**CITATION:** Grotz v. 1392275 Ontario Inc. o/a Hilton Garden Inn Toronto/Markham, et al, 2016 ONSC 2688
**NEWMARKET COURT FILE NO.:** CV-14-120827-00 and DC-15-810-00
**DATE:** 20160422

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | |
| BRENT GROTZ<br>Plaintiff (Respondent) | George Siotas, for the Plaintiff (Respondent) |
| **– and –** | |
| 1392275 ONTARIO INC. o/a HILTON GARDEN INN TORONTO/MARKHAM and PILEGGI LANDSCAPING CONTRACTING INC.<br>Defendant (Appellant) | Shannon R. Wood, for the Defendant (Appellant) 1392275 Ontario Inc.<br><br>No one appearing for the Defendant Pileggi Landscaping Contracting Inc. |
| | **HEARD:** April 15, 2016 |

## REASONS FOR DECISION ON MOTIONS

**R. MacKINNON J.:**

[1] The appellant/defendant, Hilton Garden Inn Toronto/Markham ("Hilton"), appeals the order of Master Brott dated May 14, 2015, which dismissed its motion for security for costs. That order found that the particular terms of adverse costs insurance for which the plaintiff, Brent Grotz ("Plaintiff"), had been approved, along with the accompanying Plaintiff's solicitor's undertaking, satisfied the established criteria for security for costs.

[2] Appellant interference is warranted only if the Master made an error of law, exercised her discretion on wrong principles or misapprehended evidence such that there is a palpable and overriding error. The standard for legal error is correctness. This appeal is not a re-hearing on questions of fact or mixed fact and law. An appellate court cannot substitute its interpretation of the facts or re-weigh evidence simply because it takes a different view of the evidence from that of the Master: *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 and also *Wellwood v. Ontario Provincial Police et al*, 2010 ONCA 386.

[3] It is the position of Hilton that the Master failed to properly apply the test for security for costs in finding that the particular adverse costs insurance in question (being a Legal Protection Insurance Policy issued by DAS Legal Protection Insurance Company) was adequate insurance. Hilton also argues that the Master's decision was in conflict with other Ontario case law. On both grounds of the appeal, I disagree.

**Background**

[4] On March 22, 2013, while a guest of Hilton, the Plaintiff slipped and fell on ice on a walkway from the hotel to its parking lot, injuring his knee and requiring surgery. The facts before the Master included that the ice on which he slipped was about five inches by eight or so inches in diameter, a Hilton manager later apologized to him for that ice, the contractor's snow log indicated the last general walkway salting and sanding happened approximately four and a half hours pre-slip and fall, and that the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, applied. Under s. 3(1) of that *Act*, an occupier of premises owes a duty to take such care to see that persons entering on its premises are reasonably safe while there. Higher risk areas demand greater vigilance and better systems as the risk of falls is greater, increasing the likelihood of injury. There was no evidence adduced by Hilton of a proper system of sanding, salting and inspection – the Master had before her only the contractor's snow log.

[5] An order for security for costs is discretionary. Pursuant to Rule 56.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, a court may, on motion by a defendant, make such order for security for costs as is just where it appears that the plaintiff is ordinarily a resident outside of Ontario. Such is the case at bar. It was clearly before the Master that the Plaintiff resides in the State of California in the United States of America, earns between $115,000 and $160,000 per annum, and is not impecunious. As a non-resident he bears the burden of proving the effect on him should an order for security for costs be granted. There was evidence before the Master both of the defendant's substantial mounting legal costs, the amount of the Plaintiff's income and his extent of his real estate holdings.

[6] If a plaintiff shows a real possibility of success then a court may conclude in appropriate circumstances that justice demands that a plaintiff not be required to post security at all. The Master carefully scrutinized the quality and sufficiency of the Plaintiff's assets to determine whether they were genuine. The merits of the Plaintiff's claim was also a relevant factor in the exercise of her discretion.

[7] The Master was required to, and did, conduct a balancing to afford Hilton a reasonable degree of protection in the lawsuit after also having regard to the potential financial impact on the Plaintiff. In coming to her conclusion that the Plaintiff's case had a good chance of success, I am fully satisfied that the Master made no error of law and misapprehended no evidence such that she committed any palpable or overriding error. She was fully entitled to conclude as she did.

[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 plaintiff's 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 Plaintiff's 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*.

**Conclusion**

[12] The learned Master fairly and reasonably exercised her discretion to accept the specific adverse costs insurance policy in question together with the Plaintiff's solicitor's undertaking as reasonable security for Hilton's costs. She committed no legal error. I would accordingly dismiss Hilton's appeal.

[13] Counsel on appeal agreed on the quantum of costs to be ordered against the unsuccessful party. The appellant/defendant Hilton shall forthwith pay to the Plaintiff his partial

indemnity costs of this appeal fixed in the sum of $5,750 inclusive of fee, disbursements and HST.

R. MacKINNON J.

**Date:** April 22, 2016