

CITATION: Stamp v. Sun Life Assurance Company of Canada, 2015 ONSC 2858
BARRIE COURT FILE NO.: 10-1387
DATE: 20150501

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Wade Roland Stamp, Plaintiff

AND:

Sun Life Assurance Company of Canada and Honda Canada Inc., c.o.b. as Honda of Canada Mfg., Defendants

BEFORE: THE HON. MR. JUSTICE G.M. MULLIGAN

COUNSEL: A.R. Kerr, Counsel for the Plaintiff

I. St. John and J. Rochweg, Counsel for the Defendants

HEARD: April 22 and 29, 2015

ENDORSEMENT

[1] The defendants bring a motion to stay or dismiss the claim based on the plaintiff's failure to pay an outstanding costs order. In the alternative, the defendants seek security for costs. The plaintiff, Wade Roland Stamp (Stamp) brings a cross-motion for an order varying the outstanding costs order to allow for payments on terms.

Background

[2] The plaintiff commenced an action against the defendants as a result of the discontinuance of long-term disability benefits. The matter came before Justice Eberhard on the eve of trial, November 18, 2014. At the request of the defendants, and based on certain production failures by the plaintiff, the matter was adjourned to the May 2015 trial sittings list with priority. Justice Eberhard requested written submissions as to costs. Submissions were made by the defendants in a timely manner. Although invited to do so, the plaintiff made no submissions as to costs. Justice Eberhard issued a costs endorsement December 17, 2014. Justice Eberhard ordered costs as follows, "[6] Costs thrown away on a full indemnity basis, for the futile attendance only, are fixed at \$5,282.75 as requested, payable forthwith."

[3] In determining that the costs were to be payable on a full indemnity basis, Justice Eberhard noted:

[3] On December 17, 2014, I am still without a response from counsel for the plaintiff.

[4] This follows on a very unimpressive performance by counsel for the plaintiff on November 18, 2014, particularly, statements he made about important facts in a litigation that were later retracted as false.

[5] It was only because of the cautious professionalism of the defendants' counsel that I granted an adjournment at his request, made necessary by lack of preparation and disclosure of the plaintiff.

- [4] The defendants then began a series of correspondence with the plaintiff's lawyer, seeking to recover the costs which were to be payable forthwith. They wrote to plaintiff's counsel on January 19, 2015. Plaintiff's counsel responded, "Neither Mr. Stamp nor I have the funds at present to satisfy the costs award made by Justice Eberhard at present." Defendants' counsel wrote again on February 10, 2015, requesting payment of costs, suggesting if the costs were not paid, they would bring a motion to stay or dismiss the claim and to seek security for costs.
- [5] On February 23, 2015, they wrote to plaintiff's counsel indicating they would schedule a motion. On February 23, plaintiff's counsel wrote indicating Mr. Stamp had no funds, but enclosed a cheque for \$250 with an offer to continue to make monthly payments. Plaintiff's counsel forwarded another cheque for \$500. A further cheque in the amount of \$500 was provided at the motion. No agreement was arrived at and the motion proceeded on the basis that the plaintiff had not paid the outstanding costs award forthwith, as directed by Justice Eberhard.

Responding Motion Record

- [6] In his Responding Motion Record, Mr. Stamp provided some details as to his impecuniosity following the termination of his long-term disability benefits from the defendants. Significantly, for the first time he revealed that he had purchased a form of litigation insurance from BridgePoint Indemnity Company (Canada). Although the policy was purchased one year previously, no explanation was provided in his affidavit as to why he had not sought coverage for the outstanding costs award pursuant to the policy.
- [7] The issue was raised at the first return of the motion and the matter was adjourned so that plaintiff's counsel could make inquiries of BridgePoint with respect to coverage for the outstanding costs award. In the short time that was available, BridgePoint provided a letter dated April 28, 2015, which was filed upon the return of the motion. The letter provided in part, "We will be reviewing the interim costs award made in December 2014 shortly, and advise as to payment." The letter confirmed that Mr. Stamp had coverage in the event of an adverse costs award. Further, the company indicated that they were not aware of any breach of the indemnity agreement by Mr. Stamp or his lawyers.

[8] Before a discussion about the relief sought by the plaintiff and the defendants, it is important to review the fundamental principles at play when costs are awarded on a full indemnity basis. The issues were canvassed by the Court of Appeal in *Davies v. Clarington*, 2009 ONCA 722. Epstein J.A. noted that rule 57.01(4) allows a court jurisdiction to award costs on a full indemnity basis. At para. 15, Epstein J.A. noted, “Full indemnity costs is not a defined term but is generally considered to be complete reimbursement for all amounts a client has had to pay to his or her lawyer in relation to the litigation.” In summing up her review of elevated costs, Epstein J.A. stated at para. 40, “Apart from the operation of Rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the costs award is being made.”

Plaintiff’s Motion to Vary the Order of Eberhard J.

[9] In the circumstances here, I am not satisfied that the plaintiff is entitled to the relief sought, that is, a variation of the order allowing payment on terms. The following points inform my decision:

- the costs awarded were on an elevated scale, a full indemnity basis, clearly signaling the reprehensible conduct of the plaintiff;
- the plaintiff made no submissions as to costs, nor did he request terms of repayment as part of the costs order;
- the plaintiff made no offers of partial payment until several months after the costs award;
- the plaintiff did not reveal until the eve of the motion that he had an indemnity agreement;
- the plaintiff took no steps to realize on the indemnity agreement until the return of the motion.

Defence Motion to Stay or Dismiss the Action

[10] I am satisfied that the defendants are entitled to a stay of this action until the plaintiff has paid the outstanding costs award of Justice Eberhard. I need not repeat the above noted points as to the conduct of the plaintiff leading to the elevated costs award against him, and the steps or lack of steps taken by him thereafter. A stay of the action until payment of the outstanding costs award is the appropriate remedy.

[11] The plaintiff has an indemnity agreement from BridgePoint for \$100,000. This policy may be of assistance to him to resolve the stay issue.

Security for Costs

- [12] The defendants seek, in the alternative, security for costs from the plaintiff. This action was started in 2010, but the security for costs issue was not brought forward until 2015. I am satisfied that the underlying basis for seeking this relief was the costs arrears. Mr. Stamp in his affidavit, indicated impecuniosity. Although his evidence was not as fulsome as it ought to be with respect to this issue, I am satisfied that there is an access to justice issue for a person who was claiming long-term disability benefits and who has established that he has limited income and limited assets.
- [13] There is a lack of judicial authority with respect to the effects of an indemnification agreement when security for costs is sought. Much of the judicial authority provided by the defendants related to indemnification agreements for plaintiffs in class action proceedings. In my view, those agreements are for a different purpose and may be an appropriate way to shelter a representative plaintiff from dire costs consequences if the class action suit is not successful.
- [14] In this case, the presence of an indemnification agreement for \$100,000 together with confirmation from the insurer that the policy is in force provides further comfort to the defendants.
- [15] I therefore dismiss the defendants' alternative claim for security for costs against the plaintiff.

Conclusion

- [16] The plaintiff's motion to vary the costs award is dismissed.
- [17] The defendants' motion to stay the action pending payment of the outstanding costs order is granted.
- [18] The defendants' motion for security for costs is dismissed.

Costs

- [19] Both counsel provided costs outlines but indicated they would prefer to make written submissions regarding costs upon the release of this endorsement. The parties are encouraged to resolve the issue of costs. If costs are not settled, the defendants may make brief written submissions as to costs, not exceeding two pages, within fifteen days of the release of this endorsement. The plaintiff will then have ten days to respond, with submissions not exceeding two pages.
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Date: May 1, 2015