

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprise Ltd et al
Defendant(s)

Case Management Yes No by Judge: McBew

Counsel	Telephone No:	Facsimile No:
<u>see counsel slip</u>		

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: _____
- Time Table approved (as follows):

KSV Restructuring Inc, as the receiver and manager (the "Receiver") of Xela Enterprise Ltd ("Xela") brings this motion seeking security and costs from Juan Guillermo Gutierrez ("Gutierrez") with respect to Gutierrez's motion to replace the Receiver.

The Receiver seeks security for

1 Dec 22
Date

McBew
Judge's Signature

Additional Pages 14 total

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costs in the amount of \$150,000.00

I have been managing this action for some time and have released several endorsements to date. The facts are well-known to all parties, and the Receiver, and need not be repeated in detail.

Of import with respect to my analysis of this motion is the following:

- The Receiver is not a party in the action and thus is not directly pursuing any claims.
- This motion is being brought with respect to a motion not a proceeding.
- Gutierrez has not delivered any affidavit evidence with respect to the issues on this motion. He relies upon the affidavits of his lawyer's law clerk and

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David Bell, a digital forensic investigator who provides evidence with respect to the Receiver's handling of Gutierrez's personal data, which Gutierrez alleges has been mishandled.

- The Notice of Motion served by Gutierrez does not make any mention of the above complaint.

- Justice Conway recently found Gutierrez liable in civil contempt - by swearing a Declaration to support a Criminal Complaint made against the Hatstone directors in Panama. The Hatstone directors were appointed by the Receiver (the decision is under appeal).

- Based on evidence filed by the Receiver ⁱⁿ at the motion ⁱⁿ the prosecutor in Panama has closed its case against the Hatstone directors on the basis that

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"The facts complained are not considered the crime of falsehood accused."

I will now turn to the issues raised on this motion.

(1) Gutierrez submits that the Receiver cannot bring this motion pursuant to Rule 56.01(1) since it is not a party with a claim.

I disagree.

Although the Rule does speak of parties with claims, s. 101 of the Courts of Justice Act provides this Court with jurisdiction to grant receivers orders where it is just or convenient to do so. Further, Rule 56.01(2) expands the provisions of Subrule (1).

A proper reading of s. 101 and Rule 56.01 provides this Court with the necessary

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jurisdiction. And for that matter Rule 1004(1).
✓ I note that Gutierrez also argued at the motion that the Receiver cannot bring this motion against him as he has no claim in the action.

Again, based on the above I disagreed.

✓ Further, if Gutierrez is correct, this would result in a situation where a Court officer (here the Receiver) could face any number of spurious motions brought directly against it and have no recourse to ask for security for costs. Also, since the Receivership is funded by the Applicant such motions will deplete the estate as the Applicant indirectly funds

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The motions brought by the Receiver. Surely this cannot be the case and is neither fair nor just. Last, on this issue, I accept the Receiver's submission that a security for costs motion can be brought with respect to a pending motion and is not restricted to a proceeding.

This premise accords with common sense and has been accepted clearly by the OCA: see *Di Paolo Re*, 2006 CanLII 37117 (ON CA) at para 12th.

Having determined that I have jurisdiction and the Receiver is entitled to bring the motion I now turn to the other issues raised on this motion.

(2) Gutierrez submits that since his

1. This conclusion is generally supported by the OCA in *Kramer Henderson Sidlby LLP v. Monteiro* 2018 O.R. (3d) 286 at paras 15, 18, 22 and 23.

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unpaid costs relate to Justice
Newbould's order concerning the
Applicant (\$889,858.21) and not the
Receiver, the provisions of Rule 56.01(1)
(c) do not apply.

Again I disagree. A proper
reading of the above OCA jurisprudence
and s.101 of the CTA lead to
a conclusion that the Receiver ought
to be able to rule on subrule (1)(c).

Gutierrez is a judgment debtor to
the Applicant who is funding this
receivership. He ought not be able
to bring this motion in these
circumstances without paying
security for costs.

③ The Receiver also brings this
motion pursuant to Rule 56.01(1)(c)
submitting that there is good
reason to believe that the motion

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is frivolous and vexatious and Gutierrez has insufficient assets to pay the the costs of the motion.

Gutierrez in his notice of motion makes a number of allegations but again to date has not delivered any supporting affidavit.

Generally, to date the ReceiverTM has not been the subject of any negative judicial comment, unlike Gutierrez who has been found in contempt. The Receiver has not been unsuccessful at any motion.

Further, in a number of my previous endorsements I have commented that many of the complaints Gutierrez now raises have been litigated and/or unsupported by evidence.

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Specifically in my March 25/01 Endorsement I noted that the Receiver had been acting in a neutral fashion to that point in time.

With respect to Gutierrez's most significant complaints I note:

- The criminal complaints in Panama, as noted, have ceased and Gutierrez was found in contempt for his participation.

- Again, there is no mention in the noticed motion of complaints concerning computer security and Mr Bellis affidavit wasTM served 2 days before this motion.

- I have previously rejected Gutierrez's complaints about the involvement of "The Cousins" and the Receiver's alleged interference with secured funding due to lack of evidence.

Overall, based on the above,

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I accept that the Receiver has demonstrated that "it appears" that the motion is frivolous and vexatious and "suggests a tentative conclusion of absence of merit": McArthur v Neumann 2020 ONSC 66 at para 17 & 18.

In this regard I note that Gutierrez seeks to have the Receiver replaced with someone of his choosing.

Last, in considering the test I need to determine whether Gutierrez has sufficient assets in Ontario to pay the Receiver's costs. I agree with the Receiver that there is good reason to believe Gutierrez has insufficient assets in Ontario for the reasons set out in para 37 of the Receiver's Factum.

⊗ Gutierrez claims in his Factum that he is impecunious. He has not, however,

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as noted, delivered any evidence on the motion to support this assertion. Further, according to the Bill Costs filed at his contempt hearing he has paid Mr. Greenspan \$150,000.00 between April - September 2022. He continues to be represented by two sets of counsel. Also, it appears from Gutierrez's litigation conduct to date and moving forward with his motion, that he has not been deterred by legal costs.

I am also satisfied, based on the above, that this motion is not being used as a litigation tactic to prevent the motion from being heard on its merits.

(4) Gutierrez also submits that this motion ought to be dismissed since the Receiver delayed in bringing this motion.

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This argument has to merit. The motion to replace the Receiver and this motion were scheduled at the same time. Since then Gutierrez has been found in contempt.

The fact that the Notice of Motion was served approximately one year ago is immaterial as I only agreed to schedule it and this motion in the fall of this year.

⑤ Insofar as quantum is concerned I agree with Gutierrez that the amount sought is high. Having reviewed the nature of the motion and the steps likely required up to and including the motion, I am satisfied that \$100,000.00 is fair and reasonable on a partial indemnity basis after reviewing the Receiver's draft Bill of Costs.

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Based upon foregoing I order that security for costs be paid in the amount of \$100,000. This includes some costs vis a vis the Receiver, as per my Jul, 2021 decision where I allowed these costs pursuant to s.131(1) of the CTA on the basis that stakeholders ought not be saddled with costs they ought not have to incur.

Insofar as costs of this motion are concerned I have reviewed the parties' draft Bill of Costs. Since the Receiver was successful it ought to receive its costs on a partial indemnity basis in the amount of \$30,092.10 inclusive as allowed. This amount is fair & reasonable.

[Signature]

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Addendum

Since preparing this endorsement I have concluded that, given my findings concerning sub 5d.01(i)(e), it would be appropriate to have another judge on the Commercial List hear the motion to replace the Receiver.

[Handwritten signature]



COUNSEL SLIP

COURT FILE NO. CV-11-9062-CL

DATE: Thursday, November 24, 2022

THE HONOURABLE: MISTER JUSTICE MCEWEN

No. ON LIST: 10am
COURTROOM: 330 UA

TITLE OF PROCEEDING

CASTILLO v XELA ENTERPRISES LTD et al

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