

SUPREME COURT OF YUKON

Citation: *Freedom TV v. Holland*, 2016 YKSC 52

Date: 20161004
S.C. No. 14-A0024
Registry: Whitehorse

Between:

**DP1 INC., FREEDOM TV INC., MASTERWORKS 2011 TV INC.,
AARON GOLDMAN and SYMPHONIC VISION INC.**

Plaintiffs

And

**JIM HOLLAND, GREEN NEEDLE RECORDS, SEAWEED STUDIOS,
CHRIS RODGERS, AVCR VIDEO PRODUCTION**

Defendants

Before Mr. Justice R.S. Veale

Appearances:

Aaron Goldman
Lenore Morris

Appearing for the plaintiffs
Counsel for the defendants

REASONS FOR JUDGMENT (Application for Security for Costs)

INTRODUCTION

- [1] This is an application by the defendants for security for costs from the plaintiffs.
- [2] The application was filed on January 11, 2016, and it has been a challenge to proceed to a hearing. Some of the background is provided in *Freedom TV v. Holland*, 2016 YKSC 44, in which I denied Mr. Goldman's request for an adjournment. Mr. Goldman continued to seek the adjournment of this application on September 2, 2016, the day of the hearing.

[3] Mr. Goldman is self-represented. Mr. Holland has counsel. Mr. Rodgers is self-represented and joins in to support the application which was argued by Mr. Holland's counsel. Mr. Goldman appeared at the hearing by telephone from Manitoba.

[4] Mr. Holland and Mr. Rodgers filed their affidavits on January 29, 2016. Mr. Goldman filed his affidavit #5 on April 6, 2016, consisting of 465 paragraphs, of which the first 365 paragraphs related to alleged improprieties of Mr. Holland and his counsel. Paragraphs 366 to 465 address the security for costs issue.

BACKGROUND

[5] This background is not intended to be a finding of fact on any issue but rather to set the context.

[6] As I filed my Reasons for Judgment denying an adjournment on September 1, 2016, and the application proceeded on September 2, 2016, I do not intend to repeat all the background, which can be reviewed in *Freedom TV*, cited above.

[7] Suffice it to say that this is not a complex proceeding. Mr. Goldman retained the services of Mr. Holland for audio recordings and Mr. Rodgers for video recording the Blue Feather Music Festival in Whitehorse, Yukon, which took place on November 8, 9 and 10, 2013.

[8] Mr. Goldman alleges that the defendants agreed to be paid (approximately \$1,890 for Mr. Holland and \$1,300 for Mr. Rodgers) when he secured financing for the Blue Feather project. Mr. Goldman's allegations arise out of the discussions and negotiations that took place after the Festival ended and continued until at least August 2014. It appears Mr. Holland and Mr. Rodgers had both been substantially paid by the end of May 2014, but there is still some dispute on that matter.

[9] The basis of this court action are a number of emails between Mr. Goldman, Mr. Holland, Mr. Rodgers and Ms. Morris, counsel for Mr. Holland. Mr. Goldman initially filed his Statement of Claim on May 23, 2014 and filed an amended version on June 10, 2016. Within, he alleges various instances of breach of contract, intimidation, conversion, deceit, fraud, detinue, interference in economic interests, unjust enrichment, extortion, breach of duty of care, interference with contractual relations, slander, libel and defamation.

[10] In terms of financial loss, Mr. Goldman claims that as a result of Mr. Holland's refusal to release the audio tapes until August 2014, Mr. Goldman could not obtain his financing for the Blue Feather project causing "tens of thousands of dollars in damages daily" and harm to his reputation and relations with multiple other parties in the Yukon. He also claims that various defamatory and misleading comments made by Mr. Holland and Mr. Rodgers have interfered with his economic relations. However, Mr. Goldman also stated in an e-mail to Mr. Rodgers dated December 17, 2013, that the delay in financing was a result of delays from the CRA auditor on a previous show.

[11] Mr. Goldman's allegations also implicate counsel for Mr. Holland, who attempted to obtain a release of claims and \$600 for costs from Mr. Goldman before the audio tapes were delivered in August 2014. I note that Mr. Goldman filed a Statement of Claim against counsel for Mr. Holland on September 2, 2016, the date of this hearing, claiming "several million dollars" in damages as a result of financing delays caused by her conduct. The claim is based upon counsel's advice to Mr. Holland, his extortion on her advice, counsel's extortion on Mr. Holland's behalf, suborning perjury, intentionally misleading justice in this file, as well as alleging slander, libel and defamation.

[12] The evidence supporting financial damage to Mr. Goldman consists of a Letter of Intent from R&D Capital offering a credit facility of \$750,000 signed by Mr. Goldman on July 30, 2013.

[13] This Letter of Intent concerning the credit facility and financing of Film or Video production tax credits required a personal guarantee from Mr. Goldman for 50% of the approved amounts and a guarantee from Masterworks 2011 TV Inc. for the other 50%, along with other security. Mr. Goldman refers to the Letter of Intent as a “750,000 revolving credit that was in place for all productions related to DPI Inc. from that date onward”.

[14] Mr. Goldman also attached a “Term Sheet” from Tristar Film Finance Corp. dated December 17, 2003, agreed to by Mr. Goldman on behalf of Masterworks Inc. whereby Tristar “wishes” to finance various Canadian Film Tax Credits. Mr. Goldman states that this commitment was breached by Tristar.

[15] Mr. Goldman also attached a January 5, 2014 Financing Offer (his words) from Aster Capital Inc. which is entitled “Term Sheet” and is unsigned and identified within as a “Letter of Intent”. The Line of Credit amount is \$1,000,000. Mr. Goldman says this “was not executed as a result of this failure to provide an agreement that coincided with the loan terms.”

[16] Mr. Goldman states that the projected revenues for Freedom TV Inc. for performance documentary productions arising out of the Blue Feather Music Festival ranged from a low of \$3,047,520.90 to a high of \$4,063,361.20.

[17] In terms of Mr. Goldman’s present financial status, Mr. Rodgers became aware after this litigation commenced that the Royal Bank of Canada in an action against

FTVRB2 Inc., FTVRTZ Inc., NMF-TV Inc., Janice Olivia Goldman and Aaron Goldman (Ontario Superior Court File No. CV-13-10039-00CL) appointed a Receiver under s. 243(1) of the *Bankruptcy and Insolvency Act* for the corporate defendants.

[18] Further, Mr. Rodgers attached a judgment issued in the same matter, on the consent of Aaron Goldman, ordering that Aaron Goldman pay the sum of \$1,260,000.74 with interest at the Royal Bank's prime rate plus 1.95% and costs in the amount of \$2,284.82 plus the same interest as above. There is no evidence before me that Mr. Goldman has paid that judgment. However, Mr. Goldman states that he has filed an appeal which he says "functions as a stay of any such default judgment, and I continue to wait for the Commercial List Court to forward my appeal to the Ontario Court of Appeal as they are and were required to do at the time it was filed."

[19] He adds the following:

388. I have been advised that the corporate defendants, myself and my mother have a clear cause of action against the court staff involved in illegitimately suppressing the appeal and allowing the default judgment to proceed ex parte, as well as against the Ontario Ministry of the Attorney General for all damages flowing from these inappropriate actions by court staff.

[20] In addition to the material from the bankruptcy proceedings, counsel for Mr. Holland has filed a Ruling in a civil suit commenced by Mr. Goldman in the Superior Court of Justice in Ontario (CV-11-00441961-0000). Meyers J., in a Ruling dated April 24, 2015, speaking at p. 7 about the costs arising from the dismissal of Mr. Goldman's case against the Bank of Montreal stated as follows:

... In this case, there were extensive cross-examinations by Mr. Goldman that were unnecessary from the issues in the proceeding. He was claiming \$25 million against the bank,

and he knows and expects that the bank would be defending full out. The bank's costs outline is reasonable, both in rates and time. Accordingly, in my view, it is fair and reasonable that the plaintiff, Mr. Goldman, pay the defendants Ma, Kirkwood and Bank of Montreal jointly and severally, costs on a partial indemnity in the amount of \$30,000 inclusive of disbursements and HST.

[21] There is no evidence before me that Mr. Goldman has paid this cost order against him.

[22] In their affidavits filed in January 2016, the defendants sought \$10,000 as security for costs in this case. As a result of multiple case management meetings and applications for adjournments, counsel for the defendants filed, at the hearing, a draft Bill of Costs of \$30,200.

[23] The corporate plaintiffs are not registered in the Yukon and Mr. Goldman is not a resident of the Yukon. All of the plaintiffs have addresses in Manitoba.

[24] In my ruling of August 29, 2016, denying Mr. Goldman's application to adjourn, I permitted him to file a further affidavit no later than August 31, 2016. His Affidavit #10 consisting of 53 paragraphs in which he was largely seeking an adjournment based on his litigation in Ontario and other reasons, such as his recent attempts to engage counsel, provided the following response to the security for costs application:

43. I indicated during the hearing on Monday August 29th that I am ill-prepared to address the security for cost motion at this time, and that the financial and other information requested by Ms. Morris cannot be provided quickly enough to be available for the hearing as currently scheduled.
44. Our production bookkeeper, Deborah Narine had begun and is still working on the preparation of Freedom TV's financial statements, but only works two days a week with our company.

45. Freedom TV has recently secured financial commitments for acquisitions of the productions that were just shot in Saskatchewan.
46. I am prepared to disclose the particulars of these commitments to the court under seal, but do not wish to expose Freedom TV to any further potential interference in contractual relations by Mr. Holland or Mr. Rodgers by disclosing the details of these broadcaster relationships or negotiations to them.
47. In order for me to put my best foot and that of the corporate plaintiffs forward in relation to the security for costs application, I require an adjournment to clearly set out the financial positions of the corporate plaintiffs, as well as my own.
48. The financial positions of Freedom TV Inc. and Symphonic Vision have shifted recently, and the financial position of DP1 Inc. is in flux while we await a notice of assessment on tax credit for that company from CRA.
49. It is difficult, if not impossible, for the court to assess what exigible assets each of the corporate plaintiffs have before these details can be prepared and properly presented, which requires time to document changes that have only recently occurred for all three companies.
50. In the case of Freedom TV, Symphonic Vision and DP1 Inc., this is not due to any failure to prepare on my part but is, rather, the result of very changes [as written] in the operations of both companies, as well as ongoing developments with CRA.
51. In lieu of a security for costs application being heard at this time, in recognition of the defendants desire to thwart this litigation at any cost, the corporate plaintiffs and I are willing to have a stay ordered in this matter until such time as Freedom TV and Symphonic Vision's books are brought up to date to address recent changes in their financial position, and possibly until the pending notice of assessment for DP1 Inc. on its tax credit has been delivered.

52. I would anticipate that this would function to effectively stay this matter until at least the end of October, 2016.
53. If the court does not see fit to make such an order, I would ask that the court provide a minimum two week adjournment of this motion so that I may have the benefit of legal counsel in further amending the statement of claim as I have now been advised by three counsel to do, and so that my bookkeeper has a reasonable opportunity to bring the corporate plaintiff's books up to date to reflect changes that have occurred within the last 30 days so that the court is able to assess the necessary financial aspects relating to the defendants' security for cost application.

[25] In order to give some appreciation of the time spent on this file and the accommodations of Mr. Goldman, there have been more than 10 case management conferences since he filed his claim on May 23, 2016. The following, submitted by counsel for Mr. Holland in her Outline dated August 26, 2016, gives some indication of the discussion at one case management conference:

19. On April 20, 2016 another case management conference was conducted. This conference took over three hours. At the April 20, 2016 case management conference:
 - a. Each of the individual defendants was ordered to provide certain disclosure by April 22, 2016 (none of the sought items existed);
 - b. trial of this matter was scheduled for July 4-8, 2016;
 - c. hearing of the plaintiffs' costs application was adjourned until May 2, 2016 at Aaron Goldman's request (page 5 of 11 of clerk's note);

- d. the plaintiffs were ordered to file materials in support of their application for costs by April 25, 2016 (not completed to date);
- e. Aaron Goldman was ordered to answer the Defendants' Interrogatories by May 14, 2016 (completed May 16, 2016);
- f. the defendants were ordered to provide the plaintiffs with a copy of Jim Holland's Facebook conversation(s) with Gary Bailie that was non-truncated (completed April 26, 2016);
- g. examinations for discovery were ordered to be completed by the end of May 2016 (not conducted to date);
- h. Counsel for the defendants was directed to provide the court with copies of documents over which litigation privilege was asserted and which the plaintiffs challenged (completed April 25, 2016).

[26] It is fair to say that each case management has resulted in a similar amount of detailed direction being provided to the parties.

The Law on Security for Costs

[27] Section 254 of the Yukon *Business Corporations Act*, R.S.Y. 2002, c. 20, (as amended), states the following:

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.

[28] At para. 23 of *37790 Yukon Inc. v. Skookum Asphalt Ltd.*, 2007 YKSC 24, this Court applied s. 254 and relied on *Citizens for Foreign Aid Reform Inc. v. Canadian*

Jewish Congress, [1999] B.C.J. No. 2160 (S.C.), at para. 14, to adopt the following tests:

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?

[29] More recent case law in British Columbia addresses the fact that there has been no rule of court with respect to orders for security for costs against individuals since 1976. As the old British Columbia *Rules of Court* applied in the Yukon up until September 15, 2008, and the present Yukon *Rules of Court* have no such provision, the recent case law is very helpful.

[30] In *Han v. Cho*, 2008 BCSC 1229, Dillon J. reviewed the history of security for costs against an individual and set out the present rule as follows:

14 The longstanding basic rule that has applied with respect to an order for security for costs against an individual is that a natural person can sue without giving security for costs in any but excepted cases. The rule flows from the principle that poverty is not a bar to access to the courts. This is the "true principle" referred to by Lambert J.A. in *Shiell* at p. 261. More recently, this basic principle has been enunciated as the right of citizens to have access to the courts, a fundamental theme of recent debate surrounding changes to the Rules of Court (*Fraser v. Houston* (1997), 36 B.C.L.R. (3d) 118 at para. 11, [1997] B.C.J. No. 1537 (QL) (B.C.S.C.); Effective and Affordable Civil Justice, Report of the Civil Justice Reform Working Group to the Justice Review Task Force, B.C. Justice Review, November 2006).

...

27 The onus is on the applicant to establish that he or she will be unable to recover costs (Bronson #1 at para. 45). The fact that the plaintiff resides outside the jurisdiction, has no assets within the jurisdiction, or is impecunious, is not sufficient in itself. The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances. Such special circumstances could arise if an impecunious plaintiff also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance.

[31] In *Gichuru v. Pallai*, 2015 BCCA 81, S. Stromberg-Stein J.A. confirmed the adoption of the test in *Han v. Cho* since the decision in *Meade v. Armstrong (City)*, 2001 BCCA 63, and stated:

27 In summation: the chambers judge correctly cited and analyzed all the relevant authorities; she did not claim to have "unfettered discretion" to order security for costs; and she did not fail to distinguish between individual and corporate litigants in security for costs proceedings. Justice Fenlon's finding that Mr. Gichuru's previous failures to pay costs amounted to an egregious circumstance justifying security for costs is not an error in principle or fact.

ANALYSIS

The Corporate Plaintiffs

[32] The initial corporate plaintiffs were Freedom TV Inc. and Masterworks 2011 TV Inc. Mr. Goldman added DP1 Inc. and Symphonic Vision Inc. in June 2016. This court action is based on the premise that Mr. Goldman was unable to pay the small amounts invoiced by Mr. Holland and Mr. Rodgers until significant financing could be secured by Mr. Goldman or CRA would pay certain film tax credits. Neither event appears to have occurred since Mr. Goldman first raised them in 2013 as reasons for not paying the

defendants for their services. It appears that the corporate plaintiffs are not in position to pay the defendants' costs if the action fails.

[33] Further, the defendants filed this application for security for costs on January 11, 2016. Since that time, Mr. Goldman has been either unable or unwilling to file financial information. At this point, Mr. Goldman has not shown exigible assets of any value sufficient to satisfy an award of costs.

[34] I am of the view that the defendants have an arguable defence to present. Simply put, they allege that there was no agreement that payment of their accounts was contingent on Mr. Goldman securing financing for the Blue Feather Festival project. The defence is also based upon the evidence that Mr. Goldman was encountering financial difficulties long before the Blue Feather Music Festival project arose. While one must be careful not to equate Mr. Goldman's financial problems to those of the corporate plaintiffs, it is reasonable to assume that they are somewhat interrelated in that personal guarantees of principals are not unusual security requirements for corporations. The arguable defence is simply that there is no causal connection between the corporate plaintiffs' financing issues or alleged losses and the actions of the defendants in pressing their claims for payment.

[35] Will an order for security for costs visit undue hardship such that it would prevent the corporate plaintiffs from pursuing their court action? I do not think that is the situation here given Mr. Goldman's optimism about future financing and collection of the film tax credits from the CRA. He has travelled from Manitoba to appear in person in court, so he is not impecunious, although it appears that his corporations have had some financial challenges.

The Individual Plaintiff

[36] In my view, the analysis with respect to the corporate plaintiffs applies to Mr. Goldman, who is the key person pursuing this litigation.

[37] However, in the case of an individual, the power to issue a security for costs order is to be exercised cautiously, sparingly and only under special or egregious circumstances which could include a weak claim, a prior failure to pay costs, or refusing to follow a court order for payment of maintenance.

[38] The reason that special or egregious circumstances are required in the case of an individual is to ensure that citizens have access to the courts and that poverty is not a bar, all of which is expressed in the phrase “access to justice”. However, access to justice must be assured equally to Mr. Goldman, Mr. Holland and Mr. Rodgers and there must be a balancing of interests. In that respect, Mr. Goldman’s affidavit indicates that he has much experience in high finance while Mr. Holland and Mr. Rodgers are small businessmen with limited resources.

[39] The principle of access to justice for individuals is generally applied so that the mere fact that a plaintiff resides out of the jurisdiction, has no assets within the jurisdiction or is impecunious is not sufficient to attract an order for security for cost. See *Koch (Guardian ad litem of) v. Koch Estate*, 2005 YKSC 47, at paras. 47 – 54.

[40] While these are indeed Mr. Goldman’s circumstances, it is not on this basis that I think this is an appropriate case to make an order for security for costs. My decision is based on the fact that this case raises the prospect of abuse of the court process as it has taken excessive hours of court time and incurred significant legal expense to the defendants, largely based upon procedural issues raised by Mr. Goldman rather than

the merits of his claim. In effect, Mr. Goldman has taken a dispute over the payment of a relatively small amount of money and the consequent delay of the delivery of an audio file, and turned it into the basis for a Supreme Court action. Mr. Goldman professes to want a quick trial but he seems to continuously be seeking adjournments to prevent that from happening.

[41] This Court has given Mr. Goldman every opportunity to conclude the case with discoveries and trial, all of which have been adjourned at Mr. Goldman's request for reasons that have nothing to do with the merits of the case. Success in all of his various claims is very tenuous at best. For all these reasons, I find that the circumstances in which this case is brought and is being conducted are egregious and a security for costs order is appropriate.

CONCLUSION

[42] Mr. Goldman takes exception to the filing of the draft Bill of Costs at \$30,200 rather than the \$10,000 originally applied for in January 2016, as he had not had sufficient opportunity to review it. However, given the excessive delay and adjournments in this matter, the draft Bill of Costs is not unreasonable. In January 2016, Mr. Goldman appeared to be interested in an expeditious process to hear this matter. However, for reasons that have nothing to do with this court action, a just and speedy determination of this action is not possible. To ensure fairness to all parties, I order that this action be stayed until Mr. Goldman provides this Court with security for costs in the amount of \$10,000 by way of certified cheque.

VEALE J.