CITATION: 2024 ONSC 3923
COURT FILE NO.: CV-22-688280
MOTION HEARD: 20240710

2024 ONSC 3923 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Howard Buchin, applicant

AND:

Hugh Scher, respondent

BEFORE: Associate Justice L. La Horey

COUNSEL: Matthew Gordon for the respondent lawyer, moving party

Howard Buchin - applicant responding party in person

HEARD: July 10, 2024

REASONS FOR DECISION

[1] The moving party brings this motion for an order for security for costs in the amount of $10,000 payable immediately, and in any event prior to the conduct of the assessment hearing. In this application (and two other applications) Mr. Buchin seeks to assess the accounts rendered by the respondent for legal services in connection with three matters. The applicant has made full payment in respect of several invoices rendered in the sum of $53,089.73. An assessment hearing is scheduled for three days on July 24, 25, and 26, 2024.

[2] The moving party takes the position that there is good reason to believe that the applications are frivolous and vexatious and submits that the applicant has insufficient assets to pay any cost award in favour of the respondent given that the applicant has filed a consumer proposal under the *Bankruptcy and Insolvency Act* (“BIA”).

[3] The moving party did not provide particulars of the consumer proposal and did not make submissions in his factum as to whether or not there is any stay of proceedings that would impact this motion. With the consent of the parties, they appeared before my colleague Associate Justice Ilchenko who is also a Registrar in Bankruptcy. Associate Justice Ilchenko will be issuing a separate endorsement on the bankruptcy issues. In any event, I have concluded that it would not be in the interests of justice to grant the motion for security for costs.

[4] The moving party relies on Rule 56.01(e) of the *Rules of Civil Procedure* which 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,
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> > 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.

[5] The leading case on security for costs is the decision of the Court of Appeal in *Yaiguaje v. Chevron Corp*, 2017 ONCA 827. In that case, the Court of Appeal held:

> [23] The Rules explicitly provide that an order for security for costs should only be made where the justness of the case demands it. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of Rules 56 or 61 have been met.
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> [24] Courts in Ontario have attempted to articulate the factors to be considered in determining the justness of security for costs orders. They have identified such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns and the public importance of the litigation. See *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119, [1989] O.J. No. 1399 (H.C.J.); *Morton v. Canada (Attorney General)* (2005), 75 O.R. (3d) 63, [2005] O.J. No. 948 (S.C.J.); *Cigar500.com Inc. v. Ashton Distributors Inc.* (2009), 99 O.R. (3d) 55, [2009] O.J. No. 3680 (S.C.J.); *Wang v. Li*, [2011] O.J. No. 3383, 2011 ONSC 4477 (S.C.J.); and *Brown v. Hudson's Bay Co.*, [2014] O.J. No. 795, 2014 ONSC 1065, 318 O.A.C. 12 (Div. Ct.).
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> [25] While this case law is of some assistance, each case must be considered on its own facts. It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made.

[6] On a motion under Rule 56.01, the moving party bears the initial burden of demonstrating that there appears to be good reason to believe that the matter falls under one of the enumerated subrules (*Sutherland v Canadian Imperial Bank of Commerce*, 2023 ONSC 3465 at para 39 aff'd 2024 ONCA 338).

[7] I accept that the moving party has discharged its onus to show that the applicant does not have sufficient assets in Ontario to pay a costs award based on Mr. Buchin's consumer

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proposal under the BIA. Mr. Buchin concedes that he does not have sufficient assets in Ontario to pay costs.

[8] However, I do not accept that there is good reason to believe that the applications are frivolous and vexatious. I note that the moving party did not include the notices of application in his materials so I do not have the pleadings. In any event, I cannot determine on this short motion that the assessment of the lawyer's accounts is frivolous and vexatious. Determining the applications will require the booked three day assessment hearing.

[9] The fact that the applicant may be in breach of the procedural orders made by the assessment officer in respect of the upcoming assessment (including a requirement that materials be filed electronically), does not change my analysis.

[10] The applicant made a complaint to the Law Society of Ontario ("LSO") about the lawyer. On March 23, 2023, the LSO advised that that it would not be investigating the complaint further. The moving party submits that the LSO's letter is evidence upon which I can conclude that the assessment is frivolous and vexatious. I disagree. The LSO did not make any determination about the lawyer's accounts. Indeed, the LSO specifically stated in its March 23, 2023 letter to Mr. Buchin that it cannot provide assistance with recovery of the legal fees already paid to the lawyer and it advised the applicant about the assessment process.

[11] This is not a case where the application is *res judicata*, as in the *Sutherland* case relied on by the moving party.

[12] The moving party also relies on *Lacroix v Central-McKinlay International Ltd.* (2023 ONSC 485) where the defendant was successful on a security for costs motion. There are a number of grounds to distinguish *Lacroix*. In that case the defendant moved under Rule 56.06(1)(c) (unpaid cost order). The moving party in this case refers to the cost order of Assessment Officer Ittleman in the sum of $500 payable by the applicant to the respondent. However, the cost order is not outstanding. It is only payable after the assessment. In *LaCroix,* there was a *Statute of Frauds* issue which applied to the claims advanced: there was a legal issue on which the motions judge could make an assessment of the merits for the purposes of the motion. Further, the merits of the plaintiff's claim were considered by the motions judge at stage two of the security for costs analysis, i.e. after the moving party had met its initial onus.

[13] I find that the moving party has not discharged its onus to show that there is good reason to believe that the applications are frivolous and vexatious.

[14] Mr. Gordon was not able to point me to any cases whether the court considered whether to grant security for costs in an application by a client to assess their lawyer's accounts. It seems to me that this could raise access to justice concerns. There is also a question as to whether a motion for security for costs might be inconsistent with the rights granted the client in the *Solicitors' Act.* However, these points were not briefed and fully argued and these potential considerations do not factor into my decision.

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[15] After examining the evidence and circumstances of this case and considering the matter holistically, I find that it is just that the respondent's motion for security for costs be dismissed.

[16] Even if I had determined that it would be just to make an order for security for costs, the lawyer did not provide any assistance to the court in his materials in determining an appropriate amount. He did not provide any cost outline for the forthcoming hearing or any explanation for the amount requested. Determining an amount for costs where the lawyer is acting for himself is difficult. The Court of Appeal held in *Benarroch v Fred Tayar & Associates P.C.*, (2019 ONCA 228) stated:

> 28 Where the self-represented litigant is a lawyer, he or she will not recover anything for the time spent on the matter that would necessarily have been devoted to the case had outside counsel been retained. There will likely be no clear way to differentiate between time devoted by the lawyer that would have been spent on the matter as "client" and time devoted in lieu of retaining an outside lawyer to deal with the matter. Some time is clearly either "client time" or "lawyer time", but much of the time will be a blend of both.

[17] The motion is dismissed. The parties have agreed that the costs of the motion will be in the cause of the assessment.

L. La Horey, A.J.

Date: July 10, 2024

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