IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***D. Jorgenson***
	)	*on his own behalf*
THE COLLEGE OF PHARMACISTS OF MANITOBA	)	*(via teleconference)*
	)	
	)	***J. A. Pollock***
(Plaintiff) Respondent	)	*for the Respondent*
	)	*(via teleconference)*
- and -	)	
	)	*Chambers motion heard:*
DAREN JORGENSON	)	***July 31, 2020***
	)	
(Defendant) Appellant	)	*Decision pronounced:*
	)	***August 24, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba*, Court of Appeal Rules*, Man Reg 555/88R, all motions are heard remotely by teleconferencing until further notice.

MAINELLA JA

Introduction

[1] The plaintiff applies for security for costs for the defendant's appeal and leave to serve its motion by email transmission retroactive to the date of filing.

Background

[2] The plaintiff obtained summary judgment against the defendant for its claims of defamation and nuisance in relation to statements he repeatedly published about how the plaintiff and its staff dealt with his allegation that at

least 24 Indigenous people died in northern Manitoba because they did not get their medications as a result of the improper conduct of Muskehki Pharmacy and Grand Medicine Health Services Pharmacy. The judge issued a permanent injunction against the defendant and awarded damages of $150,000 and costs totalling $83,293.72. The defendant has appealed the judgment.

[3] This motion appeared before me on July 23, 2020. Although the defendant opposed security for costs, he filed no materials in response despite the requirements of r 43.1 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R. He delayed advising the plaintiff that he wanted to adjourn the motion until court commenced on July 23rd. He provided no explanation for not being forthright with the plaintiff earlier. He stated that he had a draft factum already prepared to show the merits of his appeal but he required three to four weeks to prepare other unspecified materials. He said he is impecunious but had no documentation as to his financial affairs. The plaintiff opposed adjournment of its motion and underlined that the defendant is not credible and has unreasonably delayed proceedings at every opportunity, this being only the latest example.

[4] The interests of justice govern the granting of an adjournment. This requires a balancing of the interests of the plaintiff, the defendant and the administration of justice with the objective of minimising prejudice to the parties and the system itself (see *Toronto-Dominion Bank v Hylton*, 2010 ONCA 752 at para 36; and *Moore v Darlington*, 2012 NSCA 68 at para 51).

[5] To that end, a number of circumstances are noteworthy. While the defendant is self-represented, he is an articulate and sophisticated

businessperson. He is familiar with the court process. The reasons he provided for the adjournment request were cursory and vague. The adjournment request must be considered in light of the ongoing proceeding. This is a chambers motion. The speedy resolution of it is important to ensure that the hearing of the ultimate appeal is not unreasonably delayed. The motion is not overly complex and the defendant has already prepared materials to deal with one important consideration on the motion, the merits of his appeal. While there is little prejudice to the plaintiff by a brief delay of this matter, particularly as costs normally could remedy the delay to some degree, the entire reason it has proceeded with the motion for security for costs is to be protected from incurring further costs that are unlikely to be recovered. In order to ensure a fair hearing on the motion, I concluded that it was necessary in the interests of justice to grant an adjournment of the hearing of the motion, but only until July 31, 2020. I also imposed deadlines for the filing of further materials.

[6] At the appearance on July 23rd, the defendant advised that he preferred service by email transmission and that he was not opposed to the plaintiff's request to validate service of the motion retroactive to the date of its filing.

[7] After the adjournment was granted, the defendant filed materials in opposition to the request for security for costs consisting of an affidavit; copies of the five audio recordings referenced in paragraph 23 of the judge's reasons (see 2020 MBQB 88); a memorandum in response to the motion; and his factum on the appeal itself.

[8] The audio recordings were surreptitiously made by the defendant and involved telephone and in-person conversations he had with three individuals between April 21, 2018 and June 8, 2018 where the topic of the 24 deaths was discussed.

[9] The plaintiff says that there are special circumstances to warrant granting security for costs for the defendant's appeal: the appeal has no merit; the defendant has acted unreasonably during the litigation which has unnecessarily increased costs; and it is unlikely to recover its costs responding to the appeal. It requests security for costs in an amount similar to what was ordered in *Canada (Attorney General) v Moss*, 2001 MBCA 166, namely, $7,500.

[10] The defendant responded by submitting that he has a genuine and strong appeal on an important societal issue: systemic racism in the healthcare system in relation to Indigenous people. He said that he sincerely believes that, due to systemic racism, lives were lost, a cover-up involving powerful interests ensued, the plaintiff failed in its regulatory duties and he therefore had every right to aggressively critique the plaintiff and, as he put it, "to speak [his] truth" publicly. He argued that he should not be thwarted by his impecuniosity in advancing his appeal.

Discussion

[11] Section 31 of *The Court of Appeal Act*, CCSM c C240, provides that "[a] judge of the court in chambers may, under special circumstances, make an order or orders for security for costs of any appeal." Hamilton JA summarised the exercise of this discretion in the following manner in *Amneet Holdings Ltd v 79548 Manitoba Ltd et al*, 2003 MBCA 108 (at para 7):

> The governing principle in an application for security for costs under s. 31 is that such an order must be "just" in the "particular circumstances of the case." See *Moss (Bankrupt), Re* (2001), 160 Man.R. (2d) 80, 2001 MBCA 166, and *Harvard Investments Ltd. v. Canadian National Railway Co.* (2002), 170 Man.R. (2d) 10, 2002 MBCA 127. As noted by Scott C.J.M. in *Franck Estate v. Webster et al.* (1998), 129 Man.R. (2d) 87 (C.A.) (at para. 32): "An order for security for costs should only be granted where it is essential to do so, in the interests of justice, to provide defendants with some protection for their potential costs." Scott C.J.M. was speaking about security for costs for trial but the words are equally applicable to such an application on an appeal.

[12] In past decisions where security for costs has been ordered, the Court has often used party/party costs under the applicable tariff as a rough benchmark to set the amount of security. The applicable tariff in this case is Tariff C, which sets party/party costs at $3,000, plus reasonable disbursements, which would amount to a range of roughly $4,000 to $8,000 given that this is an appeal of a judgment after a summary judgment motion as opposed to a trial where the disbursements would likely be more significant.

[13] The pertinent circumstances to be considered holistically as to whether it is just to order security for costs are as follows.

Defendant's Financial Means

[14] The law on impecuniosity in relation to a motion for security for costs was neatly summarised by Perell J in *Montrose Hammond & Co v CIBC World Markets Inc*, 2012 ONSC 4869 as follows (at para 34):

> . . . A litigant who relies on impecuniosity bears the onus of proof on this point and must do more than adduce some evidence of impecuniosity and must satisfy the court that it is genuinely

> impecunious with full and frank disclosure of its financial circumstances . . ..

See also *Shaw v Paton*, 1996 CarswellPEI 42 at para 12 (SC (AD)); *Mapara v Canada (Attorney General)*, 2016 FCA 305 at para 8; and *Yaiguaje v Chevron Corporation*, 2017 ONCA 741 at para 30.

[15] The defendant is a resident of Manitoba. For many years, he was a licensed pharmacist although, currently, he is non-practicing. He has operated various pharmacies and clinics on a significant scale. In his factum, he describes himself as a "prominent figure" in the field of pharmacy.

[16] There is no suggestion that the defendant's apparent impecuniosity was caused by the plaintiff which would be reason for security for costs not to be ordered.

[17] In his affidavit, the defendant states he is "going through a period of financial strain that severely limits" his ability to pay security for costs. He states that his financial difficulties relate to a receivership order in unrelated litigation, the facts of which are summarised in *7451190 Manitoba Ltd v CWB Maxium Financial Inc et al*, 2019 MBCA 95 at para 6. He says the *7451190 Manitoba Ltd* litigation has led to him losing his residence and leaving him "penniless." There is no evidence to support this assertion. According to the facts of *7451190 Manitoba Ltd*, the pharmacy in question was not insolvent—it was a "healthy business" (at para 23); the receivership was triggered because of a loan dispute between the defendant and a commercial lender. Once the receiver was appointed, the pharmacy operated in accordance with its loan obligations.

[18] The defendant has not made full and frank disclosure of his financial circumstances and has failed to provide with robust particularity the supporting documentation as to his income, expenses, assets, liabilities and ability to borrow. I have no independent evidence before me of insolvency or any documentary evidence as to the defendant's financial affairs, how he supports himself generally or how he can pay for the costs of prosecuting the appeal. One important fact, in terms of the defendant's silence, is that he does not state in his affidavit that he cannot obtain financing to pay security for costs despite the relatively modest sums provided for party/party costs in Tariff C (see *Amneet Holdings Ltd* at para 12).

[19] Of particular concern to me is the defendant's historical lack of candour in financial disclosure and the consequences of that for this motion (see *PK v SK*, 1996 ABCA 224 at para 4). The lack of candour relates to the defendant's conduct in this litigation where he was ordered twice in the lower Court to produce documentation as to his financial affairs from January 1, 2016 onward for an examination in aid of execution, but refused to do so. While the defendant was not found in contempt, the costs ordered for his defiance of the court orders totalled $6,000.

[20] In a civil case, in the absence of a satisfactory explanation, an adverse inference may be drawn from the failure of a party to produce a document or to call a witness. The failure amounts to an implied admission that the evidence would be contrary to the party's case or at least would not support it (see *Murray v Saskatoon*, [1952] 2 DLR 499 at 505-6 (Sask CA); and Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) at 406-7).

[21] The defendant has no explanation for not producing the financial information ordered in the lower Court other than the bald assertion he made to me that he has no financial documents. That submission is difficult to accept. Even people with limited financial means have financial documents, such as records related to income assistance or some other government or charitable support. In cases of being supported financially by friends or family, a particularized affidavit from the benefactor can provide the necessary evidentiary basis to establish being impecunious.

[22] The onus is on the defendant to establish genuine impecuniosity because his financial capabilities are within his knowledge and are not known to the plaintiff. Refusing to disclose relevant financial information despite being ordered to do so on two occasions by the lower Court without a believable explanation satisfies me that the defendant has not met his onus to demonstrate genuine impecuniosity.

[23] There is, however, more evidence against the defendant's claim of impecuniosity. At the examination in aid of execution, he said that he was thinking of relocating to the Caribbean with the help of friends and that he had significant debts owed to him (in the millions of dollars) which he has not bothered to pursue. In the audio recordings involving conversations between the defendant and Martin Michaels and the defendant and Jack Rosentreter, there is extensive discussion about the defendant's business operations in Manitoba, which would have resulted in financial documentation of some sort, such as income tax and banking records. These records would have existed during the period covered by the orders for production of financial information made in the lower Court. In the audio recording involving the defendant and Kevin Hart, the defendant says he has made 30 secret

recordings with various people in relation to the 24 deaths and "purposely put" them with lawyers in Alberta and North Dakota to keep them safe. I have no reason to believe that such legal work would be pro bono. In his submissions, the defendant conceded that he has a long-standing corporate dispute with the Canada Revenue Agency over allowable business investment losses in the millions of dollars which could benefit him if resolved.

[24] In summary, I reject the defendant's enigmatic claim of impecuniosity.

Merits of the Appeal

[25] In deciding relative merit, the Court is to make a preliminary consideration of an appeal mindful of the applicable standard of review (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 72-75). The likelihood for an order for security for costs is often converse to the relative merit of the appeal (see *Moss* at para 23; and *Sargsyan v Westman Regional Laboratory Services Inc et al*, 2006 MBCA 85 at paras 5-6, aff'd 2006 MBCA 141).

[26] While 14 grounds of appeal are specified in the notice of appeal, I would group them into four categories: (1) the defendant was denied his right to trial by jury; (2) the judge erred in her determination of whether there was a genuine issue requiring a trial; (3) the award of damages was excessive; and (4) this was not a case for solicitor/client costs.

[27] The defendant's claim that his defamation case could not be decided by summary judgment and required a trial by jury because of section 64(1) of *The Court of Queen's Bench Act*, CCSM c C280, has no merit. The judge was

bound by the jurisprudence of this Court that section 64(1) does not preclude determination of a defamation case by summary judgment when there is no genuine issue for trial (see *Hall v Puchniak*, 1997 CarswellMan 460 at para 5 (QB), aff'd 1998 CarswellMan 630 (QB), aff'd 1998 CarswellMan 512 (CA), leave to appeal to SCC refused, 1999WL33193426; and *Weisenberger v Johnson & Higgins Ltd* (1998), 168 DLR (4th) 298 at para 12 (Man CA)).

[28] Many of the defendant's arguments challenge the judge's interpretation of the evidence as to whether there was a genuine issue for trial. For example, he says the plaintiff's registrar's evidence was not probative and the judge did not give appropriate weight to the audio recordings in terms of his defences to the action. His submissions make it clear that he desires that this Court, on an appeal, substitute its view for that of the judge.

[29] The interpretation of evidence or inferences made from evidence is a question of fact reviewable on a standard of palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at para 10). The magnitude of that burden is seldom discharged and is indicative of a relatively weak appeal unless it is reasonably apparent on the materials filed on the motion for security for costs that the trial judge made an obvious and material error (see *Colt Engineering & Construction Ltd v Bond Architects & Engineers Ltd*, 1993 CarswellNfld 32 at paras 10, 15-16 (SC (CA)); and *DeZorzi v Sonley*, 2002 MBCA 149 at para 2).

[30] The judge's reasons are comprehensive. She makes plain findings of fact in favour of the plaintiff and against the defendant. She explained why the plaintiff had established all the requirements of defamation and nuisance.

There is nothing clear from the judge's reasons or the record before me to support the defendant's claim that she unevenly scrutinised the evidence.

[31] Based on the record before me and mindful of the deferential standard of review that applies to findings of fact, in my view, the defendant has no reasonable prospect of success to disturb the judge's findings of fact as to whether there was a genuine issue for trial.

[32] In terms of whether there was a genuine issue for trial, the defendant also challenges the judge's refusal to let him call 13 non-cooperating witnesses. One of the reasons the judge gave in rejecting the defendant's request is because she had no evidence before her that any one of the 13 witness had "direct knowledge of the events on which he sought to rely to prove the truth of the alleged defamatory statements" (at para 21).

[33] The exercise of a fact-finding power by a summary judgment judge is owed deference on appeal absent an error of law (see *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 at para 36).

[34] I see no merit to this part of the defendant's appeal. The defendant had the obligation to muster compelling evidence in an admissible form to establish that there was a genuine issue for trial (see *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 11; *Beavis et al v PricewaterhouseCoopers Inc*, 2010 MBCA 69 at para 11; *Bodnarchuk v RBC Life Insurance Co et al*, 2011 MBCA 18 at para 31; and *3746292 Manitoba Ltd et al v Intact Insurance Company et al*, 2018 MBCA 59 at para 30). Without proof of the existence of non-disclosure agreements and their wording, it is difficult to accept the defendant's submission that he had to proceed in the way he did because the uncooperative witnesses were subject

to non-disclosure agreements. The defendant was not entitled to compel witnesses on the speculative hope they might say something favourable to his case.

[35] A final part of the defendant's appeal of whether there was a genuine issue for trial is how the judge dealt with his defences of justification (i.e., substantial truth) and responsible communication on matters in the public interest to his statements of fact.

[36] The determination of whether there is a genuine issue for trial is a question of mixed fact and law (see *Dakota Ojibway Child and Family Services* at para 36). The standard of review on questions of mixed fact and law is palpable and overriding error absent an extricable error in principle (see *Housen* at para 36).

[37] In terms of the defence of justification, the judge reviewed the evidence in some detail (see paras 22-29). It is undisputed that the defendant has no direct knowledge of his allegation. She found that none of the parties to the five audio recordings had direct knowledge of the allegation. That was evident to me as well after listening to the five and one-half hours of conversations. All the defendant could adduce to support the truth of his allegation was his own evidence that he had a conversation with the former director of Physician Services for the Northern Medical Unit who said that "her unit had 24+ documented cases of death because patients could not get their prescription drugs" (at para 29). In his factum, the defendant ignores the distinction between the admissibility of evidence and assignment of weight to evidence. As was her right, the judge decided to place little weight on this hearsay evidence taking into consideration it was "unsubstantiated" (at

para 29) as it was not satisfactorily explained why the former director had not filed an affidavit.

[38] The judge rejected the defence of responsible communication on matters in the public interest as being "unsupported by evidence or argument" and "[the defendant] is not a member of the media" (at para 36).

[39] While I have a concern about the judge's use of the term "media", which, in the internet age, has a wider meaning than it did it previously (see *Grant v Torstar Corp*, 2009 SCC 61 at para 62; and *Baglow v Smith*, 2012 ONCA 407), publication of defamatory material must nevertheless be "responsible" for the defence to apply (*Grant* at para 98). The judge found the defendant's conduct to be "persistent and egregious" (at para 43) which included him publishing defamatory comments without having evidence to back up his claims.

[40] Based on the record before me and mindful of the deferential standard of review that applies to questions of mixed fact and law, in my view, the defendant does not have a reasonable prospect of success to overturn the judge's decision that there was not a genuine issue for trial based on the defences of justification and responsible communication on matters in the public interest.

[41] In his factum, the defendant says little as to why the award of damages and order for costs should be varied on appeal other than they were "excessive and unsupported". The judge gave extensive reasons for her decision and made strong comments about the plaintiff's problematic conduct inside and outside of court.

[42] The standard of review for decisions regarding damages and costs is largely deferential (see *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27; and *Dansereau v The City of Winnipeg*, 2014 MBCA 18). I have not been persuaded that the defendant has a reasonable prospect of success on these final two grounds of appeal based on the record before me, particularly given the conclusory nature of the defendant's arguments.

[43] In summary, the relative merits of the defendant's appeal are dubious.

Defendant's Conduct

[44] The reasonableness of a litigant's conduct during the course of litigation is a factor to be considered for security for costs (see *Kalo v Law Society of Manitoba*, 2010 MBCA 24 at paras 9-10, aff'd 2010 MBCA 64).

[45] While the defendant attests that he has abided by the interim and permanent injunctions issued against him, which I accept to be the case for the purposes of this motion, the refusal to follow court orders to disclose relevant financial information and documentation belies his assertion of fidelity to the Court and its orders and is cogent evidence of a propensity of the defendant to act unreasonably during litigation, which is one of the objectives security for costs seeks to discourage (*ibid*).

[46] I also note that the defendant has made critical comments about the judge in his factum that are highly unusual and serious. He submits that, "in refusing to allow witnesses to be heard regarding a matter as serious as 24 Indigenous deaths [the judge] acted in a way that might be seen by some as indication of racial bias even within the court system itself."

[47] The issue before me is not contempt but whether the defendant will conduct his appeal reasonably despite refusing to do so previously. The defendant has the right to freedom of belief and expression but, by making scurrilous comments in an attempt to advance his appeal, in my view, he is continuing to conduct this litigation in an unreasonable fashion. The less than subtle submission that anyone who disagrees with him may be a racist complicates the appeal and creates unnecessary distraction from the relevant issues.

[48] While the defendant has paid nothing towards the costs ordered, there is no evidence that he has failed to pay orders for costs in other litigation or has outstanding judgments to satisfy (see *Moss* at paras 29-31; and *Lienaux v Norbridge Management Ltd*, 2013 NSCA 3 at para 17).

Plaintiff's Conduct

[49] There is no conduct by the plaintiff which would give me pause not to order security for costs. In particular, it has not unreasonably delayed in bringing its motion for security for costs (see *Hilson v 1336365 Alberta Ltd*, 2019 ONCA 727 at paras 11-12). The defendant's appeal is not yet perfected.

Likely Recoverability of Costs

[50] Not in dispute is the fact that, if the plaintiff is successful on the appeal, its costs will not be readily recoverable (see *Lu v Mao*, 2006 BCCA 560 at para 6).

Conclusion

[51] The defendant relies on *Montrose Hammond & Co* as reason not to order security for costs. That decision is distinguishable on its facts. It involved an appeal of an order for security for costs of an action. The record provided a complete picture of the litigants' financial affairs to allow a reasoned decision to be made about impecuniosity, unlike the situation here. The merits of the action were unknown one way or the other and turned on findings of fact not yet made. The state of affairs here is different. The facts have been found and the defendant will have an uphill battle to disturb those findings given the deferential standard of review. In *Montrose Hammond & Co*, there were strong arguments about the deleterious effect on access to justice if an order for security for costs was made, unlike the circumstances of this case.

[52] Taking into consideration the particular circumstances of this case, I have concluded that it is just to order the defendant to pay security for costs in the amount of $5,000.

Disposition

[53] In the result, the motion is allowed. Leave to serve the defendant by email transmission retroactive to the date of the filing of the motion is granted. The defendant is ordered to pay security for costs in the amount of $5,000 by deposit with the Court within 45 days of these reasons, failing which the appeal will be struck without further order. The plaintiff's filing deadlines on the appeal are suspended until the security for costs is paid in full.

[54] This motion and the defendant's late request to adjourn it occasioned two appearances. Costs in favour of the plaintiff will be in the amount of $500, all-inclusive, payable forthwith and in any event of the cause.

"Mainella JA"