SUPREME COURT OF NOVA SCOTIA
Citation: *Krisko Construction Inc. v. Harper*, 2024 NSSC 299

Date: 20241009
Docket: No. 522195
Registry: Halifax

IN THE MATTER OF: The *Builders' Lien Act*, being Chapter 277, R.S.N.S. 1989, as amended

-and-

IN THE MATTER OF:The Claim of Lien of Krisko Construction Inc.

Plaintiff

-and-

Sheldon Todd Harper and Wesley Sheldon Harper

Defendants

DECISION

Judge: The Honourable Justice Frank P. Hoskins

Heard: April 12, 2024, in Halifax, Nova Scotia

Counsel: Matthew G. MacLellan for the Defendants (Plaintiffs by Counterclaim)

Krisko Construction Inc., Plaintiff
(Defendant by Counterclaim)
Self-Represented (not appearing)

By the Court:

Introduction

[1] The Defendants/Plaintiffs by Counterclaim, Sheldon Todd Harper and Wesley Sheldon Harper (the "Defendants") move for an order requiring the Plaintiff /Defendant by Counterclaim, Krisko Construction Inc. ("Krisko"), to provide security for costs.

Background

[2] The Defendants own the property at 147 Lakewood Drive, Chester Grant, Lunenburg County (the "Property"). Wesley Harper co-signed the mortgage for the Property, but was otherwise not involved in the facts giving rise to this litigation (Affidavit of Sheldon Harper, sworn on February 16, 2024, at paras 4 - 6).

[3] In May 2022, Sheldon Harper entered into an agreement with Krisko wherein Krisko would build a new home on the Property (the "Project"). Kristen Geldart ("Mr. Geldart"), the principal for Krisko, was known to Sheldon Harper and lives in Prince Edward Island (Affidavit of Sheldon Harper, sworn on February 16, 2024, at paras. 5, 7, 8).

[4] The Project was funded through a construction mortgage and other funds, including Sheldon Harper's savings and credit available to him (Affidavit of Sheldon Harper, sworn on February 16, 2024, at para.13).

[5] Krisko commenced work on the Project on May 16, 2022. There were issues with the Project, including numerous missed deadlines.

[6] The Defendant claim that Krisko breached the contract by not remediating work deficiencies. The Defendants counterclaimed and were granted default judgment in August 2022, with damages to be assessed.

[7] Krisko's last day of work on the Project was November 4, 2022. On November 19, 2022, Sheldon Harper directed Krisko to discontinue their work on the Project. Thereafter, Sheldon Harper continued to source and pay for the

completion of the Project (Affidavit of Sheldon Harper, sworn on February 16, 2024, at paras. 14 - 23).

[8] A Claim of Lien was registered on the Property on January 18, 2023. The lien was not perfected until on or after March 21, 2023.

[9] After November 2022, Mr. Geldart continued to contact Sheldon Harper demanding additional money. Mr. Geldart texted and called Sheldon Harper multiple times in the spring of 2023, in one message telling Sheldon Harper: "You won't hear from me again. It's others you have to worry about. You can ask them to stop but they won't."

[10] Sheldon Harper considered this message a threat. The Defendants stress that the messages in May 2023 were received when Krisko was represented by counsel (Affidavit of Sheldon Harper, sworn on February 16, 2024, at para. 27).

[11] In January 2023, Sheldon Harper received notices from the Canada Revenue Agency ("CRA"), requiring that money that would otherwise be paid to Krisko be paid to CRA (Affidavit of Sheldon Harper, sworn on February 16, 2024, at paras. 29 - 30).

[12] The Defendants say that Krisko is registered in Nova Scotia as an extra-provincial corporation, otherwise registered in Prince Edward Island ("PEI"). Krisko's status in PEI's business/corporate registry is "inactive due to nonpayment". A web [an internet*]* search for "Krisko" returns results indicating Krisko is permanently closed (Supplemental Affidavit of Matthew MacLellan, sworn on March 13, 2024, at paras. 4 - 6). The Krisko invoice to Sheldon Harper indicates Krisko's website was at the domain kriskoconstmction.ca (Affidavit of Sheldon Harper, sworn on February 16, 2024, Exhibit "B"). That domain is no longer active.

[13] Counsel for the Defendants was notified on September 22, 2023, that Andrew Christofi ("Mr. Christofi") intended to withdraw as counsel and that Krisko was no longer represented (Affidavit of Matthew MacLellan, sworn on February 9, 2024, at para. 8). The Defendants point out that Mr. Geldart confirmed same by email on September 25, 2023 (Affidavit of Matthew MacLellan, sworn on February 9, 2024, at para. 9).

[14] In a recent motion to be removed as counsel of record, Mr. Christofi noted that he has attempted to contact Mr. Geldart and was unsuccessful (Affidavit of Andrew Christofi, affirmed on January 17, 2024).

[15] Process server Robert Watson recently attempted to serve Danny Hashie, the recognized agent for Krisko in Nova Scotia, in relation to Mr. Christofi's motion to be removed as counsel of record. Mr. Watson was told by the company at that address that they did not know Danny Hashie or Krisko (Affidavit of Robert Watson, sworn on February 1, 2024).

[16] As of March 7, 2024, Krisko's status is listed as "revoked" on Nova Scotia's Registry of Joint Stock Companies (Supplemental Affidavit of Matthew MacLellan, sworn on March 13, 2024, at para. 4).

Issue

[17] Should the Court grant an Order requiring the Plaintiff/Defendant (Krisko) to pay Security for Costs pursuant to Rule 45?

Law and Analysis

[18] *Civil Procedure Rule* 45 allows for security for costs to be ordered as a "remedy for a party who defends" a claim and who will "experience undue difficulty realizing on a judgment for costs if the defence or contest is successful". It states:

> **45.01 Scope of Rule 45**
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> **(1)** This Rule provides a remedy for a party who defends or contests a claim and will experience undue difficulty realizing on a judgment for costs if the defence or contest is successful.
>
> **(2)** A party against whom a claim is made may make a motion for security for costs, in accordance with this Rule.
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> **45.02 Grounds for Ordering Security**
>
> **(1)** A judge may order a party who makes a claim to put up security for the potential award of costs in favour of the party against whom the claim is made, if all of the following are established:
>
> **(a)** the party who makes a motion for the order has filed a notice by which the claim is defended or contested;
>
> **(b)** the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party;
>
> **(c)** the undue difficulty does not arise only from the lack of means of the party making the claim;
>
> **(d)** in all the circumstances, it is unfair for the claim to continue without an order for security for costs.

> **(2)** The judge who determines whether the difficulty of realization would be undue must consider whether the amount of the potential costs would justify the expense of realizing on the judgment for costs, such as the expense of reciprocal enforcement in a jurisdiction where the party making the claim has assets.
>
> **(3)** Proof of one of the following facts gives rise to a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means:
>
> **(a)** the party making the claim is ordinarily resident outside Nova Scotia;
>
> **(b)** the party claimed against has an unsatisfied judgment for costs in a proceeding in Nova Scotia or elsewhere;
>
> **(c)** the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful;
>
> **(d)** the party making the claim fails to designate an address for delivery or fails to maintain the address as required by Rule 31 - Notice.
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> **(4)** A judge may also order security for costs in either of the following circumstances:
>
> **(a)** the security is authorized by legislation;
>
> **(b)** the same claim is made by the same party in another proceeding, and it is defended or contested by the party seeking security for oncosts the same basis as in the proceeding in which security for costs is sought.

[19] Rule 45.02(2) requires the court to consider whether the costs at issue be sufficiently large to justify the expense of pursuing their recovery, regardless of whether the order is granted.

[20] Rule 45.02(3)(c) applies in this case as Krisko is a corporation not appearing to have sufficient assets to satisfy a judgment for costs. This creates a rebuttable presumption that the Defendants will have undue difficulty realizing on a judgment for costs.

[21] Under Rule 45.02(4)(a), a judge may also order security for costs if the security is authorized by legislation. In this matter, s.152 of the *Companies Act*, RSNS 1989, c. 81 appears to address the same concept - that security for costs may be ordered when a plaintiff company will be unable to pay the costs of the defendant if successful in his defence:

> **Security for costs**

> **152** Where a limited company is a plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.

[22] In *Rapid Camp Ltd. v. Dalhousie University*, 2024 NSSC 53, Justice Norton commented on the purpose of orders for security for costs:

> [9] Security for costs is not meant as a penalty against a plaintiff, or as a way to prevent viable actions from proceeding. The purpose of orders for security for costs is to protect defendants who, if successful in receiving a judgment for costs, may otherwise be unable to recover those costs. If no costs are awarded against a plaintiff at the conclusion of trial, then the security is returned.
>
> [10] Security for costs re-levels the playing field as without security, some plaintiffs may not face the risk of potential costs, should they lose at trial. For example, in *The Jeanery Limited v. Dartmouth Crossing Limited*, 2020 NSSC 297, the Court noted that the plaintiff corporation did not face "any corresponding risk of suffering financial detriment if it is unsuccessful and costs should be awarded against it." The Court held that without security for costs, the plaintiff, as noted in para. 100:
>
> > ...essentially has no stake in the process, and as a consequence is faced with no incentive to conduct itself reasonably either with respect to an assessment of the merits of its case, or the manner in which it goes about prosecuting it.

[23] In *Emmanuel v. Simpson Enterprises Limited*, 2007 NSSC 278, Associate Chief Justice Deborah K. Smith (as she then was) aptly noted that there are two competing principles at play when security for costs is sought:

> [8] … On the one hand, the Court strives to ensure that people of modest means are not prevented from having access to the court as a result of their financial status. On the other hand, the Court recognized that the interests of justice are not served if a Plaintiff is artificially insulated from the risk of a costs award …

[24] These considerations, while written in the context of the precursor rule, remain valid.

[25] Justice Moir provided a helpful review of Rule 45 and the relevant principles in *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316, affirmed 2012 NSCA 89:

> 20 The old rule provided categories, or examples, and a catch-all. The new rule abandons that approach. It provides an analytical framework of grounds in Rule

45.02(1), a factor in Rule 45.02(2), rebuttable presumptions in Rule 45.02(3), and special grounds in Rule 45.02(4). That said, the changes require only modest modifications to the Associate Chief Justice's statement of principles.

21 The need remains for a balance between access to justice and artificial insolation from an award of costs. On the more detailed principles:

1. Rule 45.02 provides a broad discretion. The limit on discretion commented on by Justice Goodfellow *in Flewelling v. Scotia Island Property Ltd.*, 2009 NSSC 94, at para. 19 is not severe. The judge has a free hand to do what is just, so long as the defendant files a defence, shows undue difficulty, and either shows that security would not be unfair, see Rule 45.02(1), or establishes special grounds under Rule 45.02(4).

2. The new rule does not change the principle that the court should be reluctant to order security for costs if the plaintiff establishes that doing so will prevent the claim from going forward.

3. The principles that courts should avoid security for costs being used as a means test for access to justice and that the discretion should not be used to exclude persons of modest means from court are reinforced by the ground prescribed by Rule 45.02(1)(c).

4. The new rule does modify the principles about impecuniosity. Now, the burden is on the defendant under Rule 45.02(c) if the plaintiff is an ordinary individual rather than a nominal plaintiff or a corporation under Rule 45.02(3)(c). For nominal plaintiffs and corporations, the burden remains as stated by the Associate Chief Justice.

5. The principle about foreclosing the suit, that an order should not be made that prevents the plaintiff from proceeding unless the claim obviously has no merit, remains unchanged. Indeed, it is enhanced by Rule 45.02(1)(d).

6. The principle that the judge must be satisfied about the justice of ordering security for costs is reflected specifically in the new rule by the express requirement for fairness. The requirement for a circumstantial inquiry into fairness is expressly ("in all the circumstances") preserved.

[26] Justice Moir also noted that:

> 22 The *Companies Act* contains its own provision about security for costs: s. 152. I do not think that the discretion under that section is governed by considerations different than those under Rule 45 -- Security for Costs.

The Defendants' Position

[27] The Defendants submit that Rule 45.02(3) applies because Krisko is a corporation that does not appear to have sufficient assets to satisfy a judgment for costs, if they are successful. Thus, this creates a rebuttable presumption they will have undue difficulty realizing on a judgment for costs.

[28] The Defendants further submit that the presumption in favour of an order for security for costs cannot be rebutted because undue difficulty does not arise solely from Krisko's lack of means. They say that Krisko has not met its evidentiary burden for demonstrating impecuniosity.

The Plaintiff's Position

[29] The Plaintiff (Krisko) did not respond to the motion, notwithstanding having been personally notified of the date and time for the motion by Alec Costain, a process server, who delivered the relevant documents to Kristen Geldart, Krisko Construction Inc, 180 Blue Shank Road, Summerside, PEI (Affidavit of Service of Alec Costain sworn on March 18, 2024).

Discussion

[30] In deciding whether to issue an order for security for costs against Krisko, I have considered the evidence proffered in the motion, the submissions of counsel, the *Civil Procedure Rules* and the case authorities.

[31] The Defendants say that they should have some protection for costs if successful in their counterclaim. The moving party must establish four factors under Rule 45.02(1), each of which they say have been met on this motion.

[32] First, the party who makes a motion for the order has filed a notice by which the claim is defended or contested (Rule 45.02(1)(a)). That part of the test has clearly been met, as the Defendants have filed a Statement of Defence and Counterclaim.

[33] Secondly, Rule 45.02(1)(b) requires it to be established that the party will have undue difficulty realizing on a judgment for costs if the claim is dismissed and costs are awarded to that party. The Defendants say this element of the test is met. They submit that Krisko is not a going concern and that they will face undue difficulty realizing on a potential judgement for costs is evident, for the following reasons:

- Krisko appears to owe taxes to CRA;

- Krisko's status on the Nova Scotia Registry of Joint Stock Companies is listed as "revoked";
- Krisko's status on the PEI Business/Corporate Registry is listed as "inactive due to non-payment";
- Google advertises the Krisko as being "Permanently Closed";
- The web domain listed on Krisko's invoice is no longer registered; and
- Krisko's registered agent in Nova Scotia could not be located at the registered address listed with the Registry of Joint Stock Companies.

[34] Thirdly, as previously stated, Rule 45.02(1)(c) requires the moving party to establish that the undue difficulty does not arise only from the lack of means of the party making the claim. The Defendants say that since Krisko is a corporation, there is a rebuttable presumption that the difficulty does not arise solely from Krisko's lack of means.

[35] Fourthly, Rule 45.02(1)(d) requires the moving party to establish that in all the circumstances, it is unfair for the claim to continue without an order for security for costs. The Defendants say that Krisko has a lien on their Property, which provides it with protection if Krisko's claim succeeds, but without security for costs, they have no such protection.

[36] Rule 45.02(3) lists a series of factors, that if proven, give rise to the rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means.

[37] In the appeal decision in *Ellph.com Solutions*, Justice Saunders outlined the necessary analysis once a rebuttable presumption under Rule 45.02(3) is established, para. 63:

> … CPR 45.02(1)(c) says that a prerequisite to any security is that the difficulty "does not arise only from the lack of means of the party making the claim". We know from Ellph.com's factum (quoted above) their admission that their companies "are insolvent . . . (and) . . . will not be in a position to contribute to Aliant's costs". On its face, therefore, the difficulty does "arise only from the lack of means of the party making the claim" which would then suggest that security is unavailable because of the wording of 45.02(1)(c). However, that conclusion is neutered by CPR 45.02(3)(c) which says that when the plaintiff is a corporation there is a rebuttable presumption that the difficulty does not arise solely from the plaintiff's

> lack of means. Ellph.com could have sought to rebut the presumption but, with its concession, chose not to do so. Accordingly, CPR 45.02(1)(c) is satisfied and we are left with 45.02(1)(d) -- unfairness - as the only issue.
>
> [Emphasis in original]

[38] To rebut the Rule 45.02(3)(c) presumption, the burden is on Krisko to satisfy the court that the undue difficulty to realize on an award of costs does not arise solely through its lack of means. There is no evidence on the record to suggest that Krisko is impecunious and that requiring it to provide security for costs would prevent it from continuing with a meritorious claim against the Defendants.

[39] In terms of impecuniosity, the Defendants say that the evidence before the court is insufficient to rebut the presumption against them. They refer to the case law which provides that there must be more than a blanket or empty assertion of impecuniosity. Relying on that case law, the Defendants say that impecuniosity must be supported by detailed evidence of a party's financial position, including income, assets and liability as well as capacity to raise security from any source (*Emmanuel v. Sampson Enterprises Ltd.*, at para. 9).

[40] Rule 45.02(3) identifies factors that would reasonably give rise to a rebuttable presumption that the moving party will face undue difficulty in realizing on a judgment for costs, difficulties that do not arise from the Plaintiff's lack of means only.

[41] In this case, the Defendants submit that the circumstances contemplated by Rule 45.02(3)(a), (c), and (d) are directly on point: Krisko is ordinarily resident outside of Nova Scotia and Krisko is a corporation that does not appear to have sufficient assets to satisfy a judgment. Accordingly, the presumption is made out. The Defendants say that they are expected to encounter undue difficulty in realizing upon a potential award of costs, and the same is not solely attributable to Krisko's lack of means.

[42] As to the requirement of Rule 45.02(l)(d) that it be unfair to the moving party to continue without the security, this is determined by the court on a "circumstantial inquiry into fairness" (*Ellph.com*, at para. 21).

[43] The Defendants submit that allowing Krisko to continue without security would be grossly unfair to them. This litigation has provided Krisko means and opportunity to conduct itself unreasonably, behaviour which predates the litigation and continues to have negative impacts on the Defendant Sheldon Harper.

[44] The Defendants say that Mr. Geldart has continued to contact Sheldon Harper demanding money and even making objectively unsettling comments such as: “It’s others you have to worry about. You can ask them to stop but they won’t”. The unreasonableness of the conduct of the Plaintiff’s principal is more serious considering both parties were represented by counsel at the time he was sending such messages to Sheldon Harper directly.

[45] The Defendants submit that from the outset of this litigation, they have been forced to incur legal fees to defend and counterclaim, including filing a motion for default judgment when Krisko failed to defend the counterclaim. The Defendants say they will incur significantly more expenses to conclude the litigation, including the cost of ultimately conducting a trial. As Krisko is a self-represented litigant, it is reasonably expected that the Defendants’ legal fees will increase as the Plaintiff no longer has the benefit of legal advice on the law and court procedures.

[46] The Defendants further submit that, in contrast, Krisko is effectively insulated from any consequences for continuing its claim because it likely has no assets to cover a damage award for the Defendants’ counterclaim, let alone a costs award, if unsuccessful.

[47] The Defendants submit that in conducting the circumstantial analysis required under Rule 45.02(1)(d), it is appropriate and in the interests of justice that an order for security for costs be granted. It would be unfair for Krisko to be artificially insulated from the risks of a costs award. A similar analysis was very recently undertaken by Justice Norton in *Rapid Camp Ltd*.:

> [26] Having considered all of the evidence on the motion before me and the submissions of the parties, in conducting the balancing exercise described by the former Associate Chief Justice, I find that wherein Rapid Camp has no assets, no income, and no active business, its corporate status was only reinstated for the exclusive purpose of pursuing this litigation, and its failure to rebut the presumption, it would be unfair that the Plaintiff should be artificially insulated from the risks of a costs award.
>
> [27] Accordingly, I find that it is appropriate and in the interests of justice that an order for security of costs be granted before the matter proceeds further.

[48] The Defendants submit that the court should consider the debt owing to the Canada Revenue Agency, as was done in *SaltWire Network Inc. v. Groupe Des Medias Transcontinental de la Nouvelle-Ecosse Inc*., 2024 NSSC 65, where Justice Keith noted:

> [52] I agree with the position of Transcontinental that, in all of the circumstances, it would be unfair to proceed without security for costs. SaltWire's claim against Transcontinental is large. The potential costs award, should Transcontinental's defence succeed, will likely approach $1 million. SaltWire defaulted on a substantial loan from the Senior Lender, resulting in a forbearance agreement. The security interest of the Senior Lender will rank in priority to any costs award in favour of Transcontinental. SaltWire has had a significant, outstanding debt to the Canada Revenue Agency for some time. Transcontinental has given SaltWire every reasonable opportunity to satisfy it, and the Court, that it has sufficient assets or income to satisfy a potential costs award against it: see the Affidavit of Mr. Boyle at paras.11-16. SaltWire either cannot do so or has chosen not to do so. On the evidence, SaltWire is effectively insulated from costs given the priority of the pre-existing debts. Moreover, SaltWire does not claim that an order for security for costs would stifle is claim against Transcontinental.

[49] Lastly, the Defendants say that Krisko has taken no steps to move this litigation forward, and arguably has slowed it down by not filing a defence their counterclaim and delaying the process to have counsel removed for several months. Thus, there is no reason to believe that Krisko will act reasonably with respect to the prosecution of its case - they have no incentive do so and no stake in the process.

Conclusion

[50] Having considered all of the evidence proffered in this motion, the *Civil Procedure Rules*, case authorities and the able submissions of counsel, I am satisfied that having defended the claims against them, and there being a rebuttable presumption that there would be undue difficulty recovering a cost award against Krisko not due solely to its impecuniosity, and it appearing unfair in the circumstances that the Defendants be required to incur unrecoverable costs defending Krisko's claims, that it is appropriate that an order for security of costs be granted before the matter proceeds further.

[51] Accordingly, the motion is granted. The amount of the costs for which security should be required under Rule 45.03 can be determined by the tariffs under Rule 77, Tariff A, states that the costs to which each successful Defendant may be entitled are $2,000 for each day of trial plus $16,750 for the amount claimed ($125,001 - $200,000). There are currently no trial dates scheduled; however, the Defendants say that they do not anticipate a trial for this matter to be more than six (days). Thus, the total potential costs award on the basic scale for this matter is therefore $28,750.

[52] It is therefore ordered that the Plaintiff (Krisko) provide Security for Costs in the amount of $28,750 to ensure that the Defendants are able to recover at least a portion of their costs in defending this matter should they be successful at trial.

Hoskins, J.