COURT FILE NO.: CV-20-00649655
MOTION HEARD: 20241217

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Logan Instruments Canada Corp., Plaintiff

AND:

Yichen Wang, Defendant

BEFORE: Associate Justice B. McAfee

COUNSEL: P. Starkman and C. Zhang (observing), Counsel, for the Moving Party, the Defendant,

J. Cecchetto, Counsel, for the Responding Party, the Defendant

HEARD: December 17, 2024

ENDORSEMENT

[1] The defendant moves pursuant to Rule 56.01(1)(d) and (e) of the *Rules of Civil Procedure* for an order that the plaintiff post security for costs on a partial indemnity basis in the all-inclusive amount of $100,000.00.

[2] In this action the plaintiff seeks $3,250,000.00 in damages and other relief and alleges, among other things, that the defendant, a former employee, misused confidential and/or proprietary information belonging to the plaintiff.

[3] The defendant relies on Rule 56.01(1)(d) and (e) of the *Rules of Civil Procedure*. Rule 56.01(1)(d) and (e) provide:

> 56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
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> …
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> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
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> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
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> …

[4] The application of Rule 56.01(1)(d) involves a two-step analysis. The first step of the analysis requires the defendant to establish that it appears that the plaintiff is a corporation or a nominal applicant and there is good reason to believe that the plaintiff has insufficient assets in Ontario to pay the costs of the defendant. If the defendant discharges its initial onus, the second step of the analysis requires the plaintiff to establish the basis for a broad flexible exercise of discretion that an order for security for costs would be unjust (*Coastline Corp. v. Canaccord Capital Corp.*, [2009] O.J. No. 1790 (Ont. S.C.J.) at para. 7).

[5] With respect to the defendant's initial onus under Rule 56.01(1)(d), in *Websports Technologies Inc. v. Cryptologic Inc.*, [2003] O.J. No. 5455 (Ont. S.C.J.) Master Haberman states as follows:

> 6 The moving party is not required to go so far as to prove that the situation, in fact, meets the criteria of the subsection. They need only demonstrate that there is good reason to believe that that is the case (see *Warren Industrial Feldspar C. Ltd. v. Union Carbide Canada Ltd. et al.*, [1986] O.J. No. 2364).
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> ...
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> 8 ...the phrase "good reason to believe" must have some meaning. In my view, it involves something more than a hunch or a concern. There must be some evidence placed before the court from which the court can accept that the concern is genuine and that it is based on proven facts regarding the corporations' current financial circumstances. A bald assertion that a party has insufficient assets, on its own, cannot satisfy the first part of the test. If that was all that was required, motions of this kind would be brought to "test the waters", in all cases where a plaintiff corporation alleges that the defendant's action has caused it to sustain a significant loss, with no information as to the state of a company's financial affairs and no legitimate basis for concern. The 2-part test, with the initial onus on the moving party, is intended to discourage parties from bringing these costly motions without actual grounds. While the moving party need not go so far as prove that there are insufficient assets, they must, at least, prove facts from which a court can conclude that there is good reason to believe that that is the case.

[6] The defendant conducted a Rule 39.03 examination of John Chen, a director of the plaintiff. No formal or interim motion was brought with respect to the approximately 42 questions refused on that examination. Limited submissions were made with respect to some refusals during this short motion for security for costs. Appended as Exhibit DD to the affidavit of administrative assistant C. Quatela sworn June 20, 2024, filed in response to this motion is a letter from plaintiff's counsel dated February 28, 2024. The letter attaches screen shots of the balance of two plaintiff bank accounts totalling approximately $106,596.84 CDN. The defendant argues that because the plaintiff put its assets in issue, the defendant was entitled to ask questions about the plaintiff's financial circumstances. The defendant relies on the decision of Justice Harvison Young in *1427814 Ontario Ltd. v. 3697584 Canada Inc.*, [2008] O.J. No. 3670 (Ont. S.C.J.).

[7] The initial onus on this motion is on the defendant, and it is up to the defendant to adduce evidence to support its initial onus. In the circumstances of this case and for the purposes of the defendant's initial onus, to the extent that Mr. Chen refused to answer questions concerning the plaintiff's financial assets, I am not satisfied that the refusals were improper. However, to the extent that the plaintiff has put in evidence of its bank account balances for the purpose of the second step of the analysis, the refusal to answer questions about the bank accounts was not proper. In the circumstances of this case, the failure to answer questions with respect to the bank accounts does not allow the court to determine whether the balances are *bona fide* assets of the company for the purposes of the second step of the analysis (see *671122 Ontario Ltd. v. Canadian Tire Corp.*, [1993] O.J. No. 2173 (Ont. C.A.) at para. 9).

[8] I am satisfied that it appears that there is good reason to believe that the defendant has insufficient assets in Ontario to pay the defendant's costs. There are facts before me from which I can conclude that that is the case. The plaintiff operates from the home address of Mr. Chen. The registered address for the plaintiff is Mr. Chen's residence. Mr. Chen is not an employee of the plaintiff but an independent contractor who sells products in Ontario for the US parent company. The plaintiff has no employees. I am satisfied that the defendant has discharged its initial onus under Rule 56.01(1)(d).

[9] Having found that the defendant has satisfied its initial onus with respect to the plaintiff under Rule 56.01(1)(d), it is not necessary to determine if the defendant has also satisfied its initial onus under Rule 56.01(1)(e).

[10] The onus now shifts to the plaintiff to satisfy the court that an order for security for costs would be unjust.

[11] In *Yaiguaje v. Chevron Corp.*, 2017 ONCA 827 at paragraphs 23-25, the Court of Appeal states as follows with respect to consideration of the justness of the order:

> [23] The Rules explicitly provide that an order for security for costs should only be made where the justness of the case demands it. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of rr. 56 or 61 have been met.
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> [24] Courts in Ontario have attempted to articulate the factors to be considered in determining the justness of security for costs orders. They have identified such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns, and the public importance of the litigation. See: *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (H.C.); *Morton v. Canada (Attorney General)* (2005), 75 O.R. (3d) 63 (S.C.); *Cigar500.com Inc. v. Ashton Distributors Inc.* (2009), 99 O.R. (3d) 55 (S.C.); *Wang v. Li*, 2011 ONSC 4477 (S.C.); and *Brown v. Hudson's Bay Co.*, 2014 ONSC 1065, 318 O.A.C. 12 (Div. Ct.).

> [25] While this case law is of some assistance, each case must be considered on its own facts. It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all of the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made.

[12] With respect to the merits, as summarized in *Coastline* at para. 7(vi) and (vii):

> (vi) The court on a security for costs motion is not required to embark on an analysis such as in a motion for summary judgment. The analysis is primarily on the pleadings with recourse to evidence filed on the motion, and in appropriate cases, to selective references to excerpts of the examination for discovery where it is available (*Padnos v. Luminart Inc.*, [1996] O.J. No. 4549 (Gen.Div.) at para. 7; *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, [2007] O.J. No. 4096 (S.C.J.- Mast.) at para. 37);
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> (vii) "If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. The assessment of the merits should be decisive only where (a) the merits may be properly assessed on an interlocutory application; and (b) success or failure appears obvious" (*Wall v. Horn Abbott Ltd.*, [1999] N.S.J. No. 124 (C.A.) at para. 83).

[13] The plaintiff argues that an order for security for costs would be unjust because of the defendant's delay in bringing this motion. The defendant brought a prior motion seeking to dismiss or stay the action on the basis of jurisdiction. That motion was heard and dismissed by Associate Justice Robinson on May 8, 2023. The defendant delivered a statement of defence and counterclaim on May 29, 2023. The counterclaim was ultimately dismissed on consent and on February 2, 2024, an amended defence was served. The plaintiff served its reply on February 12, 2024. The defendant advised of its intention to bring the within motion on February 16, 2024. While this action has been delayed due to an unsuccessful jurisdiction motion and a counterclaim that was ultimately dismissed on consent, I am not satisfied that these circumstances support a finding that the delay has been significant or unreasonable such that an order for security for costs would be unjust.

[14] With respect to the merits, the plaintiff alleges that the defendant misappropriated and misused the defendants' confidential and proprietary information to patent, sell, market and profit from competing products to the detriment of the plaintiff. The defendant denies any breach of fiduciary duty or employee obligation and asserts that the plaintiff had no proprietary interest in the product. To properly assess the merits, factual findings and assessments of credibility are required. The merits cannot be properly assessed on this motion and at this stage of the action. The merits are a neutral factor on this motion.

[15] The plaintiff does not allege impecuniosity. If the plaintiff is relying on sufficiency of assets to demonstrate that an order for security for costs would be unjust, the screen shots

of bank account balances alone are not convincing evidence in that regard and the defendant would have been entitled to ask questions about this evidence.

[16] I was not referred to evidence in response to this motion that an order for security for costs will prevent the plaintiff's action from proceeding.

[17] Considering the justness of the order holistically and in all the circumstances of this case, it is just that security for costs be ordered.

[18] With respect to the issue of quantum of security, the defendant seeks partial indemnity costs in the all-inclusive amount sought of $100,000.00. In my view the costs sought are high. In particular, the bill of costs estimates 33 hours for a case conference. Mediation and pre-trial time are estimated in the total amount of 50 hours. Disbursements for the examination to the defendants *[sic]* is estimated at $10,000.00 not including transcript fees which are a separate entry. The bill of costs also includes time associated with the within motion of 24.2 hours. Having regard to all the circumstances of this proceeding, in my view a fair and reasonable amount to be posted for security for costs is the all-inclusive amount of $60,000.00.

[19] The plaintiff shall pay into court to the credit of this action as security for the costs of the defendant the all-inclusive amount of $60,000.00, to be paid into court in tranches as follows:

(i) On or before 45 days from today's date, the amount of $10,000.00;

(ii) On or before 30 days prior to examinations for discovery, the further amount of $10,000.00;

(iii) On or before 30 days prior to the mediation, the further amount of $10,000.00; and

(iv) On or before 120 days prior to trial, the further amount of $30,000.00.

[20] With respect to costs of the motion, the parties shall make reasonable efforts to resolve the issue of costs. If after making reasonable efforts to resolve the issue of costs the parties are unable to resolve the issue, any party seeking costs shall serve written costs submissions of three pages or less in length on or before March 7, 2025. Any responding costs submissions shall also be three pages or less in length and served on or before March 21, 2025. Any reply costs submissions shall be no more than one page in length and served on or before March 28, 2025. On or before the above deadlines, the served costs submissions shall be emailed to Assistant Trial Coordinator Teanna.Charlebois@ontario.ca together with a copy of the costs outlines, any offers to settle that the parties seek to rely upon, and an affidavit of service.

B. McAfee

Associate Justice B. McAfee

Date: February 14, 2025