CITATION: Neuhaus Management Ltd. v. Ding, 2024 ONSC 6144
COURT FILE NO.: CV-22-687607
MOTION HEARD: 20240731
REASONS RELEASED: 20241105

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

NEUHAUS MANAGEMENT LTD.

Plaintiff

- and-

WEI (EMILY) DING and YANG WANG

Defendants

BEFORE: ASSOCIATE JUSTICE McGRAW

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REASONS RELEASED: November 5, 2024

Reasons For Endorsement

I. Background

[1] This is a motion by the Defendants seeking security for costs of $64,530.91 on a partial indemnity scale.

[2] The Plaintiff Neuhaus Management Ltd. ("NML") is a residential property developer. Regent Street Developments Ltd. ("Regent") manages NML's investments and developments. On November 11, 2016, Shuanghhuai Gong entered into an Agreement of Purchase and Sale with NML and Regent (the "APS") for the purchase of a new-home build at 108 Marbrook Street, Richmond Hill (the "Property"). The Defendant Wei (Emily) Ding is Ms. Gong's daughter and Power of Attorney and the Defendant Yang Wang is Ms. Ding's husband.

[3] Closing was delayed due to municipal issues, labour disputes and contractor and trade availability. On November 20, 2019, the Property sustained significant fire damage. NML agreed to build a new property and the parties agreed to proceed with the APS with an amended closing date of October 27, 2020. On April 20, 2020, NMH requested a firm mortgage commitment from a Canadian chartered bank and proof of deposit. Ms. Ding advised that Ms. Gong's response would

be delayed because she was in China and unable to travel due to the pandemic, and the original mortgage had expired due to the delays. Ms. Ding executed a Power of Attorney. NMH then requested an additional deposit of $200,000 starting with a $5,000 instalment. Ms. Gong refused. In May 2020, Ms. Gong provided a mortgage approval letter and screenshots showing available funds. NMH advised Ms. Gong that the APS was terminated and her deposit was forfeited but left the option open to reinstate the APS upon payment of the $5,000 deposit instalment. Ms. Gong purchased the Property under power of sale from Northside Mortgage Investment Corporation ("Northside") on February 13, 2024.

[4] On May 29, 2020, Ms. Gong commenced an action (the "Gong Action") for specific performance against NML and Regent. NML and Regent brought a counterclaim. By Order of Master McAfee (as she then was) dated June 1, 2020, Ms. Gong obtained leave to register a Certificate of Pending Litigation ("CPL") against the Property. On July 21, 2020, Master McAfee dismissed NML and Regent's motion to discharge the CPL and an appeal was denied by R.S.J. Ellies on February 12, 2021. On August 16, 2021, NML and Regent brought another motion to discharge the CPL based on an alleged settlement agreement with Ms. Gong which was dismissed by Associate Justice Frank. The Gong Action was set down for trial on March 6, 2023. The only remaining issues in the Gong Action are costs and the counterclaim.

[5] On September 21, 2022, NML commenced this action (the "NML Action") claiming $1,500,000 from the Defendants alleging that they engaged in a conspiracy with Ms. Gong to induce her to breach the APS. Notwithstanding the allegations of a conspiracy, Ms. Gong is not a Defendant to this action. By Order of Associate Justice LaHorey dated March 25, 2024, the NML Action and the Gong Action are being tried together.

[6] In February 2023, NML and Regent brought an urgent motion in the Gong Action seeking enforcement of a purported settlement agreement and discharge of the CPL (the "Urgent Motion"). Akbarali J. and Ramsey J. both refused to schedule the motion at Civil Practice Court ("CPC") on February 8, 2023 and March 14, 2023, respectively.

II. The Law and Analysis

[7] For the reasons that follow, I conclude that it is just in the circumstances that NML post security for costs on the terms set out below.

[8] Rule 56.01(1) states:

> "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…
>
> (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;"

[9] Rule 56.01(1) does not create a *prima facie* right to security for costs but rather triggers an enquiry whereby the court, using its broad discretion, considers multiple factors to make such

order as is just in the circumstances including the merits of the claim, the financial circumstances of the plaintiff and the possibility of an order for security for costs preventing a bona fide claim from proceeding (*Stojanovic* v. *Bulut*, 2011 ONSC 874 at paras. 4-5). The court has broad latitude to make any order that is just in the circumstances (*Yuen* v. *Pan,* 2018 ONSC 2600 at para. 14).

[10] In Y*aiguaje* v. *Chevron Corp.*, 2017 ONCA 827, the Court of Appeal held as follows:

> **"**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 rr. 56 or 61 have been met.
>
> 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 (H.C.); *Morton v. Canada (Attorney General)* (2005), 75 O.R. (3d) 63 (S.C.); *Cigar500.com Inc. v. Ashton Distributors Inc.* (2009), 99 O.R. (3d) 55 (S.C.); *Wang v. Li*, 2011 ONSC 4477 (S.C.); and *Brown v. Hudson's Bay Co.*, 2014 ONSC 1065, 318 O.A.C. 12 (Div. Ct.).
>
> 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."

[11] Determining the order which is just in the circumstances requires a balancing between ensuring that meritorious claims are allowed to go forward with the consequences of being left with an unenforceable costs award where a party pursues an unsuccessful claim (*Ascent Inc.* v. *Fox 40 International Inc.,* [2007] O.J. No. 1800 at para. 3; *Rosin* v. *Dubic,* 2016 ONSC 6441 at para. 39; *Lipson* v. *Lipson,* 2020 ONSC 1324 at paras. 47-48). In some cases, security is required to correct the imbalance of a plaintiff having security for a successful claim while a defendant has no security for a successful defence and to prevent a plaintiff from going to trial without posting security, be unsuccessful then avoid paying costs (*2232117 Ontario Inc.* v. *Somasundaram,* 2020 ONSC 1434 at para. 27; *DK Manufacturing Group Ltd.* v. *Co-Operators Insurance,* 2021 ONSC 661 at para. 26).

[12] The initial onus is on the defendant to show that the plaintiff falls within one of the enumerated categories in Rule 56.01(1). The plaintiff can rebut the onus and avoid security for costs by showing that they have sufficient assets in Ontario or a reciprocating jurisdiction to satisfy a costs order; the order is unjust or unnecessary; or the plaintiff should be permitted to proceed to trial despite its impecuniosity should it fail (*Travel Guild Inc.* v. *Smith,* 2014 CarswellOnt 19157

(S.C.J.) at para.16; *Coastline Corp.* v. *Canaccord Capital Corp.*, [2009] O.J. No. 1790 (ONSC) at para. 7; *Cobalt Engineering v. Genivar Inc.,* 2011 ONSC 4929 at para. 16). This was summarized by Master Glustein (as he then was) in *Coastline:*

> "7…
>
> (i) The initial onus is on the defendant to satisfy the court that it "appears" there is good reason to believe that the matter comes within one of the circumstances enumerated in Rule 56;
>
> (ii) Once the first part of the test is satisfied, "the onus is on the plaintiff to establish that an order for security would be unjust";
>
> (iii) The second stage of the test "is clearly permissive and requires the exercise of discretion which can take into account a multitude of factors". The court exercises a broad discretion in making an order that is just;
>
> (iv) The plaintiff can rebut the onus by either demonstrating that:
>
> (a) the plaintiff has appropriate or sufficient assets in Ontario or in a reciprocating jurisdiction to satisfy any order of costs made in the litigation,
>
> (b) the plaintiff is impecunious and that justice demands that the plaintiff be permitted to continue with the action, *i.e.* an impecunious plaintiff will generally avoid paying security for costs if the plaintiff can establish that the claim is not "plainly devoid of merit", or
>
> (c) if the plaintiff cannot establish that it is impecunious, but the plaintiff does not have sufficient assets to meet a costs order, the plaintiff must meet a high threshold to satisfy the court of its chances of success"

[13] The initial onus is not a heavy one and only requires the Defendants to establish that there is more than conjecture, hunch or speculation that it appears there is good reason to believe that NML does not have sufficient assets in Ontario or a reciprocating jurisdiction to satisfy a costs award (*Mazzika Arbika Ltd.* v. *Aviva Insurance Company of Canada,* 2017 ONSC 6801 at paras. 21-27; *Amelin Resources Inc., LLC* v. *Victory Energy Operations, LLC,* 2022 ONSC 4514 at paras. 17-18; *Georgian Windpower Corp.* v. *Stelco Inc.*, [2012] O.J. No. 158 (ONSC) at para. 7; *Coastline* at para. 7).

[14] Based on the record before me, I conclude that the Defendants have met their light onus under Rule 56.01(1)(d). NML has made representations to the court and provided other evidence regarding the insufficiency of its assets and financial difficulties:

i.) in NML and Regent's Notice of Motion dated February 1, 2023 for the Urgent Motion, NML and Regent represented that they "cannot continue to finance and carry costs for the Property";

ii.) during his examination for discovery in the Gong Action on February 22, 2022, Khalid Yusuf, the President of NML and Regent, testified that NML and Regent are not large operations and companies of their size require firm purchasers in place to get construction financing to build a home, and that having the CPL registered on title to the Property had a detrimental effect because their construction financing had been "pulled" and they could not build any houses, not just the Property, without coming up with "creative ways to produce money and beg and borrow for favours" from their trades, some of who obliged;

[15] In my view, taken as a whole, NML's representations to the court and Mr. Yusuf's evidence are more than conjecture, hunch or speculation and are sufficient to satisfy the Defendants' onus. The Defendants and the court are entitled to rely on the representations which NML made in seeking relief on the Urgent Motion and Mr. Yusuf's evidence, both in the related proceedings and both involving the Property. This conclusion is supported by Regent's default on the mortgage for the Property. Northside delivered a Notice of Sale on June 13, 2023, commenced an action against Regent and obtained Judgment on November 28, 2023. While Regent was the mortgagor, given its close relationship with NML by which it manages NML's business and developments including the Property, I am satisfied that the default, Notice of Sale and Judgment are relevant, though I give this less weight than the evidence directly involving NML.

[16] NML argues that the Defendants have not met their onus and the motion must fail. NML submits that the Defendants are incorrectly conflating Regent's financial obligations and circumstances with NML's and that the financial information is outdated. However, the representations on the Urgent Motion were made by both NML and Regent and Mr. Yusuf's evidence related to both. Further, this motion was brought based on this information only approximately 4 months after the representations at the March 2023 CPC attendance and 5 months after Mr. Yusuf's examination. It was open to NML at any time to file evidence to explain or update the previous information and evidence. NML asserts that it does not have to do so because the onus has not shifted. I disagree and in any event, it would not have been overly onerous for NML to provide some additional evidence or information to support its position.

[17] Applying a holistic approach, I conclude that it is just in all of the circumstances to exercise the court's discretion to order security for costs. In arriving at this conclusion, I have considered the balance between not impeding NML's right to have its claim tried on the merits with the Defendants' right not to be left with an unenforceable costs award. This is private, commercial litigation without public interest considerations in which NML is making serious allegations of a conspiracy. To the extent to which NML is successful it stands to benefit from the action and therefore should accept at least some of the risk of pursuing its claim (*Design 19 Construction Ltd.* v. *Marks,* [2002] O.J. No. 1091 (Ont. S.C.J.) at paras. 10-15). This is consistent with the principle that absent impecuniosity, those who are prepared to finance the litigation should also be prepared to post security (*Crudo Creative Inc.* v. *Marin,* [2007] O.J. No. 5334 (Ont. Div.).

[18] I reject NML's submissions that no security should be granted because it has a good claim

on the merits or its claim is not otherwise meritless (*Coastline* at paras. 3 and 7; *Chalhal v. Abdullah et al,* 2022 ONSC 1727 at paras. 47-50; *Chill Media Inc.* v. *Brewers Retail Inc.,* 2021 ONSC 1296 at para. 14). Similarly, I decline to conclude, as urged by the Defendants, that NML's claim is frivolous and vexatious. In considering the merits, the court is not required to embark on an analysis such as on a summary judgment motion (*Coastline* at para. 7; *Horizon Entertainment Cargo Ltd.* v. *Marshall,* 2019 ONSC 2081 at para. 3). The analysis is based primarily on the pleadings with recourse to evidence filed on the motion and if the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage (*Coastline* at para. 7; *Horizon* at para. 3). An assessment of the merits should only be decisive where they can be properly assessed on an interlocutory application and success or failure appears obvious (*Coastline* at para. 7; *Horizon* at para. 3).

[19] It is not possible to draw any conclusions with respect to the merits on the current record at this stage of the proceedings. NML's claims are based on allegations of conspiracy which will require the court to decide multiple disputed issues of fact and law and make findings of credibility. This is not possible or appropriate based on the record before me which is comprised largely of evidence obtained in the Gong Action. The merits of this claim can only be considered at trial on a complete record.

[20] I also reject NML's assertion that the Defendants' request for security should be denied because they delayed in bringing their motion (*Chalhal* at paras. 33, 51-55; *Wilson Young & Associates* v. *Carleton University et al,* 2020 ONSC 4542 at para. 59). A motion for security for costs must be brought promptly upon the defendant discovering that it has a reasonable basis for bringing the motion as a plaintiff should not have to post security after it has incurred significant expense in advancing the litigation (*Wilson Young* at para. 59). The moving party should not be entitled to security for costs if its delay causes prejudice to the plaintiff and failure to explain the delay is fatal to the motion even in the absence of prejudice (*Wilson Young* at para. 59). I am satisfied that the motion was brought in a timely fashion and that there was no undue delay. The Defendants advised the court at the case conference on May 10, 2023 that they intended to bring the motion. They brought the motion on July 28, 2023, approximately 4-5 months after the second CPC attendance and Mr. Yusuf's examination for discovery in the Gong Action and while pleadings in the NML Action were still open. I am satisfied that it was reasonable to bring the motion after NML's representations and evidence regarding its financial situation. Accordingly, I cannot conclude that this is a strategic motion brought by the Defendants to impede the progress of NML's claim (*Wilson* at para. 59; *Yaiguage* at para. 23)..

[21] The justness of the order and the balance between seeing claims through to trial against the risk of unenforceable costs awards should be reflected in the quantum of security ordered, not simply whether security is ordered at all (*Rosin* at paras. 38-39; *Lipson* at para. 48). I am satisfied that an amount can be ordered which is not so onerous as to prevent NML from advancing its claims to trial while providing the Defendants with some protection from an unenforceable costs award. In my view, an amount can be ordered which strikes the necessary balance. The court has broad discretion to determine a fair and reasonable amount of security which is substantially similar to the exercise of its discretion in fixing costs of a proceeding pursuant to Rule 57.01 (*Canadian Metal Buildings Inc.* v. *1467344 Ontario Limited,* 2019 ONSC 566 at para. 27). The quantum should reflect an amount that falls within the reasonable contemplation of the parties,

what the successful defendant would likely recover and the factors set out in Rule 57.01 (*720441 Ontario Inc.* v. *The Boiler et al*, 2015 ONSC 4841 at para. 56; *Marketsure Intermediaries Inc.* v. *Allianz Insurance Co. of Canada*, 2003 CarswellOnt 1906 at paras. 17-20). In most cases, security will be ordered on a partial indemnity scale by stages in the litigation on a "pay as you go" basis (*Marketsure* at paras. 13-18).

[22] The Defendants seek total security of $64,530.91 on a partial indemnity scale including $8,568 for examinations for discovery and $35.700 for trial preparation and attendance at trial. NML submits that if the court is inclined to grant security then $10,000 is a reasonable amount. In considering an appropriate amount, there is material overlap between the NML Action and the Gong Action which will reduce the expected costs of defending NML's claim. However, NML's conspiracy claim will require more time and cost to defend than a more straightforward related claim. Having reviewed the Defendants' Bill of Costs, I am satisfied that it is fair and reasonable, within the parties' reasonable expectations and just in all of the circumstances for NML to post security for costs of $30,000 on the following terms: $10,000 within 60 days of these Reasons; $10,000 within 30 days after setting the NML Action down for trial; and $10,000 within 30 days after the Pre-Trial Conference.

IV. Order and Costs

[23] Order to go on the terms set out above.

[24] If the parties cannot agree on the costs of this motion, they may file written costs submissions not to exceed 3 pages (excluding Costs Outlines) on a timetable to be agreed upon by counsel.

Released: November 5, 2024

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Associate Justice McGraw