SUPREME COURT OF NOVA SCOTIA
Citation: *Fraser v. MacIntosh*, 2024 NSSC 183

Date: 20240702
Docket: 522091
Registry: Halifax

Between:

Donn Fraser, and DLF Law Practice Incorporated, a body corporate

Plaintiff

v.

Bruce Tait MacIntosh

Defendant

SECURITY FOR COSTS DECISION

Judge: The Honourable Justice Scott C. Norton

Heard: June 18, 2024, in Halifax, Nova Scotia

Decision: July 2, 2024

Counsel: Donn Fraser, self-represented
DLF Law Practice Incorporated, on its own behalf by its officer Donn Fraser
Bruce Tait MacIntosh, KC, self-represented

By the Court:

Introduction

[1] The Defendant, Bruce Tait MacIntosh, moves for an order for security for costs, payment of costs and discovery in aid of execution.

[2] The underlying proceeding involves causes of action claimed in the existing Second Amended Statement of Claim that include breach of fiduciary duty, defamation, inducement or encouragement of contractual breach, interference with contractual or economic relationships, and the civil tort of conspiracy.

[3] The history of dealings between the parties within this litigation have been antagonistic and distrustful. By way of example, on this motion, each party takes umbrage with the content of the other's affidavit as being in breach of the requirements of the *Civil Procedure Rules* and related case authorities. In my view some content of both affidavits violates the well-established principles that affidavits should not contain opinion or submission.

[4] Both parties complain of the pejorative and vitriolic content of the other's affidavits and written submissions. Both parties are experienced civil litigation lawyers who know, or ought to know, that in materials filed with the court, continued reference and reliance upon language that is hyperbolic and vitriolic is not effective advocacy. Such language masks and diminishes what otherwise might be a persuasive point of argument.

[5] At the outset of the motion, I dealt with objections made by both parties to the affidavit evidence filed on the motion. As is apparent from my rulings, both parties made extensive references to conduct of the other that I found was irrelevant to the legal issues to be decided on the motion. The Plaintiff's affidavits and submissions, in particular, display a stream of consciousness of malice toward the Defendant. It was a substantial waste of time and expense for the parties to file this material and for the Court to deal with the required rulings and redactions.

[6] The motion arises substantially from an award of costs made by Justice Mona Lynch in this proceeding by written decision dated March 5, 2024. Justice Lynch ordered the Plaintiff to pay interlocutory costs to the Defendant in the amount of $20,131.72. The Plaintiff has not paid the costs. The Plaintiff has appealed the

Decision of Justice Lynch, and the hearing of the appeal is scheduled for September 2024. There has been no order for the stay of Justice Lynch's decision.

[7] The issues before me on this motion are:

1. Is the Defendant entitled to an order for security for costs?
2. Should the Plaintiff be ordered to pay an existing judgment?
3. Should the court order discovery in aid of execution?

Analysis

Is the Defendant entitled to an order for security for costs?

[8] The *Rules* provides the court with general discretion to award costs (77.02). A court may order security for costs if the factors set out in Rule 45.02 are satisfied:

> 45.02 Grounds for ordering security
>
> (1) A judge may order a party who makes a claim to put up security for the potential award of costs in favour of the party against whom the claim is made, if all of the following are established:
>
> (a) the party who makes a motion for the order has filed a notice by which the claim is defended or contested;
>
> (b) the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party;
>
> (c) the undue difficulty does not arise only from the lack of means of the party making the claim;
>
> (d) in all the circumstances, it is unfair for the claim to continue without an order for security for costs.
>
> (2) The judge who determines whether the difficulty of realization would be undue must consider whether the amount of the potential costs would justify the expense of realizing on the judgment for costs, such as the expense of reciprocal enforcement in a jurisdiction where the party making the claim has assets.
>
> (3) Proof of one of the following facts gives rise to a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means:

(a) the party making the claim is ordinarily resident outside Nova Scotia;

(b) the party claimed against has an unsatisfied judgment for costs in a proceeding in Nova Scotia or elsewhere;

(c) the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful;

(d) the party making the claim fails to designate an address for delivery or fails to maintain the address as required by Rule 31 - Notice.

(4) A judge may also order security for costs in either of the following circumstances:

(a) the security is authorized by legislation;

(b) the same claim is made by the same party in another proceeding, and it is defended or contested by the party seeking security for costs on the same basis as in the proceeding in which security for costs is sought.

[9] I have canvassed the *Rules* and authorities dealing with such a motion, including the directions of the Court of Appeal in *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316, aff'd 2012 NSCA 89. I refer to and adopt my decision in *Rapid Camp Ltd. v. Dalhousie University*, 2024 NSSC 53.

[10] The Plaintiffs say that the judgment has not been paid because neither Plaintiffs have the "funds on hand" to pay the award at this time and it would be unfair to the Plaintiffs to not allow their claims to continue without security for costs.

[11] The Defendant has proved facts that give rise to a rebuttable presumption under *Rule* 45.02(3). Specifically, that there is an unsatisfied judgment for costs against both Plaintiffs; and that the corporate Plaintiff does not appear to have sufficient assets to satisfy a judgment if the Defendant is successful at trial. As such the burden is on the Plaintiffs to rebut the presumption that the Defendant will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the Plaintiffs' lack of means.

[12] In the present case, the only evidence of the means of the Plaintiffs is the bald statement from the Plaintiffs that they do not have "funds on hand". There is no explanation of what that means. There is no evidence that neither Plaintiff could sell

assets, borrow money, or otherwise access funds that are not "on hand". There is no evidence of the Plaintiffs' past or current incomes, nor any statements of net worth. There is no banking documentation provided. With respect, the bald statements of the Plaintiffs that they do not have "funds on hand" is insufficient to overcome the presumption. The decision in *Ellph.com* is distinguishable on this basis.

[13] The evidence also strongly suggests a pattern of disposition of or encumbering of assets by both Plaintiffs. The Plaintiffs have failed to rebut the presumption that the Defendant will have undue difficulty realizing on a judgment for costs.

[14] I am satisfied that there is sufficient evidence before the Court to suggest that this matter cannot be allowed to go ahead without security for costs.

[15] I now must consider the amount of security. The security should be in an amount sufficient to cover the existing judgment as well as the costs reasonably expected to result from the ongoing proceedings. I note here the cautioning words of Justice Scanlan, as he then was, in *Leigh v. Belfast Mini-Mills Ltd*., 2013 NSSC 190, at para. 11:

> … In other words, if you continue wasting money on applications that are inappropriate or unsuccessful it may be that the $30,000.00 gets used up and there's another requirement to revisit the issue of costs again.

[16] For the purposes of setting an amount for security for costs, I would conservatively set the amount involved at $500,000. This would lead to basic costs on Scale 2 of Tarriff "A" of $49,750 together with $30,000 for a conservative estimate of 15 days trial time. So, and considering the outstanding judgment for $20,000, I find that a sum of $80,000 is appropriate for security for costs, subject to review in the future depending on how the process unfolds, including the outcome of the appeal of Justice Lynch's decision.

[17] The Order will provide that this amount is to be paid into court on or before July 30, 2024, and that the amount of the outstanding judgment shall not be payable from the security until and subject to the determination of the appeal. Any costs awarded from this motion and the motion for disclosure heard on the same day shall be payable from the security unless otherwise paid by the Plaintiffs.

[18] Except for the pending appeal, the proceeding shall be stayed until the security for costs is paid into court.

2. *Should the Plaintiff be ordered to pay an existing judgment?*

[19] The Defendant requests an order that the Plaintiffs pay the costs awarded by Justice Lynch. The Defendant has a judgment and execution order for the ordered costs amount and that judgment is under appeal.

[20] There is a process for the enforcement of judgments available to the Defendant. An order from this Court to pay a judgment in existence is redundant. The request for an added order is denied.

3. *Should the court order discovery in aid of execution?*

[21] I now turn to the third ground of relief, an order for discovery of a debtor in aid of execution. This is governed by *Rule* 79.23. The *Rule* contemplates this being an administrative procedure with a subpoena to be issued by the Prothonotary.

[22] I am not satisfied by the evidence that the Defendant has pursued the procedure set out in the *Rules* regarding a discovery of the Plaintiffs in aid of execution. Further, it is not clear that any such discovery will be necessary with the Order for security for costs that has been made.

[23] Regarding the request for an Order that the Defendant be permitted to discover Heather MacDonald, I am not satisfied that Ms. MacDonald was personally served with notice of the motion today. She did not appear. Mr. Fraser acknowledges that he does not represent her or speak for her.

[24] Accordingly, I decline to grant an order for discovery of Ms. MacDonald in aid of execution, without prejudice to a future motion. Again, with the security for costs ordered, it may not be necessary for discovery of Ms. MacDonald in any event.

Conclusion

[25] As to costs of this motion, I find that the Defendant was substantially but not totally successful on the motion. The security for costs was the most significant of the three forms of relief sought. I have considered the conduct of both parties with respect to the content of their affidavits and briefs as addressed at the outset of this decision. I have from the outset of my management of this matter told counsel that unacceptable conduct will be addressed by costs. Had it not been for the objectionable content of the Defendant's materials, I would have ordered the Plaintiffs to pay higher costs for the objectionable content of their materials. In the result, I consider it reasonable to order the Plaintiffs to pay costs, inclusive of

disbursements, to the Defendant in the sum of $2,000.00 forthwith and in any event of the cause.

[26] The Defendant will provide the Court and the Plaintiffs with a draft order in Word form via email within 5 days from today and the Plaintiff may address to the Court any concerns with the form of the order in writing within 2 days of its receipt. The Court will then decide the form of Order.

Norton, J.