Federal Court  Cour fédérale

Date: 20091113

Docket: T-949-05

Citation: 2009 FC 1160

Vancouver, British Columbia, November 13, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

FREDERICK L. NICHOLAS

Plaintiff

and

ENVIRONMENTAL SYSTEMS (INTERNATIONAL) LIMITED
BRIAN G. COOK
REIF WINERY INC. (c.o.b. as "REIF ESTATE WINERY")
KLAUS REIF
AND RE/DEFINING WATER INC.

Defendants

REASONS FOR ORDER AND ORDER

[1] By motion dated July 27, 2009, and amended October 1, 2009, the plaintiff appeals the order of Prothonotary Aalto dated July 17, 2009 requiring that the plaintiff post additional security for costs in this action.

[2] The claim, filed in June 2005, alleges infringement of copyright and moral rights in a report, dated June 3, 2003, which the plaintiff prepared for a third party. The plaintiff is representing himself in the pre-trial proceedings. The trial is currently scheduled to begin on April 10, 2010.

[3] The plaintiff is ordinarily resident outside Canada. Thus, under Rule 416 of the *Federal Courts Rules,* the defendants are *prima facie* entitled to security for costs unless the Court exercises the discretion authorized by Rule 417 to refuse such an order. Rule 417 requires that the plaintiff demonstrate impecuniosity and the Court must be of the opinion that the case has merit.

[4] In their initial motion for security brought before Prothonotary Tabib in December 2006, the defendants conceded that the action had merit but declared their intent to vigorously defend the claim. The issue was, therefore, whether the plaintiff was impecunious. In her order dated December 22, 2006, Prothonotary Tabib declined to find that the plaintiff was impecunious as, among other reasons, he had not explained why he was not employed and why he could not rely on his spouse's financial support to raise the necessary security.

[5] Prothonotary Tabib required the plaintiff to post security of $20,000 for the defendants' costs incurred or to be incurred through the discoveries stage of the proceedings. The order provided that the amount of the security could be paid in monthly instalments and varied on application for changes in circumstances, additional costs incurred, or to provide security for the further stages of this litigation.

[6] In a motion in writing dated May 20, 2009, the defendants sought additional security on the grounds that they had incurred costs in excess of $400,000 to defend the action to that date and estimated that they would incur an additional $100,000 in further costs to defend the action. They asserted that the claim should have been brought under simplified procedure, if at all, and alleged that the manner in which the plaintiff had pursued his case had been unnecessarily cumbersome and had put them to great expense. The defendants requested that security be calculated at the high end of Column V of the table to Tariff B.

[7] The plaintiff filed a voluminous responding motion record requesting, among other things, that the motion be denied on the grounds that his claim had merit and that he had demonstrated impecuniosity. On the question of merit, the plaintiff filed a great deal of material including his Pre-trial Conference Memorandum (PTCM). With respect to impecuniosity, the plaintiff's affidavit refers at length to his continuing unemployment, indebtedness, and inability to raise funds from other sources as grounds to refuse the order.

DECISION UNDER APPEAL:

[8] In the July 17, 2009 decision, Prothonotary Aalto found that the defendants had provided affidavit evidence to support the claim for additional security for costs. He noted that the burden of proving impecuniosity is on the plaintiff and held that there was no reason to review the findings already made by Prothonotary Tabib. In his view, the evidence did not disclose that the plaintiff is impecunious as that concept is defined in the jurisprudence.

[9] The prothonotary concluded that the plaintiff's burden had not been discharged on the motion and that "…the plaintiff has to date been able to raise funds as needed to assist in the litigation. An increased security for costs order is required."

[10] A draft bill of costs had been provided as part of the defendants' motion setting out an estimate at the high end of Column V of $47,000. Prothonotary Aalto found that while there was little to criticize in the draft bill some expenses were not justified. He ordered that the plaintiff post the amount of $36,000 as additional security for costs incurred and to be incurred up to the end of trial together with costs of the motion to be paid in any event of the cause. The order provided that the amount may be posted in stages of a minimum of at least $1,500 per month beginning August 17, 2009 provided the balance is paid into court at least 30 days prior to the date set for trial of the action.

[11] The trial is currently scheduled to begin on April 12, 2010 for a duration of three days. The plaintiff has, as yet, made no payments into court in satisfaction of the July 17, 2009 order. In a motion dated October 16, 2009, the plaintiff sought a stay of the July 17, 2009 order, "*nunc pro tunc"* under Rule 398(1)(b) of the *Federal Courts Rules.* At the hearing of the appeal on November 2, 2009, the plaintiff did not appear. A lawyer attended on the plaintiff's behalf. The lawyer advised the Court that he was appearing on an *ex gratia* basis and was not retained to act as counsel of record. He was permitted to make submissions as the plaintiff's representative in the course of which he acknowledged that the stay motion is now moot as the appeal was being heard and that there was no reason for the Court to consider it. I agree.

ISSUE:

[12] The issue on this appeal is whether Prothonotary Aalto was clearly wrong in deciding to exercise his discretion to require further security for costs.

STANDARD OF REVIEW:

[13] The standard of review applicable to a prothonotary's discretionary decisions was established by the Federal Court of Appeal in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), [1993] F.C.J. No. 103, and endorsed with approval by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-LINE N.V.*, [2003] 1 S.C.R. 450, [2003] S.C.J. No. 23, at paragraph 18:

> Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case.

[14] The *Aqua-Gem* test was reformulated in *Merck & Co. v. Apotex Inc.*, (2003), 315 N.R. 175, [2003] F.C.J. No. 1925, as follows:

> Discretionary orders of Prothonotaries ought not to be disturbed on appeal to a judge unless:
> a) the questions in the motion are vital to the final issue of the case, or
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of facts.

ANALYSIS:

[15] The plaintiff has not argued that the question of security for costs is "vital to the final issue of the case". It appears, in any event, to be settled in the jurisprudence of this Court that the stringent test for "vitality" would not be met by the question of security for costs: *Contour Optik Inc. v. Hakim Optical Laboratory Ltd* (F.C.T.D.), (2000), 10 C.P.R. (4th) 357, [2000] F.C.J. No. 2060, at para. 9; *Heli Tech Services (Canada) Ltd. v. Weyerhaeuser Co.* (F.C.T.D.), (2006), 56 C.P.R. (4th) 432, [2006] F.C.J. No. 1494, at para 18; *Coombs v. The Queen*, 2008 FC 894, [2008] F.C.J. No. 1128, at para. 12; *Merck & Co. v. Apotex Inc*. (F.C.A.), (2003), 30 C.P.R. (4th) 40, [2003] F.C.J. No. 1925, at para. 22.

[16] The Court should, therefore, only interfere with the order of Prothonotary Aalto if satisfied that he was "clearly wrong" in that he based his decision upon an incorrect principle of law or upon a misapprehension of the facts and then, only if upon conducting a *de novo* review of the evidence, the Court reaches a different conclusion on the facts and the law. A *de novo* review may only consider the evidence that was before the prothonotary. The defendants have properly objected to the inclusion of additional evidence in the plaintiff's affidavit in his appeal record. I have given that fresh evidence no consideration in arriving at a decision.

[17] While the plaintiff raised some collateral issues regarding the decision to require additional security, the central question was whether the prothonotary had erred in principle or misapprehended the facts in finding that the plaintiff had failed to demonstrate that he is impecunious within the meaning of Rule 417 of the *Federal Courts Rules*.

[18] The definition of "impecunious" which Justice Max Teitelbaum derived from the dictionaries in *Ferguson v. Arctic Transportation Ltd.*, (1996), 118 F.T.R. 154, [1996] F.C.J. No.1074, at paragraph 17, has been consistently applied in the subsequent cases. A person who is "impecunious" is someone who is "in need of money, poor, penniless, impoverished or needy".

[19] A plaintiff who asserts that he is impecunious in an effort to avoid having to post security for costs bears a heavy onus of proof. Full and frank disclosure is required so that there be no unanswered material questions: *Morton v. Canada (Attorney General)*, (2005), 75 O.R. (3d) 63, [2005] O.J. No. 948, at paragraph 32.

[20] The rationale behind the adoption of the test for impecuniosity under Rule 417 was set out by Justice Douglas Campbell in *Heli Tech Services*, above at paragraph 4. The Courts have been anxious to ensure access to justice where a litigant is required to pay security for costs but is unable to do so. This was expressed in the following terms by Reid J. in *John Wink Ltd. v. Sico Inc.*, (1987), 57 O.R. (3d) 705, 15 C.P.C. (2d) 187, [1987] O.J. No. 5, at paragraph 8:

> There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of the plaintiff. If the consequence of an order for costs would be to destroy such a claim no order should be made.

[21] The reason for this is, as Justice Reid put it more colourfully, is that if such an order "stops a plaintiff in its tracks it has disposed of the suit". This can be a powerful incentive to a defendant to seek such an order.

[22] The Courts have also been concerned that successful defendants, if successful, should not be effectively deprived of costs by a failure to require security. This concern has arisen often in the context of plaintiffs carrying on business and litigation through a corporation consisting of a shell without assets: *Fortyn v. Canada* (T.D.), [2000] 4 F.C. 184, [2000] F.C.J. No. 686, at paras. 19-20 citing *Smith Bus Lines Ltd. v. Bank of Montreal*, (1987), 61 O.R. (2d) 688 at pages 704-705, [1987] O.J. No. 1197.

[23] Accordingly, as Mr. Justice Reid observed (at page 709 of the O.R. report):

> To raise impecuniosity there must be evidence that if security is required the suit will be stopped – because the amount of the security is not only not possessed by the plaintiff but is not available to it.

[24] In the case of a shell corporation without discoverable assets, the courts can reasonably look to the shareholders to provide the indemnification. In the case of a non-corporate plaintiff, it is appropriate to look at other sources of funds that may be available to the litigant including those held by close family members. In *Ferguson*, above, for example, Justice Teitelbaum rejected an argument that the plaintiff was impecunious on evidence that he had cash savings of $13,000, received an annual pension of about $60,000 and owned several mortgage-free properties in joint tenancy with his wife.

[25] In this case, in response to the defendants' motion for additional security, the plaintiff provided evidence about his financial situation and that of his wife at paragraphs 148 to 180 of his affidavit, with supporting documentary exhibits. Prothonotary Aalto dealt with the plaintiff's evidence with the following comments at page 4 of his order:

> The evidence falls short of the "robust particularity" that is required to meet the burden of demonstrating impecuniosity. The plaintiff has filed a lengthy affidavit as part of his motion record which exceeds 600 pages. Much of it appears to repeat evidence that was before Prothonotary Tabib although some of the information has been updated. The plaintiff refers to the fact he is not currently employed; that he and his wife own a home although he is no longer on the deed of trust; that he has incurred substantial costs of about $21,000 U.S. to prepare motions including copying and binding; that his credit card was suspended; that unforeseen expenses were incurred as a result of floods and hurricanes; that he has some cash value in a life insurance policy; that he devotes all of his time to this litigation and only occasionally works in designing software which he says he was doing until the need to bring this litigation; that his company has no income; that he has cashed in an RRSP valued at $3220.08 which he established when he lived in Canada; that he supports a son from his former marriage; that he has obtained funds from a colleague to assist in paying the prior order for security for costs; that his father has advanced funds for this litigation; and, that he has no other sources of funds or assets.

[26] With the greatest respect to the learned prothonotary, I have considerable difficulty in understanding how the plaintiff's evidence did not demonstrate that he was impecunious. As I read that evidence, he responded to the concerns raised by Prothonotary Tabib in the December 2006 order. The plaintiff explained that he is self-employed but has no income; he is heavily indebted and subject to a child support order which is in arrears; he is without credit and relies on his wife's income as a nurse to meet the family's living expenses. The family home is heavily mortgaged and the minimal amount of equity remaining falls far short of the amount of the security required. His RRSP was now exhausted. The wife's credit card had been suspended. The plaintiff had borrowed funds from his father and a former colleague to meet litigation costs including the initial order for security but, he averred, those sources of funds were no longer available to him. No other sources of funds were identified. An unrelated action to recover the unpaid balance on a promissory

note issued by one of the defendants in this action remained pending before the Ontario Superior Court but there was no indication that it would be resolved in the short term.

[27] At paragraph 180 of his affidavit, the plaintiff averred that an order for additional security for costs would prevent him from continuing his action against the defendants. He was not cross-examined on his affidavit. Prothonotary Aalto acknowledged this but relied on the fact that the plaintiff had to date been able to raise funds as needed to assist in the litigation. That is a relevant consideration but cannot be determinative when the plaintiff has otherwise demonstrated through unchallenged evidence that he is impecunious.

[28] In my view, it is an error in principle to assume that because a plaintiff has been able to satisfy a modest order for security for costs in the past that he would be able to raise funds as needed again when the only evidence before the court relating to the financial circumstances of the plaintiff is to the contrary. Reluctantly, I must conclude that the prothonotary erred in principle and misapprehended the facts. Conducting a review of the evidence that was before the prothonotary, *de novo*, I find that the plaintiff demonstrated impecuniosity and that the order for security for costs should not have been issued.

[29] I arrive at this conclusion reluctantly because it is clear from the court record that it may have served as a kindness to this plaintiff to "stop this action in its tracks". The defendants may well be correct that the claim should have been dealt with under the simplified procedure and that the plaintiff can only hope to achieve statutory damages if he is successful in the cause. That is not for me to decide on this appeal but it is apparent from his affidavit and written representations that the

plaintiff does not have an objective or, one might say, realistic, view of the degree of success that he can expect to achieve on the possible outcome of his claim.

[30] I am also satisfied that the manner in which the plaintiff has pursued his claim has added to the costs incurred thus far. The defendants are entitled to vigorously defend the action in the manner they consider necessary. I am also mindful that should the defendants succeed and be awarded costs against the plaintiff, they may be unable to recover them if security is not required. The Court has no reason to believe that the defendants have "deep pockets" capable of easily bearing these costs. Nonetheless, if the principle of access to justice means anything, it has to allow a litigant such as Mr. Nicholas his day in court.

[31] I am not influenced in my view of this matter by the extraordinary effort undertaken by the plaintiff to demonstrate that his action has merit. Rule 417 provides that the Court may refuse to order that security for costs be given if a plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit. This is a conjunctive assessment. The factors do not outweigh each other. The plaintiff must demonstrate merit and impecuniosity. The defendants conceded that the action had some merit on the initial motion for security while denying much of the claim. Neither Prothonotary Tabib nor Prothonotary Aalto thought it necessary to consider the matter beyond that concession. Nor do I. Nothing in these reasons should be construed by the plaintiff as an endorsement of his view of the strength of his case.

[32] The plaintiff submitted in his written representations that Prothonotary Aalto should have recused himself from hearing the motion after having been made aware of confidential information

disclosed at the pre-trial conference. This argument is entirely without merit and was not pressed by plaintiff's representative at the hearing. The test for disqualification is very strict and requires evidence of bias or a reasonable apprehension of bias: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *R. v. S(R.D.)*, [1997] 3 S.C.R. 484. That the prothonotary may have become apprised of such information is not, in itself, sufficient. There would have to be, in addition, some objective basis on which a reasonable person could infer that the prothonotary would have been influenced consciously or unconsciously by the information. The plaintiff has failed to provide any grounds for such a finding.

ORDER

THIS COURT ORDERS that the appeal is allowed and the order of Prothonotary Aalto dated July 17, 2009 to require security for costs is set aside. Costs to be in the cause.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-949-05
STYLE OF CAUSE:	FREDERICK L. NICHOLAS and ENVIRONMENTAL SYSTEMS (INTERNATIONAL) LIMITED; BRIAN G. COOK; REIF WINERY INC. (c.o.b. as "REIF ESTATE WINERY"); KLAUS REIF; AND RE/DEFINING WATER INC.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 2, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	November 13, 2009

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Sarah M. Huggins	FOR THE DEFENDANTS

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