IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Rankin v. Schoner, 2004 NSSC 95

Date: 20040205
Docket: 0333
Registry: Port Hawkesbury

Between:

Brenda Rankin

Applicant/Respondent

v.

Werner Schoner

Respondent/Plaintiff

Judge: Before the Honourable Justice Simon J. MacDonald

Heard: February 5, 2004, in Port Hawkesbury, Nova Scotia

Counsel: W. Augustus Richardson, for the Applicant
Hugh MacIsaac, for the Respondent

By the Court:

[1] This is an application wherein the defendant, Brenda Rankin, seeks security for costs pursuant to *Civil Procedure Rule 42.01(1)* on the grounds that:

> (a) the plaintiff resides out of the jurisdiction and is ordinarily a resident out of the jurisdiction;
>
> (b) it appears that there is a good, sufficient reason to believe that the proceeding is frivolous and vexatious and that the plaintiff is not possessed of sufficient property within jurisdiction to pay costs;
>
> (c) the plaintiff with a view to evade in the consequence of litigation has changed his address during the course of the proceeding.

[2] Civil Procedure Rule 42.01 provides:

> 1. The Court may order security for cost to be given in a proceeding where, whenever it deems it just, and without limiting the generality of the foregoing it may order security be given where
>
> (a) a plaintiff resides out of the jurisdiction;
>
> (b) a plaintiff is ordinarily resident out of the jurisdiction, though he is temporarily within the jurisdiction;
> (c) a plaintiff commences a proceeding to enforce a cause of action that is the subject matter of an earlier proceeding commenced by the plaintiff and still pending;
>
> (d) a plaintiff, or any person through or under whom he claims, has a judgement or order against him for costs that have not been paid;

> (e) a proceeding is brought by a nominal plaintiff;
>
> (f) upon the examination of a plaintiff it appears that there is good reason to believe that the proceeding is frivolous and vexatious, and that the plaintiff is not possessed of sufficient property within the jurisdiction to pay costs;
>
> (g) a proceeding is brought on behalf of a class and the plaintiff is not possessed of sufficient property to answer the costs, and it appears that the plaintiff is put forward or instigated to sue by others;
>
> (h) by an enactment, a party is entitled to security for costs;
>
> (I) a plaintiff, with the view to evading the consequences of the litigation, has not stated his address in the originating notice, or stated it incorrectly therein, or changed his address during the course of the proceeding.
>
> 2. Where it appears from an originating notice that a plaintiff resides out of the jurisdiction and in the belief of the defendant the plaintiff has not sufficient property within the jurisdiction to secure the defendant's costs, the defendant may obtain an order for security of costs on an ex parte application.

[3] The accident occurred on June 5, 1995. The Statement of Claim was issued on or about the 30th of May 1997 by counsel Francis Moloney. The defence was filed around May of 1997. On June 4, 1999 Mr. Moloney indicated he had no instructions to deal with matters relating to Mr. Schoner. Subsequently, an application was made and an order issued dated

November 2, 1999 for the Plaintiff to produce. On or about February 25th 2000 Mr. Schoner changed counsel to Mr. MacIsaac.

[4] Mr. Schoner and his wife, Elisabeth, became involved in a divorce action. In that action she was discovered on March 5, 2001 wherein she made certain comments about this accident and Mr. Schoner, for example:

> 1. She thought he was "definitely" exaggerating his symptoms in order to "get some money" from the insurance company.
>
> 2. After the accident Mr. Schoner, when off their property, "was the sick guy;" but when on their property "he was fine, unless he-he had-he wanted to be lazy and we-we was doing the work for him."
>
> 3. He painted the inside windows of his tractor dark so that no one could see inside to see that he was operating the tractor.
>
> 4. He pretended to need various types of pain medication, though he never actually took them.

[5] The Court does appreciate these comments were made in the midst of the divorce action. Mr. Schoner's response to counsel and to move this matter forward were so slow counsel required Court Orders to compel his action, e.g. an Order of the Court in November, 2002 to complete his undertakings at discovery. A similar order was required in February 2003 with the addition that the Plaintiff's Statement of Claim was liable to be dismissed

on application if not complied with. I am satisfied he has not been advancing his claim in a diligent manner.

[6] There has been arguments by counsel both pro and con about the impecuniousity of the Plaintiff. Mr. MacIsaac in his remarks has referred to the discovery testimony of Mr. Schoner in 2003 to show that if he was forced to make a deposit by way of security for costs the court could possibly be forcing him to eliminate what he feels is a genuine claim.

[7] In cases where the impecuniousity of the plaintiff is the basis of the application for security the court must be cautious to insure the application is not advanced for the purpose of eliminating a genuine claim. Orkin's Law of Costs, 2d ed. At 5.503 states:

> "The court's discretion to reduce or eliminate security for cost on the grounds for impetuosity should however be exercised only in special circumstances and with caution and restraint. The plaintiff should clearly demonstrate impetuosity and lack of ability to borrow or sell assets to raise the required money. On the other hand, security for cost is not to be used to defeat the right of a foreign plaintiff to assert a just claim. In the circumstances of the case payments may be ordered on an installment basis or in a reduced amount where full security would preclude the action."

[8] A review of the merits of this case on an application for costs must take place in the context of determining whether there is a serious issue to be

tried. It is a low threshold. The determination of the merits of the claim or the defence is for the trial judge.

[9] Justice Cromwell said in *Wall v. Horn Abbot et al*, (1999), 176 N.S.R. (2d) 96, (NSCA) at para. 83:

> "From this review of the authorities, I reach the following conclusions. The merit of the plaintiff's case is a relevant consideration to the exercise of discretion to grant or refuse security for costs. The extent to which the merits may properly be considered varies depending on the nature of the case. If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. The assessment of the merits should be decisive only where (a) the merits may be properly assessed on an interlocutory application; and (b) success or failure appears obvious. If the plaintiff resists security that would otherwise be ordered on the basis that the order will stifle the action, the plaintiff must establish this by detailed evidence of its financial position including not only its income, assets and liability, but also its capacity to raise the security. Where the order for security will prevent the plaintiff from proceeding with the claim, the order should be made only where the claim obviously has no merit, bearing in mind the difficulties of making that assessment at the interlocutory stage. Where the choices are, on one hand, allowing an unmeritorious claim to go to trial and, on the other, stifling a possibly meritorious claim before trial, the policy of our law is clear. While there is a risk of injustice on either account, stifling a possibly meritorious claim is the greater injustice."

[10] In this case there is no affidavit from Mr. Schoner stating he has a bona fide claim, detailing his financial position and indicating his income. I have

nothing presented at this application by him to show his full financial situation. I have the material supplied by Mr. MacIsaac in his affidavit, but all he says is based on information supplied to him by Mr. Schoner subject to the April 2003 discovery testimony of which I am aware. The impecuniousity of Mr. Schoner is an important factor one has to consider in coming to a conclusion in this matter.

[11] It has been argued before the court that he does not have the ability to pay. Yet, there has been reference to trips and other matters involving the expenditure of money. Also there is a disability pension. Mr. MacIsaac told the court his friends and relatives were the source of funds to pay for those expenses.

[12] The court was advised of land here in Nova Scotia but this is a matter in dispute between Mr. and Mrs. Schoner in the divorce action. I've also considered Mr. MacIsaac's urging to consider Ms. Schoner's remarks and comments in the context of their divorce action. Mr. MacIsaac is not a counsel of record in the divorce action.

[13] I have concern about Mr. Schoner's place of residence. The material on file reveals he lives in Germany, but he might want to come to Canada, or he might stay in Germany. It also appears his girlfriend is trying to become a

nurse, trying to get work in Germany, trying to decide whether she will come to Canada or not. All of this is from information derived from Mr. MacIsaac's affidavit. I've considered the discovery evidence Mr. MacIsaaac pointed out but that was almost a year ago.

[14] In Royal Trust Corporation of *Canada v. Burke* (1991) P.E.I.J. No. 150, Carruthers, J. speaking on behalf of the court said at para. 10:

> "The appellants did not present any further evidence on the issue of impecuniousity nor were they cross-examined on their affidavits. The Chambers Judge held that the mere assertion of impecuniousity is not sufficient to meet the test. He held that plaintiffs who seek to avoid security for costs on the ground of impecuniousity must lead evidence to demonstrate that they are impecunious by giving evidence of their assets, debts, etc. This conclusion is supported by Mr. Justice Doherty of the Ontario High Court of Justice in *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 when he states at p. 125:
>
> > 'A litigant who falls within one of the categories created by rule 56.01(a) to (f), and who relies on his impecuniousity to avoid an order requiring that he post security, must do more than adduce some evidence of impecuniousity. The onus rests on him to satisfy the court that he is impecunious: *City Paving Co. v. Port Colborne (City)* (1985), 3 C.P.C. (2d) 316 (Ont. Master's Ch.). The onus rests on the party relying on impecuniousity, not by virtue of the language of rule 56.01, but because his financial capabilities are within his knowledge and are not known to his opponent; and because he asserts his impecuniousity as a shield against

> an order as to security for costs: *Sopinka and Lederman, The Law of Evidence in Civil Cases* (1974), at p. 395.'"

[15] I am aware Mr. Schoner is out of the jurisdiction and his obligations. There is no clear evidence which satisfies me he intends to come back to this country. There is no clear indication he has any assets within this jurisdiction, subject to my earlier comments about the divorce action and the possibility of the land transaction. There is no affidavit from Mr. Schoner, nor is there evidence to satisfy me he is impecunious even if I consider Mr. MacIsaac's affidavit. I am therefore going to order security for costs.

[16] I am mindful when I fix the amount it ought not to be of such an amount that it might prevent Mr. Schoner from proceeding with his claim. But as I review this file I am satisfied this is a case where there should be an order for the Plaintiff to pay security for costs.

[17] The applicant in his original material has sought the payment of $20,000.00. This morning he said a more realistic figure is $10,000.00. I've read the material and heard Mr. MacIsaac, when questioned by me clearly indicated he has no instructions with regard to any particular figure. I am going to fix a figure. I order the Plaintiff post the sum of $7,000.00 as security for costs on or before August 1, 2004.

[18] I further order costs be payable for the application today and I fix this amount at $750.00 to be paid within 30 days.

[19] I further order the Plaintiff not be entitled to proceed to a Date Assignment Conference or trial until the above payments are made.

J.