

Date: 20080721

Docket: T-776-07

Citation: 2008 FC 894

Toronto, Ontario, July 21, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

HAROLD COOMBS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER AND ORDER

[1] The plaintiff appeals the Prothonotary's order to provide security for costs.

[2] The plaintiff commenced two actions and has brought seven applications since February 8, 2007. The defendant has successfully applied to have all applications struck on the grounds of timeliness or lack of the Court's jurisdiction to hear them. The plaintiff has discontinued one action. The defendant brought a motion to strike the remaining statement of claim and the plaintiff subsequently amended his statement of claim.

[3] The plaintiff owes court costs of \$4,750.00 as a result of orders dismissing the applications, \$2,250.00 of which came in three proceedings where the Court ordered costs to be paid forthwith. A further Bill of Costs relating to the discontinued action is outstanding is the amount \$987.92. None of the orders for costs have been paid.

[4] The defendant applied for an order for security of costs pursuant to section 416 (1)(f) of the *Federal Court Rules*. The Prothonotary granted an order for security for costs of \$10,000.00 up to and including examination for discovery. The plaintiff now appeals this order.

[5] The plaintiff appeals the order for security for costs on the basis that the Prothonotary erred:

- a. By not following the principle of *stare decisis*;
- b. By inappropriate application of Rule 416 (2) of the *Federal Court Rules*;
- c. By indiscriminately drawing false conclusions and making false assumptions relating to the plaintiff's affidavit material; and
- d. Such other grounds that may be submitted.

[6] The standard of review of a Prothonotary's discretionary order involves a high degree of deference. The order should not be disturbed on appeal unless:

- a. It is based on a wrong principle or misapprehension of the facts; or
- b. It raises a question vital to the final issue to the case. (*Merck & Co. v. Apotex Inc.*, [2003] F.C.J. No. 1925 paragraphs 17 to 19)

I. Wrong Principle or Misapprehension of the Facts

[7] The Prothonotary correctly noted unpaid cost orders place the plaintiff under the category set out in Rule 416 (1)(f). The defendant was *prima facie* entitled to security for costs unless the plaintiff can establish impecuniosity under Rule 417.

II. Impecuniosity

[8] The plaintiff asserted before the Prothonotary, and in this appeal, that he is impecunious. He does so by simple assertion without confirmatory evidence establishing impecuniosity. The Prothonotary correctly applied the test in *Heli Tech Services (Canada) Ltd. v. Weyerhaeuser Co.*, [2006] F.C.J. No. 1494 at paragraph 8, where Justice Campbell stated:

As to the evidence required to prove impecuniosity, a high standard is expected; frank and full disclosure is required. That is, the onus must be discharged with “robust particularity”, so that “there be no unanswered material questions (*Morton v. Canada (Attorney General)* (2005), 75 O.R. (3d) 63 (S.C.J.) at para. 32)

[9] The plaintiff has not met the high standard of proof required to prove impecuniosity and the Prothonotary was not under any obligation to consider this question.

[10] The plaintiff submits that the Prothonotary proceeded without awaiting an examination on affidavit of the plaintiff's impecuniosity. There is no need to require an examination on affidavit where impecuniosity merely stated without sufficient disclosure that would make an examination on affidavit meaningful.

III. Other Submissions

[11] The plaintiff also submits the order for security for costs is prospective and further such costs to be limited to incurred costs and disbursements. The Prothonotary awarded security for costs in the within action up to the examinations for discovery. Security for costs may be prospective. The Prothonotary decided that security for costs should be posted for the first phase of the proceedings, that is up to examinations for discovery. The decision is within the Prothonotary's discretion. The Prothonotary did not err in his assessment.

[12] Finally, the issue of security is not vital to outcome of the case. (*Heli*, above, at paragraph 18)

[13] Accordingly, I dismiss the appeal of the Prothonotary's order for security for costs.

ORDER

THIS COURT ORDERS that:

1. The appeal of the Prothonotary's order for security for costs dated July 4, 2008 is dismissed;
2. Costs are ordered in favour of the defendant in the amount of \$600.00 payable forthwith.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-776-07

STYLE OF CAUSE: HAROLD COOMBS v.
HER MAJESTY THE QUEEN

CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369

**REASONS FOR ORDER
AND ORDER BY:** MANDAMIN J.

DATED: July 21, 2008

WRITTEN REPRESENTATIONS BY:

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(Self-Represented)

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