

Date: 20071219

Docket: A-207-07

Citation: 2007 FCA 409

PRESENT: NOËL J.A.

BETWEEN:

**B-FILER INC., B-FILER INC. doing business as
GPAY GUARANTEED PAYMENT and NPAY INC.**

Appellants

and

THE BANK OF NOVA SCOTIA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 19, 2007.

REASONS FOR ORDER BY:

NOËL J.A.

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REASONS FOR ORDER

NOËL J.A.

[1] The respondent brings a motion asking that security for costs be provided by the appellants before the appeal can proceed any further. To the extent that the appellants fail to provide security, the respondent asks that their appeal be dismissed without further notice.

BACKGROUND

[2] The respondent was awarded costs in the amount of \$887,049.62 by the Competition Tribunal at the conclusion of a proceeding during which it successfully countered an allegation that it refused to deal with the appellants contrary to subsection 75(1) of the *Competition Act*, R.S.C.

1985, c. C-34. The appellants have brought an appeal against this decision, and have yet to pay the costs which were awarded against them.

[3] The respondent has produced a projected bill of costs with respect to the forthcoming appeal in which it estimates that costs in the amount of \$35,427.00 will be incurred to respond to the appeal. It asks that security be provided for the outstanding cost award made by the Competition Tribunal, as well as the projected costs of the appeal, which in total amount to \$922,476.62.

[4] The appellants do not challenge the fact that the cost award made by the Competition Tribunal is presently owing and that they have failed to pay the outstanding amount despite repeated demands by the respondent nor do they challenge the amount awarded by the Competition Tribunal in the appeal they have brought. However, they submit that they have no substantial stream of income at the present time by reason of all major Canadian Banks now refusing to supply banking services to them and that they have no assets to satisfy the amount sought. According to the appellants, their appeal should be allowed to proceed without the payment of the outstanding costs and without providing security because their appeal is meritorious and raises matters of public interest.

ANALYSIS AND DECISION

[5] I do not believe that there is any entitlement to security with respect to the costs which the respondent has projected with respect to the current appeal. The only basis for securing such costs is that provided in Rule 416(2) of the *Federal Courts Rules* which authorizes the Court to grant

security in stages “as costs are incurred”. The respondent is free to reframe its motion on that basis, but the present application insofar as it seeks to secure projected costs cannot succeed.

[6] The respondent has however demonstrated that it is entitled to an order for security with respect to the outstanding cost award made by the Competition Tribunal pursuant to both paragraphs (b) and (f) of Rule 416 which provides respectively:

Where security available

416. (1) Where, on the motion of a defendant, it appears to the Court that

(b) the plaintiff is a corporation, an unincorporated association or a nominal plaintiff and there is reason to believe that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant if ordered to do so,

(f) the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part,

the Court may order the plaintiff to give security for the defendant's costs.

Cautionnement

416. (1) Lorsque, par suite d’une requête du défendeur, il paraît évident à la Cour que l’une des situations visées aux alinéas a) à h) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur :

b) le demandeur est une personne morale ou une association sans personnalité morale ou n’est demandeur que de nom et il y a lieu de croire qu’il ne détient pas au Canada des actifs suffisants pour payer les dépens advenant qu’il lui soit ordonné de le faire;

f) le défendeur a obtenu une ordonnance contre le demandeur pour les dépens afférents à la même instance ou à une autre instance et ces dépens demeurent impayés en totalité ou en partie;

[7] Once entitlement to security has been established pursuant to Rule 416, the burden shifts on the other party to demonstrate that an order for security should nevertheless not issue:

Grounds for refusing security

417. The Court may refuse to order that security for costs be given under any of paragraphs 416(1)(a) to (g) if a plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit.

Motifs de refus de cautionnement

417. La Cour peut refuser d'ordonner la fourniture d'un cautionnement pour les dépens dans les situations visées aux alinéas 416(1)a) à g) si le demandeur fait la preuve de son indigence et si elle est convaincue du bien-fondé de la cause.

[8] Even if I assume for present purposes that the appellants' appeal has merit, they have not established that they are impecunious.

[9] The appellants have limited their response to the present application insofar as it relates to their financial circumstances to an admission that they do not have the assets or the income stream to satisfy the outstanding award of costs. This does not satisfy the onus which they bear to show that they are impecunious. The appellants' financial circumstances are within their own knowledge and it is difficult for any one else to learn more than what the appellants choose to disclose. In this case, the appellants have, in effect, pleaded impecuniosity without advancing any material evidence establishing that they are indeed without resources.

[10] In *Heli-Tech Services (Canada Ltd. V. Weyerhaeuser Co.*, 2006 F.C.J. No 1494, the Federal Court stated at para. 8:

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).

[11] A few paragraphs earlier (at para. 6), the Federal Court quoted the following passage from the decision of the High Court of Ontario in *Smith Bus Lines Ltd. v. Bank of Montreal* (1987), 61 O.R. (2d) 688 at pages 704-705:

... The corporate plaintiff wishing to be allowed to proceed with its action, without either showing sufficient assets or putting up security, must first show "impecuniosity" meaning not only that it does not have sufficient assets itself but also that it cannot raise the security for costs from its shareholders and associates, partly because the courts do not want a successful defendant to be effectively deprived of costs where, for example, wealthy shareholders have decided to carry on business and litigation through a shell corporation. To go the impecuniosity route the plaintiff must establish by evidence that it cannot raise security for costs because, if a private company, its shareholders have not sufficient assets. As expressed by Reid J. in *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705 at p. 709, 15 C.P.C. (2d) 187: "If an order for security stops a plaintiff in its tracks it has disposed of the suit." To raise impecuniosity there must be evidence that if security is required the suit will be stopped -- because the amount of the security is not only not possessed by the plaintiff but is not available to it ...

[My emphasis]

[12] As already noted, the appellants have filed no evidence about their financial affairs.

However, we know from the evidence before the Competition Tribunal that:

- (a) The appellants ("NPay and GPay") are a money transfer business. NPay and UseMyBank Services Inc. ("UseMyBank") are Joint Venture Partners;
- (b) People wishing to gamble on-line can click on an icon called "UseMyBank". The on-line gambler is then directed to the UseMyBank website. The on-line gambler is then prompted to type in his bank card number and secret on-line password;

- (c) UseMyBank takes this information and enters into an on-line banking session as if they were the banking customer, and causes money to be transferred from the banking customer's account to an account held in the name of NPay or GPay;
- (d) The money is aggregated, and is eventually sent off-shore to casino management companies or other payment processing gateways;
- (e) In 2006, the Joint Venture processed over \$60 million, over \$58 million of which was directed to internet casinos;
- (f) NPay and UseMyBank earn money by retaining a percentage of the funds collected from Banking customers' accounts that they hold in trust for the internet casinos and payment processing gateways. They also make money by keeping a percentage of the foreign exchange spread when converting the banking customers' Canadian dollars into the currency by which their casino accounts are funded;
- (g) NPay and GPay are companies incorporated in the Province of Alberta. Raymond Grace is the President of both NPay and GPay;
- (h) The NPay and GPay business are run out of Mr. Grace's basement, with only one or two other full-time employees.

[13] In support of its application, the respondent has asserted, and the appellants have not challenged, the fact that virtually all of the money earned by NPay as a result of its Joint Venture arrangement with UseMyBank has been paid out to NPay's shareholder, Raymond Grace. Similarly, the appellants have not challenged the respondent's assertion that UseMyBank also has an interest in this litigation, and that it and its principal, Joseph Luso, have the financial resources to secure the outstanding cost award.

[14] Based on the record before me, the appellants have failed to meet the burden of establishing that they are impecunious.

[15] An order will therefore issue compelling the appellants to post security in an amount commensurate with the costs award made by the Competition Tribunal within thirty days from the date of this order, failing which the appeal will be dismissed without further notice. The order will also provide that no further step shall be taken in the appeal until security is posted in accordance with this order. The respondent shall be entitled to the costs of the application.

“Marc Noël”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-207-07

STYLE OF CAUSE: B-FILER INC., B-FILER INC. doing
business as GPAY GUARANTEED
PAYMENT and NPAY INC. THE
BNAK OF NOVA SCOTIA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: NOËL J.A.

DATED: December 19, 2007

WRITTEN REPRESENTATIONS BY:

Ms. Sharon J. Dalton

FOR THE APPELLANTS

Mr. F. Paul Morrison
Ms. Lisa M. Constantine

FOR THE RESPONDENT

SOLICITORS OF RECORD:

EDY, DALTON
Calgary, Alberta

FOR THE APPELLANTS

McCARTHY TETRAULT LLP
Toronto, Ontario

FOR THE RESPONDENT