

Date: 20080704

Docket: T-776-07

Citation: 2008FC837

Toronto, Ontario, July 4, 2008

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

HAROLD COOMBS

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] At the conclusion of the argument of the motion, after hearing the submissions of counsel for the Respondent and from Mr. Coombs, a self-represented litigant, I gave oral reasons for decision reserving the right to correct and amend the reasons. These are the final edited version of those reasons.

[2] This is a motion brought by the Defendant, Her Majesty the Queen, for security for costs in the amount of \$43,410. There are several enumerated grounds in support of the Respondent's request for security for costs set out in the Motion Record in paragraphs 1 through 4 as follows:

1. The Canada Revenue Agency (CRA) is investigating the plaintiff for offences under *The Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("the Act") for evading the payment of payroll taxes on behalf of Sun-Air Travel Inc. and for making false or deceptive statements in several tax returns;
2. The CRA searched 23 locations, including the plaintiff's personal residence, business addresses, and at the residences of family members and business associates. The matters being investigated include donations to Rocky Ridge, a charity for which the plaintiff acts as accountant, various claims for allowable business investment losses and other matters. The statement of claim alleges *inter alia* that various officials of the CRA acted in concert to devise a scheme to intimidate and cause the plaintiff and his family harm;
3. The plaintiff has brought seven applications and two actions since February 8, 2007, contesting the CRA's audits of the donors to the charity and its investigating under the Act. The defendant has successfully struck the applications on the grounds of timeliness or lack of the Court's jurisdiction to hear them. The defendant also brought a motion to strike the statement of claim in the within action. The claim was subsequently amended;
4. The plaintiff owes court costs of \$4,750.00 as a result of the orders dismissing the applications, \$2,250.00 of which came in three proceedings where the Court directed that the costs are payable forthwith. A further Bill of Costs with respect to a discontinued action is outstanding in the amount of \$987.92. None of the Orders for costs have been satisfied.

[3] In response, Mr. Coombs filed an affidavit in which he makes the bald statement that he is impecunious. For that reason he relies upon Rule 417 to resist the payment of security for costs.

Rule 417 provides as follows:

417. The Court may refuse to order that security for costs be given under any of paragraphs 416(1) (a) to (g) if a plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit.

[4] Rule 417 remains discretionary and requires the Court to balance a number of factors, including the strength of the evidence before the Court.

[5] The Court has grappled with the issue of impecuniosity in the past. Indeed, there is a long line of authority that deals with the meaning of impecuniosity. The Court has been referred to *Heli Tech Services (Canada) Limited v. Weyerhaeuser Co.*, 2006 FCJ 1494, a decision of Justice Campbell of this Court. That was a case in which an appeal from a Prothonotary was taken who granted security for costs in the face of a bald statement from the Plaintiffs that they were impecunious. One of the Plaintiffs was an individual.

[6] In *Heli Tech*, Justice Campbell reviews at some length the meaning of impecuniosity, and makes the following observation:

[5] A line of authority places a heavy onus of proof on any party seeking to avoid posting security for costs on the basis of impecuniosity.

[7] Justice Campbell then goes on to review a number of other cases dealing with impecuniosity. One of the cases is *Smith Bus Lines Limited v. Bank of Montreal*, (1987) 61 O.R. (2d) 688, at 704-705 and, in particular, the following passage:

The corporate plaintiff wishing to be allowed to proceed with its action, without either showing sufficient assets or putting up security, must first show “impecuniosity” meaning not only that it does not have sufficient assets itself but also that it cannot raise the security for costs from its shareholders and associates, partly because the courts do not want a successful defendant to be effectively deprived of costs where, for example, wealthy shareholders have decided to carry on business and litigation through a shell corporation. To go the impecuniosity route the plaintiff must establish by evidence that it cannot raise security for costs because, if a private company, its shareholders have not sufficient assets. As expressed by Reid J. in *John Wink Limited v. Sico Inc.*, (1987) 57 O.R. (2d) 705 at page 709: “If an order for security stops the plaintiff in its tracks it has disposed of the suit.” To raise impecuniosity there must be evidence that if security is required, the suit will be stopped because the amount of the security is not only not possessed by the plaintiff but is not available to it.

[8] After this analysis, Justice Campbell reaches the following conclusion:

As to the evidence required to prove impecuniosity, a high standard is expected. Frank and full disclosure is required. That is, the onus must be discharged with “robust particularity”, so that there can be no unanswered material questions.

[9] In support of that conclusion, Justice Campbell also refers to *Morton v. Canada*, (*Attorney General*), (2005), 75 O.R. (3d) 63 (S.C.J.) at paragraph 32 and a decision of the *House of Lords*,

M.V. Yorke Motors (a firm) v. Edwards, [1982] 1 WLR 444, wherein Lord Diplock approved the following remarks:

The fact that the man has no capital of his own does not mean that he cannot raise any capital. He may have friends, he may have business associates, he may relatives, all of whom can help him in his hour of need.

[10] Taking into consideration the evidence before the Court and the affidavit of Mr. Coombs, and particularly being cognizant of the fact that Mr. Coombs on prior occasions in this Court has brought proceedings in which orders for costs have been made against him which have not been paid, Mr. Coombs ought not in this case, without full, frank and "robust particularity" demonstrate the impecuniosity which he alleges and which he relies upon to have the Court exercise its discretion in Rule 417 to deny the Plaintiff its security for costs.

[11] In the circumstances of this case, after having carefully reviewed Mr. Coombs' affidavit and heard his submissions, I am not satisfied based on these authorities that impecuniosity has been made out with robust particularity. The affidavit merely states that Mr. Coombs is impecunious and that he has no source of income other than his Canada Pension and Old Age Security Pension and that he has debts to the Revenue Canada Agency which he is paying back in small increments. He does not attach exhibits showing his bank balances, nor any other financial data. He states his wife provides him with various amenities of life without advising the Court of whether he can raise funds either from his wife or other relatives in order to pursue this litigation. Thus, an order for security for costs is entirely appropriate in this case.

[12] The defendant's bill of costs seeks \$43,410. It is divided into two stages, a pre-trial stage and a post-trial stage. The pre-trial stage comprises an amount of \$11,990, which I understand from Mr. Parke should be increased to \$12,070, to include a further amount for pre-trial, as I understand it.

[13] Mr. Coombs takes issue with the 21 hours for attending on examination for discovery in this case, which is calculated at \$240 an hour, at \$5,040.

[14] In all of the circumstances, it is my view that security for costs for stage one of the proceeding should be payable. The 21 hours for examination for discovery is somewhat high and having reviewed the Statement of Claim in this case, I would reduce that amount by a small percentage.

[15] Thus, an appropriate award security for costs for the first stage of these proceedings, to the end of discoveries, is \$10,000. The Defendant is free to seek a further payment of security for costs thereafter.

[16] Unless and until those funds are paid into Court for security for costs of the defendant in this proceeding, the action would otherwise remain stayed in accordance with the *Federal Courts Rules*.

ORDER

THIS COURT ORDERS that

1. The Plaintiff shall pay into Court as security for costs up to and including the examinations for discovery in this action the sum of \$10,000.
2. Until the security for costs has been given the Plaintiff may not take any further step in the proceeding, other than an appeal from this order.
3. The Defendant may move for additional security for costs as costs are incurred.

“Kevin R. Aalto”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-776-07

STYLE OF CAUSE: HAROLD COOMBS
v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto

DATE OF HEARING: June 23, 2008

**REASONS FOR ORDER
AND ORDER:** AALTO P.

DATED: July 4, 2008

APPEARANCES:

Mr. Harold Coombs	FOR THE PLAINTIFF (SELF-REPRESENTED)
Mr. Christopher Parke	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Mr. Harold Coombs	FOR THE PLAINTIFF (SELF-REPRESENTED)
Mr. Christopher Parke	FOR THE DEFENDANT