

Defendants succeed in getting security for costs despite plaintiffs' action not being frivolous (Walker v. Smith)

Civil Procedure | Costs | Litigation & Dispute Resolution | Security for Costs

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Under rule 56 of the *Rules of Civil Procedure*, a defendant can seek an order for security of costs against a plaintiff in certain limited circumstances. This is an important rule because it protects a defendant from being required to defend a case for years, only to be denied recovery for their costs if successful at trial. In Ontario, the costs of litigation are governed by the “loser pays” principle. This principle is designed to impose discipline on litigants, and to act as a disincentive to the commencement of meritless claims.

In *Walker v. Smith*, (Court File No. CV-22-00683420-0000, May 13, 2026, Myers J. (not on CanLII)), lawyers at Gardiner Roberts LLP successfully obtained an order for security of costs against the plaintiffs under [subrules 56.01\(c\) and \(d\)](#).

In this case, the plaintiffs had commenced proceedings against their lawyer, a mortgage broker and his company, and two other defendants in connection with a mortgage refinancing which was allegedly tainted by fraud and deceit.

On the refinancing, the broker and his company originally took \$370,000 from the loan monies as fees and other amounts allegedly owing to them by the plaintiffs. This led to a dispute which was resolved by the payment of the \$370,000 to the plaintiffs and the execution of a release. The plaintiffs had retained the defendant lawyer to assist them in the mortgage transaction. Another lawyer, who was not named as a defendant, was allegedly engaged to draft the release.

Although the release stated that it was a “mutual release”, the release was one-sided.

After signing the release, the plaintiffs allegedly discovered that several other fees had been improperly charged to them in the refinancing transaction. Accordingly, they commenced their action.

The broker and his company sought to strike the claim on the grounds that it was frivolous, vexatious and an abuse of process and also, along with the other defendants, sought security for costs.

With respect to the motion to strike the claim, the court held that it was unclear, even though the language of the release was drafted broadly, that the lawsuit could not succeed due to the release.

The court explained that there was uncertainty whether the plaintiffs had truly obtained independent legal advice in the refinancing transaction and the execution of the release, and whether proper professional care had been taken in the drafting of the release. Among other things, the court noted that the release contained typos and grammar errors.

Furthermore, the plaintiffs alleged that they did not have sufficient knowledge of the details of transactions related to the mortgage refinancing. In addition to the taking of the \$370,000, the plaintiffs alleged that the broker and his company had charged them another \$320,000. The broker's partner, in writing, called the

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taking of \$120,000 of that money "fraudulent".

With respect to the defendants' request for security for costs, the defendants showed that the plaintiffs owed significant sums in outstanding costs orders in the within action and other proceedings. The plaintiffs had millions of dollars in outstanding judgments against them.

As well, the defendants contended that the corporate plaintiff did not appear to have sufficient assets to pay costs if it was unsuccessful at trial.

The plaintiffs contended that despite these facts, security for costs should not be granted because they were impecunious.

Impecuniosity is a standard defence to a security for costs motion. However, as explained by the court in *Coastline Corporation Ltd. v. Canaccord Capital Corp.*, 2009 CanLII 21758, the evidentiary threshold for impecuniosity is high and a plaintiff must provide complete and accurate disclosure of income, assets, expenses, liabilities and borrowing ability. A corporate plaintiff must also demonstrate that it cannot raise money for security for costs from its shareholders or associates.

Overall, a plaintiff cannot simply make a bald assertion of impecuniosity, which the plaintiffs had done in this case.

The plaintiffs made no financial disclosure about their resources and an affidavit filed in defence of the defendants' motion baldly asserted that the plaintiffs:

do not have access to sufficient funds to post the level of security sought by [the defendants]. Requiring the Plaintiffs to post security in the amount sought would effectively prevent the Plaintiffs from pursuing their claims.

The court concluded that the plaintiffs were not impecunious and that the justice of case favoured the granting of security for costs.

As well, the defendants' motion was not being used as a litigation tactic to prevent the plaintiffs' case from being heard on its merits. In this regard, the court noted that the plaintiffs failed to plead particulars of any fraud or wrongdoing against some of the defendants, and that the pleaded claims were not strong. Notwithstanding the plaintiffs' claim about only discovering after the signing of the release that additional monies had been taken, the evidence showed a paper trail for the movement of money and that, among other things, many documents were executed by the individual plaintiff.

Furthermore, the court found that the plaintiffs had exhibited a reluctance to move their action forward and had engaged in tactical litigation by delivering evidence and written argument only days before the hearing of the defendants' motion.

In balancing the plaintiffs access to justice against the risk of the defendants being exposed to costly litigation for many years and potentially being denied cost recovery at the end of trial, the court concluded that ordering security for costs against the plaintiffs was appropriate. The court awarded each set of defendants \$50,000 (\$150,000 in the aggregate) in security for costs up until the end of discovery.

The defendants were also entitled to seek further security for costs for trial at the pre-trial conference. A PDF version is available to download [here](#).

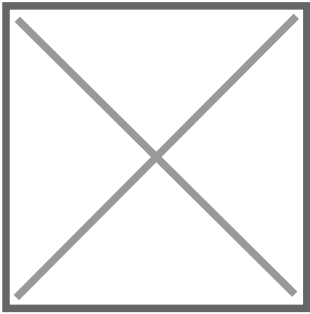
Representation by Gardiner Roberts LLP

The defendant lawyer in this case was represented by James Beesley, a partner in the Dispute Resolution Group at Gardiner Roberts LLP.

Mr. Beesley was assisted in this matter by Mason Kohn, a junior associate in the firm's Dispute Resolution Group.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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