

CITATION: Speciality Life Insurance Inc. et al v. Daumier Financial Services Inc. et al,
2024 ONSC 808

COURT FILE NO.: CV-23-00707720-00CL

DATE: 20240206

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SPECIALITY LIFE INSURANCE INC. AND INSURANCE
SUPERMARKET INC., Plaintiffs

AND:

DAUMIER FINANCIAL SERVICES INC., DAUMIER FINANCIAL
SERVICES LTD., LISET RODRIGUEZ, CARLOS DE ZAYAS,
CARMEN SIRLEY MUNOZ-GUITIERREZ, ANA HUANG YU,
ANDRES HERNANDEZ, MAYLIN RODRIGUEZ PEREZ, SAMUEL
OSEI, KRISTOFF SUJBALLI, MICHAEL LUE AND LIZ ELVIGIA
VALDIVIA MONTES, Defendants

BEFORE: Cavanagh J.

COUNSEL: *Aaron Kreaden, Hesam Wafaei, and Alannah Kay-Meltzer*, for the Plaintiffs

Junior Sirivar, for the Defendants Daumier Financial Services Inc., Carlos
de Zayas, Liset Rodriguez, Carmen Sirley Munoz-Gutierrez, Ana Huang
Yu, Andres Hernandez, Maylin Rodriguez-Perez and Michael Lue

HEARD: In Writing

COSTS ENDORSEMENT

- [1] In an endorsement released on November 24, 2023, I dismissed the Defendants' motion to vacate certain operative provisions my Order dated October 12, 2023, as modified by subsequent Orders, that provide that the Defendants are subject to a *Mareva* injunction. This motion was heard on January 17, 2023.
- [2] This is my endorsement with respect to costs.
- [3] The Plaintiffs seek costs in the amount of \$246,705.94 (inclusive of HST and disbursements) which is comprised of (i) costs of the motion without notice on October 12, 2023 and the extension on October 23, 2023, on a partial indemnity scale; and (ii) costs of the motion to vacate the order (heard on November 17, 2023) on a substantial indemnity scale. In the alternative, the Plaintiffs seek costs in the amount of \$211,277.23 on a partial indemnity scale.

- [4] The Defendants submit that an order should be made for costs of \$100,000 (including HST and disbursements) on a partial indemnity scale payable in the cause.

Are the Plaintiffs entitled to costs of the November 17, 2023 motion on a substantial indemnity scale?

- [5] The Plaintiffs submit that the Defendants engaged in egregious conduct that justifies an award of costs for the motion heard on November 17, 2023 on a substantial indemnity scale.
- [6] The Plaintiffs submit that they have shown that the Defendants had knowingly engaged in a multi-year fraudulent scheme and wrongfully obtained nearly \$74 million therefrom.
- [7] The Plaintiffs assert that when they were required to disclose their worldwide assets, the Defendants de Zayas, Rodriguez, and Daumier refused to disclose multiple bank accounts in their names. The Plaintiffs submit that these Defendants were required to be transparent about what happened to the funds received from the Plaintiff and their dishonesty in this regard qualifies as egregious conduct that justifies costs a substantial indemnity scale.
- [8] The Plaintiffs also submit that these Defendants engaged in conduct during the litigation that was not acceptable (by not responding to requests to schedule the Plaintiffs' motion; varying the relief sought to include a request that the *Mareva* order be set aside entirely (when Plaintiffs' counsel was out of the country); delivering additional affidavits which required responses on an unreasonable schedule at high costs).
- [9] Although I found that the Plaintiffs had met their onus of showing a strong *prima facie* case on the merits, the Plaintiffs' claims have not been finally adjudicated. The Defendants deny that a fraud occurred. I am not satisfied that the allegations of misconduct in relation to the conduct of this litigation are merited or justify an award of costs on a substantial indemnity scale.

- [10] I award costs on a partial indemnity scale.

Are the Plaintiffs entitled to costs of motion made without notice

- [11] The Plaintiffs seek costs of this motion made without notice on a partial indemnity scale in the amount of \$89,588.40 plus HST (\$101,234.89 in total).
- [12] Rule 57.03(3) provides that on a motion made without notice, there shall be no costs to any party, unless the court orders otherwise.
- [13] The Defendants submit that there should be no costs of this motion.

- [14] The Defendants moved to set aside the *Mareva* order on grounds that included that the Plaintiffs failed to make full and frank disclosure of all material facts and that the evidence failed to establish a strong likelihood that the Plaintiffs will succeed at trial in proving that the Defendants were operating a fraudulent scheme. The Defendants challenged the sufficiency of the Plaintiffs evidence in support of the *Mareva* order on other grounds as well.
- [15] The Plaintiffs submit that the comeback motion was treated as a *de novo* hearing and, where the Defendants challenged the *Mareva* order in all respects and asked that it be set aside, they are responsible for the costs of the materials that were filed, including the materials filed on the motion made without notice.
- [16] In the circumstances of this motion, where the materials used to seek the initial *Mareva* Order on a motion made without notice are used as part of a *de novo* hearing on a motion by the Defendants to vacate the Order, and the motion is dismissed, the Plaintiffs are entitled to costs for preparing the materials used on the motion made without notice because these materials were necessary for adjudication of the Defendants' motion. See *DSL Capital Corp. v. Credifinance Securities Limited et al.*, 2011 ONSC 5961, at para. 3.
- [17] I exercise my discretion to award costs to the Plaintiffs for preparation of materials used on the motion made without notice.

Should costs be ordered to be paid within 30 days or in the cause?

- [18] The Plaintiffs seek an order that costs be paid forthwith.
- [19] The Defendants seek an order that costs be in the cause.
- [20] Rule 57.03(1) of the *Rules of Civil Procedure* provides that on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall (a) fix the costs of the motion and order them to be paid within 30 days; or (b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.
- [21] In *Amphenol Canada Corp. v. Sundaram*, 2019 ONSC, Faieta J. cited jurisprudence, including the decision of Strathy J. (as he then was) in *Precision Fine papers Inc. v. Durkin*, [2008] O.J. No. 2189, where courts concluded that costs of an interlocutory injunction should be payable forthwith where: (1) a trial on the issue of liability is not highly probable; (2) the plaintiff has established a strong *prima facie* case against the defendant; (3) the conduct of the defendant was egregious; (4) the plaintiff had to engage in lengthy and expensive investigations and litigation procedures in order to expose the defendant's misconduct; (5) the plaintiff was substantially successful on the most important issues.
- [22] On the evidentiary record before me, although the Defendants' defences have not yet been pleaded, I cannot say that a trial is highly probable. I found that the

Plaintiffs had, through evidence, shown a strong *prima facie* case against the Defendants based on allegations that the Defendants engaged in a fraudulent scheme and wrongfully obtained many tens of millions of dollars therefrom. The Plaintiffs incurred substantial expenses in reviewing bank statements and other documents in relation to the alleged fraudulent scheme. The Plaintiffs were successful on the issues for which costs are being sought.

- [23] In the circumstances, I am not satisfied that it would be just to make an order that the usual approach set out in Rule 57.03(1) not be followed. I exercise my discretion and order that costs be paid within 30 days.

What amount of costs should be awarded?

- [24] The Plaintiffs seek costs on a partial indemnity scale in the amount of \$211,277.23 based on hourly rates that are 60% of the full rates.
- [25] The Defendants have not provided their own costs outline for the motion. As a result, I am not able to assess what the reasonable expectations of the Defendants were based on their own costs outline. It has been held in other cases that in such circumstances, a challenge to the reasonableness of the costs claimed is “no more than an attack in the air”. See *Risorto v. State Farm Mutual Automobile Insurance Co.*, 2003 CanLII 43566, at para. 10, and cases that have followed it.
- [26] I have considered the factors in Rule 57.01(1). I fix costs on a partial indemnity scale in the amount of \$200,000 to be paid by the Defendants represented by Mr. Sirivar to the Plaintiffs within 30 days. I reduce the amount claimed to take into account the hearing of the motion made without notice on October 23, 2023. Based on the Plaintiffs’ Bill of Costs, I am satisfied that this amount is fair and reasonable and within a range of costs that these Defendants would reasonably expect to pay if they were unsuccessful on their motion.

Cavanagh J.

Date: February 6, 2024