

CITATION: Fernandes v. AllState Insurance, 2020 ONSC 1356
COURT FILE NO.: CV-17-4864
DATE: 20200302

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Antonio Alberto Fernandes,

Plaintiff

AND:

Shane Ronnie Naruse, Nelson Perry and Perth Insurance Company,

Defendants

AND:

AllState Insurance

Statutory Third Party

BEFORE: Ricchetti, J.

COUNSEL: G. Specht for AllState Insurance

S. Chaggar for the Plaintiff

HEARD: February 27, 2020

ENDORSEMENT

Background

[1] A motor vehicle accident occurred on November 19, 2016.

[2] The Plaintiff claims he was injured and seeks damages in excess of \$1,000,000.

[3] The Plaintiff commenced an action on November 8, 2017. The individual defendants are the driver and owner of the opposing vehicle.

[4] On February 23, 2018, Allstate was added as a statutory party.

[5] Shane Ronnie Naruse and Nelson Perry have not defended this action. They have not been noted in default.

[6] After the accident, the Plaintiff returned to work. He resigned on January 2019.

[7] In April 2019, the Plaintiff returned to Angola, Africa. The Plaintiff continues to reside in Angola, Africa.

THE MOTION

[8] Allstate Insurance seeks an order that the Plaintiff post \$10,000 as security for costs.

THE LAW

[9] Rule 56 of the *Rules of Civil Procedure* 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,

- (a) the plaintiff or applicant is ordinarily resident outside Ontario;
- (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
- (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;
- (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
- (f) a statute entitles the defendant or respondent to security for costs.

56.04 The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court.

IS THE PLAINTIFF ORDINARILY RESIDENT OUTSIDE OF ONTARIO?

[10] Allstate submits that the Plaintiff no longer is ordinarily resident in Ontario

[11] The Plaintiff now resides in Angola, where his mother and sister reside.

[12] The Plaintiff is not married and has no children in Canada.

[13] The Plaintiff has no remaining connection with Ontario.

[14] The Plaintiff did not return to Ontario for his examinations for discovery in August 2019.

The examination of the Plaintiff took place by video conference.

[15] The Plaintiff's counsel states that the Plaintiff's move to Angola was only temporary.

However, the only evidence of this is Plaintiff's counsel's law clerk's affidavit that she had been told this. Regardless of this "thin" evidence of the Plaintiff's intention, I am satisfied that the Plaintiff is ordinarily resident outside of Ontario because:

- a) The Plaintiff's evidence fails to identify any assets he has in this jurisdiction or any other non-financial connection to suggest the Plaintiff will or is expected to return to this jurisdiction;
- b) The Plaintiff's only personal connection with this jurisdiction is that he has an uncle here, but his immediate family is in Angola;
- c) The Plaintiff's stated "intention" to return to Canada at some unspecified date, even if true, does not mean he remains ordinarily resident in Ontario, particularly given the length of time he has been out of the jurisdiction;

- d) Examinations for discovery were held in August 2019. The Plaintiff did not return for the examinations for discovery but participated by video conferencing; and
- e) the Plaintiff has taken no steps to examine Allstate or to set the matter down for trial. Undertakings given by the Plaintiff 6 months ago have not been answered.

[16] I am satisfied that Allstate has established the Plaintiff is not ordinarily resident in Ontario.

[17] I note that, if the Plaintiff returns to Ontario, with a demonstrated intention to remain here, he would be free to seek to reduce or eliminate any security for costs posted under R. 56.07, if such an order is granted.

ANALYSIS

[18] Given that Allstate has established a *prima facie* case under Rule 56.01(a), the onus now shifts to the Plaintiff to establish that an order for security for costs would be unjust.

[19] In *Yaiguaje v. Chevron Corporation*, 2017 ONCA 741, (the application of Rule 61 on an appeal refers to Rule 56) the Court of Appeal summarized the approach to be taken on such motions:

[25] This means that Chevron and Chevron Canada have met their initial onus of showing that the Ecuadorian plaintiffs fit within r. 61.06(1)(b). Thus, they have successfully "triggered the enquiry" into security for costs, requiring me to take into account a number of factors and make such order as is just: *Zeitoun v. Economical Insurance Group* (2008), 2008 CanLII 20996 (ON SCDC), 91 O.R. (3d) 131 (Div. Ct.), aff'd 2009 ONCA 415, 96 O.R. (3d) 639, at para. 44. Relevant considerations include the merits of the claim and the possible effect of an order for security preventing a bona fide claim from proceeding. Courts enjoy broad discretion to make such order as is just: *Novak v. St. Demetrius (Ukrainian Catholic) Development Corporation*, 2017 ONCA 693, at para. 9; *Stojanovic v. Bulut*, 2011 ONSC 874 (Master), at para. 5.

[26] As per *Zeitoun*, at paras. 49-50, if the Ecuadorian plaintiffs demonstrate impecuniosity on a balance of probabilities, they can resist the motion by showing that their claim is not plainly devoid of merit – a low evidentiary threshold. Conversely, where impecuniosity is not shown, a closer scrutiny of the merits is called for and it will be legitimate to require the Ecuadorian plaintiffs to demonstrate a good chance of success on the main appeal in order to resist the motion. The Ecuadorian plaintiffs submit that test is satisfied given the merits of their pending appeal.

(emphasis added)

[20] The Court of Appeal provided additional guidance in *Novak v. St. Demetrius (Ukrainian Catholic) Development Corporation*, 2018 ONCA 219:

7 Justice Epstein's order was made prior to the release of this court's decision in *Chevron Corp. v. Yaiguaje*, 138 O.R. (3d) 1, 2017 ONCA 827, which was included in the appellant's materials. We do not read that decision as altering the established test for ordering security for costs. The established test requires a judge, after analysing the specific factors spelled out in the rules, to consider the overall justness of the order sought. In *Yaiguaje v. Chevron Corp.* the court found that the motion judge had erred in principle in her consideration of the justness of the order.

[21] A party who claims impecuniosity must make full and frank disclosure of their financial circumstances. In *Yaiguaje* the court stated:

[30] A party who seeks to establish impecuniosity must lead evidence of "robust particularity", with full and frank disclosure, and supporting documentation as to income, expenses and liability: *T.S. v. Publishing Group Inc. v. Shokar*, 2013 ONSC 1755 (Master); *Mapara v. Canada (Attorney General)*, 2016 FCA 305, at para. 8. Doherty J. (as he was then) explained the rationale for this evidentiary rule in *Hallum v. Canadian Memorial Chiropractic College* (1989), 1989 CanLII 4354 (ON SC), 70 O.R. (2d) 119 (Ont. H.C.), at pp. 9-10:

A litigant who falls within one of the categories created by rule 56.01(a) to (f), and who relies on his impecuniosity to avoid an order requiring that he post security, must do more than adduce some evidence of impecuniosity. The onus rests on him to satisfy the court that he is impecunious...The onus rests on the party relying on impecuniosity, not by virtue of the language of rule 56.01, but because his financial capabilities are within his knowledge and are not known to his opponent; and because he asserts his impecuniosity as a shield against an order as to security for costs.

IMPECUNIORITY

[22] The Plaintiff claims he is impecunious.

[23] The Plaintiff's evidence on impecuniosity is "thin". He did not file an affidavit. There is NO evidence, even from the law clerk, as to what assets the Plaintiff has, what employment he is engaged in, what his current income is etc.

[24] All that is submitted by the Plaintiff is a statement by a law clerk that, having reviewed the file, "Therefore, I do verily believe that the Plaintiff is impecunious..."

[25] As a result of the lack of evidence and lack of reliable, clear evidence, I am not satisfied that the Plaintiff has established he is impecunious.

UNJUST?

[26] As a result, I must go on to consider all other relevant factors as to whether the Plaintiff has established it would be unjust to grant the order for security for costs.

[27] The Plaintiff's submission that any security for costs order would end the proceeding resulting in an unjust result is simply an incorrect statement of the law. If it were so, every time a plaintiff established impecuniosity, no order for security for costs could be ordered. I am satisfied that, the onus remains on the Plaintiff to demonstrate that, after a consideration of all the factors, an order for security for costs would be unjust.

[28] The Plaintiff's counsel submits that the Plaintiff's claim is "meritorious". In order to establish this, counsel points to the various reports outlining his injuries and damages claimed.

[29] However, the Plaintiff's counsel in the materials and submissions does not deal with the issue of liability.

[30] On the issue of damages, there is no dispute that the Plaintiff returned to work after the accident - he stated so in his examination for discovery. As a result, income loss will be an issue at trial. And as against Allstate, there is an issue of collateral benefits available to him. As it relates to non-pecuniary damages, the Plaintiff must meet the threshold of permanent serious impairment of an important physical, mental or psychological function. And there is no evidence on this point.

[31] With this lack of clear evidence from the Plaintiff, I am not persuaded that the Plaintiff has established that his action is likely to succeed.

[32] The Plaintiff does not submit any other factor(s) to suggest that an order for security for costs would be unjust.

[33] As a result, I do not find it would be unjust to order security for costs in these circumstances.

[34] Order for security for costs granted.

QUANTUM

[35] The Plaintiff's counsel made no submissions regarding the amount claimed by Allstate for security for costs.

[36] Allstate claims security for costs in the amount of \$10,000. Given the pleadings, discoveries, outstanding undertakings and Allstate's costs incurred to date, I find this amount reasonable as an amount for security for costs at this stage of the proceeding.

[37] The amount of security for costs shall be \$10,000 paid into court to the credit of this action. The Plaintiff shall post such security for costs within 90 days.

COSTS

[38] Any party seeking costs of this motion shall serve and file written submission on entitlement and quantum within two weeks of the release of these reasons. Written submissions shall be limited to 3 pages, with attached Costs Outline and any authorities.

[39] Any responding party shall have one week thereafter to serve and file responding submissions. Written submissions shall be limited to 3 pages with any authorities relied on attached.

[40] There shall be no reply submissions without leave.

Ricchetti, J.

Date: March 2, 2020