Federal Court  Cour fédérale

Date: 20210310

Docket: T-1440-19

Citation: 2021 FC 216

Ottawa, Ontario, March 10, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SWEET PRODUCTIONS INC. AND ENCHANTED RISE GROUP LIMITED

Plaintiffs

and

LICENSING IP INTERNATIONAL S.À.R.L., 9279-2738 QUEBEC INC., 9219-1568 QUEBEC INC., SOCIETE DE GESTION FDCO INC., FERAS ANTOON AND DAVID TASSILLO

Defendants

ORDER AND REASONS

Background

[1] The Defendants appeal the Order of the Prothonotary on their motion to strike this action for undue delay pursuant to Rules 167 and 369 of the *Federal Courts Rules*, SOR/98-106 [the Rules].

[2] The Plaintiffs describe the action as one for "copyright infringement in respect of cinematographic works appearing on the Defendants' PornHub web sites." The claim covers "186 works with a total of at least 5501 infringing occurrences spread out over an interconnected web of the Defendants' PornHub network in various languages."

[3] In support of their motion, the Defendants sought leave to file a reply affidavit. After considering the principles set out in *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 [*Amgen*] at paragraphs 9 to 13, the Prothonotary refused leave. She notes that the affidavit contained evidence of further occurrences of delay after the motion was filed "notably in delivering the Plaintiffs' responding record to the motion and unfulfilled promises to deliver further particulars and amended pleadings." She held that the motion to dismiss "concerns principally the delay in prosecuting the matter up to the motion to strike" and thus the evidence of later events was of diminished usefulness. In her view, these additional facts "are not necessary for a proper determination of the motion."

[4] The Prothonotary correctly noted that there were three questions she was required to address under Rule 167: (1) is the moving party in default of any requirement under the Rules; (2) if not, has there been undue delay by the Plaintiffs in prosecuting the matter; and (3) if yes, should the matter be dismissed or should the Court impose "other sanctions"?

[5] The Prothonotary observed that 8 months had elapsed from the filing of the Statement of Claim on August 30, 2019, to the filing of the motion to strike on May 11, 2020. She divided that period into two. The first period runs from August 30, 2019, to March 16, 2020, the day

before all matters in the Federal Court were stayed by Order of the Chief Justice as a consequence of COVID-19 [the First Period]. The second period runs from March 16, 2020, to May 11, 2020 [the Second Period].

[6] In answering the second question, the Prothonotary found undue delay:

> It is apparent that the case has not moved forward in any meaningful way during the First and Second Periods: other than the response to the request for particulars in October 2019 and the service of the amended statement of claim in February 2020, the Plaintiffs did not take any other steps to ensure that the case proceeded in a timely fashion.

[7] The Prothonotary examined whether there was any explanation for the Plaintiffs' delay and found none. She found that the Plaintiffs' evidence "lacks the expected particularity and robustness one would expect from a party facing the potential termination of their proceedings."

[8] She noted that "the delay during the Second Period is in large part due to the fact that the COVID-19 pandemic halted most commercial and judicial activities." However, she also accepted that the bulk of the delay occurred in the First Period. She found that "there is very little, if any, cogent explanation for the delay, notably during the First Period, such that the Court concludes that the Plaintiffs have failed to discharge their burden to show adequate justification for the delay."

[9] The Prothonotary inferred a likely prejudice to the Defendants as a result of the Plaintiffs' delay in prosecuting this matter:

> In view of the foregoing, the Court finds that the Plaintiffs have failed to proactively and diligently move their case forward, that

> they have provided no justification for their failure to do so and that the delay is likely prejudicial to the Defendants.

[10] The Prothonotary then turned to the third question – whether to dismiss the action or impose other "sanctions" on the Plaintiffs. She observed that the Defendants, in the motion record, sought case management as an alternative to dismissing the action. She also observed that the Plaintiffs opposed any case management order. She correctly observed that their consent was not required.

[11] In imposing case management, the Prothonotary stated the following at paragraph 47:

> In the Court's view, with a case management scheduling order setting out clearly defined steps and deadlines, it is not impossible to hope that this this [*sic*] case could henceforth move forward at a reasonable pace towards a determination on its merits. [emphasis added]

Issues on Appeal

[12] The Defendants raise three issues on appeal, which I frame as the following:

1. Whether the reply affidavit ought to have been admitted by the Prothonotary;
2. Whether Rule 167 was satisfied on the facts before the Court; and
3. Whether the Plaintiffs' action ought to have been dismissed for delay?

Analysis

[13] In *Hospira Healthcare Corporation v The Kennedy Institute of Rheumatology*, 2016 FCA 215, the Federal Court of Appeal held that the standard enunciated by the Supreme Court of

Canada in *Housen v Nikolaisen*, 2002 SCC 33, is to be applied to appeals of discretionary orders of a Prothonotary. Questions of law and mixed fact and law are to be reviewed on the correctness standard, and all others are to be reviewed on the standard of palpable and overriding error.

1. Admissibility of the Reply Affidavit

[14] Justice Stratas in *Amgen* at paragraph 10 observed that "considerations of procedural fairness and the need to make a proper determination can require the Court to allow the filing of reply evidence in a motion in writing." At paragraph 13, he observed that the Court must have regard to whether the evidence will assist it, whether its admission will cause substantial or serious prejudice to the other party, and whether the evidence was available earlier or could have been available with due diligence.

[15] The Prothonotary considered each of these factors and at paragraph 5 held:

> Even accepting that the proposed reply evidence is unlikely to prejudice the Plaintiffs and that it could not have been available earlier, the Court is simply not convinced that the reply evidence will assist in the proper determination of whether the Plaintiffs have failed to prosecute the proceeding in a timely manner within the meaning of Rule 167.

[16] The Prothonotary's reasoning is sound if one were to consider it as evidence of undue delay prior to the filing of the motion. The Defendants submit that the purpose of the reply affidavit evidence was not to lead additional evidence on the issue of delay, but to raise the Plaintiffs' post-motion conduct as relevant to the issue of the appropriate remedy once undue

delay is found. It says that the Plaintiffs' continuing delays and failures to meet deadlines set by themselves supports the request that the action be dismissed.

[17] I agree with the Defendants that "determining the relevance of evidence is generally a question of law, subject to appellate review on a standard of correctness": see *Sawridge Band v Canada*, 2006 FCA 228, at paragraph 24. Accordingly, the Prothonotary's ruling on the admissibility of the reply evidence must be correct to withstand appeal.

[18] In my assessment, even accepting that reply evidence is properly admissible only in limited circumstances, I find her ruling was not correct.

[19] First, as noted above, she failed to consider whether the evidence in the reply affidavit was relevant when assessing the remedy for the Plaintiffs' undue delay. That was an error. The facts set out therein cover the period after the filing of the motion and are relevant to the issue of remedy. They illustrate that the Plaintiffs' delay is continuing even in the face of a motion to dismiss for delay.

[20] Second, notwithstanding that she rejected the Defendants' evidence on post-filing conduct adverse to the Plaintiffs, as the Defendants note she "expressly considered evidence from the post-filing period, and gave the Plaintiffs credit for events which occurred after the motion was filed." Specifically, she notes that the Plaintiffs filed a further amended statement of claim on June 15, 2020, and she concludes that "efforts were made in the Spring and early Summer of 2020 to move the matter forward."

[21] However, the impugned affidavit speaks to the circumstances leading to the filing of that pleading. The reply affidavit reveals that in their letter on June 2, 2020, the Plaintiffs asserted that they "will be providing our 2nd Amended Statement of Claim next Monday [June 8, 2020] and expect a defence to be filed within the time limits in the Rules." It was not filed when promised and the Defendants were required to follow up. The Plaintiffs then responded by email on June 11, 2020, promising it the following day, and it was then delivered electronically.

[22] The reply affidavit also shows that the Plaintiffs failed twice to keep their commitment regarding filing their responding materials on the motion to dismiss in a timely manner. Again, this goes to their continuing conduct in prosecuting this litigation.

[23] I am satisfied that the evidence in the reply affidavit is relevant to the issue of remedy and leave should have been granted to file it, especially as the Prothonotary considered other post-filing events in concluding that "efforts were made in the Spring and early Summer to move the matter forward" and "it is not impossible to hope that this this [sic] case could henceforth move forward at a reasonable pace" if case management were ordered.

2. Is Rule 167 Satisfied?

Were the Defendants in Default Under the Rules?

[24] The Prothonotary found that the Defendants were not in default under the Rules. She rejected the Plaintiffs' submission that the Defendants, having failed to file their defence to the amended claim within the 30 day period prescribed by the Rules, were in default. In so doing she relied on the fact that a demand for particulars had been served and the Defendants were

waiting for a response. She recognized that the COVID-19 pandemic had brought things to a stand-still. Lastly, she observed that subsequent to the filing of the motion, the Plaintiffs served and filed their Further Amended Statement of Claim, thus restarting the clock.

[25] The Plaintiffs at paragraphs 47 to 52 of their memorandum on appeal reiterate the position taken on the motion before the Prothonotary; however, they filed no cross-appeal challenging her finding. Accordingly, their purported challenge to the finding of the Prothonotary is not properly before the Court on this appeal, and their submissions are irrelevant.

Was There Undue Delay?

[26] On this appeal, the Plaintiffs acknowledge that the Prothonotary found on the basis of the record before her that there was undue delay and that the requirements under Rule 167 had been established. They informed the Court that while they did not agree with the Prothonotary's assessment, they were not challenging it. Accordingly, the requirements of Rule 167 have been made out by the Defendants.

The Remedy

[27] The Defendants submit that the Prothonotary "erred in principle in her analysis of the remedy which should follow a finding of undue and unjustified delay." They advance three submissions in support of that position:

1. The Prothonotary conducted her analysis without applying the culture shift required by *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*] and *R v Jordan*, 2016 SCC 27 [*Jordan*];

2. Her analysis did not start from the presumption of dismissal that exists once Rule 167 is satisfied; and

3. Her analysis was tainted by the consideration of irrelevant factors and a failure to consider relevant factors and evidence.

[28] The Plaintiffs submit that the Defendants are asking the Court to reverse the discretionary ruling of the Prothonotary – one she was entitled to make under Rule 167. Moreover, in imposing case management, she was taking the Defendants up on their submission in their memorandum filed in support of the motion, wherein they stated that they were seeking:

> i. An Order that the Plaintiff's action be dismissed for delay;
>
> ii. In the alternative, if the action is not dismissed for delay, an order that the action continue as a specially managed proceeding.

[29] I turn to consider the three grounds advanced by the Defendants regarding the remedy ordered by the Prothonotary.

i. *Hryniak and Jordan*

[30] The Plaintiffs correctly point out at paragraph 74 of their memorandum that *Jordan* was a criminal matter and there were *Charter* considerations at play:

> The application of *Jordan*-like criteria to a civil copyright infringement claim is misguided and conflates personal Charter

> rights and remedies in the criminal context with commercial litigation where such personal rights and remedies have no such application.

[31] The Defendants, relying on *Office of the Children's Lawyer v Balev*, 2018 SCC 16 at paragraph 82, submit that *Jordan* and *Hryniak* are cases of general application:

> The time it took to bring this *Hague Convention* application to hearing and resolve the ensuing appeals was unacceptably long. In another context, this Court has recently decried a culture of complacency towards delay within the justice system: see *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 (S.C.C.), at para. 4. Complacency towards judicial delay is objectionable in all contexts, but some disputes can better tolerate it. Hague Convention cases cannot. [emphasis added]

[32] Whether or not one relies on *Jordan*, the Supreme Court of Canada is clearly directing that "judicial delay is objectionable in all contexts" and that parties should not engage in delay and the judiciary should not be complacent in the face of delay.

[33] *Hryniak* addressed the requirement of proportionality in the judicial management of cases and dealt specifically with the remedies of summary judgment and summary trials in civil matters. The Supreme Court observes at paragraph 28 of its decision that the judicial process must be "proportionate, timely and affordable." Moreover, at paragraph 31, it speaks directly to circumstances where discretion is involved:

> Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation": *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53.

[34] The Plaintiffs are of the view that the Prothonotary used her discretion in imposing the sanction for the undue delay and submit that her decision is "entirely consistent with the proportionality espoused in Hryniak." However, in so stating the Plaintiffs point only to what it says is the four month delay in the First Period, whereas the Prothonotary found delay across both periods. Moreover, the First Period was 6.5 months, not four months, and the Second Period was 2 months. The Prothonotary found undue delay across both periods, amounting to 8.5 months of delay. She found that "the Plaintiffs have failed to proactively and diligently move their case forward" and provided no justification for their failure.

[35] The Plaintiffs also observe that the Prothonotary did reference *Hryniak* in her reasons at paragraph 49:

> However, to use the terms of the Supreme Court of Canada's in *Hyrniak v Mauldin*, 2014 SCC 7, there will need to be a "culture shift" in the way the parties approach this litigation. There will be a heightened expectation of collaboration. Unacceptable conduct will bear consequence, including in the form of costs such as including solicitor-client costs and costs awards made payable forthwith. Hopefully, none of these measures will be necessary from this point forward. [emphasis added]

[36] I agree with the submission of the Defendants that her reference to *Hryniak* was directed to the future. This is evident from her statement that "there will need to be a culture shift in the way the parties approach this litigation." The culture shift was dictated by the Supreme Court prior to the commencement of this litigation and the parties were required to heed and follow it. Had the Prothonotary allowed the reply affidavit to be filed, she would have then had evidence of the Plaintiffs' continuing delay.

[37] I agree with the Defendants that it was an error in law not to apply the principles in *Hyrniak* to the events that had occurred to the date of the decision.

i. *Presumption of Dismissal if Undue Delay is Found*

[38] The Defendants submit that once the criteria in Rule 167 has been satisfied, the presumptive result is dismissal. They point to the decision of the Federal Court of Appeal in *Bensalah v Canada*, [2000] FCJ 316 (CA). In that matter, the appellant was three months late in filing his factum and the explanation offered was found not to be credible. The decision of Justice Noël, as he then was, for the Court of Appeal, was that as "there was no credible explanation for the failure to observe the deadlines laid down by the Rules for prosecuting the appeal, I would allow the respondent's motion and dismiss the appeal for undue delay in prosecuting the proceeding." The Defendants submit that the "Court of Appeal proceeded on the assumption that once Rule 167 is satisfied, dismissal follows as a matter of course." They further submit that "many" other cases have been decided on the same basis and reference the following cases: *Ferrostaal Metals Ltd v Evdomon Corp*, [2000] FCJ 589, aff'd *Ferrostaal Metals Ltd v Evdomon Corp*, [2000] FCJ 972 (TD), *Behnke v Canada (External Affairs)*, [2000] FCJ 1166, and *Créations Magiques (CM) Inc c Madispro*, 2005 FC 281.

[39] It is true that in each of the cases referenced by the Defendants the disposition was to dismiss the matter for delay. However, I would be hard-pressed to agree that they support the proposition that there is a presumption that the matter will be dismissed if undue delay is proven.

[40] Nevertheless, in my view, given the language of Rule 167 and the culture shift established by the Supreme Court of Canada in *Hyrniak*, it is appropriate to apply Rule 167 as these Defendants submit. Where a party has established on the balance of probabilities that there has been undue delay in prosecuting a proceeding, the proceeding will be dismissed unless the Court is convinced that imposing another sanction is more appropriate. The burden of satisfying the Court that it ought to order another sanction rests on the party facing the dismissal of its action.

[41] In assessing the merits of the proposed sanction, the test is not whether "it is not impossible to hope" that the matter could henceforth move forward at a reasonable pace. Rather, the decision-maker must be satisfied on a balance of probabilities that the sanction imposed will result in the matter proceeding forward at a reasonable pace.

[42] Here, the Plaintiffs gave no commitment to moving the action forward at a reasonable pace, they presented no litigation plan and they opposed case management. These facts coupled with the evidence of the Plaintiffs' continuing failure to meet self-imposed deadlines after the motion was filed, quite simply fails to convince me on a balance of probabilities that there is any sanction that will ensure that the Plaintiffs will move this matter along at a reasonable pace.

iii. *Consideration of Factors*

[43] The Defendants submit that the Prothonotary erred in considering at least four irrelevant factors:

> In analysing whether dismissal was appropriate, the Prothonotary considered the following factors: the fact that the Defendants had not condoned delay, but "appear to have been ready to move forward with this proceeding notwithstanding the delay" (¶45); the fact that the Plaintiffs could have brought a motion to strike or a motion for particulars (¶45); the fact the Plaintiff filed an amended statement of claim after the rule 167 motion was filed (¶46); the fact that case management had been requested as an alternative form of relief (¶47-48).

[44] In light of the interpretation I have given to Rule 167, I agree that these factors are all irrelevant. The only relevant evidence is that which goes to convincing the Court that an alternative sanction is appropriate because on a balance of probabilities it will result in the proceeding being reasonably prosecuted.

[45] Further, I agree with the Defendants that the Prothonotary failed to consider relevant evidence which pointed to case-management not being an appropriate sanction. Not considered was the evidence in the reply affidavit of continuing undue delays by the Plaintiffs, the fact that the Plaintiffs made no effort to provide any assurance that the action would be prosecuted expeditiously, and the fact that they opposed case-management of the litigation.

[46] When all relevant evidence is considered, I conclude that case-management is not an appropriate sanction. In particular, it is difficult to see it being effective when the Plaintiffs are opposed it.

3. Disposition

[47] For the reasons provided, and making the Order the Prothonotary ought to have made, the Court will order: (i) that the reply affidavit of Lynn Chacra sworn on July 13, 2020, be admitted, (ii) that the finding of the Prothonotary pursuant to Rule 167 of undue delay by the Plaintiffs in prosecuting this action be upheld, and (iii) that the action be dismissed with costs for undue delay.

ORDER IN T-1440-19

THIS COURT ORDERS that:

1. The appeal of the Order of the Prothonotary dated October 16, 2020, is allowed;

2. The motion for leave to file the reply affidavit of Lynn Chacra sworn July 13, 2020, is allowed;

3. The finding that Rule 167 has been satisfied and there has been undue delay by the Plaintiffs in prosecuting this action is affirmed;

4. The Prothonotary's awards of costs are set aside;

5. This action is dismissed, with costs to the Defendants;

6. The Defendants are awarded their costs of the motion to file reply evidence in the amount of $750.00; and

7. The Defendants are awarded their costs of this appeal which are fixed at $5,000.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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