

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED,
FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO
GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of
Juan Arturo Gutierrez

Respondents

NOTICE OF MOTION FOR LEAVE TO APPEAL

The Respondent, Juan Guillermo Gutierrez, will make a Motion to the Divisional Court to be heard in writing, at 330 University Avenue, 9th Floor, Toronto, Ontario, M5G 1R7, on a date to be fixed by the Registrar from the Order of Justice McEwen dated December 1, 2022 (the "**Order of Justice McEwen**").

PROPOSED METHOD OF HEARING: The Motion is to be heard in writing as an opposed motion under subrule 62.02(2) or in such other manner as the Court may direct.

THE MOTION IS FOR

- (a) An Order granting leave to appeal the Order of the Honourable Justice McEwen, made on December 1, 2022;

- (b) An Order granting leave to appeal the Costs Order of the Honourable Justice McEwen, made on December 1, 2022;
- (c) The costs of this Motion, if opposed; and,
- (d) Such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

Background

- (a) The within Application relates to execution of a Judgment (the “**Judgment**”) against, among others, Xela Enterprises Inc. (“**Xela**”) and Mr. Gutierrez in favor of Margarita Castillo (“**Castillo**”). By order dated July 5, 2019 (the “**Appointment Order**”) the Receiver, KSV Kofman Inc. (the “**Receiver**”) was appointed over the undertakings, property and assets of Xela, in accordance with s. 101 of the Courts of Justice Act to aid in the execution of the Judgment.
- (b) Mr. Gutierrez is Castillo’s brother and the president of Xela and owner of 100% of Xela’s voting shares. Xela’s only significant assets are (a) Gabinvest S.A. (“**Gabinvest**”) a wholly owned subsidiary of Xela; and (b) Lisa S.A. (“**LISA**”), a wholly owned subsidiary of Gabinvest. Both are Panamanian entities. Mr. Gutierrez has never been employed by, or been an officer or director of, either.

- (c) Prior to the appointment of the Receiver, Judgment was partially satisfied with all of Mr. Gutierrez's personal assets, with approximately \$4 million remaining unsatisfied.
- (d) As part of the enforcement efforts, Mr. Gutierrez';
 - (i) Bank accounts were frozen;
 - (ii) Home was sold;
 - (iii) Cottage was sold; and,
 - (iv) Cars were sold.
- (e) On or about July 25, 2017, Mr. Gutierrez was examined in aid of execution.
- (f) The Applicant was not able to collect any more money and/or assets to realize on the Judgment as all of Mr. Gutierrez assets/money was taken by the Applicant to satisfy the Judgment.
- (g) After all of Mr. Gutierrez' assets were seized by the Applicant, the Applicant brought an application for appointment of a receiver.
- (h) On July 5, 2019, the Receiver was appointed. In or around January 2020, Mr. Gutierrez sought to bring a motion to terminate the Receivership. The Receiver did not bring a motion for security for costs at that time.
- (i) On January 18, 2021, the Receiver brought a motion to compel Mr. Gutierrez to, inter alia, provide passwords to devices. On February 9, 2021,

the Receiver brought a second contempt motion against Mr. Gutierrez, as its first contempt motion was adjourned sine die.

- (j) On the same day, Mr. Gutierrez delivered a notice of motion seeking to vary the Appointment Order to replace the Receiver with another receiver. No security for costs motion was brought at this time.
- (k) In December 2021, the Receiver commenced a separate civil proceeding against Mr. Gutierrez and his family. The receiver did not disclose that it had commenced that proceeding until approximately 6 months after the claim was issued.
- (l) On September 12, 2022, Mr. Gutierrez delivered his notice of motion to vary the Appointment Order by replacing the Receiver (“the Recusal Motion”). On September 27, McEwen J. scheduled the Recusal Motion, despite opposition from the Receiver.
- (m) On September 27, 2022, the Receiver, for the first time, communicated its intention to bring a motion for security for costs.
- (n) On December 1, 2022, the Motion Judge ordered Mr. Gutierrez to pay \$100,000 in security for costs and Ordered Mr. Gutierrez to pay \$30,092 in costs for the motion.

Security for Costs Motion

(o) At the security for costs motion, the Receiver relied upon r. 56.01(1) (c) and r. 56.01(1)(e) to ground its motion for security for costs.

(p) Rules 56.01(1)(c) and (e) provide as follows:

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:

(c) The defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remains 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 sufficient assets in Ontario to pay the costs of the defendant or respondent.

(q) Mr. Gutierrez seeks leave to appeal the Order of Justice McEwen on the question of whether the Motion Judge erred in law:

(i) in ordering that security for costs be paid despite the fact that the Appointment Order expressly permits any interested party to apply to the Court to vary the Appointment Order on not less than seven days' notice;

(ii) in ordering a respondent to pay security for costs in the context of an Application under R. 56.01 of the *Rules of Civil Procedure*;

(iii) in ordering that security for costs be paid in favour of a non-party to a proceeding;

- (iv) in finding that section 101 of the *Courts of Justice Act* and Rule 56.01(2) can be invoked within a context of an application to order security for costs against a Respondent;
- (v) in exercising his discretion to order security for Costs against Mr. Gutierrez where Mr. Gutierrez is a respondent who has no cross-claim or counterclaim in the proceeding;
- (vi) in applying *Di Paolo Re*, 2006 CanLii 37117, a bankruptcy court case where there was no respondent or plaintiff, and using that decision to order security for costs against a respondent in the context of an application;
- (vii) in relying upon *Kramer Henderson Sidlofsky LLP v Monteiro*, 2009 98 O.R. (3d) 286, an assessment hearing where there was no plaintiff/applicant and/or defendant/respondent, to support the order for security for costs;
- (viii) In relying upon r. 56.01(2) of the *Rules of Civil Procedure* to find that Gutierrez was a 'claimant', even though the word 'Applicant' and 'Respondent' are clearly defined within the context of an application and therefore, Rule 56.01(1) should apply;
- (ix) in ordering security for costs against a respondent in an application, where no other case law was presented where a Judge has ordered

security for costs against a respondent (without a cross-claim or counterclaim) in the context of an application;

- (x) in ordering security for costs where the Receiver did not have an outstanding cost order against the Respondent as required by r. 56.01(1)(c) of the *Rules of Civil Procedure* and where all costs orders had been paid by the Respondent;
 - (xi) in ordering security for costs where the purported outstanding costs order is not owed to the party bringing the motion for security for costs and conflating the Applicant's rights with those of the Receiver, an independent officer of the court;
 - (xii) in ordering security for costs where the Receiver had failed to show how a motion within an Application can be equated to an application and/or action within the meaning of r. 56.01(1)(e) of the *Rules of Civil Procedure*;
 - (xiii) In ordering security for costs where to do so, results in the interference with a Defendant and/or Respondent's ability to defend themselves within a proceeding in which they were involuntarily added as a party; and,
- (r) The Motion Judge erred in fact and law by;
- (i) finding that the Motion to Vary the Order Appointing the Receiver was frivolous and/or vexatious;

- (ii) in failing to consider the Receiver's delay in bringing the security for costs motion;
 - (iii) in ordering \$100,000 in security for costs;
 - (iv) In ordering costs payable to the receiver in the amount of \$30,092.10;
 - (v) In failing to consider access to justice when exercising his discretion to order security for costs;
- (s) There are a number of conflicting decisions, which state that; (1) it is trite law that security for costs cannot be awarded against a respondent or defendant with no cross-claim or counterclaim, and (2) no party should have to post security for costs as a condition of defending themselves, including:
- (i) *Willets v Colalillo* [2007] O.J. No. 4623
 - (ii) *ICC International Computer Consulting & Leasing Ltd. v. ICC Internationale Computer & Consulting & Leasing Ltd. v. ICC Internationale Computer & Consulting GmbH* [1989] O.J. No. 70
 - (iii) *Gaming Lottery Corp. v. Digital Motors Corp.* [1997] O.J. No. 5245
- (t) Rules 1.04, 2, 3.02, 56, 57 and 61 of the Rules of Civil Procedure; of the *Rules of Civil Procedure*;
- (u) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion: (List the affidavits or other documentary evidence to be relied on)

- (a) The Order of the Honourable Justice McEwen, made on December 1, 2022;
- (b) The Affidavit of Nanda Singh;
- (c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December 16, 2022

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Court File No. CV-11-9062-00CL
Divisional Court File No.

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PROCEEDING COMMENCED AT
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