CITATION: Frantz v. NB Thrilling Films 4 INC. et al., 2017 ONSC 4637
COURT FILE NO.: 16-70457
DATE: 2017/07/31

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Adrienne Frantz, Plaintiff

AND

NB Thrilling Films 4 INC., Pierre David, Cinthia Burke, and Curtis Crawford, Defendants (Moving Party)

BEFORE: C.T. Hackland J.

COUNSEL: Robyn Wishart, for the Plaintiff

Sean Van Helden, for the Defendants

HEARD: June 26, 2017 (Ottawa)

ENDORSEMENT

[1] The defendants bring this motion for security of costs. The plaintiff is an American actress residing in California, with no assets in Ontario. She was injured while filming a movie in Ottawa when a dog, owned by or under control of the defendants, ran onto the set and jumped on the plaintiff and a male actor during the filming of a love scene. The dog is alleged to have bit or scratched the plaintiff's face.

[2] The plaintiff claims general damages of $350,000 and special damages of $5,000,000 for injuries arising from the dog bite. A jury notice has been served. The defendants have filed on this motion internet images of the plaintiff's face showing no evidence of any scaring. The plaintiff's affidavit states that she sustained emotional injuries including PTSD, Graves' disease, anxiety and depression and has been unable to work for certain periods of time, all of which she attributes to the dog bite.

[3] The defendants suggest both that the plaintiff's claim for any compensation beyond a claim for nominal damages, is frivolous and overstated and that her claim is likely covered by and thus barred by the provisions of the *Workplace Safety Insurance Act* 1997, S.O. 1997, c. 16.

[4] The plaintiff in her affidavit, does not suggest that she is impecunious and she has provided the addresses for two California properties she owns. She has not specifically challenged the quantum of the security for costs sought by the defendant's ($90,000), but submits that any such award, if granted by the court, should be paid in installments at appropriate milestones during this litigation.

[5] Examinations for discovery have not yet been scheduled. It would be premature to draw any conclusions as to the merits of the plaintiff's claim (apart from recognizing that dog bite injuries normally result in a strict liability analysis: see: *Dog Owners Liability Act*, R.S.O. 1990, c. D. 16). The Court is not in a position to evaluate the potential worker's compensation claim which will be adjudicated in another forum.

[6] The principal argument advanced before this court was addressed to the issue of whether security for costs should be refused on the basis that plaintiff's counsel has taken out a valid "DAS After-the-Event legal expenses insurance policy", which arguably would cover an award of costs in the defendants' favour in relevant circumstances.

[7] Adverse costs insurance policies or "after the event costs insurance", or "ATE insurance" policies, are becoming more common and are usually sought by plaintiff's counsel retained pursuant to contingency fee arrangements. Several cases have considered these policies in the context of, or in answer to motions for security for costs. See: *Alary v. Brown*, 2015 ONSC 3021; *Grotz v. 1392275 Ontario Inc.o/a Hilton Garden Inn Toronto/Markham, et al*, 2016 ONSC 2688; *Shaw v. Loblaws Companies Limited*, 2015 ONSC 598.

[8] These cases hold that such policies are a factor to consider when the court is asked to exercise its discretion for or against ordering security for costs. The circumstances of each case and the terms of the policy must be looked at.

[9] In the present case I would exercise my discretion to order security for costs to be paid into court unless I am satisfied that the ATE policy constitutes an adequate substitute and reasonably protects the defendants' interests.

[10] The defendants' position is that the ATE policy is inadequate due to the inability of the defendants to recover under the policy and due to the policy's exclusions and conditions which may give rise to denial of coverage.

[11] It is true that the defendants are not a party to the ATE contract of insurance and thus could not sue on it per se, due to the rules of privity of contract. On the other hand, given the representations in these policies made specifically to both counsel and indeed to the court, as in this case, a cause of action in tort and possible equitable remedies may well arise in the event the policy is not honoured. Claims based on contract may be denied to the defendants, but tort claims, claims for costs and possibly other causes of action may be available.

[12] The plaintiff has filed on this motion a letter under the signature of the Vice President of Chief Legal Officer of DAS Legal Protection Insurance Company Limited, 390 Bay Street, Toronto, stating in part:

> This letter is prepared on the understanding that it may be provided to the court and/or defendants to satisfy concerns regarding the ability of our insured client, Adrienne Bailey (a.k.a. Adrianne Frantz), to satisfy a covered peril under their DAS underwritten After-The-Event (ATE) legal expenses insurance policy.
>
> DAS, a subsidiary of Munich Re, is a licensed and regulated insurance company in Canada (licensed both federally and within all provinces and territories) and is part of the DAS group; the largest specialist Legal Expenses Insurer globally, operating across Europe and North America.

The plaintiff has also provided opposite counsel and the court with a letter from Nick Robson BA LLB managing director, addressed to plaintiff's counsel and intended for filing with the court:

> DAS is a licensed and regulated insurance company within Ontario, Canada, and is a member of the PACICC, and is a 100% subsidiary of Munich Re (A+ rated reinsurance company). So basically, is good for the cash!

[13] The defendants argue that an ATE costs insurance policy does not meet the requirements for security to be given to the court under the *Courts of Justice Act*, specifically, section 115 of the *Courts of Justice Act* provides that security given in respect of a court proceeding must be in the form of a bond of an insurer, not an insurance policy. The section states:

> **Security**
> **115** Where a person is required to give security in respect of a proceeding in a court, a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance is sufficient, unless the court orders otherwise.
>
> *Courts of Justice Act*, R.S.O. 1990, c. 43, s 115

[14] I agree that an ATE policy does not constitute a "bond of an insurer" under section 115 of the *Courts of Justice Act*. However, there is nothing in the wording of section 115 that requires security given in respect of a court proceeding necessarily to be in the form of a bond of an insurer. Rather the section deems a bond of an insurer to constitute sufficient security unless the court orders otherwise.

[15] I accept the submission of plaintiff's counsel that any payments under the policy must be directed by the insurer to her and not to her client and as such could be subject to further court order. Moreover, in answer to several policy conditions which enable the insurer to suspend coverage in regard to certain actions of the plaintiff personally (matters obviously outside the defendants' knowledge and control), plaintiff's counsel has personally undertaken to advise defence counsel within 30 days of any such development. At that point, defendants would be free to seek payment into court for security for costs or other direction of the court.

[16] I note as well that ATE policy in this case, covers the defendants' costs up to the date of cancellation should that event occur. The policy before Smith J. in *Alary* lacked such a provision and this factor was material to his decision to not accept the ATE policy as an adequate substitute for payment into court.

[17] In addressing the sufficiency of the ATE policy in this case, the court was most assisted by the analysis of R. MacKinnon J. in *Grotz*, in which he upheld the ruling of Master Brott in which the Master determined that the ATE policy, apparently the same policy before the court in the present case, was an adequate substitute for payment into court. Justice MacKinnon made these observations which I respectfully adopt:

> [8] DAS Legal Protection Company is a federal Canadian insurance company authorized to provide legal expense insurance in Canada. The insurance

coverage in question pays up to $100,000 for any adverse costs award in the action, in favour of the defendant. That policy is now in force and will pay when:

(a) An unsuccessful result in a plaintiff's case leads to legal costs and disbursements payable to the defendant by the plaintiff;

(b) A withdrawal of a plaintiffs case results in legal costs and disbursements payable to the defendant; and/or

(c) An award is given to a plaintiff which is less than a formal offer to settle made by the defendant, resulting in legal costs and disbursements payable to the defendant.

[9] In the event the policy is suspended or cancelled, it will cover the defendant's costs up to the date the policy is suspended or cancelled.

[10] Counsel for Hilton has taken me to no case law which interprets this specific policy. The Master clearly considered the specific policy terms of the adverse costs insurance in question. She concluded in her reasons that while it was conditional, it was certain enough when considered with other factors which she detailed - such that a security for costs order against the Plaintiff would be unjust. In coming to the decision she did, the Master had not only the specific terms to consider, but also a personal undertaking from the Plaintiffs solicitor to advise the defendants of any suspension, cancellation or issue with that policy.

[11] Neither the specific policy provisions in this case nor the issue of the personal undertaking by Plaintiff's counsel, were before the court in *Alary v. Brown*, 2015 ONSC 3021, or in *Shah v. Loblaws Companies Limited*, 2015 ONSC 5987. The court in Alary held that a differently worded adverse costs insurance policy without any provision covering costs incurred by a defendant until cancellation was an inadequate substitute for payment of security into court. By contrast, the policy at bar contains those provisions and was in the opinion of Master Brott, an adequate substitute. As I have noted, this particular policy wording has not previously been judicially considered. It was clearly reviewed and considered in detail by Master Brott in the case at bar. I have reviewed the policy and conclude that she was correct. In coming to the decision that she did, the Master correctly followed principles set out in *Alary and Shah*.

[18] In summary, I exercise my discretion and declare that the ATE policy furnished by the DAS Legal Protection Company will be accepted as security for the defendants' costs in lieu of payment into court. The identification of the ATE policy is to be set out in the recital to the

court order as well as the undertaking of plaintiff's counsel. In the event of any material change in circumstances this order may be reviewed and if appropriate, varied.

[19] If the plaintiff wishes to seek costs of this motion a brief written submission must be filed within 14 days of the release of this endorsement and the defendants may respond within 14 days of receiving the plaintiff's submission.

Justice Charles T. Hackland

Released: July 31, 2017

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