

Security for costs victories

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Under rule 56.01 of the *Rules of Civil Procedure*, a defendant can protect themselves against the costs of a legal proceeding by seeking an order that the plaintiff post security for costs. Such orders are also available to third parties who are sued by defendants.

In circumstances where a security for costs motion has been brought and is then abandoned or withdrawn, a plaintiff is also entitled to obtain costs for being required to respond to the motion.

In three cases, lawyers at Gardiner Roberts LLP were either able to successfully obtain security for costs for their clients or recover costs for an abandoned security for costs motion.

Obtaining security for costs

In *1502300 Ontario Inc. v. Kanellos*, 2024 ONSC 4452 [*"Kanellos"*] and *World Financial Solutions Inc. v. Alfred*, CV-18-000594161-0000, Justice Akazaki, 7 August 2024 [*"Alfred"*], senior partner, Anna Husa, and senior associate, James Beesley, were, respectively, successful in obtaining security for costs for their clients.

In *Kanellos*, security for costs were sought under rule 56.01(1)(d) of the *Rules of Civil Procedure* on the grounds that the plaintiff was a corporation and that there was good reason to believe that it had insufficient assets in Ontario to pay the costs of the defendant.

The plaintiff corporation claimed that the defendant, its lawyer, had been negligent in allowing it, as landlord, to sign a commercial lease without receiving a personal guarantee from the tenant and in failing to disclose that he was related to the principal of the tenant and acted for the tenant in the lease negotiations. The defendant lawyer denied these allegations and also contended that the plaintiff's claim was statute-barred.

Ms. Husa argued that the plaintiff corporation did not have sufficient assets because it had sold its property in August 2023 and had a bank balance of less than \$10,000. Accordingly, the conditions under rule 56.01(1)(d) were met, and the burden shifted to the corporate plaintiff to demonstrate, with robust particularity, either that it had sufficient assets, or that it was impecunious and had a meritorious case.

In this case, the corporate plaintiff claimed that it was impecunious. Accordingly, as set out in *Air Palace v. Abdel*, 2021 ONSC 7882, the corporate plaintiff was required to demonstrate that it was genuinely impecunious and could not raise security for costs from its shareholders and associates.

The corporate plaintiff was unable to meet this test. It provided no evidence about the identity of its shareholders and no particulars of its principal's current income or assets.

But this did not end the court's analysis. Notwithstanding that the corporation could not prove impecuniosity, it could still avoid posting security for costs if it was able to show that it had a good chance of success at trial.

The motion judge found that the corporate plaintiff was unable to meet this high threshold.

There were credibility issues as between the plaintiff and the defendant about what the representative of the plaintiff was told about the lack of a personal guarantee before signing the commercial lease at issue. The court could not decide the issues of credibility on the security for costs motion. However, the court noted that there was no obvious direct nexus between the plaintiff's lack of funds and the defendant's alleged conduct. There was also evidence that the principal of the corporation had been told about the relationship between the defendant lawyer and the principal of the tenant (which the plaintiff alleged was not disclosed to him and placed the defendant lawyer in a conflict of interest). Lastly, there was evidence that the defendant lawyer might succeed on the limitation period defence.

Considering the justness of whether a security for costs order should be granted under the holistic approach established under *Yaiguaje v. Chevron*, 2017 ONCA 827, the security for costs order was granted. Ms. Husa's client obtained an order for security for costs in the amount of \$13,729.22 for costs incurred to date, \$16,195.72 for costs up to the pre-trial, \$38,103.60 for trial costs, plus future disbursements of \$18,645.

In *Alfred*, Mr. Beesley sought security for costs for a third party defendant, also under rule 56.01(1)(d).

In this case, the plaintiff had brought a mortgage enforcement action against the corporate defendant. The corporate defendant had borrowed over \$2 million to acquire a resort property. Eventually, the corporate defendant defaulted on the mortgage.

The corporate defendant alleged that the plaintiff was in a conspiracy with the third parties to acquire the resort property for their own purposes, and accordingly commenced proceedings against them. As well, the corporate defendant contended that a notice of sale issued by the plaintiff, and under which the resort property was sold, was invalid.

Among other things, the third parties contended that the corporate defendant was a shell company without assets or the ability to generate revenues.

The court explained that under rule 56, a third party can apply for security for costs against defendants and that once an enumerated factor within the rule applied to the case, the burden shifted to the responding party on the security for costs motion to establish either:

- It had appropriate or sufficient assets within Ontario or a reciprocating jurisdiction;
- Was impecunious and that the claim was not devoid of merit; or
- Was not impecunious and did not have sufficient assets to pay a costs order, but the claim had a good chance of success.

Although the corporate defendant conceded that it lacked assets to pay a costs award, it contended that it should be relieved of the requirement to post security for cost because the conduct of the moving parties was the cause of its deprivation.

The motion judge rejected this argument because, among other things, the corporate defendant's lack of assets in this case predated its alleged lack of deprivation arising from the sale of the resort property.

In any event, the motion judge rejected that the corporate defendant was impecunious because its principal had considerable assets, but was unwilling to put them into jeopardy as security for costs. Accordingly, in order to avoid security for costs the corporate defendant, like the plaintiff in *Kanellos*, was required to demonstrate that it had a good chance of success to avoid a security for costs order. The corporate defendant was unable to do so against any of the third party defendants.

Lastly, in *Khanberg v. Ramji*, CV-18-00603988-0000, Associate Justice Jolley, 14 August 2024, senior partner, Howard Wolch, successfully obtained a \$20,000 order for costs for an abandoned security for costs motion.

Under rule 37.09(3) of the *Rules of Civil Procedure*, where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is presumptively entitled to costs, unless the court orders otherwise.

In this case, the defendant sought security for costs on the grounds that the plaintiff was not ordinarily resident. After an exchange of materials, including affidavit evidence, the defendant withdrew his motion. With respect to costs, the defendant contended that there should be no costs because the motion would not have been necessary if the information which the plaintiff provided immediately before the decision to withdraw the motion had been provided earlier.

The court accepted that the information provided by the plaintiff immediately prior to the withdrawal of the defendant's motion only expanded on previous evidence originally provided to the defendant in November 2023 and that despite other evidence delivered in June 2024 which went to the issue of the plaintiff's place of ordinary residence, the defendant chose to deliver a supplementary affidavit and a reply factum.

The late withdrawal of the defendant's motion therefore entitled the plaintiff to costs in the amount of \$20,000.

Representation by Gardiner Roberts LLP

Again, in the above cases, the respective clients were represented by Ms. Husa, a senior partner, Mr. Beesley, a senior associate, and Mr. Wolch, also a senior partner. All of these lawyers practice in the firm's Dispute Resolution Group.



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Ms. Husa and Mr. Wolch were assisted in the drafting of written argument by Stephen Thiele, a senior lawyer and partner, and the firm's Director of Knowledge Management and Legal Research. Isabel Yoo, a junior knowledge management associate in the firm's Dispute Resolution Group also assisted Mr. Wolch in preparing legal argument in *Khanberg*. A PDF version is available to download [here](#).

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you.

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