

CITATION: Shah v. Loblaw Companies Limited., 2015 ONSC 5987
COURT FILE NO.: CV-13-2122-A1
DATE: 2015-10-06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KAMLESHBHAI KANTILAL SHAH v.
LOBLAW COMPANIES LIMITED

BEFORE: LEMON J.

COUNSEL: B. Kalsi and Y. Jabbour, Counsel for the
Plaintiff

M. Miles, Counsel for the Defendants

A. Joshi, Counsel for the Third party

HEARD: August 27, 2015

ENDORSEMENT

The Issue

[1] The defendants and third party move for an order requiring the plaintiff to pay into court security for costs up to and including examinations for discovery.

They also seek an order allowing them to re-attend before the court to obtain a further order for security as might be necessary. Finally, they seek an order that the plaintiff pay those funds into court within 30 days of being ordered to do so, failing which the parties may move without notice to have the action dismissed.

Background

[2] The action arises out of a slip and fall that occurred on February 3, 2012, on the grounds of Real Canadian Superstore, located in Brampton, Ontario.

[3] Mr. Shah pleads that he was a shopper in the store and was walking in a careful and prudent manner when his foot got stuck on a damaged carpet rug at the exit of the store. He lost his balance, fell to the ground and landed on his left shoulder.

[4] At the time of the incident, he was a permanent resident of Canada, residing with his daughter and son-in-law in Mississauga.

[5] He had already made arrangements to fly back to India for a visit and was scheduled to leave on February 4, 2012. He was not aware he had fractured his shoulder and decided not to postpone his trip. He therefore returned to India February 4, 2012.

[6] When in India he sought medical attention and eventually underwent surgery on his shoulder.

[7] He was a permanent resident and was covered by OHIP so he returned to Canada at the end of 2012 or early 2013 and underwent care in Ontario.

[8] Ms. Shah's permanent resident card was set to expire on May 12, 2013. Although he made application to renew the card, it was not renewed by the time of expiration and he therefore returned to India. He is a citizen of India and is still waiting to hear from Citizenship & Immigration Canada on the status of his permanent resident card. He has resided in India since his return.

[9] In his supporting materials, Mr. Shah says that he has no income and is not receiving any sort of pension from either India or Canada. He resides in a home owned by his wife and owns no other assets.

[10] When the defendants and the third party advised that they were seeking an order for security of costs, Mr. Shah obtained a Legal Protection Certificate and Indemnity Agreement from BridgePoint. The terms of this insurance for costs is a particular issue between the parties.

Legal Authorities

[11] Rule 56.01(1) of the *Rules of Civil Procedure* sets out that the court, on motion by the defendant in a proceeding, may make such order for security for costs as is just where it appears that, among other things, the plaintiff is ordinarily resident outside of Ontario.

[12] Rule 56.04 sets out that the amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court.

[13] Rule 56.07 sets out that the amount of security required by an order for security for costs may be increased or decreased at any time.

[14] In *Yazdani v. Ezzati* (August 5, 2015), Brampton, CV-14-3239 (Ont. S.C.), Mackenzie J. set out the test for security for costs:

There is no real dispute between the parties as to the test for security for costs. It may be simply stated as follows:

On a motion for an order for security for costs, the initial onus is on the party moving for security to show that the other party falls within one of the circumstances for which an order may be made: here the plaintiff ordinarily resides outside Ontario.

The party responding to a motion for security for costs may avoid an order issuing by showing that security is unnecessary because it has sufficient exigible assets in Ontario or that it should be permitted to proceed to trial despite its inability to pay costs.

On a motion for security for costs, the court has a broad discretion in deciding whether security for costs is just in the circumstances. The court will carefully scrutinize the quality and the sufficiency of

the plaintiff's assets and determine whether they are genuine assets.

The merits of the plaintiff's case is a relevant factor in the exercise of the court's discretion to make an order for security for costs. If the plaintiff shows a real possibility of success, then the court may conclude in the circumstances of the case, justice demands that he or she not be required to post security.

Impecuniosity in the context of a non-resident plaintiff responding to a motion for security for costs by a defendant includes the inability to raise sufficient funds for the purposes of the litigation. Where impecuniosity is shown the plaintiff to avoid having to post security for costs needs only to demonstrate that his or her claim is not plainly devoid of merit.

A litigant who relies on impecuniosity bears the onus of proof and must do more than adduce some evidence of impecuniosity and must satisfy the court that he or she is genuinely impecunious with full and frank disclosure of his or her financial circumstances. [Emphasis removed]

Analysis

Residency

[15] Mr. Shah denies that he is a non-resident. As set out above, he presently resides in India and has for more than two years. He does not have any status in Canada. At his examination for discovery, he said that he did not plan to come to Canada for the trial.

[16] Based on all of that, it is clear that he is not ordinarily resident in Ontario.

Impecuniosity

[17] In his affidavit, Mr. Shah sets out that:

I am a pharmacist by training and received my Bachelor of Pharmacy degree in 1972 from India. I worked for various companies in India. I retired about nine or ten years prior to the accident of February 3rd, 2012 and have not worked as a pharmacist since then. I had no other income apart from what is mentioned above.

In India, the modest house where my wife and I reside is legally owned by my wife, Ms. Shobhana Shah. Neither of us own any other assets in India, nor do I own any assets in Ontario or Canada.

I do not receive any pension from either the government or any private company, neither in India or in Canada. The only source of income in my household is the rent my wife collects from renting a part of the house. That income is used to support us financially so as to be able to sustain our modest living expenses.

At my age, and especially after the accident of February 3rd, 2012 I find it extremely difficult to work and earn income. Also, at 67 years of age it is very difficult to find jobs and earn income.

...

If I am ordered to pay security for costs, this will effectively force me to abandon my claim as I do not have assets of any sort which I can realize in order to satisfy the costs requested by the Defendants and the Third party.

[18] And yet in his examination for discovery, Mr. Shah testified:

Q. So, I'll ask again, please explain to me why you cannot be here in Brampton to answer these questions?

A. We have work going on in my house.

Q. Which house?

A. The house in which I – right now it's my own house.

[19] While I appreciate that it is difficult for Mr. Shah to prove a negative, this inconsistency over his own home along with his ability to travel between India

and Ontario seems to suggest financial means inconsistent with his affidavit. I do not find this to be the robust particular evidence needed to satisfy this aspect of the analysis: see *CIT Financial Limited v. Sellter Industries Inc.*, [2006] O.J. No. 3596 (S.C.); *Hallum v. Canadian Memorial Chiropractic College*, [1989] O.J. No. 1399 (H.C.).

Adverse Costs Protection Insurance

[20] The plaintiff submits that his Adverse Protection Insurance Plan will provide sufficient security for the defendants. I disagree.

[21] Although other judges have relied on those insurance policies as a factor to consider, a review of the case law shows that it will depend on the circumstances of the case and the terms of the policy to be sure of the effect that such a policy will have on the analysis.

[22] Here, the policy holds that if the plaintiff or his counsel provides BridgePoint any fraudulent or materially misleading information or materially misrepresents information, BridgePoint will cancel the policy. Further, the policy sets

out a number of exclusions which outline the circumstances where the insurance proceeds will not be paid, including:

- a) The plaintiff does not accept his counsel's recommendation to accept an offer to settle;
- b) The plaintiff changes counsel and BridgePoint does not agree with the new counsel;
- c) The plaintiff decides to represent himself;
- d) Failure to attend a defence medical examination;
- e) Failure to advise of an adverse cost award within 15 days;
- f) The contingency fee agreement entered into between the plaintiff and his counsel will not be materially amended during the pursuant of the plaintiff's claim;
- g) The plaintiff's counsel's professional opinion must be that there is a greater likelihood that the plaintiff will have a successful claim;
- h) The plaintiff provides BridgePoint materially mis-leading information;

- i) The plaintiff fails or delays to provide instructions to or fails to cooperate with counsel; and
- j) If the plaintiff or counsel abandons any or all of the plaintiff's claim.

[23] I agree with the defendants that they do not have any control over any of the above circumstances. If the policy is cancelled partway or at the end of trial, the defendants will have no security for costs incurred to that point. Accordingly, the policy provides no protection to the defendants in the event of an adverse cost award should the matter proceed to trial.

[24] Further, the policy sets out that the coverage can only be applied for where "examinations for discovery have not yet commenced". The policy was obtained in June of 2015. The examinations for discovery had, however, commenced in July of 2014. Mr. Shah's counsel has provided correspondence from the insurer that, despite that discrepancy, they are content to cover the plaintiff. While that is an answer to an argument put forward by the defendant. It does not solve the following.

[25] On the Certificate of Indemnity, the plaintiff's counsel "*confirm*, where this Indemnity Agreement is being offered under Legal Protect™ *that* (a) *examinations for discovery have not yet commenced* or (b) an application for

arbitration has not been filed before an Administrative Tribunal in any Claim”. Further, the certificate goes on to “Certify and Declare that *the Information provided by us to the Indemnitor is true to the best of our knowledge and belief.*” The plaintiff’s counsel signed that June 18, 2015. Both are clearly incorrect when the examinations for discovery had in fact already commenced in 2014. Neither I nor the defendants can be satisfied that there are no other mis-representations that support this policy.

As is just

[26] I agree with plaintiff’s counsel that the court, when making such an order, is not simply checking off boxes in making its determination. Rather, the court must make an order “as is just”.

[27] Given the nature of the case, I can make no determination at this point whether the case is devoid of merit. That will rely on Mr. Shah’s credibility and the medical records. While this standard is a low one, at this point, I can make no assessment of either the plaintiff’s or the defence case.

[28] However, given that Mr. Shah resides in India, has apparently no immediate intention to return to Canada, has not made full disclosure of his financial circumstances and has put forward an insurance policy that does not

appear to be of assistance to the defendants, I cannot accept that it would be just, in this case, to dismiss the motion.

Third Party

[29] The third party, G & K Services Inc., also seeks security. It was added to the action because G & K supplied the mats in question. I agree with the plaintiff that it would be unjust to order him to pay security for costs where the plaintiff did not sue the third party, did not want him in the case and was not responsible for joining him: see *Milina v. Bartsch*, 1985 CanLII 454 (B.C.S.C.).

[30] While it is true that the third party has filed a defence to the main action, that is not as a result of any claim by the plaintiff against the third party.

[31] In these circumstances, it would not be just for the plaintiff to pay security for costs for the third party.

[32] I therefore dismiss the third party's claim for security for costs.

Amount

[33] The plaintiff's counsel did not make submissions with respect to the bill of costs filed by the defendants.

[34] The requested amount of \$11,646.17, goes forward and beyond a defence medical assessment. The notice of motion, however, only seeks costs to the end of examinations for discovery. From a review of the bill of costs, I am satisfied that, including disbursements other than a medical assessment, the defendants will be amply secured by the payment of \$7,500.00 into court within the next 30 days. If the plaintiff fails to make the payment, the action is stayed pending any further motions that may be made by any of the parties on notice to the plaintiff.

[35] The defendants may apply for further security after the action has been set down for trial.

Costs

[36] If the parties cannot agree upon costs, the defendants shall provide their cost submissions within the next 15 days. The plaintiff will then make his submissions within 15 days thereafter. Finally, the third party shall make its cost submissions within 15 days after that date. Each submission shall be no more than three pages, not including any bills of costs or offers to settle.

Lemon J.

DATE: October 6, 2015

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