

Case Name:

Enescu v. Wawanesa Mutual Insurance Co.

Between

**Cornel Enescu and 1380470 Ontario Inc., and
The Wawanesa Mutual Insurance Company, Maskell
Insurance Brokers Ltd. and William Maskell**

[2005] O.J. No. 3058

17 C.B.R. (5th) 283

2005 CarswellOnt 6572

Court File No. 03-CV-251448CM1

Ontario Superior Court of Justice

E.M. Stewart J.

Heard: June 15, 2005.

Judgment: June 22, 2005.

(16 paras.)

*Civil procedure -- Costs -- Security for costs -- Where plaintiff is corporation or association --
Where plaintiff insolvent or impecunious.*

Application by the defendant Wawanesa Mutual Insurance for an order to require the plaintiffs to post security for costs. Wawanesa provided theft and business interruption coverage to the plaintiffs. The plaintiffs sued Wawanesa for its refusal to compensate them for loss of merchandise and damage to physical property that resulted from a robbery. The plaintiff Enescu subsequently made a proposal under the Bankruptcy and Insolvency Act. Enescu and the plaintiff 1380470 Ontario agreed to pay proceeds recovered from the lawsuit, less one third for legal fees, to Enescu's trustee for distribution to his creditors. Wawanesa sought security because 1380470 was a corporation and there was good reason to believe that the plaintiffs had insufficient assets in Ontario to pay its costs. The plaintiffs claimed impecuniosity. They failed to provide affidavits to substantiate impecuniosity or to attest to their inability to raise funds from any source to provide security.

HELD: Application allowed. The plaintiffs were required to post security of \$60,000 within 60 days. The plaintiffs failed to establish they were impecunious. There was no evidence that they could not raise the funds to post the requested security.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, s. 65.3, s. 136(1)(d)

Income Tax Act, s. 224(1.2)

Ontario Rules of Civil Procedure, Rule 56.01(1)(d)

Counsel:

Martin P. Forget, for the Moving Party/Defendant Wawanesa Mutual Insurance Company

Brian Morris and Justin M. Jakubiak, for the Plaintiffs/Respondents

James Klein, for Martin Sole and Segal & Partners Inc.

ENDORSEMENT

1 E.M. STEWART J. (endorsement):-- The Defendant Wawanesa Mutual Insurance Company ("Wawanesa") brings this motion seeking an order requiring the Plaintiffs to post security for costs pursuant to Rule 56.01(1)(d). In the alternative, it seeks an order adding Martin Sole of Segal & Partners Inc. as a party to these proceedings.

2 This action was commenced on June 27, 2003. The Plaintiffs sue under a policy of insurance which provided coverage for theft and business interruption. They claim damages from the Defendants arising out of the refusal by Wawanesa to compensate the Plaintiffs for their alleged loss of merchandise and damage to physical property experienced during a robbery at their business premises which is said to have occurred on December 26, 2002.

3 On February 10, 2004, the Plaintiff Cornel Enescu ("Enescu") made a proposal (the "Proposal") under the Bankruptcy and Insolvency Act. That Proposal was accepted by the required majority of creditors and was approved by order of the Registrar dated March 29, 2004.

4 Among the provisions of the Proposal are the following:

I, Cornel Dumitru Enescu, the above-named debtor, hereby make the following Proposal under the Bankruptcy and Insolvency Act (the "Act"):

1. (a) The Debtor and 1380470 Ontario Inc. are joint plaintiffs in a lawsuit commenced against:
 - i) The Wawanesa Mutual Insurance Company;
 - ii) Maskell Insurance Brokers Ltd.
 - iii) William Maskell

(collectively referred to as "the defendants")

- (b) The Debtor will cause the joint plaintiffs to pay the net proceeds recovered from the lawsuit from either a Court judgment or by way of a settlement with the defendants.
 - (c) The net proceeds are defined as the proceeds recovered from the defendants less payment of one-third of the proceeds recovered which will be paid to the joint plaintiff's solicitor - Morris Morris and Klein ("Morris"). The net proceeds will also be defined as the Proposal funds.
 - (d) The Proposal funds will be paid to the Trustee by Morris as soon as they are available.
 - (e) A copy of the claim filed by the joint plaintiff's is attached to the Proposal.
2. The Debtor agrees to not settle the claim for an amount of less than \$100,000 without the permission of the estate inspectors.
 3. The Debtor agrees that in the sixth (6th) month following Court approval of the Proposal, a meeting of inspectors will be held to consider the status of the lawsuit. Morris will also attend the meeting. At that meeting, the inspectors will have the option to either annul the Proposal or extend the time to continue with the lawsuit for a further six (6) months, following which a further meeting of inspectors will be held to again consider the status of the lawsuit and whether the Proposal should be annulled.
- ...
5. The Proposal funds shall be distributed to all creditors affected by the term of this Proposal, including without limitation, Claims of Canada Customs and Revenue Agency (Revenue Canada/"CCRA") Claims of Preferred Creditors and all Claims of Unsecured Creditors, as each are defined under this Proposal, in the following priorities:
 - i) An amount equal to the amount that they would have been entitled to receive under paragraph 136(1)(d) of the Act if the debtor had become bankrupt on the date of the filing of the Notice of Intention as well as any wages, salary, commissions, or compensation owing for services rendered after the date of the Proposal and before Court approval of the Proposal shall be paid to each of the debtor's employees (if any) immediately after Court approval of the Proposal;
 - ii) Claims of Revenue Canada, if any, outstanding at the time of the filing of the Proposal that could be subject to a demand under Section 224(1.2) of the Income Tax Act, shall be paid within six (6) months following Court approval of the Proposal;

- iii) The Trustee's fees, expenses, liabilities and obligations of the Trustee, including the proper fees and expenses of the Trustee's counsel arising out of this Proposal;
- iv) Claims of Preferred Creditors as defined in the Act; and
- v) Claims of Unsecured Creditors.

- 6. Unsecured creditors shall receive a pro rata share of the Proposal funds then remaining after the priority payments are provided for as outlined in Section 5(i), (ii), (iii) and (iv) of the Proposal.
- 7. Payment of claims of secured creditor(s) shall be paid in accordance with the present arrangements existing between the Debtor and the holders of secured claims, or as otherwise may be arranged between the secured creditor(s) and the Debtor.

...

- 10. Segal & Partners Inc., of the City of Toronto, in the Province of Ontario, shall be the Trustee under this Proposal and all monies payable under this Proposal shall be paid over to the Trustee. The Trustee shall make the payment of all interim and final dividends under the Proposal in accordance with the instructions provided by the inspectors of the estate (see paragraph 19).

...

- 12. Segal & Partners Inc., is acting in its capacity as Trustee under this Proposal and not in its personal capacity and no officer, director, employee or agent of Segal & Partners Inc. shall incur any obligations or liabilities in connection with this Proposal or in respect of the business or liabilities of the Debtor.
- 13. That, except as required under the Act, the Trustee shall no be obliged to take or institute any step, action or proceeding for the recovery of monies or rights due to the Debtor, the Debtor's estate or the creditors, including, but not limited to, any step or proceeding relating to any settlements, preferences or fraudulent conveyances, except as the Trustee decides in its sole discretion to do so.

...

- 24. Once all of the monetary payments that the Debtor is required to make to the Trustee have been made, the Debtor will be deemed to have satisfied the terms of the Proposal and will be eligible to receive the Certificate pursuant to section 65.3 of the Act.

5 As is evident from the Proposal, Enescu has agreed to distribute the net proceeds of recovery from this action, if any, which have been termed the "Proposal funds", to those creditors affected by

the terms of the Proposal to settle all amounts owing. Neither he nor the corporate plaintiff is bankrupt.

6 As noted above, Wawanesa now moves for an order for security for costs pursuant to Rule 56.01(1)(d), asserting with respect to 1380470 Ontario Inc. that the Plaintiff is a corporation and that there is good reason to believe the Plaintiffs have insufficient assets in Ontario to pay the costs of the Defendants if ordered to do so at trial.

7 Once it has been shown that the Plaintiffs have insufficient assets, as is the case here, the burden shifts to the Plaintiffs to show that they are either impecunious or, alternatively, have sufficient assets to pay the costs of the Defendant (see: *John Wink Ltd. v. Sico Inc.*, [1987] O.J. No. 5 (H.C.), (Q.L.) p. 3; *Hallam v. Canadian Memorial Chiropractic College*, [1989] O.J. No. 1399 (H.C.) (Q.L.) p. 5).

8 The Plaintiffs claim that they are impecunious and should not have to post security for costs. No affidavit from Enescu on his own behalf or on behalf of the corporate plaintiff has been filed to substantiate the alleged impecuniosity or to attest to any inability to raise funds from any other sources to post security for costs which may be ordered. An affidavit from Enescu's solicitor swears that Plaintiffs have been rendered impecunious because of the Defendants' conduct and points both to answers from Enescu on discovery as well as the Proposal to support that assertion.

9 Wawanesa does not take any issue with the substance of the Proposal. It merely wants to have some protection as to recovery of its costs if successful at trial. It wants to avoid being put in a situation akin to that so aptly described by Philp J.A. in *ABI Biotechnology v. Apotex (No. 2)*, [2000] 3 W.W.R. 217 (Man. C.A.), at p. 233:

Courts have determined that a corporate plaintiff without assets, manipulated by shareholders with assets, ought not to be able to say to the defendant, 'Heads I win, tails you lose'.

10 I do not consider that there is any reasoned basis upon which Wawanesa should be unable to succeed in this motion simply because it did not raise this issue when the Proposal was considered and approved. I view the subject as an entirely separate and distinct matter for proper determination in the proceedings in which Wawanesa has been sued.

11 On the material before me, I cannot conclude that the action is plainly devoid of merit. The principal issue, however, is whether the Plaintiffs have established that they are truly impecunious such that an order requiring them to post security for costs would prevent them from proceeding with the action and should not be granted. In these circumstances, I am of the opinion that the Plaintiffs have failed to discharge that burden.

12 It is evident from the Proposal that the creditors of Enescu would benefit from any award at trial. There is no evidence that the Plaintiffs could not raise funds to post the security requested in this case. I am therefore of the opinion that they should be required to post security for costs.

13 This same approach was taken by Nordheimer, J. in *Design 19 Construction Ltd. v. Marks*, [2002] O.J. No. 1091, in which he stated (at para. 15):

If the creditors are prepared to take the benefit of this action, then I fail to see why they should not also accept the burden of it. We are, of course, only speak-

ing of a requirement that security for costs be posted. If the plaintiff is ultimately successful, then those funds will be returned to the creditors. If the plaintiff is not, I fail to see why the creditors should be able to avoid the consequences of standing behind an unsuccessful action. I find, therefore, that the Master's conclusion that the plaintiff was impecunious in the absence of any evidence as to whether the creditors or plaintiff were in a position to fund the payment of security for costs reflects an error in principle.

14 In my view, it is only just that the Plaintiffs be required to post security for costs in this case. Counsel for the Plaintiffs concedes that the \$60,000.00 sought by Wawanesa for this purpose is reasonable. An order therefore shall go directing that the Plaintiffs post security for costs in the amount of \$60,000.00 within 60 days hereof.

15 In view of Wawanesa's success on what was pursued on the hearing of the motion as its primary relief, the alternative relief sought, i.e., an order adding the Trustee as a party to this action, is dismissed.

16 If the parties cannot agree on costs of the motion, written submissions may be delivered within 20 days of the date of release of this decision.

E.M. STEWART J.

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