Federal Court  Cour fédérale

Date: 20231110

Docket: T-576-23

Citation: 2023 FC 1498

Toronto, Ontario, November 10, 2023

PRESENT: Associate Judge Trent Horne

BETWEEN:

CRB CONSULTING INC.

Plaintiff /
Defendant by Counterclaim

and

MASSAGE ADDICT INCORPORATED AND
2798639 ONTARIO INC.
O/A MASSAGEADDICT APPLEWOOD

Defendants /
Plaintiffs by Counterclaim

ORDER AND REASONS

I. Overview

[1] The defendants' motion for security for costs includes an affidavit of a private investigator who undertook searches to locate and identify the plaintiff's assets. The investigator obtained, but did not disclose, a business credit report for the plaintiff. The business credit report includes information that could be favourable to the plaintiff.

[2] On a motion for security for costs, the initial burden on the moving party is not a heavy one; all that is required is a *prima facie* basis that the plaintiff might be unable to pay costs. If the defendant provides that evidence, the onus then shifts to the plaintiff to show that it has sufficient assets in Canada to pay the defendant's costs, or that it is impecunious but has a meritorious action.

[3] Defendants moving for security for costs should not be encouraged to make partial or selective disclosure, only revealing those facts or documents that would assist in meeting their initial burden.

[4] On this motion, the defendants have met their initial burden. The analysis in this respect includes consideration of the business credit report, which is deemed to be part of the defendants' evidence. In the absence of any admissible evidence from the plaintiff, security for costs will be awarded.

II. Background

[5] In this action for patent infringement, the plaintiff claims rights in Canadian patent 2,636,116 ("116 Patent") that generally relates to a method and apparatus for providing compensation for therapeutic treatments. The plaintiff alleges that the 116 Patent has been infringed (directly and by inducement) by Massage Addict Incorporated, a franchisor of clinics offering various therapeutic services, and a numbered company that is a franchisee.

[6] Pleadings have closed. The defendants have brought a motion for security for costs, asserting there is reason to believe that the plaintiff has insufficient assets in Canada available to pay the costs of the defendants if ordered to do so (subrule 416(1)(b) of the *Federal Courts*

Rules, SOR/98-106 ("Rules")). The defendants also assert that there is reason to believe that the action is frivolous and vexatious, and rely on subrule 416(1)(g).

III. Security for Costs

[7] Subrule 416(1)(b) is discretionary. It provides that where it appears to the Court that the plaintiff is a corporation, and there is reason to believe that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant of ordered to do so, the Court may order the plaintiff to give security for the defendant's costs.

[8] The initial burden on the moving party is not a heavy one; all that is required is a *prima facie* basis that the plaintiff might be unable to pay costs. If the defendant provides that evidence, the onus shifts to the plaintiff to establish either that it has sufficient assets in Canada to pay the defendant's costs, or that it is impecunious but has a meritorious action (*Double Diamond Distribution, Ltd v Crocs Canada, Inc*, 2019 FC 1373 ("*Double Diamond*") at paras 12-14).

[9] Security for costs is not an automatic entitlement. The Court retains a discretion to deny a request for the posting of security in circumstances where the defendant is in no real jeopardy of recovering its costs once judgment has issued in its favour (*Pembina County Water Resource District v Manitoba*, 2005 FC 1226 at para 14).

[10] Subrule 416(1)(g) requires both a demonstration that there is reason to believe that the action is frivolous and vexatious, and that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant if ordered to do so. An appearance of vexatiousness or frivolousness is very different from the absolute standard of frivolousness and vexatiousness which the Court uses in applying Rule 221 on a motion to strike. What the Court may consider

under subrule 416(1)(g) is whether there is reason to believe that the proceeding is frivolous and vexatious in the sense that it is not a fair and honest use of the process of the Court, or that the action is for a collateral or improper purpose (*Maheu v IMS Health Canada*, 2002 FCT 558 at paras 16-24).

IV. The Evidence

[11] To assess the risk of a plaintiff's inability to pay a costs award, it is necessary to consider what those costs may be.

[12] The defendants' motion materials include a draft bill of costs for all steps up to and including trial. It estimates $213,807.30 in fees (based on Column IV of the Tariff), and a further $426,500.00 in disbursements. Most of the estimated disbursements ($400,000.00) are for expert witnesses.

[13] The plaintiff makes fair criticisms of the draft bill of costs. The estimated duration of discoveries (6 days) and the trial (15 days) appears generous. It is not self-evident that disbursements for experts would be in the range provided. The draft bill of costs includes a second counsel fee for certain items, but this is only available where the Court so directs, and no such direction has been made.

[14] The defendants rely on *Swist v MEG Energy Corp*, 2021 FC 198 ("Swist") where the successful defendant in a patent proceeding was awarded an all-inclusive amount of $521,932.93. Fees were calculated at the high end of Column V of Tariff B. I note that the proceedings in *Swist* were bifurcated; unless and until a bifurcation order is granted in this proceeding, both liability and damages will be the subject of discoveries and trial.

[15] The defendants rely on cases where lump sum awards of costs were made (eg *Seedlings Life Science Ventures, LLC v Pfizer Canada* ULC, 2020 FC 505, where the successful defendant was awarded $2,629,062, inclusive of taxes and disbursements). While a number of judges have assessed costs on a lump sum basis, others have not. The default of assessing fees in accordance with Column III of Tariff B remains (Rule 407). I cannot assume that the defendants, if successful, will receive a fee award based on Column IV, or significantly in excess of the Tariff.

[16] Having regard to all of the above, the draft bill of costs submitted by the defendants may be high, but generally within a range of what could be awarded.

[17] The defendants' motion is supported by an affidavit of a private investigator, Stephen Rodger. Mr Rodger's affidavit attaches a corporate profile report for the plaintiff, and speaks to various searches he conducted and assets the plaintiff appears to own. Mr Rodger was unable to locate a distinct business location for the plaintiff (the plaintiff's corporate address is the same as another business, Canadian Institute of Sports Medicine) or a website. The plaintiff does not have title to commercial, residential or recreational real estate in Ontario. Mr Rodger's searches located a security interest in two Toyota SUVs registered against the plaintiff, and the ownership of three Canadian and one United States patent.

[18] Mr Rodger was cross-examined. It was revealed on cross-examination that Mr Rodger also obtained an Equifax Business Credit Report for the plaintiff as part of his inquiries, but did not disclose that report in his affidavit. The reason for this omission was not explored during the cross-examination. It is unknown whether the omission was accidental or intentional. I make no finding in this respect.

[19] How Equifax reports are created, and how reliable they are, is uncertain. The Equifax report obtained by Mr Rodgers shows that the plaintiff had "sales volume" of $289,812.00, which was reported on December 6, 2022. The Equifax report also indicates that the plaintiff has no accounts past due, and no judgments against it. Several scores are included, such as a business risk failure score, commercial delinquency score, and financial trade delinquency score. The plaintiff's stated risks in these areas is described as low or average.

[20] Mr Rodgers is not presented as an expert witness, and therefore does not have an overriding duty to assist the Court. This motion has not been brought *ex parte*, which imposes on both a party and counsel an exceptional duty of candour, requiring full and frank disclosure. That said, whether accidentally or intentionally, Mr Rodgers was aware of information that was material to the issues he was asked to investigate and did not disclose it. Defendants moving for security for costs should not be encouraged to make partial or selective disclosure, only revealing those facts or documents that would assist in meeting their initial burden. I will therefore deem the Equifax report to be part of the defendants' evidence when considering whether their initial burden has been met. This will also be considered when assessing the costs of the motion.

[21] The plaintiff's evidence is an affidavit sworn by a legal assistant employed by the plaintiff's lawyers. The affidavit attaches three of the plaintiff's annual financial statements. This is inadmissible hearsay.

[22] The financial statements are unaudited. The financial statements state that the accountants who prepared them express no assurance on them, and that readers are cautioned that these statements may not be appropriate for their purposes. The caution is not identical on all three, but the same in principle.

[23] The affidavit only attaches the documents. There is no statement that the affiant has any first-hand knowledge of the facts contained in the financial statements. The affiant is merely relaying information received from accountants, who in turn were relying on information received from the plaintiff. This is the very definition of hearsay.

[24] By introducing the financial statements through a legal assistant, the defendants were precluded from cross-examining anyone with personal knowledge of the plaintiff's assets and liabilities. I draw an adverse inference because the plaintiff sought to file evidence in this manner.

V. Analysis

[25] The defendants' notice of motion relies on subrule 416(1)(g), however the written representations are almost silent in this respect, and the issue not advanced in oral argument. The defendants point out that the United States patent application that corresponds to the 116 Patent was the subject of a decision of the Patent Trial and Appeal Board of the United States Patent and Trademark Office ("PTAB"), which affirmed the decision of the Examiner rejecting all five claims as obvious and directed to non-statutory subject matter.

[26] It may be that the defendants have a strong invalidity argument, however a decision of the PTAB, without more, is insufficient to demonstrate a reason to believe that the plaintiff's action is not a fair and honest use of the process of the Court, or that the action has been brought for a collateral or improper purpose. The defendants' motion under subrule 416(1)(g) can be dismissed summarily.

[27] As for relief under subrule 416(1)(b), if a defendant introduces evidence that may justify an order for security for costs, a plaintiff has three options: argue that the defendant has not met its initial burden, and introduce no evidence of its own; introduce evidence of assets sufficient to satisfy a costs award; or introduce evidence of impecuniosity in support of an argument that an award of security would prevent access to the Court.

[28] The plaintiff's financial statements are inadmissible; the plaintiff has not introduced other evidence to show that it has assets sufficient to satisfy a costs award. The plaintiff has not asserted that it is impecunious, and that an award of security for costs would preclude it from pursuing its action. The only issue is whether the defendants have met their initial burden.

[29] In the context of security for costs, a modest initial burden on the moving defendant is well justified. It is unlikely that a defendant will have detailed knowledge of a plaintiff's assets, liabilities or financial circumstances, particularly for private corporations like the plaintiff. But a moving defendant still has to adduce evidence to satisfy the Court that it appears that the plaintiff would have insufficient assets to pay a costs award if ordered to do so. If such evidence is not introduced, security cannot be awarded.

[30] The defendants argue that certain indicia can or should be almost determinative when considering security for costs. The defendant emphasizes the plaintiff's corporate name, CRB Consulting Inc. It appears that "CRB" is the initials of the plaintiff's President, Chris Bulley. This is described as a "red flag", potentially indicating a company that exists as a tax shield or for some other purpose. The defendants also describe the plaintiff as a limited liability or holding company. While these are factors to be considered when assessing whether it appears to the Court that a plaintiff would have insufficient assets to pay a costs award, an award of security for

costs remains discretionary. Rule 416 does not presume that certain types of corporate plaintiffs must post security for costs. Each case turns on its own facts.

[31] The plaintiffs place significant weight on *Double Diamond*. There, a motion for security for costs under subrule 416(1)(b) was dismissed because the defendants' evidence said nothing about the plaintiff's assets in Canada, or lack of assets sufficient to cover the defendants' anticipated costs (an order for security was made under subrule 416(1)(e)). While there are a number of similarities between *Double Diamond* and the present motion, (the plaintiffs in both appear to be going concerns; and there is no evidence that outstanding debts would exhaust the plaintiff's asset base) there are also significant differences.

[32] On this motion, the defendants have introduced evidence regarding the plaintiff's lack of assets in Canada. The plaintiff has no apparent place of business that is separate and distinct, and no real estate holdings. The plaintiff may own vehicles, but these appear to be the subject of a security interest. The plaintiff is the recorded owner of patents in Canada, but the value of those patents is unknown. If the defendants are successful in asserting that no valid claim of the 116 Patent is infringed, its value would certainly be diminished.

[33] Even if I assume that the Equifax report accurately shows that the plaintiff's revenues are $289,812.00, and I further assume that those amounts are received annually, it would not be unusual for this proceeding to take three years to get to a decision on the merits. If the defendants are successful at trial, a cost award in the range of $500,000.00-$600,000.00 is a realistic possibility. A cost award is payable forthwith and in full; payment in installments is not presumed. If the plaintiff is ultimately unsuccessful, the foreseeable adverse cost award is proximate to its gross revenues over the next three years. The plaintiff will certainly be required

to pay taxes and day-to-day expenses as the action progresses. It is expected that Mr Bulley will look for some form of remuneration. The potential size of the cost award, compared to the plaintiff's revenues, would put the defendants in real jeopardy of not being able to collect, even if an assessment of fees was based on Column III of the Tariff.

[34] I am therefore satisfied that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendants if ordered to do so.

[35] As for quantum, the defendants request an initial payment of $100,000.00, relying on *The Regents of University of California v I-Med Pharma Inc*, 2016 FC 606 ("***Regents***"). In *Regents*, the plaintiff voluntarily posted security of $50,000.00, and were ordered to pay a further $50,000.00 (para 97).

[36] The defendants' draft bill of costs does not support an initial payment of $100,000.00. Even if I take all of the entries in the defendants' bill of costs up to the end of discoveries at face value, those fees are about $44,000.00. As set out above, I have a concern that the estimate for examinations for discovery is excessive, and that fees may be awarded under Column III, not Column IV. The bill of costs also assumes recovery for at least one motion.

[37] The Court may order that security for costs be given in stages (subrule 416(2)). Based on the defendants' bill of costs, an award of $50,000.00 up to the end of examinations for discovery would be appropriate. This includes a consideration of disbursements for court reporters and initial work with experts.

VI. Costs

[38] The Court has full discretionary power over the amount and allocation of costs (subrule 400(1)).

[39] In addition to this motion, the cost consequences of the plaintiff's motion for production of documents (2023 FC 1215) was deferred to this hearing.

[40] While the defendants were successful in obtaining an order for security for costs, the Equifax report should have been included in the investigator's affidavit. The defendants moved for, but obtained no relief under, subrule 416(1)(g).

[41] The plaintiff was unsuccessful on its motion for production of documents.

[42] After the result of the motion was disclosed to the parties, the plaintiff advised that it made two offers to settle the motion: an early offer to post security of $15,000.00, and an offer on October 19, 2023 to post security of $35,000.00. While the offers at least showed a willingness to compromise and negotiate, the amount offered was less than the amount ordered, and less than the initial amount of security ordered in most, if not all, of the authorities.

[43] Having regard to the above, the plaintiff shall pay costs of $1,250.00 for the document production motion (based on Column III of the Tariff) forthwith. The same amount will be ordered for the security for costs motion, but payable in any event of the cause.

THIS COURT ORDERS that:

1. Pursuant to subrule 416(2) of the *Federal Courts Rules*, SOR/98-106 ("Rules"), the plaintiff shall provide security for the defendants' costs according to the following schedule:

    a) $25,000.00 within thirty (30) days of the date of this order; and

    b) $25,000.00 at least thirty (30) days prior to the first day of oral examinations for discovery.

2. Pursuant to subrule 416(3), the plaintiff may not take any further steps in this action until the security specified in paragraph 1a) of this order has been provided, other than any appeal from this order.

3. The amount of security in paragraph 1 of this order is without prejudice to the defendants' ability to move for further security for costs as required.

4. The defendants' motion is otherwise dismissed.

5. Costs of the plaintiff's motion for production of documents are payable by the plaintiff to the defendants, fixed at $1,250.00, payable forthwith.

6. Costs of the defendants' motion for security for costs are payable by the plaintiff to the defendants, fixed at $1,250.00, payable in any event of the cause.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-576-23
STYLE OF CAUSE:	CRB CONSULTING INC. v. MASSAGE ADDICT INCORPORATED ET AL.
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APPEARANCES:

Jennifer Ko Elizabeth S. Dipchand Prerana Gaur	FOR THE PLAINTIFF / DEFENDANT BY COUNTERCLAIM
Nicholas Whalen Michelle Noonan	FOR THE DEFENDANTS / PLAINTIFFS BY COUNTERCLAIM

SOLICITORS OF RECORD:

Dipchand LLP Toronto, ON	FOR THE PLAINTIFF / DEFENDANT BY COUNTERCLAIM
Deeth Williams Wall LLP Toronto, ON	FOR THE DEFENDANTS / PLAINTIFFS BY COUNTERCLAIM