

Federal Court



Cour fédérale

Date: 20170509

Docket: T-1226-10

Citation: 2017 FC 479

Ottawa, Ontario, May 9, 2017

PRESENT: The Honourable Mr. Justice Phelan

**ADMIRALTY ACTION *IN REM* AGAINST THE VESSEL "QE014226C010"
AND *IN PERSONAM***

BETWEEN:

OFFSHORE INTERIORS INC.

Plaintiff

and

**WORLDSPAN MARINE INC., CRESCENT
CUSTOM YACHTS INC., THE OWNERS AND
ALL OTHERS INTERESTED IN THE
VESSEL "QE014226C010" and THE VESSEL
"QE014226C010"**

Defendants

and

**WOLRIGE MAHON LIMITED in its capacity
as appointed Vessel Construction Officer of the
Defendant Vessel "QE014226C010", HARRY
SARGEANT III, MOHAMMAD ANWAR
FARID AL-SALEH, and 642385 B.C. LTD.**

Interveners

ORDER AND REASONS

I. Background

[1] This is the second decision in respect of two motions heard by the Court on March 16, 2017. As indicated in the first motion Decision, this litigation is becoming or has become intractable. The best argument advanced on both motions was the one where a party pleaded with the Court “to find a way forward” – presumably, to get this case back on course.

[2] In this specific motion filed by Worldspan Marine Inc. [Worldspan], Worldspan sought the following relief:

- Leave to file a Supplementary Claim Affidavit attaching change orders;
- Orders requiring Harry Sargeant III [Sargeant] and the representative of Comerica Bank, Cynthia B. Jones [Jones], to attend in Vancouver for cross-examination on their respective affidavits;
- A direction defining the permissible scope of the cross-examination;
- An order requiring Sargeant and Jones to produce on cross-examination all relevant documents and other materials in their possession, power or control; and
- Costs.

[3] The relief sought arises in the context of an admiralty action *in rem* proceeding dealing with the construction of the vessel “QE014226C010” [Vessel].

The moving party, Worldspan, is a Defendant in the underlying action, and the Responding Parties, Sargeant and Comerica Bank [Comerica], are interveners. Sargeant has a

builder's mortgage against the Vessel, which mortgage was assigned to Comerica pursuant to a Vessel Construction Loan.

II. Analysis

[4] It is not my intention to review all the facts of this litigation. These facts have been set out in Justice Nadon's decisions in *Offshore Interiors Inc v Sargeant*, 2015 FCA 46, 253 ACWS (3d) 503, and *Harry Sargeant III v Al-Saleh*, 2014 FCA 302, 249 ACWS (3d) 333. It is sufficient to say that the disputes between the parties have many moving parts, including proceedings in this Court, in the British Columbia Supreme Court, and, apparently, elsewhere. This is a situation which calls out for either cooperation between the parties or strict case management. The fact that I am the 13th judge – so I am informed by counsel – to handle an aspect of these proceedings speaks volumes in favour of speedy resolution of the priorities hearing. In the interim, the Court will make rulings which hopefully will advance the process. As matters stand, the parties appear to be at sea until some of these matters are resolved.

A. *Supplemental Affidavits*

[5] Worldspan wishes to add into evidence a number of change orders which have either been signed by or acted upon by the relevant parties.

[6] It is unclear what relevance these change orders may have given this Court's decisions confirming the validity of the mortgage and the irrelevancy of Sargeant's alleged breaches to

Worldspan's obligation to repay the advances. However, there is no case authority one way or the other.

[7] On the other hand, the opposing parties do not allege any real prejudice arising from the filing of supplemental affidavits, but claim that it is preferable to await the production of a statement of issues and the establishment of a priorities process.

[8] As I see matters, there has been sufficient "awaiting something to happen" that means nothing happens. Absent any prejudice and in the expectation that permitting this aspect of the motion may move this dispute along, I would grant the motion without costs. The amended affidavits are to be filed within 30 days of this Decision or such other time as the parties agree.

B. *Place of Cross-Examination*

[9] Despite Sargeant and Comerica attorning to this Court's jurisdiction, there appears to be a refusal to have their witnesses available in Canada and in Vancouver in particular. There is no issue of physical or psychological needs preventing travel to Vancouver. In fact, Sargeant is prepared to travel from his home in Florida to Detroit, Jones' location, but not to fly the additional few hours to Vancouver. For Jones, it is a preference not to leave the Detroit area.

[10] The basic provisions of the *Federal Courts Rules*, SOR/98-106, are Rules 83, 84, 87, 90, and 91.

83 A party to a motion or application may cross-examine the deponent of an affidavit

83 Une partie peut contre-interroger l'auteur d'un affidavit qui a été signifié par

served by an adverse party to the motion or application.

une partie adverse dans le cadre d'une requête ou d'une demande.

84 (1) A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.

84 (1) Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

(2) A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.

(2) La partie qui a contre-interrogé l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande ne peut par la suite déposer un affidavit dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

...

[...]

87 In rules 88 to 100, *examination* means

87 Dans les règles 88 à 100, *interrogatoire* s'entend, selon le cas :

(a) an examination for discovery;

a) d'un interrogatoire préalable;

(b) the taking of evidence out of court for use at trial;

b) des dépositions recueillies hors cour pour être utilisées à l'instruction;

(c) a cross-examination on an affidavit; or

c) du contre-interrogatoire concernant un affidavit;

(d) an examination in aid of execution.

d) de l'interrogatoire à l'appui d'une exécution forcée.

...

[...]

90 (1) Where a person to be examined on an oral examination resides in Canada and the person and the parties cannot agree on where to conduct the oral examination, it shall be conducted in the place closest to the person's residence where a superior court sits.

90 (1) Lorsque la personne devant subir un interrogatoire oral réside au Canada et n'arrive pas à s'entendre avec les parties sur l'endroit où se déroulera l'interrogatoire, celui-ci est tenu à l'endroit où siège une cour supérieure qui est le plus proche de la résidence de la personne.

(2) Where a person to be examined on an oral examination resides outside Canada, the time, place, manner and expenses of the oral examination shall be as agreed on by the person and the parties or, on motion, as ordered by the Court.

(2) Lorsque la personne devant subir un interrogatoire oral réside à l'étranger, l'interrogatoire est tenu aux date, heure et lieu, de la manière et pour les montants au titre des indemnités et dépenses dont conviennent la personne et les parties ou qu'ordonne la Cour sur requête.

(3) No person is required to attend an oral examination unless reasonable travel expenses have been paid or tendered to the person.

(3) Nul ne peut être contraint à comparaître aux termes d'une assignation à comparaître pour subir un interrogatoire oral que si des frais de déplacement raisonnables lui ont été payés ou offerts.

91 (1) A party who intends to conduct an oral examination shall serve a direction to attend, in Form 91, on the person to be examined and a copy thereof on every other party.

91 (1) La partie qui entend tenir un interrogatoire oral signifie une assignation à comparaître selon la formule 91 à la personne à interroger et une copie de cette assignation aux autres parties.

(2) A direction to attend may direct the person to be examined to produce for inspection at the examination

(2) L'assignation à comparaître peut préciser que la personne assignée est tenue d'apporter avec elle les documents ou éléments matériels qui :

(a) in respect of an examination for discovery, all documents and other material in the possession, power or control of the party on behalf of whom the person is being examined that are relevant to the matters in issue in the action;

(b) in respect of the taking of evidence for use at trial, all documents and other material in that person's possession, power or control that are relevant to the matters in issue in the action;

(c) in respect of a cross-examination on an affidavit, all documents and other material in that person's possession, power or control that are relevant to the application or motion; and

(d) in respect of an examination in aid of execution, all documents and other material in that person's possession, power or control that are relevant to the person's ability to satisfy the judgment.

(3) A direction to attend an oral examination shall be served

(a) where the person to be examined is an adverse party, at least six days before the day of the proposed

a) sont en la possession, sous l'autorité ou sous la garde de la partie pour le compte de laquelle elle est interrogée et qui sont pertinents aux questions soulevées dans l'action, dans le cas où elle est assignée pour subir un interrogatoire préalable;

b) sont en sa possession, sous son autorité ou sous sa garde et qui sont pertinents à l'action, dans le cas où elle est assignée pour donner une déposition qui sera utilisée à l'instruction;

c) sont en sa possession, sous son autorité ou sous sa garde et qui sont pertinents à la requête ou à la demande, dans le cas où elle est assignée pour subir un contre-interrogatoire concernant un affidavit;

d) sont en sa possession, sous son autorité ou sous sa garde et qui fournissent des renseignements sur sa capacité de payer la somme fixée par jugement, dans le cas où elle est assignée pour subir un interrogatoire à l'appui d'une exécution forcée.

(3) L'assignation à comparaître est signifiée :

a) si elle s'adresse à une partie adverse, au moins six jours avant la date de l'interrogatoire;

examination;

(b) where the person to be examined is not a party to the proceeding, at least 10 days before the day of the proposed examination; or

(c) where the person is to be cross-examined on an affidavit filed in support of a motion, at least 24 hours before the hearing of the motion.

b) si elle ne s'adresse pas à une partie à l'instance, au moins 10 jours avant la date de l'interrogatoire;

c) si elle vise le contre-interrogatoire de l'auteur d'un affidavit déposé au soutien d'une requête, au moins 24 heures avant l'audition de celle-ci.

[11] While both witnesses reside outside of Canada they are not third party witnesses, which would speak in favour of accommodating such witnesses' convenience. These are party witnesses conducting litigation in Vancouver where it is more practical to have two people travel to Vancouver than to have a gaggle of lawyers travel to Detroit. The opposing parties have chosen to conduct business in Canada and to litigate in Canada, and they must accept the minor inconvenience of attending here.

[12] It is normal that such witnesses bring with them documents for inspection.

[13] Therefore, Worldspan may serve the requisite Form 91, with attendant conduct money, specifying the nature of the documents to be made available for inspection. The time and place of examination shall be no sooner than 60 days from the date of this Decision as designated by the moving party or otherwise agreed upon.

C. *Scope of Examination*

[14] Worldspan has asked this Court to issue a direction on the permissible scope of these examinations.

This is essentially an advance ruling of the relevancy of questions yet to be asked.

[15] The relevancy of questions on examination is defined by the pleadings. This Court is in no position to make such advance rulings and, even if it could anticipate areas of dispute, it ought not to do so.

D. *Costs*

[16] As there are mixed results, no costs are awarded to any party.

ORDER in T-1226-10

FOR THE REASONS GIVEN, this Court grants the motion in part without costs.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1226-10

STYLE OF CAUSE: OFFSHORE INTERIORS INC. v WORLDSPAN MARINE INC., CRESCENT CUSTOM YACHTS INC., THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL "QE014226C010" and THE VESSEL "QE014226C010" AND WOLRIGE MAHON LIMITED in its capacity as appointed Vessel Construction Officer of the Defendant Vessel "QE014226C010", HARRY SARGEANT III, MOHAMMAD ANWAR FARID AL-SALEH, and 642385 B.C. LTD.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MARCH 16, 2017

ORDER AND REASONS: PHELAN J.

DATED: MAY 9, 2017

APPEARANCES:

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