CITATION: Daigneault v. 1791949 Ontario Limited, 2016 ONSC 4422
COURT FILE NO.: CV-12-470651
DATE: 20160929

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CLAUDE DAIGNEAULT Plaintiff/Appellant	*Alfred M. Kwinter and Jason D. Singer*, for the Plaintiff/Appellant
– and –	
1791949 ONTARIO LIMITED operating as TORONTO GROUND AIRPORT SERVICES AND CANJET AIRLINES Defendants/Respondents	*David A. Zuber and Melanie Prise*, for the Defendant/Respondent, 1791949 Ontario Limited, operating as Toronto Ground Airport Services *Tae Mee Park*, for the Defendant/Respondent, CanJet
	HEARD: July 4, 2016

G. DOW, J

REASONS FOR DECISION

[1] The plaintiff appeals the decision of Master Haberman dated January 7, 2016 ordering him to post security to the credit of this action in favour of the defendant, CanJet Airlines (that had successfully obtained an order the plaintiff post $16,000.00 security for costs in August, 2014) in the further amount of $60,000.00 and in favour of the defendant, 1791949 Ontario Limited, operating as Toronto Ground Airport Services ("TGAS"), in the amount of $80,000.00.

[2] The standard of review of the Master's decision is correctness or as described by Justice Low in the Divisional Court in *Zeitoun v. Economical Insurance Group*, [2008] O.J. No. 1771, at paragraph 40 " . . . the decision will be interfered with only if the Master made an error of law or exercised his or her discretion on the wrong principles or misapprehended the evidence such that there is a palpable and overriding error."

[3] It is clear from the 27 page, 166 paragraph, single spaced typed decision of the Master that she conducted a detailed review of the nature and extent of the facts and arguments before her. The Master reviewed the appropriate grounds to allow or dismiss a motion for security for costs. The plaintiff conceded he was not ordinarily resident in Ontario and thus Rule 56.01(1)(a)

was not in issue. This is the first stage of a two step inquiry. The second step depends on whether the plaintiff was impecunious. If so, the plaintiff need only demonstrate that the claim is "not plainly devoid of merit") (paragraph 49 of *Zeitoun*). In the prior motion for security for costs by the defendant, CanJet Airlines before the Master in August, 2014, the plaintiff attempted to show he was impecunious and, as found by the Master, failed. In this motion, the plaintiff sought to show he was not impecunious and had sufficient assets to pay an award of costs and thus sought dismissal of the defendants' motion. In this regard, as plaintiff's counsel conceded, the evidence was such that this was not a tenable ground of appeal. It should be noted the materials submitted to the Master included financial material in French, neither translated nor with a prior request for a bilingual master (paragraph 107), real estate holdings in Quebec (documented in French) and the lack of financial material such as the most recent tax return. The Master's review of this material led her to conclude:

a) (at paragraph 3) "his financial position was very hazy";

b) (at paragraph 47) "the plaintiff's financial information and assets snakes back and forth through these affidavits and was not clearly presented";

c) (at paragraph 106) the plaintiff has "provided only snippets of information, some of it contained in documents that are simply appended as exhibits, their contents not discussed.

d) (at paragraph 77) "that the plaintiff, though not impecunious, has a small income against which he has racked up considerable debt."

[4] Master Haberman concluded on the issue of impecuniosity at (paragraph 106) she was "not satisfied that the plaintiff had been thorough and meticulous in presenting an accurate picture of his financial position."

Issue – Adverse Cost Protection Policy

[5] The next factor raised by the plaintiff in this appeal is the purchase of an adverse cost protection policy for up to $100,000.00 from Bridgepoint Indemnity Company ("BIC"). The Master summarized the existence and value of that policy noting, (at paragraph 115) "it is clear that the costs covered by the policy are on a party-party, partial indemnity basis only, and there are 9 events that could result in the plaintiff losing protection and justify the insurer's cancellation of the policy. They range from the plaintiff's failure to take his counsel's advice or to cooperate with him, to parting company with his counsel. There are also 21 exclusions from the policy. Payment is subject to the insurer's investigation and no payment will be made if the insured abandons the claim without the insurer's approval."

[6] In addition, counsel for TGAS noted, as an example of the relative weakness of this alternative to security for costs, the clause in the Certificate of Indemnity – Legal Counsel's Acknowledgment, Declaration and Undertaking that "examinations for discovery have not yet commenced" with the initials of counsel and dated after examinations for discovery had occurred. This inaccuracy thus provides on its face, a basis for BIC to terminate the policy.

[7] In addition, the amount of the policy differs from the quantum ordered by Master Haberman and is a lesser amount. As a ground of appeal of palpable and overriding error, I would reject the plaintiff's position on this point.

[8] Subsequent to the submissions made on July 4, 2016, counsel for TGAS advised me in writing by letter dated July 20, 2016 that an Interim Cease and Desist Order had been issued by the Superintendent of Financial Services for Ontario against BIC effective July 6, 2016. The letter was copied to opposing counsel. By letter dated August 2, 2016, I requested any responding comments from the other counsel and by letter dated September 28, 2016 I received and reviewed from plaintiff's counsel a copy of Minutes of Settlement dated September 22, 2016 between BIC and the Superintendent providing for, upon implementation of an identified interim and long term solution, the provision for an order vacating the Cease and Desist Order. The net result, in my view, is that no change need be made to my analysis or conclusion above.

Issue – Good Chance of Success

[9] In the circumstances where impecuniosity has not been shown, Justice Low states (in paragraph 50 in *Zeitoun*) "a closer scrutiny of the merits of the case is warranted" and "a legitimate factor in deciding whether or not it would be just to require security for costs is whether the claim has a good chance of success."

[10] The plaintiff points to his version of events, as a passenger on CanJet Airlines, it contracted with TGAS to transfer the plaintiff off the aircraft. The plaintiff, aged 56, has been a paraplegic since the age of 25. The aircraft landed at Pearson Airport on January 13, 2011. While being removed from the aircraft, the plaintiff alleges he was tipped over while sitting on a narrow based wheelchair able to fit along the aircraft aisle. The TGAS staff had only restrained his lower body and not his upper body (where restraining straps existed). The incident allegedly resulted in injuries to the plaintiff's left shoulder and neck resulting in surgical intervention, an anterior cervical discectomy, performed by a surgeon in Florida in May, 2012.

[11] The plaintiff claims his position is reinforced by the refusal of TGAS to produce the Incident Report prepared by the person it produced for examination for discovery on the basis of litigation privilege. The defendant, CanJet Airlines did not have documentation regarding the incident. As a result (at paragraph 140) Master Haberman acknowledges that both the defendants are not well positioned to refute that the plaintiff fell while being lifted by TGAS staff.

[12] The plaintiff also notes application of international agreements known as the Warsaw and Montreal Convention that holds the defendant CanJet Airlines strictly liable. CanJet Airlines admits the application of the Convention (in paragraph 2(g) of its Statement of Defence) but defends on the basis it does not preclude it from arguing its liability is reduced to zero on the basis of contributory negligence and causation. In this regard, it is my view the plaintiff has failed to adequately address Master Haberman's consideration of the merits of the matter starting at paragraph 133 of her Reasons and the defendant's version of events including:

a) the plaintiff being contributory negligent given his evidence "he viewed himself as being in the best position to look out for his own safety and security" (paragraph 151);

b) his significant medical history along with a refusal to produce medical records predating 2008 which resulted in it not being possible for the Master "to conclude that the injuries of which the plaintiff now complains and the damages which he claims are the direct result of his 2011 accident on the plane" (paragraph 162).

[13] I would agree with the plaintiff's submission that the maximum amount of contributory negligence would appear to be 25 percent (given the comments of the Court of Appeal in *Sunshall v. Fulsang*, [2005] O.J. No. 4069), alone would render the Master's decision in error. However, it was not considered alone but in conjunction with the plaintiff's past medical history.

[14] The Master concludes that when "the evidence that has and has not been produced regarding damages and causation is placed besides the concerns I have already raised regarding liability, I am unable to say that the plaintiff has met his onus of showing he has a good chance of succeeding with this litigation, as against either defendant" (paragraph 164).

[15] As a result, I conclude the decision made by the Master was within her discretion. There was no misapprehension of the evidence nor palpable or overriding error. The appeal is thus dismissed.

Costs

[16] Counsel for the plaintiff submitted a Cost Outline claiming $15,957.50 in partial indemnity fees plus HST and disbursements which total $19,437.98. Counsel for the respondent, CanJet Airlines submitted a Cost Outline claiming $9,522.00 for partial indemnity fees plus HST and disbursements totaling $11,031.91. Counsel for TGAS submitted a Cost Outline totaling $5,785.00 for partial indemnity fees plus HST and disbursements totaling $6,798.00. In the circumstances, the defendants are entitled to their partial indemnity costs and, given the amounts, the defendant TGAS is entitled to the full amount of $6,798.00. In my view, the claim by CanJet Airlines is excessive although the hours noted appear to be more in line with that contained in the plaintiff's cost outline. As a result, I would reduce same to $8,500.00 inclusive of partial indemnity fees, HST and disbursements. Both amounts are payable by the plaintiff to the respective defendants forthwith.

Mr. Justice G. Dow

Released: September 29, 2016

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