86-00

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Docket: CI 95-01-90718
(Winnipeg Centre)
Indexed as: Sant v. Jack Andrews Kirkfield Pharmacy Ltd.
Cited as: 2001 MBQB 268

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	)	COUNSEL
	)	
LYNETTE SANT,	)	Plaintiff:
	)	Anthony H. Dalmyn
Plaintiff,	)	
- and -	)	Defendant:
	)	Michael G. Finlayson
	)	and Darcie Yale
JACK ANDREWS KIRKFIELD	)	
PHARMACY LTD.,	)	
	)	Judgment delivered:
Defendant,	)	October 18, 2001.

SCHULMAN J.

[1] This is an opposed motion brought by the plaintiff for an adjournment of the trial scheduled for October 22 to November 16, 2001. I heard the motion in my capacity as pre-trial judge. I have made the following order, with reasons to follow:

> PROVIDED that the plaintiff pays into court the sum of $12,000.00 as additional security for costs by the close of the court office on October 18, 2001 (there being $5,000.00 held in trust at the present time) and that the plaintiff provides a written undertaking to pay all costs thrown away on a solicitor-client basis, the motion to adjourn is granted. Unless the plaintiff makes strict compliance with these requirements, the motion to adjourn is dismissed with costs.

[2] The grounds on which the adjournment is sought are that:

(i) the plaintiff is not represented by counsel and is incapable of conducting the trial without counsel;

(ii) the plaintiff has not subpoenaed her witnesses and needs time in order to make the arrangements necessary to get the witnesses to court; and

(iii) the plaintiff requires time to raise money to pay fees of witnesses and engage counsel.

[3] I begin with a brief word about the procedure followed. No notice of motion has been filed nor affidavit of the plaintiff. There being no objection taken by counsel for the defendant, this court permitted Mr. Dalmyn, counsel for the plaintiff on this motion only, to relate facts gathered by him from a brief review of the plaintiff's file and some information provided by the plaintiff and by five exhibits filed by Mr. Dalmyn at the hearing.

[4] The Queen's Bench rules that pertain to the motion are those relating to adjournment of trial and security for costs. They are as follows:

> ADJOURNMENT OF TRIAL
> 52.02 A judge may postpone or adjourn a trial to such time and place, and on such terms as are just.
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> SECURITY FOR COSTS - WHERE AVAILABLE
> 56.01 The court, on motion in a proceeding may make such order for security for costs as in the particular circumstances of the case is just, including where the plaintiff or applicant,
> (a) is ordinarily resident outside Manitoba;
> (b) has another proceeding for the same relief pending;
> (c) has failed to pay costs as ordered in the same or another proceeding;

(d) is a corporation, association or a nominal plaintiff, and there is good reason to believe that insufficient assets will be available in Manitoba to pay costs, if ordered to do so; or
(e) a statute requires security for costs.

[5] The plaintiff and her brother, Kenny Sant, sued the defendant pharmacy for damages for negligence in packaging, labeling and dealing with a container of phenol, which spilled. Mr. Sant is a courier who received the container in question from the defendant with instructions to deliver it. It spilled while in his car in July 1993. The action was commenced in 1995. Mr. Sant sued for damages suffered by him physically and for financial loss. The plaintiff, who was not present at the time of the spill, sued for damages suffered by her in excess of $500,000.00.

[6] The action has been set down for trial three times at the instance of the defendant. Initially, it was set for trial from February 7 to 25, 2000, at a time when the plaintiff was representing herself. In September 1999, the plaintiff retained counsel in the person of Joe Aiello. On January 21, 2000, at the plaintiff's request and with the consent of the defendant, the trial dates were cancelled and new dates set for November 14 to December 8, 2000. The defendant settled the action with Mr. Sant in October 2000. In November 2000, the plaintiff paid Mr. Aiello a retainer of $40,000.00 on account of fees and disbursements. On November 7, 2000, the plaintiff moved for an adjournment of the trial set to begin on November 14, 2000. This court granted the motion on the ground that a critical witness for the plaintiff, Dr. Gesser, would not be

available to testify at the trial due to personal commitments. The order was granted on the following conditions:

(i) plaintiff to pay all costs thrown away;

(ii) plaintiff to pay into court by November 10, 2000, the sum of $5,000.00 as security for costs;

(iii) counsel for the plaintiff to provide to counsel for the defendant written reports of Dr. Gesser, a toxicologist, by December 31, 2000;

(iv) if security not posted by November 10, 2000, adjournment refused;

(v) the pre-trial conference will reconvene on first day available in January 2001; and

(vi) costs of this motion in the sum of $500.00 to defendant payable forthwith.

In June 2001, I made a finding that a full set of solicitor-client costs for work thrown away and done on behalf of the defendant between June and November 2000, which would be lost, totalled $17,130.70. I awarded an amount less than a full set of solicitor-client costs based on the fact that the adjournment was necessitated by a lesser kind of misconduct on the part of the plaintiff and my finding as to what was just in the circumstances. I awarded to the defendant costs thrown away equal to one-half of the above-noted amount, that is, the sum of $8,500.00. My reasons for doing so are dated June 13, 2001.

[7] At a pre-trial conference held on January 16, 2001, new trial dates were set for October 22 to November 16, 2001. As of January 16, 2001, the plaintiff's case was ready for trial. She had competent counsel. In the ordinary course of events, no further pre-trial conferences were to be held. On June 29, 2001, Mr. Aiello, who must have been aware of her financial circumstances, asked the plaintiff for a further retainer of between $5,000.00 and $10,000.00. He stated in a letter to his client:

> . . . we discussed whether or not to appeal Justice Schulman's decision on costs. You had indicated that we ought to await the final outcome of the trial if possible before deciding whether or not to appeal. I advised you that I will attempt to delay taking out the order which would then allow that to occur.
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> (emphasis added)

He concluded the letter by stating that he was prepared to discuss the matter with her if she would contact him on receipt of the letter. On receipt of the letter, the plaintiff fired Mr. Aiello and signed and filed a notice of intention to act in person. Subsequently, the plaintiff attempted to retain other counsel. In or about the month of September 2001, Martin Corne, Q.C., requested an urgent hearing and appeared before me with counsel for the defendant. Mr. Corne stated that, while he had not agreed to take on conduct of the trial, the plaintiff had a concern arising from untimely production by counsel for the defendant of an expert's report. The matter was resolved by agreement, under which the plaintiff could obtain a report from her expert in response and serve it on counsel for the defendant, up to the opening of the trial. The plaintiff did not seek an adjournment of the trial on that occasion. Apparently, Mr. Corne declined to

take on the case, and Mr. Dalmyn was first approached by the plaintiff in early October 2001.

[8] The plaintiff applied to Legal Aid Manitoba for a certificate to engage counsel, and her application has been refused. The notice of refusal states that ". . . the Board of Directors established a policy in the fall of 2000 which stated that Legal Aid ought not to pay for plaintiff civil suits unless the case was of public interest to low income people generally re civil litigation".

[9] Rule 52.02 provides that the court may adjourn a trial on such terms as are just. The granting of an adjournment depends on its being just from the point of view of both parties. The rule relating to security for costs was discussed by my colleague Hanssen J. in ***DeBono v. Smith et al.*** (1989), 62 Man.R.(2d) 98. At pp. 99-100, after quoting Rule 56, Hanssen J. stated:

> [3] Factors, in addition to those set out in rule 56.01, which the court may take into consideration in exercising its discretion, include:
>
> (a) the apparent merits of the plaintiff's case;
> (b) the amount of costs the defendants have already incurred in defending the action;
> (c) the amount of the costs that might be assessed against the plaintiff, if the plaintiff is unsuccessful;
> (d) whether there is reason to believe the plaintiff has insufficient assets to satisfy a judgment for costs;
> (e) whether the plaintiff has any assets in Manitoba that would be available to satisfy a judgment for costs;
> (f) whether the plaintiff resides or carries on business in a reciprocating state under the **Reciprocal Enforcement of Judgments Act**, R.S.M. 1987, c.J20;
> (g) whether the Plaintiff has any assets in a reciprocating state that would be available to satisfy a judgment for costs;
> (h) whether there is reason to believe the plaintiff might attempt to avoid paying a judgment for costs;
> (i) whether there is reason to believe an order for security for costs

might have the effect of preventing a plaintiff from proceeding with a meritorious claim;

(j) the manner in which the proceedings have been conducted by the parties.

. . . . .

[7] The court must take care to ensure that an order for security for costs is not used by a defendant to defeat a valid claim by a plaintiff. Accordingly, when a plaintiff seeks to avoid an order to provide security on the basis of his own impecuniosity, the court must proceed cautiously. This is especially so where the plaintiff alleges that his inability to provide security flows from the very actions of the defendant which form the subject matter of the action. However, where a defendant would otherwise be entitled to an order for security for costs and a plaintiff seeks to avoid such an order on the basis of his own impecuniosity, the plaintiff must demonstrate not only that he has insufficient financial resources to post security, but must also show why the interests of justice demand that he be allowed to proceed without being required to give security.

[8] Mr. DeBono has failed to convince me that he has a meritorious claim against the defendants. He has made serious and sweeping allegations of fraud and other misconduct against the defendants. These have been denied by the defendants. Mr. DeBono has not shown that there is a likelihood he will be able to substantiate his allegations at trial.

In the case of ***Gray v. Webster***, [1998] 8 W.W.R. 690 (Man. C.A.), Scott C.J.M. stated, after referring to rule 56.01 and the judgment in ***DeBono v. Smith et al.***:

[13] Manitoba and Nova Scotia would appear to be the only two Canadian jurisdictions that have a rule as to security for costs which specifically gives the court a general jurisdiction to order security over and above the enumerated grounds. By way of contrast, Rule 56.01 of Ontario's Rules of Civil Procedure, for example, states that the court "may make such order for security for costs as is just *where it appears that* ..." (emphasis added). Six enumerated grounds then follow. The rules in most Canadian jurisdictions are to similar effect (as we shall see, British Columbia has no rule at all). In England as in Ontario, the court's discretion to be "just" is combined with enumerated grounds.

[14] Regardless, however, of the precise wording of the rule as to security for costs, it is clear from a review of authorities that the question of delay is an important one in considering whether it is "just" to grant an order for security. Clearly, there has been much delay in this case, which

> the motions court judge characterized as "staggering," and the responsibility of the plaintiffs. But is it all the plaintiffs' fault? . . .
>
> . . . . .
>
> [30] One other observation needs to be made in light of the heavy reliance placed by the motions court judge on the "checklist" set forth in *DeBono v. Smith*. While the enumerated factors suggested in *DeBono* are a handy guide, they should not be taken as an exhaustive list to be routinely considered in every case. They are not fixed judicial add-ons to the enumerated grounds set forth in Rule 56.01. Not all of the examples listed in *DeBono* will be relevant or appropriate in every case. A good example is this case, where it would not have been proper to take into account "the apparent merits of the plaintiff's case," one of the suggested factors enumerated in *DeBono*.
>
> [31] Particularly in light of the unique wording and structure of the Manitoba rule, it is crucial that each case be looked at on its own merits to determine whether "in the particular circumstances" it is "just" to order security for costs. In this case, it was not.
>
> [32] It is also essential, despite the discretion given under Rule 56, that judges considering an application for security for costs exercise caution to ensure that the rule is being used for the purpose for which it was intended. Queen's Bench Rule 20 provides a summary mechanism for plaintiffs and defendants to move for judgment if it is thought that a claim or defence lacks merit. Where there is concern about delay on the part of a plaintiff, Rule 24 enables a defendant to make a motion for dismissal of the action. There is now no justification, if there ever was one, to use the rule for security for costs as a shortcut device to "get rid of" an action perceived to be of dubious merit, or where there has been undue delay on the part of the plaintiff. 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. An example would be where a plaintiff, though resident in Manitoba, has virtually all his assets located in an off-shore jurisdiction.

[10] I make the following observations. The ultimate decision under rule 52.02 as to whether it is just to grant the adjournment and, if so, the terms, will be dealt with in ¶14. The issue arising from rule 56.01 as to whether it is just to order security will be dealt with in ¶14. The particular circumstances referred to in subparas. (a) to (e) of rule 56.01 are not applicable to this case.

[11] I next examine the factors referred to by Hanssen J. in ***DeBono v. Smith et al***:

(a) I would say that the plaintiff's claim is not frivolous, but she will have an uphill fight in order to succeed. One could not say that there is a probability of success.

(b) The cost of defending the action has been substantial. Costs thrown away for the November 2000 adjournment alone exceeded $17,000.00. The defendant likely spent as much preparing for the trial scheduled for October 22, 2001.

(c) Manitoba courts usually award against an unsuccessful plaintiff costs on a party-party basis. Party-party costs are but a fraction of the legal costs incurred by a successful defendant.

(d) Based on the submissions of counsel, there is reason to believe that the plaintiff has insufficient assets to satisfy a judgment for costs.

(e), (f) and (g)

There is no evidence to suggest that the plaintiff has assets outside of Manitoba.

(h) There is no reason to believe that the plaintiff might attempt to avoid paying a judgment for costs, although she will not be able to pay it.

(i) An order for security for costs might well prevent the plaintiff from proceeding with the trial of a claim that may not be meritorious.

(j) Since June of 2001, the plaintiff has conducted the case in a manner which will cause prejudice to the defendant. As cautioned in ¶7 of ***DeBono v. Smith***, this court is aware that any order for security for costs should not be used by the defendant to defeat a valid claim and, having established her own impecuniosity, she must show why the interests of justice demand that she be allowed to proceed without being required to give security.

[12] I also must consider the principles set out in ¶14 of the ***Gray v. Webster*** decision; the question of whether it is just to grant an order for security; the apparent merits of the case; and the caution articulated against using these rules as a short-cut device to get rid of an action perceived to be of dubious merit.

[13] Dealing with the three grounds set out in ¶2 of these reasons:

1. Inability to Conduct Trial without Counsel

It may be that the plaintiff is incapable of conducting the trial. Some of the issues will be complex. During a substantial period of time, she has conducted her claim without counsel, and the evidence shows that she has had an informed say in making critical decisions as to how the case would be conducted, after Mr. Aiello assumed conduct of the case.

2. Witnesses not Subpoenaed

There being no evidence to the contrary, I assume that Mr. Aiello, when he obtained new trial dates in January 2001, contacted the witnesses and apprised them of the new dates. I reject this ground.

3. Time to Raise Money

There is some validity to the claim that the plaintiff may need time to raise money to engage counsel. There is insufficient information before me to establish the need for funds to obtain the attendance of Manitoba witnesses. Although a potential witness resides in Texas, it appears that the plaintiff may have decided in or about June 2001 that he not be called.

[14] In the final analysis, this court must make an order based on a conclusion as to what is just (rule 52.02 and 56.01, ***DeBono v. Smith et al.*** and ***Gray v. Webster***). There is a significant risk that the order made will impact negatively on the plaintiff's ability to present her case at trial. As I have indicated, however, she had a lawyer and was ready for trial in June 2001, and it was her decision that the lawyer should be fired. The defendant has borne the costs of defence of the action, strenuously opposed the November 2000 adjournment, will likely be unable to recover at least part of the costs ordered in its favour in June 2001, and if another adjournment were granted, it would have to bear costs thrown away on this occasion without having a chance to recover them or realize them from the plaintiff. In granting the adjournment on the conditions stated in November 2000, this court made the finding that the plaintiff was guilty of conduct which I found to be a lesser kind of misconduct, and I ordered the

plaintiff to pay one-half of the solicitor-client costs thrown away. This time, this court finds the plaintiff's conduct to be more egregious than in November 2000. I would characterize the conduct as misconduct deserving of rebuke, which, if tolerated, will cause significant financial loss to the defendant. In all of the circumstances, I concluded that it is just to make the order described in ¶2 above.

J.