

SUPREME COURT OF YUKON

Citation: *Kiselbach v. DeFilippi*, 2019 YKSC 35

Date: 20190628
S.C. No. 17-A0041
Registry: Whitehorse

BETWEEN

CRAIG KISELBACH and C.S.H. OUTFITTING LTD.

PLAINTIFFS

AND

RICHARD R.E. DEFILIPPI
RICHARD R.E. DEFILIPPI LAW CORPORATION
and BOUGHTON LAW CORPORATION

DEFENDANTS

Before Mr. Justice J.Z. Vertes

Appearances:

J.J. McIntyre

Michael G. Armstrong, Q.C.

Counsel for the plaintiffs

Counsel for the defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for security for costs. The application is brought by the defendants seeking an order that security be posted by the corporate plaintiff, C.S.H. Outfitting Ltd. ("C.S.H.").

[2] The action is one for damages brought by the plaintiffs against their former solicitors, alleging negligence and breach of their duties to their clients. It is alleged that

the solicitors failed to follow their clients' instructions on a settlement of litigation in the Yukon courts involving the plaintiffs and third parties. The defendants, in an extensive Statement of Defence, dispute many of the factual assertions made in the Statement of Claim and state that they represented the plaintiffs in accordance with the requisite standard of care and in accordance with the instructions they received from their clients.

[3] In addition to the pleadings, the parties have exchanged Affidavits of Documents but no further steps have been taken. Examinations for discovery have not yet been scheduled.

[4] The personal plaintiff, Mr. Craig Kiselbach, resides in British Columbia. He is the sole director and officer of the corporate plaintiff, C.S.H. That company was incorporated in British Columbia and has its registered office at Mr. Kiselbach's address in that province. There is no information as to whether C.S.H. is registered to carry on business in Yukon but, in the Statement of Claim, it is pleaded that the plaintiffs are involved in the outfitting business providing hunting services in Yukon and British Columbia in those concessions where Mr. Kiselbach was designated by the appropriate government authority as the outfitter.

[5] This application is brought pursuant to s. 254 of the Yukon *Business*

Corporations Act, R.S.Y. 2002, c. 20 (the "Act"):

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.

[6] While an order for security for costs against an individual is extremely rare, that is not the case with respect to a corporate party. This section of the *Act* gives the court the

discretionary power to order security if it appears that the corporate party will be unable to pay the costs of the defendants if they are successful in the action. It matters not whether the corporate party is registered to carry on business in this jurisdiction. The jurisdiction of the court is engaged by the fact the corporation has commenced litigation in this court.

[7] The general approach is that, once a defendant has shown that there is good reason to believe that the corporate plaintiff will be unable to pay costs, the plaintiff must demonstrate that there are exigible assets of sufficient value to satisfy a costs order, or establish that the defence is without merit. But, as noted in *Kropp v. Swanese Bay Golf Course Ltd.*, [1997] B.C.J. No. 593 (C.A.) at para. 17: “The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious”.

[8] This court, in *37790 Yukon Inc. v. Skookum Asphalt Ltd.*, 2007 YKSC 24, and *Freedom TV v. Holland*, 2016 YKSC 52, applied s. 254 and relied on the test outlined in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.) at para. 14:

1. Does it appear that the plaintiff company will be unable to pay the defendants’ costs if the action fails?
2. If so, has the plaintiff shown that it has exigible assets of sufficient value to satisfy an award of costs?
3. Is the court satisfied that the defendants have an arguable defence to present?
4. Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff’s case from being heard?

[9] Having regard to this four-part test, it appears to me, based on the evidence presented on this application, that the corporate plaintiff would be unable to pay the defendants' costs if the action fails. There is no evidence that C.S.H. has any assets, in this or any other jurisdiction, other than the bald assertion by Mr. Kiselbach in his affidavit that "C.S.H. owns significant assets and can easily satisfy a bill of costs in this matter." No details are given. On the other hand, there is evidence that there is no record of C.S.H. holding any hunting or outfitting concession rights in Yukon and that C.S.H. is not a member of the Yukon Outfitters Association. There is also evidence that Mr. Kiselbach has no concession rights in Yukon nor has he been a member of the Yukon Outfitters Association since 2016.

[10] The fact that both plaintiffs are resident in British Columbia, and not Yukon, is not without some significance. While I recognize that reciprocating legislation is available to enforce judgments extra-territorially, it is an added burden. The point is that there is no evidence that either plaintiff has exigible assets within the jurisdiction, thereby making enforcement of a costs order that much more difficult.

[11] Counsel agree that in all likelihood, should the defendants be successful, any costs order would be joint and several. Plaintiffs' counsel therefore submitted that one can look at Mr. Kiselbach's assets to alleviate any concern about satisfying a costs order. Thus, there is no need to impose a security requirement on the corporate plaintiff.

[12] Mr. Kiselbach deposed that he and his wife jointly own their home in British Columbia. This home was appraised at \$515,000 in December, 2016, and has a mortgage debt of \$362,000 as of the end of 2018. But, as the defendants' counsel noted, the appraisal is somewhat dated; we do not know how much the mortgage debt

may have increased in the past six months since it is tied to a line of credit; and, the assessed value was placed at only \$408,000. I also, therefore, have concerns about the lack of up-to-date information.

[13] I am satisfied that there is an arguable defence based on the pleadings. Much of the case will turn on the facts and the credibility of the witnesses so, beyond saying that there appears to be an arguable defence, I cannot go further into the merits of the case.

[14] The final criterion is whether an order for costs would visit undue hardship on the plaintiffs such that it would prevent the case going forward. The very fact that Mr. Kiselbach says he has ample equity in his home is evidence that the plaintiffs would not be unduly prevented from moving ahead with this action.

[15] The defendants' counsel has provided a draft Bill of Costs should this action proceed to trial. They estimate costs in excess of \$45,000. They seek security in the sum of \$30,000 on this application. That seems somewhat disproportionate to me considering the early stage of the proceedings. In my opinion, security can be ordered at a lower amount at this time but with leave to seek a further order as these proceedings go forward.

[16] For these reasons, the application is granted and I order as follows:

1. The plaintiff, C.S.H. Outfitting Ltd., shall furnish security for costs in the sum of \$20,000, such security to be held by the Court to the credit of this action.
2. The security amount is to be posted within 30 days of the date of this order.
3. This action is stayed until the security is posted.

4. The defendants shall be at liberty to apply for an order requiring that further security for costs be posted, but not before completion of examinations for discovery.
5. Costs of this application shall be costs in the cause.

VERTES J.