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COURT OF APPEAL FOR ONTARIO
BLAIR J.A. (In Chambers)

B E T W E E N:

JEAN-PAUL LARABIE	)	Richard R. Marks for the appellant
	)	
Plaintiff (Appellant)	)	
	)	
- and -	)	
	)	
JOHN-PAUL MONTFILS aka BROTHER IRENEE, JOHN DOE aka BROTHER ANSELME, ST. JOSEPH'S TRAINING SCHOOL, LES FRÈRES DES ÉCOLES CHRÉTIENNES D'OTTAWA LTÉE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF OTTAWA	)	Ronald R. Caza for the respondent, Les Frères des écoles chrétiennes d'Ottawa Ltée
	)	Thomas F. Wallis for the respondent, The Roman Catholic Episcopal Corporation of Ottawa
	)	
Defendants (Respondents)	)	
	)	Heard: January 15, 2004

BLAIR J.A.:

[1] Les Frères des écoles chrétiennes d'Ottawa ("Les Frères") and The Roman Catholic Episcoal Corporation of Ottawa ("the Church") each move (i) for an order staying this action because of the non-payment of cost orders made against the appellant, and (ii) for an order for security for costs respecting the within appeal. The background giving rise to these motions, briefly stated, is as follows.

Background

[2] In 1996 Mr. Larabie commenced a different action claiming damages for sexual and physical assaults he alleges he suffered while a resident at St. Joseph's Training School for four years during the early 1950's ("the first action"). The allegations in this action are essentially the same, except that in the first action two different individuals were named as defendants.

[3] Subsequent to the commencement of the first action, Mr. Larabie learned that he had named the wrong individuals as defendants and he moved to add John-Paul Montfils ("Brother Irenee") and John Doe aka Brother Anselme ("Brother Anselme") as defendants. At the same time, the defendants moved for an order dismissing the action as against the originally named individual defendants. On October 2, 1998, Manton J. dismissed Mr. Larabie's motion and granted the motion dismissing the action against the two individuals, with costs against the plaintiff in favour of the two individuals on a solicitor-client basis to be assessed.

[4] Mr. Larabie did not appeal Justice Manton's order.

[5] At the beginning of the year 2000, Mr. Larabie moved to amend his statement of claim to add allegations against Brothers Irenee and Anselme, and again to name them as defendants. Master Beaudoin dismissed this motion on the basis that it was virtually identical to the motion brought before Manton J., which had not been appealed, and the issues were therefore *res judicata*. Costs were awarded against the plaintiff in the amount of $3,495.26 payable forthwith.

[6] Mr. Larabie appealed Master Beaudoin's order to Panet J., who dismissed the appeal on the basis of deference to the Master's exercise of discretion, with costs against the plaintiff fixed at $3500 payable forthwith. Métivier J. rejected Mr. Larabie's request for leave to appeal to the Divisional Court, on the ground that there was no issue of public importance. Costs were again awarded against the plaintiff in the amount of $4000, payable forthwith.

[7] Next, Mr. Larabie attempted to appeal directly to this court from the Master's order, arguing that it should be treated as a final, rather than an interlocutory, order. Once more, he was unsuccessful – on the basis that this court lacked jurisdiction to hear the appeal – and costs were awarded against him, to be assessed.

[8] Thereafter, on May 25, 2002, Justice Roy granted summary judgment dismissing the action against Les Frères on the basis that their liability for breach of fiduciary duty depended upon the allegations made against the individuals who had been named as defendants but against whom the action was now dismissed as a result of the order of Manton J. No other individual defendants were named, since Mr. Larabie had failed in his attempts to amend his statement of claim to that effect. Again, costs were awarded against the plaintiff, fixed at $6500. Later, the action against the Church was disposed of as well.

[9] Following this series of setbacks Mr. Larabie decided to start over again. In October 2002, he commenced the present action. His claims are similar to the claims made in the first action, but this time he has named Brother Irenee and Brother Anselme as defendants, along with the corporate and institutional defendants. Les Frères moved to strike the statement of claim. On August 22, 2003, Forget J. did so, on the ground that the new action constituted an abuse of process. He awarded costs to Les Frères in the amount of $7,500 and to the Church in the amount of $2500.

[10] The appeal presently pending before this court is from the order of Justice Forget.

[11] Mr. Larabie has paid none of the outstanding costs awards. By my arithmetic they total $27,495.26.

Analysis

[12] The rules that pertain to these motions are the following:

> 56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
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> (a) the plaintiff or applicant is ordinarily resident outside Ontario;
>
> (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
>
> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.
>
> 60.12 Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,
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> (a) stay the party's proceeding;
>
> (b) dismiss the party's proceeding or strike out the party's defence; or
>
> (c) make such other order as is just.
>
> 61.06 (1) In an appeal where it appears that,

> (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
>
> (b) an order for security for costs could be made against the appellant under rule 56.01; or
>
> (c) for other good reason, security for costs should be ordered,
>
> a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceedings and of the appeal as is just.

[13] Here, there is no doubt that Mr. Larabie has not paid numerous outstanding orders for costs against him, in significant amounts; that he is a non-resident of Ontario; and that his has insufficient assets in Ontario to pay those costs or the costs of the pending appeal. There is ample basis upon which the court could exercise its discretion both to stay the action and to order security for costs on the appeal.

[14] Mr. Larabie has caused the defendants to respond to the various proceedings outlined above, in all of which he has been unsuccessful, and has refused to pay any of the outstanding costs orders against him. Now he has commenced a new action, making the very same allegations as those in the proceeding in which the courts have already ruled against him. That action has been dismissed, with costs (also unpaid) and Mr. Larabie has appealed to the Court of Appeal. The moving parties submit that the court should exercise its discretion under the foregoing rules and stay the action until Mr. Larabie has paid the outstanding costs and, further, order that he provide security for costs of the appeal.

[15] Although the decision is not an easy one, I am not prepared to do so, for the following reasons.

[16] I am satisfied on the record that Mr. Larabie is an impecunious plaintiff. His income is limited to approximately $840 per month in the form of a disability pension from the Federal Government and he becomes eligible for the old age pension this month. He has no assets save for basic clothing and a few personal belongings. He simply has no means of satisfying the outstanding costs orders or of posting any meaningful amount as security for costs. To accede to the moving parties' requests would end the proceedings for all practical purposes and, in effect, bar him from the judicial process without him

having had a final chance to persuade the court that he should be permitted to have his claims adjudicated on the merits.

[17] There is ample authority for the proposition that the courts are reluctant to deprive a worthy but impecunious litigant of the opportunity to have his or her claim adjudicated when it is not plainly devoid of merit: see, for example, *Rackley v. Rice* (1992), 8 O.R. (3d) 105 (Ont. Div. Ct.); *John Wink Ltd. v. Sico Inco*(1987), 57 O.R. (2d) 705 (Ont. H.C.); *Solcan Electric Corp. v. Viewstar Canada Inc.* (1994), 25 C.P.C. (3d) 181 (Ont. Gen. Div.); *1056470 Ontario Inc. v. Choo-Eng Goh* (1997), 34 O.R. (3d) 92. Although these are lower court decisions the same principle should apply in appeals in this court, in my view.

[18] The problem here is that Mr. Larabie has never had the opportunity to have his case considered on the merits. In hindsight, of course, it might have been better if the original order of Manton J. had been appealed. When that was not done the substance of his claim were overshadowed by procedural questions as to whether or not the matter had become *res judicata* and thereafter whether the various requisites for appeal or leave to appeal had been met.

[19] There does seem to be at least some foundation for Mr. Larabie's claim on the merits, however. A medical report from a psychiatrist, Dr. Wayne Quan, records that he does not have "any doubts that Mr. Larabie is contending with chronic depression and an ongoing post-traumatic stress disorder as a result of abuse received a great number of years ago". An affidavit from a former fellow-student at St. Joseph's attests to at least one incident of abuse.

[20] Justice Forget made a difficult decision in the exercise of his discretion in dismissing the second action. He did so on the basis that it constituted an abuse of process, primarily on the basis that it was an attempt to re-litigate something that had already been decided. He acknowledged, however, that "la question soulevée par la motion est épineuse", and I am not able to conclude there is good reason to believe that Mr. Larabie's appeal is frivolous and vexatious. Indeed, Mr. Caza stated he is not taking the position the appeal falls into that category, although Mr. Wallis did. It will be for this court to consider on the appeal whether Mr. Larabie's new action is an abuse of process on the basis of *res judicata* or some other ground.

[21] I am not unmindful of the moving parties' arguments outlined above, nor am I unsympathetic towards the position in which they find themselves. Litigants are not free to ignore or flout orders of the court awarding costs against them or to re-litigate matters that have truly been litigated and decided before. Having considered all of the circumstances, however, and having weighed and balanced the various competing interests and factors in relation to this matter, I conclude that I should exercise my

discretion in favour of permitting Mr. Larabie to proceed with the appeal, and to do so without having to post security for costs. I expect that he will do so in a reasonably expeditious fashion.

Disposition

[22] Accordingly, both motions are dismissed. Costs are reserved to the panel hearing the appeal.

"Robert A. Blair J.A."

Released: January 22, 2004