Case Name:

Vespra Country Estates Ltd. v. 1522491 Ontario Inc. (c.o.b. Pine Hill Estates)

Between
Vespra Country Estates Limited, Plaintiff, and
1522491 Ontario Inc. o/a Pine Hill Estates, Bravakis and Associates Ltd., Peter Bravakis and 981772 Ontario Inc. o/a Hassey Realty Corp., Defendants

[2011] O.J. No. 5755

2011 ONSC 7446

Court File No. 04-B7344

Ontario Superior Court of Justice

R.C. Boswell J.

Heard: November 9, 2011.
Judgment: December 16, 2011.

(38 paras.)

Counsel:

Davide V. Cortinovis, for the Plaintiff.

Paul J. Daffern, for the Defendants.

RULING ON MOTIONS FOR SECURITY FOR COSTS

1 R.C. BOSWELL J.:-- The Defendants move for security for costs in this seven year old action. The Plaintiffs, who already have $100,000 in security, move for more.

Overview of the Action:

2 The Plaintiff developed a parcel of land in the Township of Springwater, north of Barrie. The lands are located near the intersection of Horseshoe Valley Road and Fox Farm Road (the "Intersection"). The Plaintiff sold 27 lots to Pine Hill, but retained the bulk of the lands for itself. The retained lands were approved for an 800 unit subdivision.

3 In the course of performing its due diligence in relation to the purchase of the 27 lots, Pine Hill learned that, as a condition of subdivision approval, the County of Simcoe required improvements to be made to the Intersection. The roadworks - and their associated costs - put the purchase of the lots in jeopardy. To save the deal, an amending agreement was entered into between the Plaintiff and Pine Hill which provided for a sharing of the estimated costs of the roadworks. The parties' initial estimate was about $200,000. Pine Hill's purchase of the 27 lots was financed, in part, by a vendor take-back mortgage (the "Mortgage"). The parties agreed that the Mortgage would be reduced by $100,000 if Pine Hill completed the required roadworks within 5 months of the date of closing.

4 The focus of the litigation is really about what happened after the amending agreement was entered into. There was a significant difference between the roadwork required to accommodate a 27 lot subdivision and the roadwork required to support the 800 unit development. Pine Hill alleges that after the amending agreement was signed, the County of Simcoe imposed additional requirements that would have required Pine Hill to improve the Intersection to the standard required for the 800 unit development. They allege, further, that the County's position was formed after they received a letter from the Plaintiff's solicitors wrongly advising that Pine Hill had agreed with the Plaintiff to improve the Intersection to the 800 unit standard.

5 Pine Hill commissioned a traffic study and appealed the County's position to the Ontario Municipal Board. A settlement was reached whereby Pine Hill agreed to do about $400,000 in improvements at the Intersection. The traffic study and appeal delayed the completion of the roadworks and Pine Hill did not meet the 5 month deadline referred to in the Mortgage. The Plaintiff commenced this action, alleging that Pine Hill breached its obligations with respect to the improvement of the Intersection. The Plaintiff further alleged that Pine Hill jeopardized the Plaintiff's sale of the remaining lands. The Plaintiff claimed a resulting trust in the 27 lots and registered a Certificate of Pending Litigation ("CPL") on those lots. The Defendants counterclaimed for $2 million in damages they say were occasioned by the improper registration of the CPL and the misrepresentations allegedly made by the Plaintiff to the County regarding Pine Hill's contractual obligations to improve the Intersection.

The Existing Security for Costs:

6 The Mortgage included a provision that, as Pine Hill sold off any of its 27 lots, the Mortgage would be paid down proportionately and a partial discharge would be provided in relation to the lot(s) sold. The Plaintiff took the position, however, that Pine Hill had breached the terms of the Mortgage and was not entitled to prepay any part of it. It refused to provide partial discharges. Pine Hill brought a motion in September 2004 seeking an order permitting it to pay off the entire Mortgage and to obtain a complete discharge. It was agreed that, at the time of the motion, the outstanding gross balance on the Mortgage was

$317,193, though Pine Hill's position was that the gross amount should be reduced by $100,000 in view of the parties' agreement relating to the roadway improvements.

7 The motion was heard by Salmers J. on September 8, 2004. The Mortgage was ordered discharged upon payment by Pine Hill of the sum of $500,000, broken down as follows:

(i) The undisputed sum of $217,193 was ordered paid directly to the Plaintiff;
(ii) The disputed $100,000 was ordered paid into Court;
(iii) The Plaintiff argued that Pine Hill had lost the right to prepay any part of the Mortgage. The Plaintiff asserted an entitlement to interest payable over the balance of the term. That interest was calculated at $80,000 and was ordered paid into Court;
(iv) A further sum of $100,000 was ordered paid into Court as security for costs.

8 The rationale for the payment of security for costs is not entirely clear. There was no motion before Salmers J. for security. Justice Salmers appears to have treated the motion to discharge the Mortgage as analogous to a motion to discharge a construction lien and ordered the Mortgage discharged upon payment by Pine Hill of $400,000 (broken down as above) plus 25% of that sum as costs. His approach appears sensible and neither party took exception to it. The funds were paid into Court by Pine Hill and the Mortgage discharged.

The Issues:

9 This Ruling will address the following issues:

(i) The test to be applied on motions for security for costs;
(ii) Whether the Plaintiff has insufficient assets in Ontario to satisfy a costs order;
(iii) The Plaintiff's ability to pay an order for security;
(iv) The merits of the Plaintiff's claim;
(v) What amount of security, if any, would be just in the circumstances; and,
(vi) Whether the Defendants should be required to post additional security to match any order made requiring the Plaintiff to post security.

10 Before addressing the foregoing issues, I turn to a brief review of the positions of the parties.

The Positions of the Parties:

11 Pine Hill alleges that the Plaintiff is without assets. James Sabiston is a former principal of the Plaintiff. His examination for discovery took place in December 2009. He confirmed that the Plaintiff is without assets. It is not entirely clear where the $217,193 paid down on the Mortgage went, but evidently not to the Plaintiff. The remainder of the developed lands - the parcel approved for 800 units - was sold to a company named Rosten In-

vestments Limited for $4 million. The proceeds were paid to another company controlled by Mr. Sabiston, namely Jasco Holdings Limited, leaving the Plaintiff without assets.

12 The Defendants assert that the merits of the Plaintiff's claim are dubious. In addition, the substantial costs involved in this proceeding and the Plaintiff's insufficient assets to cover any costs order, justify an order compelling the Plaintiff to post substantial security.

13 The Plaintiff argues that it has assets - in particular the funds paid into Court pursuant to the order of Salmers J., that are more than sufficient to protect against any costs order that may be made against the Plaintiff. Moreover, Mr. Smith confirmed in an affidavit that he has an indemnification agreement with Mr. Sabiston whereby Mr. Sabiston has agreed to pay all of the Plaintiff's costs associated with the action against the Defendants. The Plaintiff urges the Court not to make an order requiring it to post security. If the Court should see fit to order security against the Plaintiff, then the Plaintiff requests that the security posted by Pine Hill be increased by a corresponding amount, based on the principle of parity.

Analysis:

The Applicable Test

14 Rule 56.01 of the Rules of Civil Procedure provides as follows:

> **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.

15 Rule 56.01 does not create a *prima facie* entitlement to security for costs. Instead, it involves a two stage inquiry. First, the Court must determine if one of the threshold requirements has been met. If that hurdle is cleared, the Court embarks on an inquiry to assess what amount, if any, would be just to order as security: see *Zeitoun v. Economical Insurance Group*, [2008] O.J. No. 1771, affirmed at 2009 ONCA 415.

Does the Plaintiff have insufficient assets in Ontario?

16 With respect to the first stage inquiry, Pine Hill relies on subsection (d), specifically that the Plaintiff has insufficient assets in Ontario to pay the Defendants' costs of the action. The Plaintiff responds that it *has* sufficient assets and that the Court's discretion to order security is not engaged. The Plaintiff relies on two sources of assets:

(i) The money paid into Court pursuant to the order of Salmers J.; and,
(ii) The indemnity agreement with Mr. Sabiston.

17 I find that neither source of funds is sufficient.

18 The assertion that the funds paid into Court are to the Plaintiff's credit is not persuasive. The funds were paid in by Pine Hill and are rightfully Pine Hill's money until the Court orders otherwise. Depending on the findings of fact made by the trial judge, the funds paid into court may be dispersed in a number of ways, covering the range from all funds to the Plaintiff to all funds to the Defendants. At this stage, I am unable to say that one outcome is likelier than any other.

19 The suggestion that Mr. Sabiston's indemnity provides security to Pine Hill is not persuasive either. The arrangement between Mr. Sabiston and the Plaintiff is a private, contractual one that Pine Hill is not privy to. Pine Hill, in other words, has no ability to enforce the indemnity and takes no comfort from it.

20 With this first hurdle cleared, the Court has a broad discretion to order such security as is just: *Ascent Inc. v. Fox 40 International Inc.* 2007 CarswellOnt 2877 (Ont. Master). In exercising its discretion, the Court inquires into all factors which may assist in determining what, if any, security is just, in the circumstances of the case: *Hallum v. Cdn. Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (H.C.). These factors include, amongst other things, an assessment of the Plaintiff's ability to pay any security for costs ordered as well as an assessment of the merits of the case. A balancing of interests is required. On the one hand, a defendant should not be unduly exposed to the costs of a proceeding of dubious merit, where a plaintiff can litigate essentially without risk because it has no means to pay costs if unsuccessful. On the other hand, a plaintiff should not be deprived of a meritorious action only because of the fact that it has no means to indemnify a defendant for costs if ultimately unsuccessful.

21 The issues of impecuniosity and merit are intertwined. Where a plaintiff is able to establish impecuniosity, its burden regarding the merits of the case is lessened. Where impecuniosity is not established, however, a higher burden is imposed on a plaintiff to establish that its case is meritorious: see *Zeitoun*, as above, at para.'s 48-50 and *Cigar500.com Inc. v. Ashton Distributors Inc.* (2009), 77 C.P.C. (6th) 80 (S.C.J.) at para. 62. The Divisional Court, in *Zeitoun*, described the difference as follows, at para.'s 49-50:

49. Where impecuniosity is shown, the plaintiff needs only to demonstrate that the claim is not plainly devoid of merit. (See *John Wink Ltd. v. Sico Inc*. (1987), 57 O.R. (2d) 705 (H.C.J.)). That is a very low evidentiary threshold.
50. Where impecuniosity has not been shown however, a closer scrutiny of the merits of the case is warranted; in those cases there is no compelling argument that there is a danger that poverty of the plaintiff will cause an

> injustice by impeding pursuit of a claim that otherwise would have been permitted to be tried. Where impecuniosity has not been shown, a legitimate factor in deciding whether or not it would be just to require security for costs is whether the claim has a good chance of success.

The Plaintiff's ability to pay

22 In this instance, the Plaintiff does not assert impecuniosity. In the absence of evidence of impecuniosity, the Court is entitled to assume that an order for security can be complied with: *Kymbo International Inc. v. Teskey*, 2004 CarswellOnt 4079 (Ont. Master). Even if such an assumption were not present, I would find that the Plaintiff has the ability to pay any reasonable order for security. The Plaintiff has an agreement with Mr. Sabiston to cover its costs of this proceeding. The evidentiary record supports the conclusion that Mr. Sabiston is a person of some considerable means. Though I have found that Mr. Sabiston's indemnity is of no assistance in the assessment of whether the Plaintiff has sufficient assets in Ontario to pay the Defendants' costs, it *is* a relevant consideration in determining what, if any, security would be just in the circumstances of this case.

The merits of the action

23 The merits of the Plaintiff's claim are not easily assessed at this stage for three reasons. First, the limited vantage point of a motions judge always makes a reasonable assessment of the merits of the case difficult. Second, the facts of this case, though set out in a very summary form above, are somewhat complex and involve accusations and counter-accusations of improper interference with municipal authorities. Finally, only limited attention was paid to the merits of the action in the materials filed on the motion.

24 Of particular significance, in my view, is the fact that the Plaintiff was able to successfully complete the sale of the 800 unit lands for $4 million. When the Statement of Claim was drafted, the Plaintiff indicated, at paragraph 19, that the Plaintiff's alleged wrongful actions jeopardized negotiations in relation to the sale of the 800 unit lands and *may give rise* to damages exceeding $1 million. The limited evidence adduced on the motion suggests that the Plaintiff did not in fact suffer any damages on the sale of the remaining lands. Moreover, there was no evidence before me that the Plaintiff was obliged to incur roadway improvement costs of any sort, whether arising from the Defendants' conduct or otherwise.

25 Although I am unable to say with any confidence which party is more likely to prevail on the counter-allegations of breach of contract, it does not appear, on the record now before the Court, that the Plaintiff has suffered any damages. As such, I am not persuaded that the Plaintiff's claim has a "good chance of success".

26 I am, in the circumstances, satisfied that the Plaintiff has insufficient assets in Ontario to satisfy an award of costs and that it would be just to impose upon the Plaintiff an obligation to post security. I turn then to a consideration of what sum would be just and appropriate.

The just amount of security

27 There is a significant disparity in the parties' projected costs of the action. The Defendants say they have already incurred almost $270,000 in costs and will incur another

$120,000 or so to complete the action. The Plaintiff's counsel suggests that the Defendants' costs are exaggerated and excessive and submits that costs should reasonably be about $145,000 in total from start to finish. On either party's estimate, this is a very expensive action indeed.

28 In support of its position, the Plaintiff filed an Affidavit of its counsel, Mr. Richard Quance. Mr. Quance reviewed the Defendants' Bill of Costs and expressed concerns about over-billing and duplication of effort in the offices of the Defendants' former counsel, Solmon Rothbart Goodman LLP. I share Mr. Quance's concerns.

29 Generally, when assessing costs, Courts will not subject the time spent by counsel to a microscopic analysis. This submission finds support in the observation of Nordheimer J. in *Basedo v. University Health Network,* [2002] O.J. No. 597 (S.C.J.) that "it is not the role of the court to second guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered." In this case, the costs suggested by the Defendants are manifestly unreasonable.

30 I will not review the Defendants' Bill of Costs in detail, but make the following observations, which I think are illustrative of defence counsel's[1] excessive billing:

(i) More than $99,000 was billed in relation to a motion for summary judgment, which allegedly involved over 333 hours of lawyers' time. The motion has never been argued;
(ii) More than $70,000 was billed on a motion to appoint a case management judge. This was a straightforward procedural motion for which counsel allegedly docketed almost 275 hours of time;
(iii) Almost $32,000 was billed on a motion for contempt, which was largely unsuccessful. I assessed costs of that motion at $5,000;
(iv) Almost $17,000 has been billed for photocopies, with no breakdown. If copies are being charged at 25 cents a page, the figure suggests that defence counsel have made a staggering 68,000 photocopies.

31 The Defendants' Bill of Costs is unreasonable and unreliable. I prefer the estimate of Plaintiff's counsel and conclude that reasonable costs of this proceeding are likely in the range of $150,000 to $200,000 on a substantial indemnity basis and between $100,000 and $150,000 on a partial indemnity basis.

32 I note that there is a general expectation that a motion for security for costs will be brought promptly once the Defendant becomes aware that the Plaintiff may not have an ability to pay costs, for one of the reasons enumerated in Rule 56.01. Delay in bringing the motion is one more factor to consider in the exercise of the Court's discretion. The Defendants should not, for instance, be permitted to "wait in the bushes" while the Plaintiff expends significant sums advancing a case to the point of trial, then surprise the Plaintiff with a motion for security. A significant delay in making an application for security will not inevitably be fatal, but it does call out for an explanation.

33 This action was commenced in 2004. As I have indicated, the Plaintiff claims to have incurred almost $300,000 in costs prior to the motion for security. There is, in my view, a degree of unfairness in requesting security after amassing such significant costs. That said, the Defendants do offer a compelling explanation for the timing of their motion. In particular, although the action was commenced over 7 years ago, the examination for discovery of Mr. Sabiston did not proceed until December 2009. It was during that examination that Mr. Sabiston made it clear that the Plaintiff has no assets. The motion for security for costs was initiated in July 2010, which is reasonably promptly after the examination.

34 Having regard to the apparent merits of the proceeding, the reasonable partial indemnity costs incurred and/or to be incurred, the ability of the Plaintiff to pay security for costs and the timing of the motion, I am of the view that it is proper and just that the Plaintiff be required to post $125,000 as security for costs.

The Plaintiff's counter-motion

35 The Plaintiff asks that the security for costs posted by the Defendants pursuant to the order of Justice Salmers be increased on a dollar-for-dollar basis by any amount the Plaintiff is required to post as security. In other words, based on my decision that the Plaintiff must post $125,000 as security for costs, the Plaintiff's position is that the Defendants should be required to increase their security by another $125,000. The Plaintiff's motion fails for three principal reasons:

(i) The basis for the Plaintiff's request for additional security for costs is that there should be parity between the parties. I was not provided with any authority, nor am I independently aware of any authority, that suggests that when an order for security for costs is made, the concept of parity dictates that an equivalent order be made against all parties. I do not accept the Plaintiff's submission in this regard;

(ii) The Plaintiff has failed to trigger the inquiry under Rule 56.01(1) by adducing any evidence that the Defendants meet any of the conditions specified in subparagraphs (a) through (f). The Plaintiff submitted that Justice Salmers was already satisfied that security for costs was warranted under Rule 56.01(1) and that the Court is now only being asked to top up the amount that Salmers J. ordered. I disagree. Justice Salmers did not undertake any inquiry under Rule 56.01(1). His order was based on entirely different considerations;

(iii) The Defendants paid $100,000 into Court as security for costs in September 2004, as part of a total of $281,515.34 paid pursuant to Justice Salmers' order. The evidence filed on the Plaintiff's motion included a statement from the Accountant of the Superior Court of Justice which indicated that at January 29, 2010 the total, with interest, had grown to $333,021.89. Almost two years of additional interest has accrued since then. The parties agree that a fair estimate of the total now in Court is likely about $350,000 with all accrued interest. The costs portion of the initial payment into Court was about 35.5%, which represents today about $124,250 of the total funds in court. The Plaintiff's estimate of the costs to complete

the action is $145,000 on a substantial indemnity basis and so the amount presently held by the Accountant is, in my view, more than sufficient security for those costs.

Conclusion:

36 For the foregoing reasons, the Plaintiff shall pay to the Accountant of the Superior Court of Justice, the sum of $125,000.00, to the credit of this action, as security for costs, on or before February 1, 2012, failing which the Plaintiff's action shall be stayed until such payment is made.

37 The Plaintiff's motion for increased security is dismissed.

38 The parties may address the issue of costs of these motions in writing. The Defendants shall serve and file their submissions by January 9, 2012. The Plaintiff shall make its submissions within 14 days thereafter. Submissions are not to exceed 2 pages in length, not including any Costs Outlines, and may be filed with the judicial secretaries at Newmarket.

R.C. BOSWELL J.

cp/e/qllxr/qlvxw

1 The Defendants have retained new counsel since the Bill of Costs was filed. My observations regarding excessive billing are not directed at new counsel.