Date: 1999 08 04
Docket:CV 07521

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SARAH ANN STEWART

Plaintiff

-and-

HAMLET OF FORT McPHERSON, FRED LENNIE, FRED LENNIE carrying on business under the name and style of LENNIE ENTERPRISES, JOHN DOE #1 and JOHN DOE #2

Defendants

-and-

FRED LENNIE

Third Party

REASONS FOR JUDGMENT

[1] The defendant, Hamlet of Fort McPherson, seeks an order directing the plaintiff to furnish security for costs.

[2] The plaintiff's action is for damages resulting from injuries she suffered when she slipped and fell on municipal lands in Fort McPherson. The Statement of Claim states that the plaintiff resides in the Province of Saskatchewan. It also states that the action is a subrogated one brought in the name of the plaintiff by the Workers' Compensation Board of the Northwest Territories.

[3] The non-residence of the plaintiff, and the fact that the plaintiff is a nominal one, triggers two of the criteria relevant to a security for costs application. The relevant portions of the Rules of Court are in Rules 633 and 634:

> 633.(1) The Court, on the application of a defendant in a proceeding, may make such order for security for costs as it considers just where it appears that
>
> > (a) the plaintiff is ordinarily resident outside the Territories; ...
> > (d) the plaintiff brings the proceeding on behalf of a class or an association, or is a nominal plaintiff, and there is good reason to believe that the plaintiff has insufficient assets in the Territories to pay costs;..
>
> 634. The Court may refuse to order security for costs where
> > (a) it appears on the application that the plaintiff is possessed of sufficient assets within the jurisdiction that will be available for the defendant's costs; or
> > (b) the application for security is not made within a reasonable time.

[4] Counsel agree that, even though one or two of the criteria in Rule 633(1) are triggered, the order for security is still a discretionary one. As stated by deWeerdt J. of this court, when describing the purpose of a security for costs order, in *Drywall Services Grand Centre Ltd* v. *PCL Constructors Northern Inc.*, [1991] N.W.T.R. 210 (S.C.), at page 212:

> Security for a defendant's anticipated costs is intended to offset the disadvantage, and avoid the potential injustice, which can accrue to a defendant when successful in defeating the claims of a plaintiff who is in effect beyond the court's reach for purposes of enforcing an award of costs in favour of the defendant. It being a question of what may or may not be just in the circumstances, since the security is to be given before judgment is rendered or the outcome of the case is known, the grant must be left to judicial discretion. As I held in *Lowe v. Inuvik*, [1984] N.W.T.R. 278 at 279 (S.C.): "Our Rules of Court empower me to grant such security in a proper case. It remains a matter of judicial discretion in each case, depending on the particular circumstances of the case."

[5] An affidavit has been filed on behalf of the defendant applicant. The defendant's Mayor, Philip Blake, has attested to a defence on the merits (as required by Rule

632). Essentially, he states that the area where the plaintiff slipped and fell, considering the time of year and the use to which the area was put, was not an unusual danger or hazard. He gives various details to support this argument. No doubt, in drafting this affidavit, counsel had in mind the classic expression of an occupier's liability at common law: "the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knew or ought to know..." (as per *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274). Counsel argued that the plaintiff's case is so obviously weak that security should be ordered.

[6] Many authorities have held that the court may go into the merits of the case and, if the plaintiff is unlikely to succeed, use that as a significant factor in the exercise of its discretion: see references in *McLennan* v. *Parent*, [1995] N.W.T.J. No. 66 (S.C.), at parag. 20. In this case, while the plaintiff's case may be difficult to establish, considering that she fell on an icy patch of roadway in the middle of winter, it is certainly not doomed to fail. These types of cases are highly fact-specific. I do not know if discoveries have yet been held but it does not appear so. Having regard to the fact-specific nature of this type of claim, and the need to make an assessment of the "reasonableness" of any actions taken or not taken by the defendant, it would be speculative at this stage to draw any conclusion as to the likelihood of success. Furthermore, as plaintiff's counsel noted, some of the allegations relate to this defendant's alleged part in creating the hazard by its contracting the co-defendant Lennie to carry out work in the area. It is alleged that part of the danger was created by Lennie's water supply activities in the area, and not merely the natural accumulation of snow and ice. For these reasons, if I had to rely solely on the relative strength or weakness of the plaintiff's case, I would deny the application for security for costs.

[7] This application, however, raises a further point, one apparently not yet considered in this jurisdiction.

[8] As noted above, the Statement of Claim acknowledges that the action is a subrogated one brought in the plaintiff's name by the Workers' Compensation Board of the Northwest Territories. It states that the Board has paid "various sums of money to the plaintiff and on her behalf". The Workers' Compensation Act, R.S.N.W.T. 1988, c.W-6, provides that where a worker is injured and compensation is paid by the Board, and the circumstances are such that a third party (not the worker's employer or a fellow employee) may be liable in damages for the injury, the Board is subrogated to the cause of action of the worker: s. 12(4). In such case the Board may take action, in the worker's name, against the

person who may be liable: s. 13(l)(b) . The action may be taken by the Board, in the worker's name, without the worker's consent.

[9] There was no affidavit filed on this application on behalf of the plaintiff. Thus there was no evidence as to whether this action has been taken in the plaintiff's name with or without her consent. There was no evidence as to whether the plaintiff, even though a non-resident, has any assets within the jurisdiction (something contemplated by subrule 634(a) noted above) or even what assets she may have outside the jurisdiction. I think the reason for this lack of evidence is that the real plaintiff is the Workers' Compensation Board. It is the Board that is the real party in interest. The affidavit of Mr. Blake points out that the defendant requested the Board to either provide security for costs or an undertaking to pay any costs as may be awarded against the nominal plaintiff but the Board refused.

[10] Defendant's counsel submitted that in a subrogated action such as this security for costs may be ordered. He referred me to the comment of Middleton J. in *Gough* v. *Toronto and York Radial R.W. Co.* (1918), 42 O.L.R. 415 (C.A.), at page 417: "Where the insurance company sues in the name of the assured, no doubt he is a nominal plaintiff, and in proper cases security for costs may be ordered..." This comment was obiter dicta but the term "proper case" was subsequently interpreted to be one where the plaintiff has no substantial interest in the action, the action is really that of another person, and the plaintiff is without means to satisfy a judgment for costs: *Steinberg* v. *Blum*, [1953] O.W.N. 246 (H.C.J. Master).

[11] The *Steinberg* case makes reference as well to the defendant having the burden to prove the insufficient means of the plaintiff. This is not quite accurate. While the onus generally lies on the applicant to establish the justness of an order for security for costs, there is nevertheless an evidentiary burden on the plaintiff, if he or she wishes to defend the application on the basis that he or she has assets, to produce evidence of it. I think that is the intent behind subrule 634(a) since it is normally only the plaintiff who has the knowledge as to whether there are assets available. As stated by Côté J.A. in *Steffanson* v. *Richardson Greenshields of Canada Ltd.* (1992), 135 A.R. 55 (C.A.), at page 56: "... when a prima facie case is made out by the defendant moving, the court may well order security unless the plaintiff from whom security is sought shows that he has readily exigible assets in the jurisdiction."

[12] Plaintiff's counsel submitted in response that there is no need for security or an undertaking because the Act provides protection to the defendant with respect to

recovery of a costs award against the plaintiff. He pointed to subsection 13(1) (c) of the Act:

> (c) if an action is taken by the Board it shall indemnify and save harmless the worker, his or her legal personal representative or his or her dependants from and against all costs or damages incurred in respect of the action, including costs or damages awarded by the court to the defendant...

[13] Defendant's counsel argued that this clause, while it may protect the worker in whose name the action is taken, offers no real protection to the defendant. I agree. There is nothing in the Act that would enable the successful defendant to make a claim for its costs directly against the Board. There is nothing comparable, for example, to s.151(1) of the Insurance Act, R.S.N.W.T. 1988, c. I-4, which enables a successful party to bring an action directly against the other party's insurer. Here any claim for costs must be pursued against the nominal plaintiff in another jurisdiction. While no doubt the Board would honour the indemnity obligation, the defendant's successful recovery could still be subject to all sorts of things outside of its control. Just to use two examples: What if the plaintiff dies? What if the plaintiff goes bankrupt? It is, after all, the plaintiff who must demand indemnification from the Board.

[14] These types of unpredictable contingencies are not unknown in the general insurance field. The text, *MacGillivray on Insurance Law* (9th ed., 1997), notes that generally an insurer, once it has indemnified the insured for his or her loss, can take over control of proceedings on undertaking to indemnify the insured against costs. But, as stated in a footnote on page 549, while the insurer's undertaking would make it unlikely that the insured would fail to meet an order for costs, problems could be created by the insured becoming bankrupt or being put into liquidation. Even an undertaking given directly to the defendant may be problematic. In *DeGuzman* v. *Cruickshank Motors Ltd.* (1976), 1 C.P.C. 318 (Ont. H.C.J.), security for costs had been ordered in a subrogated action where the plaintiff had left the jurisdiction after commencement of the action. The plaintiff's solicitor had confirmed to the defendant that the claim was a subrogated one and that the plaintiff's insurer would satisfy any order of costs against the plaintiff. Security for costs was ordered and the plaintiff appealed. On the appeal, Steele J. upheld the order holding that the solicitor's undertaking could not be said to be that of the insurer since there was no evidence that the solicitor was

authorized to give that undertaking. Steele J. went on, however, to note the difficulties inherent even if such an undertaking was validly given (at page 321):

> Even if such undertaking or assurance had been given, I would have difficulty in finding that security should not be awarded because of the difficulty of enforcing the undertaking in the event that it was dishonoured. A dishonouring would necessitate a second action to be taken by the successful party against the solicitor and/or the insurance company; the obtaining of judgment thereon and only then would he be able to obtain his costs. I do not believe that a party should be put in this position.

[15] In this case, the Board sues in the plaintiff's name, therefore she is a nominal plaintiff. There is no evidence that the named plaintiff has assets in this or any other jurisdiction. She is a non-resident. The Board is not a party to the action so no order can be made against it. The Board has refused to give an undertaking as to its liability for any costs awarded to the defendant. In my opinion, there would be significant disadvantage, and potential injustice, to the defendant's ability to recover an award of costs in these circumstances. Therefore I have concluded that an order should issue as requested.

[16] The defendant has presented a draft bill of costs. No issue was taken with it on the application. I have reviewed it and, considering the nature of this case, it is not unreasonable. The total anticipated party and party costs are a little over $21,000.00. Rule 635(2) provides that security may be ordered in different amounts and at different steps of the proceeding. No submissions were made on this point either so it would be pointless for me to speculate as to whether it would be appropriate for me to resort to this method of ordering security.

[17] I therefore order as follows:

1. The plaintiff shall furnish security for costs, by depositing with the Clerk of the Court cash or a bond (in a form satisfactory to the defendant applicant), in the amount of $20,000.00.

2. The security shall be deposited within 30 days of the entry of this order.

3. All further steps in this proceeding are stayed until the security is furnished.

4. In default of the security being furnished within the time limited therefor, this action shall stand dismissed as against the defendant applicant with costs against the plaintiff, without further order, unless the court on special application otherwise directs.

5. The costs of this application shall be costs in the cause.

J . Z .
Vertes

J.S.C.

Dated at Yellowknife, Northwest Territories
this 4th day of August, 1999.

Counsel for the Plaintiff: Sheldon N. Toner

Counsel for the Defendant,
Hamlet of Fort McPherson: Peter D. Gibson