CITATION: Saeed v. Gunarajah, 2019 ONSC 7236
COURT FILE NO.: CV-16-554750
MOTION HEARD: 20190919

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Musab Saeed, Plaintiff

AND:

Nirmalarajah Gunarajah et al., Defendants

BEFORE: Master Abrams

COUNSEL: J. Robinson, for the Plaintiff

S. Tock, for the Moving Defendants (Gunarajah, Ramesh, Sansoye and Sharma)

HEARD: September 19, 2019

REASONS FOR DECISION

[1] The moving defendants request an Order directing the plaintiff to post security for costs. They point to the fact that the plaintiff has failed to abide by court-imposed deadlines for the payment of costs; and, they say that there is good reason to believe that the plaintiff is a nominal plaintiff who has insufficient assets to enable her to defray a costs award at trial (R. 56.01(1)(d)).

[2] This action was commenced in June of 2016 but was not prosecuted with dispatch. A motion was brought to have the plaintiff serve an affidavit of documents, which she did. The moving defendants then sought partial summary judgment which was granted and they were awarded some $22,000.00 in costs. The costs were ordered paid by December 3/18 but were not paid until late May/19, i.e. *after* this motion was scheduled.

[3] The reason that the moving defendants posit that the plaintiff is a nominal party is that, though she was the assignee of an agreement of purchase and sale between the moving defendants and the original purchaser of property in Richmond Hill, she had no practical or financial involvement in the transaction. On cross-examination, she admitted that: she had no personal knowledge of the assignor (though she knew her father had done business with the assignor, in the past); she did not negotiate the terms of the assignment; she did not negotiate

the purchase price; she did not know how the deposit monies were calculated; she did not, herself, pay the deposit (her father did); the assignment agreement was presented to her for signature by her father and his business partner; there is no written partnership or joint venture agreement to which the plaintiff, her father and her father's business partner are parties; she never met the lenders who provided financing: they were sought out by her father and it is he who negotiated the financing terms; she was earning only $14.00/hour (working 25-30 hours/week) at the time that she was to borrow $1.275 million for the underlying transaction; she is not employed by and is not an officer, director or shareholder of the company that was to develop the property (development being intended for this property); she does not have a copy of the retainer agreement that she says, without substantiation, she signed for the purchase of the property; she did not contribute any money toward the purchase of the property; there is nothing to show that any profits from the resale of the property were to be shared with the plaintiff; she was not going to be paying any renovation costs, property taxes or maintenance costs for the property; and she had no experience developing properties, would not be contributing to the development of the property and, indeed, never owned a property before this one.

[4] As for the plaintiff's financial wherewithal, the plaintiff lives with her parents in their home; as at late, she has been working only part-time; and she owns no real property. Further, she has declined to produce any financial records, though requested to do so by the moving defendants.

[5] This court has recognized that "it is…essential to the interests of justice" that parties be protected from the "prospect of being dragged through the courts by straw claimants" (*John Wink Ltd.* v. *Sico Inc*., [1987] O.J. No. 5, at para. 6).

[6] The moving defendants have persuaded me that the plaintiff is a straw (or nominal) claimant. She is doing the bidding of her father and his business associate. As in *Smith* v. *Canadian Tire Acceptance Ltd.*, 1995 CanLII 7163 (ONSC), though (strictly speaking) the plaintiff is a real plaintiff in the sense that she is a signatory to an agreement involving the property here at issue, it appears clear to me that she was placed in the position of plaintiff (by those who make the decisions/fund her steps) as a matter of litigation strategy (or, as the plaintiff's own counsel suggests, as a matter of "tax planning")--likely *because of* her financial

circumstances. As in *Delaney* v. *MacLennan*, cited by the court in *Rolmac Construction Co.* v. *Rio Tinto Mining Co. of Canada*, [1961] O.J. No. 375, at para. 9, the plaintiff appears to be a "passive instrument in the hands of the real plaintiff", given the history of her dealings as set out in paragraph 3, above. As the moving defendants submit, the plaintiff's sole contribution to the purchase of the property was signing her name to the assignment agreement.

[7] On the issue of the sufficiency of assets, the plaintiff is a recent Canadian Beauty College graduate (August 2018), who earns only $14.00/hour working 25-30 hours per week, who owns no real property in Ontario and who has failed to provide the moving defendants with any documentation to allay their concerns about her ability to defray a costs award. There is no evidence that she has any assets—exigible or otherwise.

[8] There is thus good reason to believe that the plaintiff has insufficient assets to satisfy a costs award.

[9] Then too, and in any event, the plaintiff has not adduced evidence of impecuniosity. Indeed, she provided *no* evidence as to the state of her finances. And while it is true that one costs award was paid by the plaintiff to the moving defendants, it was not paid until she and those bolstering her were in danger of having this claim struck. Those whose interests fuel this action had an incentive to ensure that the plaintiff was in funds.

[10] That being so and looking at the motion holistically (with the merits of the case being, at this stage and on the evidence before me, no better than neutral), I think it just and appropriate that the plaintiff post security for costs. I have reviewed and considered the moving defendants' bill of costs and have had regard to the fact that this action is in the nascent stages, notwithstanding the fact that there have already been motions heard herein. The draft bill of costs does not set out the number of lawyers/staff to work on each step, years of call or hourly rates. That being so, I am discounting the amounts sought and ordering security posted in tranches: the first tranche being $20,000--to be posted by January 31/20; a further $25,000 is to be posted at least 60 days before mediation herein; and, yet a further $25,000 is to be posted at least 60 days before the date first fixed for the pre-trial herein (for a total of $70,000 to be posted, in such form and manner as may be agreed and may be approved by the Accountant of the Superior Court (Ontario)).

[11] The plaintiff herself brought a motion for leave to amend her claim. That motion was not opposed, save that the responding defendants (in my view fairly) declined to state their lack of opposition until such time as the plaintiff satisfied her legal obligations as they related to the payment of costs. Leave to amend the plaintiff's claim, as sought, is granted--with no costs ordered paid to or by the plaintiff.

[12] Failing agreement as to the costs of the motions, I may be spoken to—this by January 31/20.

December 12, 2019 _____