CITATION: [redacted] v. Sekiguchi, 2015 ONSC [redacted]
COURT FILE NO.: [redacted]
DATE: 2015/07/21

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: [redacted] (Plaintiff)

AND:

Yoshimasa Sekiguchi and Hokuto North America Inc. (Defendants)

BEFORE: M.A. Garson

COUNSEL: Dallas J. Lee, for the plaintiff
M. Mana Khami, for the defendant Yoshimasa Sekiguchi
D. Wozniak, for the defendant Hokuto North America Inc.

HEARD: June 26, 2015

ENDORSEMENT

Introduction

[1] The defendants each bring a motion under Rule 56.01 (1) (a) of the *Rules of Civil Procedure* for an order for security for costs based on the plaintiff ordinarily residing in Japan. Defendant Hokuto seeks $50,000 in security for costs and defendant Sekuguchi seeks $100, 302.89 in security for costs.

[2] On the evidence before me, and for the reasons that follow, I am satisfied that

a. the plaintiff has established that there exists more than a triable issue in this case;

b. that the defendants have allowed an unreasonable period of time to lapse before bringing this motion;

c. that the insurance policy in place for adverse cost consequences addresses much of the present concerns of the defendants; and

d. in light of the nature of the allegations and the nature of the apparent power imbalance between the parties at the time of the allegations, it would be unjust to require the plaintiff to pay security for costs at this time.

Background

[3] The plaintiff, [redacted] has commenced an action against her former employer, Hokuto North America, and the president of Hokuto, Yoshimasa Sekiguchi, essentially

alleging sexual harassment and sexual assault by Mr. Sekiguchi during the course of her employment.

[4] [redacted] was born in Japan in 1984 and moved to London in 2007 to attend Fanshawe College. She met the defendant Sekiguchi on or about June 2008 through his daughter and advised him that she was looking for full-time employment and that her intention was to become a permanent resident in Canada.

[5] [redacted] commenced employment for Hukoto in 2009. Sekiguchi, who was [redacted] direct supervisor and president of Hokuto, applied to have [redacted] work permit extended. The terms of her work permit prohibited [redacted] from working for any employer other than Hokuto.

[6] [redacted] alleges repeated sexual harassment and sexual assault throughout the majority of her employment. [redacted] further alleges that she was threatened with firing on many occasions and told she would have no choice but to go back to Japan if this occurred.

[7] After disclosing her concerns to a manager at Hokuto [redacted] was told on or about February 2010 not to return to work. As a result of the termination of her employment and no other employer willing to sponsor her, [redacted] had to return to Japan and has resided there since 2010.

[8] [redacted] is now married with a son and has not worked in Japan since 2012. She and her husband have no assets beyond a 2012 Toyota Prius. She has a total of $3759.91 in her banking accounts. [redacted] says that she is unable to pay money to the court as security for costs and will be unable to pursue her claim if ordered to do so.

[9] [redacted] purchased $50,000 of Costs Indemnity Protection coverage from Bridgepoint Indemnity Company which will cover the defendants costs up to $50,000 in the event of an adverse costs award being made against her.

[10] The plaintiff's examination for discovery took place on June 2, 2014. Neither of the defendants has been examined for discovery to date and no examination dates have been scheduled.

[11] The parties agree that the plaintiff is ordinarily a resident outside of Ontario.

[12] Sekiguchi and Hokuto intend to vigorously defend the claim. Sekiguchi admits in his statement of defence that he engaged in a sexual relationship with [redacted] but insists that it was a consensual relationship.

Positions of the Parties

[13] The defendants argue that the onus is on the plaintiff to prove that she has sufficient assets to answer a judgment for costs or that she is impecunious. The defendants suggest that the plaintiff has not led evidence of sufficient assets and has not satisfied the high evidentiary threshold of impecuniosity.

[14] The plaintiff argues that the facts of the case are such that it is just in the circumstances not to order costs. More specifically, the plaintiff argues that the conduct of the defendant is what triggered the actions of the plaintiff in having to return to Japan and that it would be unjust and unfair for the defendants to benefit from these actions.

[15] The plaintiff further suggests that the delay by the defendants in bringing the motion should be fatal to their request since they had good reason to believe the plaintiff resided in Japan when the statement of claim was first served on them in October 2012.

Discussion

The Law

[16] Rule 56.01(a) grants the court discretion to award security for costs where it appears that the plaintiff is ordinarily resident outside of Ontario.

[17] Once the defendants show that the plaintiff is ordinarily resident outside of Ontario, the plaintiff bears the onus of proving why the order for costs should not be made: *Hallum v. Cdn. Memorial Chiropractic College* (1989) 70 O.R. (2d) 119 (HCJ) at paras. 10 and 15.

[18] It is conceded that the defendants have cleared the first hurdle and that the plaintiff must demonstrate why it is unjust to make an order for security for costs.

[19] The plaintiff can show that they have sufficient assets in a reciprocating jurisdiction or that they are impecunious: *Chacula v. Baillie* (2004) 69 O.R. (3d) 175 (SCJ) at paras. 10 and 14. The plaintiff has demonstrated neither.

[20] The purpose of Rule 56.01(a) is to provide defendants with some protection for their costs. However, the court must also contemplate the potential impact of such an order on the plaintiff. There is no prima facie right to security for costs: *Chacula, supra.*, at paras. 12 and 22.

[21] The evidentiary threshold for impecuniosity is high and must include complete disclosure of the plaintiff's assets, expenses, liabilities and borrowing abilities: *Milano v. Alton et al,* 2012 ONSC 4959 at para.10.

[22] The plaintiff is not claiming impecuniosity.

[23] If the court is satisfied that a defendant is entitled to security for costs, the court should not award a token amount but should award an amount that is reasonably required for a successful defence of the action: *Michigan National Bank v. Axel Kraft International Ltd.*, 1999 CarswellOnt 412 at para. 17; *Williams v. Turner,* 1986 CarswellOnt 449 at para. 2.

[24] Courts must strike a balance between allowing insolvent plaintiffs to pursue risk-free litigation and preventing defendants from tactically derailing a valid claim through prohibitive security for costs orders: *Cigar500 Com. Inc. v Ashton Distributors Inc.,* (2009) O.J. No. 3680 (SCJ) at para. 3.

[25] Where impecuniosity is not asserted, the courts may consider the merits of the case and whether the claim has a good chance of success: *Stern v. Bondi*, 2014 ONSC 5250 at para. 31(vi) and (vii).

[26] In deciding whether the plaintiff has a good chance of success, the court may look to the evidence of the plaintiff and determine that if the evidence is accepted at trial, a good chance of success exists: *Brown v. Bramalea City Centre*, 2014 ONSC 6166 at paras. 18-19.

[27] A motion for security for costs should be brought once the defendants learn that they have a reasonable basis for bring the motion. If the plaintiff can show that the delay in bringing the motion has resulted in prejudice, the defendants may not be entitled to security for costs. Even in the absence of prejudice, delay may still negate an award of security for costs: *Shuter v. Toronto Dominion Bank*, [2007] O.J. No. 3435 at paras. 106-108; Kawkaban Corp. v. Second Cup Ltd., [2005] O.J. No. 4197 (Div. Ct.) at paras. 28, 31 and 35.

[28] Rule 1.04 requires that a court construe the rules in a way that ensures the most just, expeditious and least expensive outcome.

Conduct of the Defendants

[29] To the extent that I can, at this stage of the action, examine the conduct of the defendants, I must rely primarily on the pleadings and any available transcripts from examinations for discovery.

[30] On the limited evidence before me, it would appear that the decision by the defendants to end the employment of [redacted] was the triggering factor for her return to Japan. Although I am mindful of their position that she voluntarily left the company, that assertion is difficult to reconcile with her stated intentions to remain in Canada at that time and become a permanent resident.

[31] The conditions of her work permit while working at Hokuto were such that she could not work for any other employer. After she left Hokuto, she testifies that she was traumatized and ashamed and was unable to find further employment in Canada.

[32] I have reviewed the June 2, 2014 examination for discovery of the plaintiff. I am troubled by many aspects of that evidence including the fact that the defendant Sekiguchi had a key to the apartment that was provided to her by Hokuto.

[33] I agree with the plaintiff that it would be unfair and unjust to allow the defendants an award of security for costs when their alleged conduct is the reason why she no longer resides in Ontario.

Merits of the Claim

[34] Where impecuniosity has not been shown or is not being claimed, a closer scrutiny of the merits of the case is appropriate. In this case, that means a closer review of the pleadings and the examination for discovery transcript of the plaintiff.

[35] A good chance of success is higher than the requirement of establishing a genuine issue for trial but not at the level of proof on a balance of probabilities.

[36] The plaintiff provides extensive details of the allegations in her examination for discovery.

[37] I am mindful of the denial of these claims by Sekiguchi and his insistence that this was a consensual relationship.

[38] However, I must also consider the following factors in assessing the merits of the claim as it relates to the issue of consent:

i. At all material times, Sekiguchi was the president of Hokuto and the plaintiff's direct supervisor and as such would presumably be in a position of power and authority with respect to her;

ii. The terms of her work permit that Hokuto arranged to have extended limited where she could work and the consequences for her residency for ending her work relationship with Hokuto; and

iii. Sekiguchi maintained and appeared to use a key to her apartment that Hokuto provided to her.

[39] On the pleadings and limited transcripts available to me (in light of the defendants not yet being examined for discoveries) I am satisfied that the claim is not frivolous or vexatious and has a good chance of success. More specifically, if [redacted] claims are believed and accepted at trial, she has a good chance of succeeding in her action for damages for sexual harassment and sexual assault.

Defendants Delay in Bringing Motion

[40] I am satisfied that the defendants were well aware that the plaintiff resided in Japan in October 2012 when the statement of claim was first served on them. Instead, both defendants waited until February 2015, almost two and a half years later, to bring their motions for security for costs. Even delaying the expected date for such a motion to the close of pleadings in early 2013, the motion is still two years from the close of pleadings.

[41] There is clearly some financial prejudice to the defendant in that she has already returned from Japan on one occasion to attend in London for her examination for discovery. Had this motion been brought in 2012, the plaintiff may well have chosen a different option with respect to pursuing this matter in light of her inability to post security for costs.

Further, her evidence at the discovery speaks to ongoing depression and anxiety as a result of these allegations.

[42] Although there is some evidence of prejudice, I was not made aware of any reason for the delay in bringing this motion. The absence of examinations for discovery of the defendants at this time is also not helpful to the position of the defendants in this matter.

[43] In all of the circumstances, I find the delay to be unreasonable, and to have caused some prejudice to the plaintiff.

Costs Indemnity Policy

[44] The defendants point to a number of exclusion clauses in the policy for Costs Indemnity and suggest that it is wholly inadequate to address their concerns regarding security for costs, both as to coverage and quantum.

[45] I disagree.

[46] The entire reason for acquiring the policy is to address the defendants concerns for some protection against their costs. The plaintiff derives no benefit from acquiring this policy and its sole purpose is to offer a measure of protection to the defendants in the event that they are entitled to costs. The exclusions listed in the policy are the exceptions to the normal course of litigation.

[47] In any event, the amounts claimed by the defendants as security for costs appear to be a tad excessive and redundant. This is not a complex action and the defendants appear to be adopting almost identical defences. The existing insurance policy provides a substantial measure of protection to the defendants at this stage of the proceedings.

Conclusion

[48] I have broad discretion to determine whether an order for security for costs is just in the circumstances. In my view, such an order would deprive the plaintiff of her bona fide cause of action.

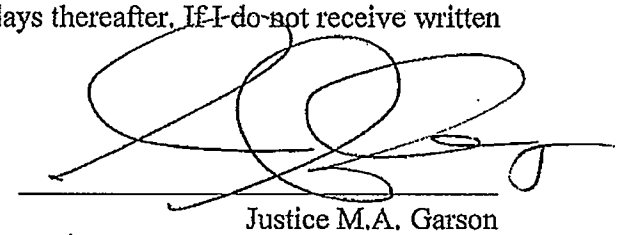
[49] For the above reasons, I am satisfied that, in light of the nature of the allegations, the length of delay in bringing the motion, the alleged conduct of the defendants and the meritorious nature of the claim at this stage of the proceedings, it would be unjust in the circumstances to order an award for security for costs.

[50] Simply put, justice requires that this action be allowed to proceed without the posting of security for costs by the plaintiff.

[51] The motions by the defendants are dismissed.

Costs

[52] In the event that the parties cannot agree, I will receive written submission on costs, not to exceed three pages (exclusive of Bills of Costs and Offers to Settle) by the plaintiff within 30 days and by the defendants within 30 days thereafter. If I do not receive written submissions, there will be no award of costs.



Justice M.A. Garson

Date: July 21, 2015