2013 CarswellOnt 4987, 2013 ONSC 1377, 228 A.C.W.S. (3d) 62

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Jones v. Jones

Gareth Glenn Jones, Plaintiff and Carol Anne Jones and Allison Randolph Jones, Defendants

Ontario **Superior Court** of Justice

L.B. **Roberts** J.

Heard: February 25, 2013
Judgment: March 7, 2013
Docket: CV-08-00356535

Counsel: Donald Douglas, for Plaintiff

Kimberly Whaley, Jaël Marques De Souza, for Defendants

Subject: Civil Practice and Procedure

Civil practice and procedure --- Costs — Security for costs — Grounds for requiring security — Non-residence of plaintiff — Miscellaneous

Defendants brought motion for security for costs — Motion granted — Plaintiff was required to post security for defendants' costs in total amount of $75,000 — It was conceded and evidence established that plaintiff was not ordinarily resident in Ontario, that, since October 2005, he had lived in Arizona, in United States of America, and that he had no assets in Ontario to satisfy judgment or order for costs made in favour of defendants, if plaintiff was not successful in his action against them — There was no evidence of any reciprocal enforcement legislation or any other formal confirmation that Arizona would recognize any Ontario costs order or that any Ontario costs order would automatically be enforced in Arizona — Plaintiff had not offered undertaking to permit any Ontario costs order to be enforced in Arizona against him — Court was not persuaded that plaintiff was impecunious or that order for security for costs would create financial hardship for plaintiff or prevent him from continuing with this action — Court was unable to make determination on basis of materials before court whether action had good chance of success — Mer-

its of action were neutral factor in exercise of discretion on motion — It would be just in all of circumstances to order that plaintiff provide security for defendants' costs in amount of $75,000.

Civil practice and procedure --- Costs — Security for costs — Application for security — Miscellaneous

Civil practice and procedure --- Costs — Security for costs — Order for security — Form and amount of security

Cases considered by *L.B. Roberts J.*:

Chachula v. Baillie (2004), 2004 CarswellOnt 6, 69 O.R. (3d) 175 (Ont. S.C.J.) — referred to

Fitzgerald v. Southmedic Inc. (2012), 2012 CarswellOnt 5936, 2012 ONSC 2466 (Ont. S.C.J.) — referred to

Leonard v. Prior (July 4, 1994), Doc. 93 CQ 34817 (Ont. Gen. Div.) — referred to

Michigan National Bank v. Axel Kraft International Ltd. (1999), 1999 CarswellOnt 412, 30 C.P.C. (4th) 344 (Ont. Gen. Div.) — referred to

Stojanovic v. Bulut (2011), 10 C.P.C. (7th) 265, 2011 ONSC 874, 2011 CarswellOnt 1140 (Ont. Master) — referred to

Talati v. Tarnoweckyj-Carr (2011), 2011 CarswellOnt 74, 2011 ONSC 228 (Ont. S.C.J.) — referred to

V. Vinokur Foundation in Support of Culture and Arts v. Fraev Estate (2013), 2013 ONSC 733, 2013 CarswellOnt 1054 (Ont. S.C.J.) — referred to

Zeitoun v. Economical Insurance Group (2008), 236 O.A.C. 76, 64 C.C.L.I. (4th) 52, 2008 CarswellOnt 2576, 53 C.P.C. (6th) 308, 292 D.L.R. (4th) 313, 91 O.R. (3d) 131 (Ont. Div. Ct.) — referred to

Statutes considered:

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

s. 13 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 48.02 — considered

R. 48.04 — considered

R. 48.04(1) — considered

R. 48.06 — considered

R. 56.01 — considered

R. 56.01(1)(a) — considered

R. 56.01(1)(e) — referred to

Words and phrases considered

impecuniosity

"Impecuniosity" means an inability to raise sufficient funds for the litigation including the exposure to costs liability and any obligation to post security for costs.

MOTION by defendants for security for costs.

***L.B. Roberts J.*:**

Nature of the motion:

1 The defendants seek an order for security for their costs against the plaintiff, pursuant to rule 56.01(1)(a) of the *Rules of Civil Procedure*, because the plaintiff is ordinarily resident outside Ontario. They no longer rely on rule 56.01 (1)(e) as a ground for their motion.

Preliminary issues:

2 At the opening of the hearing, the plaintiff sought an adjournment of the defendants' motion on two bases: to cross-examine the affiant of the affidavit served on February 22, 2013; and the plaintiff argued that the defendants' motion ought to be heard at the same time as the plaintiff's motion for summary judgment.

3 I did not allow the adjournment of the motion for security for costs.

4 First, the defendants withdrew the affidavit served on February 22, 2013.

5 Second, the requested adjournment at this late date would result in a lengthy delay for the hearing of both motions. The defendants had served their notice of motion on November 26, 2012 and, although plaintiff's counsel indicated in December 2012 that a motion for summary judgment would be brought, the plaintiff's motion materials were not served until February 12, 2013.

6 Further, it would be unfair to the defendants to require them now to be put to the not inconsiderable expense of responding to the plaintiff's motion for summary judgment without allowing them to seek in advance security for their costs.

7 As a second preliminary issue, the plaintiff contended that the defendants must seek leave to bring their motion for security for costs because they consented to the plaintiff's action being placed on the trial list.

8 As incorporated into the September 27, 2012 Order of Master Haberman, the parties agreed, among other things, that this action was to be set down for trial by October 30, 2012 and that, depending on court availability, the trial was to be heard before June 30, 2013.

9 According to rule 48.04(1) of the *Rules of Civil Procedure*, subject to certain exceptions that do not apply to this case, any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court.

10 Rule 48.02 instructs how an action is set down for trial: an action is set down for trial by the service and filing of a trial record by any party. Rule 48.06 prescribes that, in the case of a defended action, which is the case here, a defended action is placed on the trial list 60 days after receipt of a trial record or after the filing of a written consent by all parties other than the party who set the action down for trial.

11 The rules are clear that certain steps must be completed by a party to set an action down for trial and to consent to an action being placed on the trial list. The timetabling of those events without more does not serve to replace those steps or to give rise to the consequences of rule 48.04.

12 In the present case, no party set the action down for trial by serving and filing a trial record and no party filed a written consent that the action be placed on the trial list. While there may be other consequences from the failure to comply with the court-ordered timetable, that is not a matter for my determination and does not affect the question of whether the defendants must seek leave to bring their motion.

13 As a result, rule 48.04 is not invoked and the defendants do not require leave to bring their motion for security for costs.

Plaintiff's residence and location of his assets:

14 In the present case, it is conceded and the evidence establishes that the plaintiff is not ordinarily resident in Ontario, that, since October 2005, he has lived in Arizona, in the United States of America, and that he has no assets

in Ontario[FN1] to satisfy a judgment or an order for costs made in favour of the defendants, if the plaintiff is not successful in his action against them.

15 Further, there is no evidence of any reciprocal enforcement legislation or any other formal confirmation that Arizona would recognize any Ontario costs order or that any Ontario costs order would automatically be enforced in Arizona.

16 In the absence of expert evidence on the point, I am not prepared to accept as conclusive the opinions expressed in the case law and articles submitted by the plaintiff, which, in any event, do not categorically state that an Ontario costs order would always be enforceable in Arizona. The plaintiff has not offered an undertaking to permit any Ontario costs order to be enforced in Arizona against him.

17 I am satisfied that the defendants have met all of the criteria under rule 56.01(1)(a).

18 Rule 56.01 does not create a *prima facie* right to security for costs but rather triggers the inquiry. Once it is determined that the plaintiff is ordinarily resident outside Ontario, which is the case here, the issue then becomes whether it is just to order security considering all of the relevant circumstances, including the plaintiff's financial situation and the merits of the plaintiffs case.[FN2]

Plaintiff's financial circumstances:

19 The plaintiff owns the following assets: he purchased in Arizona with money from his inheritances a residence in 2010 for $644,000.00, with a $50,000.00 mortgage, and a rental property for $150,000.00; and he has savings and investments of about $200,000.00.

20 The plaintiff is self-employed as an entertainer-coach driver for touring professional artists. His net income after expenses for 2012 has not yet been determined. According to the tax returns produced, he incurred a loss of $19,586.00 in 2011; a profit of $21,115.00 in 2010; and a profit of $31,036.00 in 2009. His wife is recently employed and expects to earn about $15,000.00 per year.

21 The plaintiff asserts that he and his wife are impecunious in that they unable to further encumber their assets in order to post security for costs for this action and that, at the time they bought their residence, they were told by their financial institution that the most that they could borrow was $50,000.00.

22 "Impecuniosity" means an inability to raise sufficient funds for the litigation including the exposure to costs liability and any obligation to post security for costs.[FN3] It is the plaintiff's burden to show impecuniosity or financial hardship on a balance of probabilities.[FN4]

23 The evidence establishes that the plaintiff has substantial assets. Although the plaintiff has apparently been slow to pay his solicitors, accommodations have been made for the plaintiff by his solicitors and there is no evidence that he has been unable to fund the litigation. On the contrary, the plaintiff has instructed his counsel to bring an

expensive motion for summary judgment.

24 Further, there is no evidence that the plaintiff would at present be unable to raise money based on the security of the two houses that he owns or that he has even made those inquiries. The fact that he allegedly could only borrow $50,000.00 more than 2 years ago when he purchased his residence does not mean that he cannot now increase his mortgage or obtain a line of credit, especially given that he has a second house to offer as additional security. There is no evidence that the rental property is encumbered.

25 With respect to the plaintiffs income, the tax returns produced show that in 2009, 2010 and 2011, the plaintiff made a salary, plus interest, rental and business income. The plaintiff's income was lowered in 2010 and 2011 by the losses claimed. In particular, in 2011, against the $26,300.00 in wages, $1,089.00 in interest income, $22,165.00 in business income, and $1,083.00 in rental income, the plaintiff claimed $80,938.00 as "other losses". This resulted in the $19,586.00 loss asserted by the plaintiff.

26 It is the plaintiffs obligation to support his allegation of financial hardship or impecuniosity by providing detailed particulars of his income, expenses, liabilities and assets.[FN5] He has not done so.

27 For example, he has not appended any of the forms referenced in the tax forms that he has produced, such as Form 4797, which would have provided particulars of the $80,938.00 of "other losses".

28 Further, although he claims that his family's annual expenses are approximately $35,000.00, he has not provided a breakdown of those expenses or explained how those expenses are being paid or carried when his income over the past several years is allegedly inadequate to cover those expenses.

29 In consequence, I am not persuaded that the plaintiff is impecunious or that an order for security for costs would create a financial hardship for the plaintiff or prevent him from continuing with this action, especially if security is ordered to be posted in installments. The evidence establishes that the plaintiff has sufficient assets on which he could draw to pay a costs order.

Merits of the plaintiffs action:

30 I turn next to consider the merits of the plaintiff's case. The merits of an action have a role in any motion under rule 56.01, albeit in a continuum. The weight of the merits of an action as a factor for consideration in a motion for security for costs under rule 56.01(1)(a) would be at the low end.[FN6]

31 There is a difference in the quality of the evidence required with respect to the merits of the action depending on whether or not the plaintiff is able to show impecuniosity. Where impecuniosity is shown, the plaintiff needs only to demonstrate that the claim is not plainly devoid of merit, which is a very low evidentiary threshold; however, where impecuniosity has not been shown, as is the case here, a closer scrutiny of the merits of the case is warranted and the plaintiff must demonstrate that the claim has a good chance of success.[FN7]

32 A motion for security for costs should not be turned into a motion for summary judgment. If an action appears complex or turns on issues of credibility, an assessment of the merits is not appropriate. Any determination of issues involving serious allegations of fraud and misappropriation of funds should only be made on the basis of a full evidentiary record. In such cases where it is not possible for the court to determine on the motion record whether the plaintiff's case has a good chance of success, the merits would be a neutral factor.[FN8]

33 The following facts are not in dispute. The plaintiff received inheritances from his great-aunt and grandmother, which were held in trust for him by his parents until he reached 25 years of age on August 27, 1998. The defendants have admitted in their amended statement of defence that they held income and capital in trust for the plaintiff and that they were trustees of the plaintiff's funds from February 27, 1996 to August 27, 1998.

34 Although the specific characterization of Mrs. Jones' role after that period is somewhat in issue, it is not disputed that, with her son's consent, Mrs. Jones assisted the plaintiff in the management of his funds and had access to those funds. As the plaintiff admitted during his examination for discovery, during 10 or 12 years, Mrs. Jones managed his monies and paid money out on his behalf for the purchase of various properties and the majority of his bills, transferring money, making investments on his behalf, and moving money around.

35 To summarize the plaintiff's claim in the simplest terms, the plaintiff alleges that his parents misappropriated from the funds held in trust for him the amount of $65,490.00 over the period February 27, 1996 to August 27, 1998; and that, over the period August 27, 1998 to January 12, 2005, his mother misappropriated from his funds to which she had access the amount of $237,983.88, and improperly invested the amount of $83,613.35 in Remote Camera Broadcast Systems Inc., a company controlled by his father, without his authorization.

36 The plaintiff acknowledges that in September and October 2006, his mother paid him the respective amounts of $15,000.00 in US funds and $21,658.00 in Canadian funds. Giving credit for the payments, the plaintiff claims the amount of $348,914.23, plus interest and costs.

37 In support of his allegations, the plaintiff relies on various cheques and bank drafts that were made by his mother on the accounts held for the plaintiff for which he says she has no explanation. The plaintiff admitted on examination for discovery that he has no actual proof that his parents profited or benefitted from any of his trust funds or that any monies are actually missing.

38 It is not alleged that Randolph Jones, the plaintiffs father, withdrew or benefitted from the monies alleged to have been withdrawn by Mrs. Jones. His name does not appear on any of the cheques produced nor on any of the bank accounts from which monies were withdrawn or into which monies were transferred by Mrs. Jones.

39 The defendants deny any impropriety and assert that all of the expenditures from the various accounts were made on behalf of or with full authorization of the plaintiff. Mrs. Jones testified on her examination for discovery that while she sometimes paid for certain personal expenses from her son's funds, she always paid them back.

40 Mrs. Jones has provided a specific explanation for some of the expenditures, such as, reimbursement for an airline ticket for the plaintiff and for payment of the plaintiff's visa account, GST remittances, house insurance, ren-

ovation work and a lawn mower for the plaintiffs former Ontario residence. Given the passage of time, she is unable to identify with particularity all of the withdrawals as reflected in the cancelled cheques that have been produced.

41 Further, there is a material dispute with respect to the advances made by Mrs. Jones to Remote Camera Broadcast Systems Inc. on behalf of the plaintiff. The plaintiff asserts that he authorized an investment of only about $100,000.00; the defendants maintain that he authorized the entire $211,888.40 investment and, further, that the investment was repaid to him.

42 The defendants plead and rely on the doctrine of laches and also assert that the plaintiff's action is statute-barred because he was or should have been aware of the material facts giving rise to his cause of action more than two years prior to the commencement of his action on June 11, 2008.

43 On March 26, 2006, the plaintiff's suspicions of possible irregularities with his funds were apparent when he wrote to Crystal Black at the Toronto-Dominion Bank for explanations regarding "these unexplained items of concern".

44 According to the email exchanges between the plaintiff and his mother that have been produced on this motion, as early as June 4, 2006, the plaintiff was aware of and concerned about the "multiple cheques" for "thousands of dollars" written by his mother, and accused his mother of misappropriating his funds.

45 In his June 4, 2006 email transmission to his mother, the plaintiff writes:

> Mom please be honest and tell/prove to me what is going on here, I don't understand at what point did you discide [sic] you would help you're self [sic] to salary, and what is it I've bin [sic] paying? I can not [sic] believe that it has come to this and how big it appears to be when I have just begun to scratch the surface...

46 Not apparently satisfied with his mother's response to his June 4, 2006 email transmission, the plaintiff wrote to his mother on June 7, 2006 that, "Now it looks like you just take what you want, when you want it and don't think you should have to tell me about...[it]."

47 The limitation period issue is not, however, clear cut. Mrs. Jones paid certain amounts to the plaintiff in September and October 2006. Although Mrs. Jones asserts that she made gratuitous payments to her son to restore family harmony, the correspondence that she and her solicitor sent to the plaintiff notes that the payments are being made to help resolve the issue concerning the use of the plaintiff's funds. The meaning and effect of those statements and the two payments are unclear and, if construed as an acknowledgement of liability, pursuant to section 13 of the *Limitations Act, 2002*, they could serve to restart the limitation period for the plaintiff's action.

48 As is apparent from the above summary of the principal issues in this action, there are many serious issues of fact and credibility in dispute between the parties which require a full evidentiary record and oral evidence to resolve.

49 The plaintiff's claim against his parents for misappropriation of his funds cannot be made out simply on the basis of a series of cancelled cheques. The cancelled cheques represent only one side of the transactions that involved the plaintiff's funds. The plaintiff has admitted that he has no actual proof of any misappropriations.

50 While Mrs. Jones is not able to explain with precision all of the cheques that she wrote, the plaintiff has admitted that she paid the majority of his expenses, funded his purchases of houses in Ontario and Arizona, and advanced loans as he directed. If Mrs. Jones' evidence is accepted that she paid back any and all personal advances that she made from the plaintiff's funds, there may be no finding of misappropriation, breach of trust, or negligence on her part.

51 The difficulty is that without a complete accounting reconciliation of all receipts and disbursements for all of the accounts into which the plaintiff's funds were deposited or from which they were withdrawn (and not simply the few accounts with which the plaintiff now takes issue), it is impossible to determine whether or what amount of the funds were misappropriated or by whom. As the record appears before me, there is insufficient evidence to discern, for example, the initial amount of the account balances in all of the accounts as a point of departure for an accounting of all of the transactions, the significance of many large transfers of funds into the plaintiff's accounts, and where many of the cancelled cheques were ultimately deposited.

52 The other issues concerning the investment of funds in Remote Camera Broadcast Systems Inc. and the alleged expiry of the relevant limitation period clearly involve questions of credibility and require the assessment of witnesses' oral evidence at trial.

53 In consequence, I am unable to make a determination on the basis of the materials before me whether the plaintiffs action has a good chance of success. The merits of the plaintiffs action are therefore a neutral factor in the exercise of my discretion on this motion.

Amount of security sought:

54 The defendants seek security for costs in the amount of $227,158.25, including taxes. Their costs to date have been $128,253.59.

55 The amount of security ordered to be posted by a plaintiff should be reasonable in the circumstances of the particular case in which they are sought; however, where the court finds that a defendant is entitled to security for costs, the court should not award only a token amount.[FN9]

56 While not all of the defendants' actual and estimated costs will necessarily be payable by the plaintiff if the action is dismissed, those costs do indicate the extent of the defendants' potential financial exposure if they are successful in defending the plaintiff's action. Their bills of costs demonstrate that the defendants have incurred significant costs to date and estimate additional substantial costs for a two-week trial.

57 The plaintiff is ordinarily resident outside of Ontario and has no realizable assets within Ontario. There is no

evidence or undertaking that his assets in Arizona will be available to satisfy any award of costs to the defendants. While the merits of his action are a neutral factor, the plaintiff makes serious allegations of breach of trust, misappropriation and conversion against his parents, which, if not made out, could warrant the defendants seeking their costs on a substantial indemnity basis. The trial of this action will be expensive: the nature of the issues to be tried will likely require expert accounting evidence and a lengthy trial.

58 As a result, I conclude that it would be just in all of the circumstances to order that the plaintiff provide security for the defendants' costs in the amount of $75,000.00.

59 While I have not found the plaintiff to be impecunious, 1 recognize that the plaintiff does not have access to unlimited funds. For that reason, I also conclude that it would be just to require that the plaintiff post security in installments, as I have ordered below.

Conclusion:

60 The defendants' motion for security for costs is allowed.

61 The plaintiff is required to post security for the defendants' costs in the total amount of $75,000.00, as follows:

i. $25,000 shall be posted within 60 days of today; and,

ii. $25,000.00 shall be posted by the date fixed for the plaintiff's motion for summary judgment; or,

iii. If the plaintiff does not proceed with his motion for summary judgment, the plaintiff shall post $25,000.00 at the time that the action is set down for trial; and,

iv. $25,000.00 shall be posted 14 days before the trial of this action.

Costs:

62 The parties have provided me with their respective costs outlines but have not made submissions respecting the disposition of the costs of the defendants' motion.

63 If the parties cannot otherwise agree on the issue of costs, they may deliver brief written submissions of no more than two pages to Judges' Reception at 361 University Avenue as follows: the defendants shall deliver their submissions by March 18, 2013; and the plaintiff shall deliver his submissions by March 28, 2013.

Motion granted.

FN1 The plaintiff deposed that he had no realizable assets in Ontario but referred to a trust established by his late grandfather of which he and his sister are beneficiaries upon the death of his mother who receives the trust income during her lifetime. No evidence of the trust or of its terms was produced on the motion. It was conceded that the trust should not be considered an asset of the plaintiff for the purposes of the defendants' motion for security for costs.

FN2 *Zeitoun v. Economical Insurance Group*, 2008 CarswellOnt 2576 (Ont. Div. Ct.), at para. 44; *Fitzgerald v. Southmedic Inc.*, 2012 ONSC 2466 (Ont. S.C.J.), at para. 10: *Stojanovic v. Bulut*, 2011 ONSC 874 (Ont. Master), at para. 69

FN3 *Talati v. Tarnoweckyj-Carr*, [2011] O.J. No. 97 (Ont. S.C.J.), at para. 8; *Leonard v. Prior*, [1994] O.J. No. 1753 (Ont. Gen. Div.), at para. 3

FN4 *Zeitoun v. Economical Insurance Group*, *supra*, at paras. 45-46

FN5 *V. Vinokur Foundation in Support of Culture and Arts v. Fraev Estate*, 2013 CarswellOnt 1054 (Ont. S.C.J.) (Master), at para. 21

FN6 *Chachula v. Baillie* (2004), 69 O.R. (3d) 175 (Ont. S.C.J.), at para. 17

FN7 *Zeitoun v. Economical Insurance Group*, *supra*, at paras. 48 to 50.

FN8 *V. Vinokur Foundation in Support of Culture and Arts v. Fraev Estate*, *supra*, at paras. 26 and 27

FN9 *Michigan National Bank v. Axel Kraft International Ltd.* (1999), 30 C.P.C. (4th) 344 (Ont. Gen. Div.), at para. 17

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