Ontario Superior Court of Justice

COURT FILE NO. CV-21-00656432-0000

2476703 Ontario Inc. et al. vs. Quahold Corporation et al.

- Counsel for the Plaintiffs 2476703 Ontario Inc., et al., responding parties to the motion: D. Seifer
- Counsel for Defendants, co-moving parties Di Carlo, 2438261 Ontario Limited & Dunlop Developments (Barrie) Inc.: J. Watts
- Counsel for Defendant, co-moving party Quahold Corporation: J. Kotsopoulos
- Counsel for Defendants, moving parties Bianchi & Re-Max Premier: L. Rakowski & A. Korbin

Endorsement of Associate Justice Josefo dated February 22, 2024

Pursuant to my August 21, 2023 Endorsement which scheduled the Long Motion heard today, all defendants seek Security for Costs pursuant to Rule 56.01(d) and (e) of the *Rules of Civil Procedure*. The global total amount of $300,000 is sought which, it was explained, when referencing the Bills of Costs, is about 40% below the partial indemnity estimated costs of the defendants through to trial.

Despite the parties last August 21, 2023 setting their own timetable for the delivery of materials for this motion, the plaintiff never delivered a responding record, nor a factum. Early this morning Mr. Seifer uploaded some cases to which he referred in his submissions, which focused mainly on the timing and quantum of security.

As Mr. Seifer confirmed, the plaintiffs accept that they must post security for costs. The disagreement is only over how much, and when the security should be posted. Given that concession, *albeit* belatedly made, the hearing was streamlined. With agreement that security is to be paid, I need not address in any detail the reason for the Rule, or the many cases which have discussed it. Suffice to note that Rule 56 provides that security is awarded on motion where the Court "may make such order for security for costs *as is just*". Meaning that security is awarded in the discretion of the Court, properly applied based on the well-known legal principles.

The moving defendants sought security payable in stages or tranches as follows:

- $80,000 payable within 45 days for all past work, covering through to examination for discoveries.
- $70,000 payable within 30 days after discoveries, covering through to the pre-trial.
- $150,000 payable 45 days before trial.

The responding plaintiffs proposed that $50,000 be payable for past work and for work leading up to discovery within 60 days from today; and an additional $50,000 be payable 30 days after the completion of discoveries.

To situate my disposition of this motion in context, a few words about the action will assist. There are four plaintiffs, six defendant parties, and three sets of counsel. The case arises out of a default by the numbered company plaintiff 2476703 Ontario Inc on a mortgage held by defendant Quahold. The mortgaged property was sold via power of sale. The plaintiffs bring this action, claiming in essence that the defendants improvidently transferred the property below fair market value, which enriched defendants to the detriment of the plaintiffs.

A security for costs motion was to have been brought several years ago. Plaintiffs then satisfied defendants of sufficient assets, so to avoid the need for the motion. Yet when defendants learned of what they believed were changed circumstances, their motion was revived, leading to today's hearing. As noted, plaintiffs no longer contest the need or justification for security (and again, did not file any responding material in that regard). The only issues are, essentially, "how much and when".

Notwithstanding the well-argued position of the plaintiffs, I am unable to agree that this is a straight-forward or uncomplicated case. Rather, what plaintiffs are alleging is, by the very nature of the allegations, likely to make the matter more rather than less complex. Gathering all the relevant documents by all the parties, and then conducting discoveries of, reasonably estimated, two plaintiff parties and three or four defendant parties (it could be more, and it may be less), over at least several days, is not an inexpensive undertaking.

I have reviewed the Bills of Costs as estimated of all defendants. In my view, the costs listed on a partial indemnity basis are quite reasonable for the various tasks undertaken to date and to be undertaken as the case progresses. Mr. Seifer expressed some concern with the "general file management" category, yet Ms. Rakowski explained to my satisfaction what work that category encompassed and why there was no overlap with other work done or to be done. Considering the quantum, as I remarked at the hearing, I found the amounts proposed neither startling nor untoward. Rather, the estimated costs on a partial indemnity basis are quite realistic, and possibly even slightly "low-balled". Importantly, I reiterate that defendants are for purposes of this motion only seeking approximately 40% of their partial indemnity costs. In my view, what is sought ($300,00 paid over time) is reasonable. The plaintiffs' proposal of $100,00 in total is insufficient to properly protect the defendants.

I weigh the pros and cons in this matter. That includes the evidence submitted by the defendants of some of the plaintiffs' significant debts, and the lack of any assurance or responding explanation from plaintiffs to contradict the evidence properly before me. I also consider my preliminary (as that is all it can be at this early stage) assessment of the case pursuant to Rule 56.01(e), which is that the plaintiffs may have a challenging or difficult uphill road ahead of them to prove their case.

In balancing all this, I keep in mind what RSJ MacLeod (then Master MacLeod) stated at paragraph 11 of *Breatross Estate v. Woolfson*, 2013 ONSC 6819: "In simplest terms, the rule provides for a form of risk analysis." I also heed the admonition of the Court of Appeal in the *Yaiquaje et al v Chevron* 2017 ONCA 827 matter, that the Rule not preclude meritorious cases from being heard on their merits.

Again, it's a balance. In this case I order that payment of Security for Costs by plaintiffs shall be, as follows:

First Tranche—in two parts:

- $40,000.00 payable in 40 days from February 23, 2024.
- $40,000 payable in 75 days from February 23, 2024.

These payments will, in my view, cover past work which I find was appropriately performed, including the time expended years ago for this motion, as well as future work to be performed preparing affidavits of documents and readying for and attending at examinations for discovery. It will allow the plaintiffs to stretch out this first payment period (defendants sought $80,000 in 40 days), yet protect defendants by ensuring payments are likely received before examination for discoveries are undertaken.

I further order payment of Security for Costs by plaintiffs as follows:

Second Tranche—in two parts:

- $20,000 payable no later than 45 days before mediation.
- $50,000 payable no later than 45 days before a pre-trial conference.

These payments will cover work done pertaining to undertakings and refusals, amongst other post-discovery tasks, as well as will cover the parties through mediation and leading up to the pre-trial.

I further order payment of Security for Costs by plaintiffs as follows:

Third Tranche:

- $150,000 payable no later than 45 days before trial.

This last tranche was objected to by counsel for plaintiffs. Mr. Seifer submitted that ordering costs before trial so early on could have a chilling effect on the plaintiffs, putting economic pressure on them to settle their case because of this looming payment. Respectfully, however, I do not see how an order made now, yet not to be effective up to 45 days prior to trial, would have any chilling effect on plaintiffs. There is no evidence to that effect, only speculation from counsel. Moreover, plaintiffs are not being asked to pay that money now. The trial is likely two years away, or more, given the current timelines. All plaintiffs are being told is to be prepared to pay this sum 45 days prior to trial.

In my view, such early notice to the plaintiffs of what will be expected of them should benefit them. It will allow them to budget and plan for this payment over a period of years, rather than months. It provides certainty, at least certainty subject to any party seeking to vary this Order pursuant to Rule 56.07 with new evidence or based on changed circumstances. I believe it is far better that parties are aware, early on, of what will be their obligations and what is expected of them. Such transparency in the process is the antithesis of harmful, I suggest.

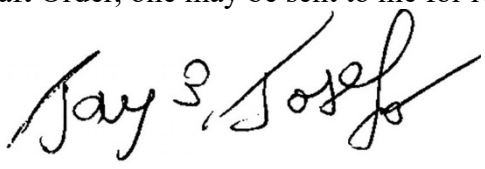
Making this Order now is also not contrary to the *Rule* and Caselaw. My reading of the cases leads me to conclude that an order to pay immediately for trial costs, when a trial is years away, usually ought not be made. Yet I am not herein ordering plaintiffs to immediately pay trial costs when the trial in this action is years away. Rather, I am ordering that such security for trial costs be paid only shortly before, when counsel are 'gearing up' for, trial.

As to placing the onus on the plaintiffs to seek to vary my Order as trial approaches, if that is what they are then inclined to do, rather than the onus be on defendants to seek a further Order for security, given the circumstances of this case it is, in my view, just that the onus be on plaintiffs in that regard. Pursuant to the unchallenged evidence on record, some of the plaintiffs owe significant funds, and are involved in a myriad of litigation.

Considering the detailed record before me, I am satisfied that making these Orders for security for costs is just in the circumstances of this case. I thus Order that security be paid by the plaintiffs as set out herein. If the parties agree, instead of paying the funds into court, the trust account of one of the law firms could be used.

Costs and an Order:
We did not address costs today as I was told there were offers of settlement exchanged, so the parties preferred to await my disposition. Having now received this Endorsement I urge the parties to agree upon costs of this motion. If not, a zoom case-conference can be held with me, to be scheduled via ATC Ms. Sharma.

Assuming the parties can agree on a draft Order, one may be sent to me for review, approval, and signature.



Associate Justice J. Josefo