Court of King's Bench of Alberta

Citation: Arraf v Royal View Surgical Centre Ltd. , 2024 ABKB 262

Date: 20240503
Docket: 2101 11303
Registry: Calgary

Between:

John Arraf and John Arraf Professional Corporation

Plaintiffs/Respondents

- and –

Royal View Surgical Centre Ltd., Gulzar Sachedina, Gulzar P. Sachedina Professional Corporation, Todd Fairbanks, Todd P. Fairbanks Professional Corporation, Sandeep Dhesi and Sandeep Dhesi Professional Corporation

Defendants/Applicants

Endorsement
of the
Honourable Justice J.C. Price

I. Introduction

[1] This is an appeal of an Applications Judge's ("AJ") decision made on March 23, 2023, that dismissed the Defendants' application. The Defendants' application sought an order for the Plaintiffs to pay into trust $77,916.78, an amount to be held as security, to cover their estimated costs should they be successful in defending the claims made against them at trial.

[2] For the reasons that follow, I allow the Appeal and grant the order sought by the Defendants requiring the Plaintiffs to pay $77,916.78 into trust as security for the Defendants' costs pending the outcome of the trial.

II. Background

A. The Underlying Action

[3] The Plaintiffs, Dr. John Arraf ("Dr. Arraf") and John Arraf Professional Corporation ("Prof. Corp."), filed a Statement of Claim on September 9, 2021, against the Defendants alleging wrongful and/or constructive dismissal. The Plaintiffs seek damages of $2,100,000.

[4] The Plaintiff Dr. Arraf is an anaesthesiologist who provided anesthesiology services to the Defendant Royal View Surgical Centre Ltd. ("Royal View") between 1999 and 2021.

[5] The Defendants deny that Dr. Arraf was an employee, and in the alternative, they deny that he was wrongfully and/or constructively dismissed. Furthermore, the Defendants dispute the amount of the damages sought.

B. Relevant Facts Relating to the Security for Costs Application

[6] Following the end of the working relationship with Royal View, Dr. Arraf sold his real property in Alberta and moved to Longview, Texas with his family. Dr. Arraf began working at a medical centre in Longview, Texas in April 2022. Dr. Arraf is a high-income earner who earns a six-figure salary.

[7] Dr. Arraf does not own real property in Alberta and no longer resides in Alberta. Dr. Arraf owns real property in Texas. Also, Dr. Arraf has stated that he owns real property in Montana. There is no documentary evidence on the record to support Dr. Arraf's statement that he owns real property in Montana or any indication of what that property is.

[8] Dr. Arraf has a personal bank account in Alberta. On December 22, 2022, two days after Dr. Arraf was served with the application for security for costs, Dr. Arraf deposited $77,000 into his bank account. Dr. Arraf holds approximately $77,255.21 in his Alberta bank account.

[9] In addition to the Alberta bank account, Dr. Arraf holds a registered retirement savings plan (RRSP) account in Alberta. The RRSP account has a stated value of $192,339.08. RRSPs are protected from enforcement proceedings: see section 92.1(2) of the *Civil Enforcement Act*, RSA 2000, c C-15.

[10] Prof. Corp. does not own any property or assets in Alberta or elsewhere.

C. The Applications Judge's Decision

[11] On March 23, 2023, the AJ, after hearing submissions of the parties, issued oral reasons from the bench dismissing the application made by the Defendants for security for costs. The transcript of the AJ's oral reasons reveals the basis for which the AJ exercised his discretion to dismiss the Defendants' application.

[12] To ground his decision, the AJ found that although Dr. Arraf's funds in his bank account are "very liquid" and "easy to move" out of Alberta, that alone was not a sufficient basis to grant the application sought by the Defendants for security for costs.

[13] It is clear from my review of the transcript of his oral reasons that the AJ relied heavily on the possibility that the Defendants, if successful in defending the claims made against them, could enforce a costs decision made in their favour in Montana. Montana is where Dr. Arraf stated, without supporting evidence, that he owns property.

[14] The AJ noted that while the State of Texas is not a reciprocating jurisdiction, the State of Montana is a reciprocating jurisdiction for the purposes of the *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6 [*REJA*]: see s 1 of the *Reciprocating Jurisdictions Regulation*, Alta Reg 344/1985.

[15] *REJA* is Alberta legislation that applies when a judgment has been given in a court in a reciprocating jurisdiction, for example in the State of Montana. *REJA* permits the judgment creditor to apply to the Court of King's Bench of Alberta within 6 years after the date of the judgment to have the judgment registered in this Court, and on application this Court may order the judgment to be registered: s 2. That judgment then could be enforced under the *Civil Enforcement Act*.

[16] Although no submissions were made regarding exactly what the name of the reciprocal enforcement legislation is in Montana and what steps a judgment creditor who has a judgment from Alberta would have to take in Montana to enforce the Alberta judgment, the AJ stated in his oral reasons that an Alberta judgment could be "essentially automatically registered" in Montana to enforce it.

[17] After considering all the evidence and the applicable test for security for costs, the AJ in arriving at his decision concluded as follows:

> "[I]n the end result...the most important factor is we have an individual with a high income, with assets in Montana...which is a reciprocating jurisdiction. In all the circumstances, I think the correct exercise on my discretion is to decline to award security for costs."

[18] This decision by the AJ dismissing the Defendants' application for security for costs has been appealed pursuant to Rule 6.14 of the Alberta *Rules of Court*, Alta Reg 124/2010 ["*Rules of Court"*].

III. Issues

[19] The issues before me are:

(a) Did the AJ err in the exercise of his discretion to not order security for costs?

(b) Should security for costs be ordered?

IV. Law and Analysis

A. Standard of Review

[20] The procedure for an appeal from an applications judge's decision is set out at Rule 6.14 of the *Rules of Court*. Relevant portions of Rule 6.14 for this appeal are as follows:

> 6.14(1) If an applications judge makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge.
>
> [...]
>
> (3) An appeal from an applications judge's judgment or order is an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.

[21] The standard of review of an appeal from an applications judge's decision where no new evidence has been adduced (such as in this case) is whether the applications judge was correct based on the record that was before him and takes the form of a *de novo* hearing: ***Bahcheli v Yorkton Securities Inc*** 2012 ABCA 166 at para 3; ***Steer v Chicago Title Insurance Company***, 2019 ABQB 318 at para 9; ***Western Energy v Savanna Energy***, 2022 ABQB 259 at para 22.

B. Applicable Provisions of the *Alberta Rules of Court* and the *Business Corporations Act (Alberta)*

[22] The applicable legislation in the present Application is Rule 4.22 of the *Rules of Court* and section 254 of the Alberta *Business Corporations Act*, RSA 2000, c B-9 ["*ABCA*"].

[23] Rule 4.22 states:

> Considerations for security for costs order
>
> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

[24] Section 254 of the *ABCA* states:

> Security for costs
>
> 254. In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body

> corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

C. The Test for Security for Costs

[25] There is no dispute between the parties about what the applicable test is regarding security for costs. The tests under both Rule 4.22 of the *Rules of Court* and section 254 of the *ABCA* are discretionary: ***Amex Electrical Ltd v 726934 Alberta Ltd***, 2014 ABQB 66 at para 58.

[26] The question of whether to apply the test under Rule 4.22 or the test under section 254 when there is a corporate respondent in an application for security for costs has been raised before in this Court: see for example ***North American Polypropylene ULC v Williams Canada Propylene ULC***, 2018 ABQB 281 at para 49. In this case both Dr. Arraf and Prof. Corp. are named respondents and both Rule 4.22 and section 254 were pled and argued. In the result, I find that it is appropriate for me to consider the law under both Rule 4.22 of the *Rules of Court* and section 254 of the *ABCA* for Prof. Corp.: see ***Orubor v Borden Ladner Gervais LLP***, 2019 ABQB 328 at paras 30-31; ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2020 ABCA 36 at para 17.

[27] As for Dr. Arraf, only the test under Rule 4.22 applies because for section 254 to apply, the respondent to a security for costs application must be a corporation.

[28] The test for security for costs under Rule 4.22 is a two-step process. First the Court considers the factors set out in Rule 4.22, including (e) "any other matter the court considers appropriate". Second, after taking all the factors into consideration, the Court is to ask itself whether it considers it just and reasonable to grant an application for security for payment of a costs award: ***Attila Dogan Construction v AMEC Americas Ltd***, 2011 ABQB 175 at paras 24-25.

[29] The test for security for costs under section 254 is "more stringent" than the test under Rule 4.22, the test is whether "the body corporate will be unable to pay the costs of a successful defendant". The standard of proof is on a balance of probabilities: ***Amex*** at paras 54-55.

[30] As earlier stated, the granting of a security for costs order whether it be pursuant to Rule 4.22 or section 254 is discretionary. Exercising this discretion involves balancing the right to economic security in one hand, with the right to legal process in the other, keeping in mind that "access to justice does not equate with access to civil processes without fear of cost consequences": ***Liu v Calgary Chinatown Development Foundation***, 2018 ABCA 4 at para 15.

D. Application of the Test for Security for Costs

1. Did the AJ err in the exercise of his discretion not to order security for costs?

[31] When determining whether to grant security for costs, the court must consider all of the factors set out under Rule 4.22: ***Attila Dogan*** at para 24. There is no doubt that the AJ considered all of the factors under Rule 4.22, although he put heavy reliance on the evidence that Dr. Arraf is a high-income earner, and on the belief that the Defendants could easily enforce an award of costs in Montana.

[32] The Plaintiffs in support of the AJ's decision to dismiss the security for costs application, rely on the Ontario Superior Court decision in ***Smallwood v Sparling et al***, 1983 CanLII 1930, 42 OR (2d) 53 (1983) for the proposition that reciprocal enforcement legislation is an important factor for the court to consider as it may render an order for security for costs unnecessary. ***Smallwood*** is clear, however, that reciprocal enforcement legislation is not determinative of that issue by its existence alone: see also the discussion in ***Charose Holdings v Edible Arrangements International***, 2014 ONSC 4185 at paras 42-44. On the other hand, the Alberta Court of Appeal in ***Singh v Dura (sub nom Crothers v Simpsons Sears Ltd)***, 1988 ABCA 155 held that reciprocating enforcement legislation does not give an "Alberta party any substantive rights" and "are of little relevance to security for costs": ***Singh*** at para 18. Considering the particulars of this case, I am inclined to agree with our Court of Appeal. I find that even in looking at the Alberta legislation itself, when considering what steps need to be taken to enforce a foreign judgment from a reciprocating jurisdiction, there are still hurdles that the judgment creditor must overcome before obtaining an enforceable judgment in Alberta.

[33] I acknowledge that reciprocal enforcement legislation can be a factor that may be considered, however, the existence of reciprocal enforcement legislation in and of itself should not be solely determinative. It depends on the context and the particulars of the case, and all the factors must be considered as a whole.

[34] Further, as described in ***Smallwood***, the question is if there is "in that jurisdiction sufficient assets which can conveniently be realized upon". During the proceedings the AJ commented regarding the assets in Montana "[…] it was not said, but I assume we are talking real property". There has been no evidence presented of what the assets in Montana are or their value other than a statement in the Respondent's appeal brief that "Dr. Arraf also owns real property in the state of Montana." A bald assertion that the assets exist in a reciprocating jurisdiction is not enough in my view to overcome an application for security for costs. Without evidence presented to the court, it is not possible to determine if these are sufficient assets that can be conveniently realised upon. Indeed, in ***Smallwood*** the Court affirmed the Master's decision ordering security for costs as there was a total lack of evidence regarding the assets in the reciprocating jurisdiction. Furthermore, even if there was such evidence, I am not satisfied whether in the circumstances and particulars of this case that that would sufficiently deter by itself an order for security for costs.

[35] Finally, as earlier alluded to, although Montana is a reciprocating jurisdiction for the purposes of *REJA*, it would not be accurate to describe the process of registering a judgment in Montana as an "automatic one". I take judicial notice of the fact that there would be additional costs and time required to be expended to enforce a judgment in a reciprocating jurisdiction. I also note that there was no information presented by the parties as to what steps would be required to have an Alberta judgment recognized and enforced in Montana.

[36] In my view, while recognising the discretionary nature of an order for security for costs, I find that the AJ erred in placing undue emphasis on Montana being a reciprocating jurisdiction under *REJA*, particularly when there was no evidence regarding the assets in the reciprocating jurisdiction, and in failing to consider or make any mention of the applicability of the test under section 254 of the *ABCA* for the Prof. Corp. and more specifically whether the Prof. Corp. would be unable to pay a costs award.

2. Should security for costs be ordered?

[37] The burden of establishing that it is just and reasonable to award security for costs or that the corporate Plaintiff will be unable to pay the costs that may be awarded is on the Defendants: ***Poole v City Wide Towing and Recovery Service Ltd***, 2020 ABCA 102 at para 47.

[38] I will now review the factors set out under Rule 4.22 that are to be considered in an application for security for costs and as part of that review I will also consider pursuant to section 254 whether the corporate Plaintiff, Prof. Cop. will be unable to pay a costs award.

a. Whether it is likely the Defendants will be able to enforce an order or judgment against assets in Alberta?

[39] As mentioned above, under section 92.1 of the *Civil Enforcement Act*, RRSPs are exempt from the enforcement process. The Plaintiffs have argued that this still represents money that could be drawn upon in the event of a costs award in favour of the Defendants. However, in my view, I find that this is not an "exigible asset" as required for the purposes of Rule 4.22. As such, the sole asset that Dr. Arraf has in Alberta is his bank account that contains $77,255.21.

[40] Although the bank account is liquid, I do appreciate that it is still an asset in Alberta. Furthermore, I recognize that there is no ability to tie down assets in Alberta, so theoretically real property could also be put up for sale and sold before the end of a trial making it impossible to enforce against. These theoretical considerations aside, in this case I am mindful that the Plaintiff, Dr. Arraf, no longer resides or works in Alberta, and the only asset in Alberta for the purposes of this factor is his bank account which, on the evidence before me, was only replenished to almost the exact amount sought two days after the security for costs application was served on Dr. Arraf.

[41] With my finding that the bank account is very liquid and can easily be transferred out of the jurisdiction and that it is Dr. Arraf's sole asset, I find this factor to weigh somewhat toward ordering security for costs. Comparing this case with ***Rancher Construction Ltd v Scott Construction (Alberta) Ltd***, 2019 ABQB 775 at para 39, where in that case, although security for costs was not awarded, this court found that an active corporation with a bank account in Alberta and no other assets weighed in favour of an award for security for costs.

[42] With respect to the corporate Plaintiff, Prof. Corp., it is undisputed that it has no assets in Alberta or elsewhere.

[43] Accordingly, based on the foregoing, a review of this factor as it applies to both Dr. Arraf and Prof. Corp. weighs in favor of ordering security for costs.

b. The ability of the Respondents to pay the costs award?

[44] Dr. Arraf earns through his work in Texas a high six figure income. It is apparent that at least as it stands today, given Dr. Arraf's high income and earning ability, he has an ability to pay a costs award should one be made against him.

[45] As for Prof. Corp., as previously mentioned, it has no assets or property. Despite the connection Prof. Corp. has with Dr. Arraf, there is no evidence that Prof. Corp. could pay a costs award if one were awarded against it alone.

[46] Pursuant to s 254 of the *ABCA*, "if the body corporate will be unable to pay the costs of a successful defendant" then the court may order security for costs.

[47] Based on the evidence before me, the more "stringent test" of s. 254, as it applies to Prof. Corp. has been met: ***Xpress Lube & Car Wash Ltd v Gill***, 2011 ABQB 457 at para 16; ***Autoweld Systems Limited v CRC-Evans Pipeline International Inc***, 2011 ABCA 243 at para 12. In other words, I find that the Defendants have met the burden of proving on a balance of probabilities that Prof. Corp. would be unable to pay costs if costs were awarded against it alone.

c. The merits of the action?

[48] This action is still in its early stages, and it would not be appropriate to delve into the merits of the case at this time: ***Bechir v Gowling Lafleur Henderson LLP***, 2017 ABQB 214 at paras 12-16. For the moment it appears clear that both parties have established a reasonably meritorious case on the pleadings and available evidence: ***Bechir*** at para 17. As such the merits of the action is a neutral consideration for the purposes of this Application for security for costs.

d. Whether an order for security for costs would unduly prejudice the respondents' ability to continue the action?

[49] As mentioned above, Dr. Arraf makes a very significant income. Although Dr. Arraf has asserted that an order to pay security for costs would be a significant financial burden and would severely prejudice the prosecution of the action, no evidence has been presented for that assertion. As such, the argument that an order for security for costs would prejudice Dr. Arraf does not have any weight: see ***Stepanik v Timmons***, 2021 ABQB 287 at para 55.

[50] As for Prof. Corp., there is no evidence that it has any assets or property. Considerations in relation to this factor and its impact on corporate entities has been described in ***Autoweld*** at para 23 and ***Xpress Lube*** at para 18. A plaintiff corporation can become a "one-way valve" that the successful party may have no recourse against at the end of the day. Furthermore, I am mindful of the fact that there has been no evidence presented to show that Prof. Cop. could not raise any security in or near the amount demanded: ***Autoweld Systems Limited v CRC-Evans Pipeline International Inc***, 2011 ABCA 243 at para 18. Accordingly, I am not convinced that Prof. Corp. would be unduly prejudiced and would not be able to continue the action if an order for security for costs was made against it.

e. Other factors

[51] As discussed above, Montana is a reciprocating jurisdiction under *REJA*. However, without any evidence about what the assets in Montana are and whether they could be conveniently realized upon, I do not put much weight on this factor.

[52] The Plaintiffs also argue that this application is being used as "an instrument of oppression to stifle a serious and genuine claim". As mentioned above, both sides present at this stage reasonably meritorious arguments and I find nothing to suggest that this Application is being used as a tactic to prevent the prosecution of the action.

V. Conclusion

[53] An order for security for costs is discretionary. Following the case law and principles underpinning Rule 4.22 and section 254 of the *ABCA*, and in consideration of the evidence on the record and all of the factors laid out above I find that it is just and reasonable to award security for costs in the amount proposed by the Defendants.

[54] The Plaintiffs shall post security for costs in the total amount of $77,916.78 in trust with counsel for the Defendants or if agreed by the Defendants with counsel for the Plaintiffs. That amount shall remain in trust until further order of the Court or by agreement of the parties.

[55] The security is to be deposited into trust as specified no later than by June 15, 2024. The within Action is stayed until the security is deposited into trust. If the security is not deposited into trust as specified by June 17, 2024, the Plaintiffs' Statement of Claim filed September 9, 2021, shall be dismissed without further order.

[56] In conclusion, the appeal is allowed.

VI. Costs

[57] As the successful party, the Defendants are entitled to recovery of costs for the successful appeal of the decision of the AJ. If the parties are unable to reach an agreement on the amount, they may provide written submissions, not to exceed five pages each, within 45 days of the date of these reasons.

Heard on the 8th day of February 2024.
Dated at the City of Calgary, Alberta this 3rd day of May, 2024.

J.C. Price
J.C.K.B.A.

Appearances:

Zul Verjee, K.C./Dina Mueller
Counsel for the Plaintiffs/Respondents

Dylan S. Snowdon/Alex Norris
Counsel for the Defendants/Appellants