Federal Court  Cour fédérale

Date: 20171031

Docket: T-1031-16

Citation: 2017 FC 973

Vancouver, British Columbia, October 31, 2017

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DAYTON BOOT CO. ENTERPRISES LTD.

Applicant

and

RED CAT LTD.,
DAYTON BOOT BRANDS LTD.
RODERICK HALL RISK AND
HUTCHINGAME GROWTH
CAPITAL CORPORATION

Respondents

ORDER AND REASONS

[1] This is an application by Dayton Boot Co. Enterprises Ltd. [the Applicant] for judicial review of the decision of the Registrar of Trade-marks dated May 30, 2016, to record the change in title of the Canadian trade-mark registration No. TMA792915 for the trademark **DAYTON** from the Applicant to Red Cat Ltd. and to correct the resulting entry in the register pursuant to subsection 57(1) of the *Trade-marks Act*, RSC, 1985, c T-13.

[2] Before the Court is a motion in writing, pursuant to Rule 369 of the *Federal Courts Rules* by the Respondent Hutchingame Growth Capital Corporation [HGC] seeking an order pursuant to subsection 50(1) of the *Federal Courts Act*, RSC 1985, c F-7, staying this application or alternatively an order staying this application pending resolution of the bankruptcy proceedings underway involving the Respondent, Dayton Boot Brands Ltd.

[3] This application was filed on June 29, 2016, against all Respondents except HGC, which was added only later when it recorded with the Registrar of Trade-marks an assignment of the DAYTON trademark to record it as the current owner of the trade-mark.

[4] No responding records on the application have been filed. A requisition for a four hour hearing was served and filed on March 21, 2017. On March 22, 2017, HGC filed a motion for an extension of time to file a Notice of Appearance which was granted on April 11, 2017, conditional on payment of costs.

[5] On April 25, 2017, the Respondent Dayton Boot Brands Ltd. filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*. The Proposal was filed on August 24, 2017. On September 22, 2017, HGC filed this motion seeking a stay.

[6] On this motion HGC filed the affidavit of Eric Hutchingame, sworn September 21, 2017, and an affidavit of Roderick Hall Risk, sworn September 20, 2017. There are substantial issues regarding the Hutchingame affidavit.

[7] Certain of the statements contained in the Hutchingame affidavit are based on information received from Mr. Risk. As the Applicant submits, these are "unnecessary hearsay" as Mr. Risk provided an affidavit on which he was cross-examined. He was and is in the best position to offer this evidence.

[8] I agree with the submissions of the Applicant in paragraph 21 of its memorandum of argument that many of the paragraphs of the Hutchingame affidavit are inadmissible argument and opinion.

[9] For these reasons, the following paragraphs of the Hutchingame affidavit are struck: Paragraphs 3 (except the first sentence), Paragraphs 6 through 12, 16, 18, 20 (fourth and fifth sentences), and 27.

[10] Further, as noted by the Applicant. references to attached Exhibits do not always coincide with the Exhibits attached, and portions of the affidavit appear to conflict with the Exhibits attached thereto. Mr. Hutchingame was not cross-examined on his affidavit, but given these deficiencies, that is no impediment to the submission of the Applicant, which the Court largely accepts, that his evidence ought to be given little weight.

[11] The test to be applied in a motion seeking a stay where there is another related proceeding in another forum was outlined by Justice Dubé in *White v EBF Manufacturing Ltd*,

[2001] FCJ No 1073, at para 5 and applied most recently by Justice Mactavish in *Tractor Supply Co of Texas v TSC Stores LP*, 2010 FC 883 at para 24, namely:

> 1. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?
>
> 2. Would the stay work an injustice to the plaintiff?
>
> 3. The onus is on the party which seeks a stay to establish that these two conditions are met.
>
> 4. The grant or refusal of the stay is within the discretionary power of the judge.
>
> 5. The power to grant a stay may only be exercised sparingly and in the clearest of cases.
>
> 6. Are the facts alleged, the legal issues involved and the relief sought similar in both actions?
>
> 7. What are the possibilities of inconsistent findings in both Courts?
>
> 8. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to another jurisdiction.
>
> 9. Priority ought not necessarily be given to the first proceeding over the second or, vice versa.

[12] I am satisfied from a review of the material before the Court that there is some overlap in the bankruptcy proceeding and this application and thus do not accept the submission of the Applicant that there is none. It is clear from the letter from Murphy & Associates, Trustee in Bankruptcy dated September 21, 2017 that it is proceeding on the basis that “the trade-mark was

originally sold to Red Cat Ltd. pursuant to a May 04, 2012 Asset Acquisition Agreement" and that Red Cat Ltd. has advised it that it is not in default under that agreement. In this application, the issue of default does not appear to arise; rather, the Applicant argues that the Registrar erred in relying on a redacted document as proof of the transfer of ownership, and proceeded without the knowledge or consent of the Applicant. These are significant allegations and can only be determined by this Court and not in the other proceedings.

[13] Ultimately, the rights of the various parties to the trademark may have to be determined on the bankruptcy matter, but that is not the issue before this Court. The sole issue here is whether the Registrar erred. Given that under section 19 of the *Trade-marks Act*, "the registration of a trade-mark in respect of any goods or services, unless shown to be invalid, gives to the owner of the trade-mark the exclusive right to the use throughout Canada of the trade-mark in respect of those goods or services" the owner as shown on the Register seems to me to be of significant importance and ultimately relevant to the bankruptcy proceeding.

[14] HGC has provided no evidence that any refusal to stay this application will prejudice it or result in any injustice. It asserts merely that it will delay the proposal proceedings "as it could not proceed with the registration of the mark not being licensed to [Dayton Boot Brands Ltd.] as set out in the Proposal." I see no evidence that any short delay will result in the abandonment of the Proposal should this application be unsuccessful. If it is successful, then the Applicant will have incurred substantial prejudice if a stay is granted. I note that had this motion not been brought, the matter before this Court would most likely already have been determined.

[15] This application may be heard within the next few weeks and I will so order. I am not satisfied that on the material before me that this is one of those clearest of cases where a stay ought to be granted.

[16] For these reasons, the motion is dismissed, with costs payable forthwith by HGC to the Applicant fixed in the sum of $1,500.00.

ORDER

THIS COURT ORDERS that:

1. This motion is dismissed, with costs payable forthwith by HGC to the Applicant fixed at $1,500.00; and

2. This application shall be set down for hearing by the Office of the Chief Administrator for a 4 hour hearing in Vancouver, no later than January 31, 2018.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1031-16
STYLE OF CAUSE:	DAYTON BOOT CO. ENTERPRISES LTD. v RED CAT LTD., DAYTON BOOT BRANDS LTD., RODERICK HALL RISK AND HUTCHINGAME GROWTH CAPITAL CORPORATION

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	ZINN, J.
DATED:	OCTOBER 31, 2017

WRITTEN REPRESENTATIONS BY:

Bruce M. Green	FOR THE APPLICANT
Michael S. Hebert	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Oyen Wiggs Green & Mutala LLP Vancouver, B.C.	FOR THE APPLICANT
Beament Hebert Nicholson LLP Ottawa, Ontario	FOR THE RESPONDENTS