put him to the hardship of posting security for costs on a basis that resulted from the termination itself.

[21] Considering the hardship that would be caused to the plaintiff, the absence of evidence of serious difficulty realizing on a Nova Scotia judgment against assets in Massachusetts, and the connection between the cause and Mr. Letendre’s change in residency, I find it would be unjust to order security for cost. The application will be dismissed.

J.