

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Maria Natario

v.

Manuel Rodrigues and Lucia Goncalves

BEFORE: MASTER R.A. MUIR

COUNSEL: Alan Rachlin for the defendants/moving parties
Michael Rotondo for the plaintiff/responding party

REASONS FOR DECISION

[1] The defendants bring this motion for an order staying this action until such time as the plaintiff brings a proceeding to determine the defendants' insurance coverage. Alternatively, the defendants seek an order requiring the plaintiff to post security for costs pursuant to Rule 56.01(1)(a) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "Rules").

[2] The plaintiff is opposed to the relief sought by the defendants.

[3] This is a personal injury claim. The plaintiff was visiting the defendants' home in June 2012. The defendants were renovating the upper floor of their home. The plaintiff was on the upper floor of the defendants' home when the floor gave way and she fell to the floor below. The area where the plaintiff fell was under renovation by the defendants. As a result of the fall, the plaintiff suffered very serious injuries. The plaintiff is unable to walk and requires assistance for almost all aspects of her daily living activities.

[4] This action was started in 2012. Discoveries have been completed and the action is ready for trial. The trial is scheduled to start three months from now in May 2020.

[5] It appears that due to a significant change in the defendants' evidence, their insurer has now denied coverage and there appears to be a very real coverage issue.

[6] As a preliminary argument, the plaintiff submitted that the defendants required leave to bring this motion in accordance with Rule 48.04. I do not agree for the reasons set out in my decision in *Arunasalam v. State Farm Mutual Automobile Insurance Co.*, 2015 ONSC 5235 (Master). The defendants did not set this action down for trial and did not consent to the matter being place on the trial list for the purposes of Rule 48.04. The defendants' agreement to the May 2020 trial date appears to have been connected to the issues surrounding the defendants' proposal that the plaintiff first bring a proceeding to determine the defendants' insurance coverage. This motion is directly related to the coverage issue. In my view, leave is not required in these circumstances.

[7] Regardless of whether the defendants seek an order staying this action or for security for costs, the ultimate consideration for the court on this motion is what order is just in all of the circumstances of this proceeding.

[8] The relevant portion of Rule 56.01 provides, in part, 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,

...

(a) the plaintiff or applicant is ordinarily resident outside Ontario.

[9] The test on a motion for security for costs is well settled. It is summarized in the recent decision of the Court of Appeal in *Yaiguaje v. Chevron Corporation*, 2017 ONCA 741; reconsideration allowed and order set aside, 2017 ONCA 827. The initial onus is on the moving party who must demonstrate that the plaintiff fits within one or more of the provisions of Rule 56.01. Once the moving party does so, an inquiry is triggered, and the court must consider a number of factors and make the order that is just in the circumstances of the action. The merits of the case are a relevant consideration as is the possible result of an order for security for costs preventing a *bona fide* claim from proceeding. If a plaintiff demonstrates impecuniosity, she can resist the motion by showing that her claim is not plainly devoid of merit. If impecuniosity is not established, closer scrutiny is warranted and the question of whether a plaintiff has shown a good chance of success becomes a relevant factor. See *Yaiguaje* at paragraphs 25 and 26. However, it is important to note that the Court of Appeal has emphasized that a court hearing a motion for security for costs enjoys a broad discretion to make such order as is just in the circumstances of a particular proceeding. See *Yaiguaje* at paragraph 26.

[10] These are the factors and principles I have applied in determining the issues on the security for costs portion of this motion. As stated above, I am guided by the central principle that an order for security for costs is discretionary. The role of the court on a motion such as this is to make the order that is just in all of the circumstances.

[11] In my view, the defendants have met their initial onus. The plaintiff is living in Portugal. She is not ordinarily resident in Ontario.

[12] The onus now shifts to the plaintiff to establish that an order for security for costs would not be just in the circumstances of this action. In my view, the plaintiff has met her onus. An order for security for costs would not be just.

[13] I am satisfied that the plaintiff is impecunious. Her evidence is that she has no significant assets other than a partial share of the property where she lives in Portugal. The plaintiff lives on a government pension. Her expenses exceed her income. She is unable to borrow any funds. The plaintiff must live at the property she co-owns in Portugal due to her very serious injuries which resulted from her fall in the defendants' home. I accept that she is impecunious. The plaintiff is certainly in no position to come up with \$200,000.00 as requested by the defendants.

[14] Given that the plaintiff is impecunious, she only needs to meet the low threshold of showing that this action is not plainly devoid of merit. The plaintiff easily meets this standard. The plaintiff was an invited guest in the defendants' home while it was being renovated. She fell through the floor of the upper level and suffered serious and permanent injuries. This action is not devoid of merit. An order requiring the plaintiff to post security for costs would prevent the plaintiff from pursuing this meritorious claim and deny her a determination of her claim on the merits.

[15] The general thrust of the defendants' argument on this motion for both a stay order and security for costs was that forcing the plaintiff to bring a proceeding to determine the defendants' coverage issue would be the most cost effective, efficient and just process. The defendants suggest that this action may settle if insurance coverage is available. A four-week trial may be avoided. The defendants submit that this approach would be in keeping with the principles set out in Rule 1.04 and the Supreme Court of Canada's decision in *Hryniak v. Mauldin*, 2014 SCC 7 which emphasized a culture shift and a new way of approaching the resolution of civil disputes.

[16] I certainly agree with the principles in Rule 1.04 and *Hryniak*. However, I do not see it as just to effectively order the plaintiff to place her action on hold and bring a proceeding now in order to determine the defendants' coverage issues. This action is on the eve of trial. The plaintiff was seriously injured and deserves her day in court. This action was started in 2012 and the plaintiff has spent considerable time and effort to advance the proceeding to this point. There is no evidence that explains why the defendants themselves have not taken steps to address the coverage issue. If they had done so when the issue first arose it may have been determined by now. Moreover, it appears that the coverage issue arose because the defendants may have given false evidence on discovery. It is not just that the plaintiff now pays the price for this by having her action stayed and further delaying her day in court.

[17] When deciding a motion of this nature, the court must take a holistic approach. It retains a broad discretion to make the order that is just in all of the circumstances. For the reasons set out above, I have concluded that it would not be just to stay the plaintiff's action or order security for costs in this case. The defendants' motion is dismissed.

[18] If the parties are unable to agree on the issue of the costs of this motion, they shall provide the court with brief submissions in writing by March 20, 2020. These submissions may be sent directly to me by email.

Master R.A. Muir

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