

Federal Court



Cour fédérale

Date: 20210804

Docket: T-428-19

Citation: 2021 FC 822

Ottawa, Ontario, August 4, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

**SOCIETY OF COMPOSERS, AUTHORS
AND MUSIC PUBLISHERS OF CANADA**

Plaintiff

and

**1730395 ALBERTA LTD. COB AS SILVER POINT
PUB & EATERY AND YOGESH PATEL**

Defendants

ORDER AND REASONS

I. Overview

[1] The Plaintiff is a copyright collective in Canada known as SOCAN that pursued a claim in March 2017 against the Defendants for infringing copyright in musical works for which the Plaintiff holds rights. The Defendants did not defend the action.

[2] The Plaintiff obtained default judgment and the Court ordered a reference to determine the damages and profits. The Defendants continue to be in default. The Plaintiff thus moves, on an *ex parte* basis in writing, for an *ex parte* reference to determine the damages and profits owed to it by the Defendants.

[3] For the reasons that follow, I grant the Plaintiff's motion on the terms below.

II. Background

(1) The Plaintiff's Claim

[4] The Plaintiff filed a Statement of Claim on March 7, 2019 alleging that the Defendants infringed the Plaintiff's copyrighted musical works by way of public performance by means of live music and karaoke at a bar, cabaret, restaurant, tavern, club, dining room, discotheque, dance hall, ballroom or similar establishment. More specifically, the Plaintiff claimed that the Defendants publicly performed works from SOCAN's repertoire at the "Silver Point Pub & Eatery," premises operated by the Corporate Defendant, 1730395 Alberta Ltd. The Plaintiff also claimed that the Individual Defendant, Yogesh Patel, a.k.a. Yogesh Kumar and Yogesh Patel Kumar, was a director of the Corporate Defendant.

[5] In its action, the Plaintiff sought, among other things, the payment of performing rights fees owing under Tariff 3A (Live Music) and Tariff 20 (Karaoke). The Defendants defaulted on the action by failing to file a Statement of Defence.

(2) Default Judgment

[6] The Plaintiff thus brought an *ex parte* motion for default judgment that Justice Grammond granted on September 9, 2019 [Default Judgment]. He found that the Defendants have infringed the Plaintiff's copyright in musical works in which the Plaintiff owns the right to perform in public by means of live music and karaoke.

[7] In his Default Judgment, Justice Grammond ordered that the Defendants pay the Plaintiff damages and profits, pursuant to section 35 of the *Copyright Act*, RSC 1985, c C-42, for the years 2016 to 2019 under Tariff 3A and the years 2017 to 2019 under Tariff 20, and that there be a reference to determine the damages and profits owed. Justice Grammond also ordered that the Defendants pay the Plaintiff its costs of the *ex parte* motion in writing for default judgment in the amount of \$3,000.00 plus interest at the rate of 2.2% per annum from the date of the Default Judgment. By Order of the Chief Justice on September 17, 2019, I was designated referee.

[8] In preparation for the reference, the parties were ordered to serve and file, in turn, a Statement of Issues, and the Defendants also were ordered to serve and file an Affidavit of Documents listing all documents relevant to the issues on the reference. Additionally, the Default Judgment required the Plaintiff to serve and file a copy of the Default Judgment with its Statement of Issues. The Plaintiff complied with this step, as confirmed by the process server's affidavits of service in evidence before me. The process server attested to the personal service on the Individual Defendant and the Corporate Defendant, in accordance with Rules 128 and 130 respectively of the *Federal Courts Rules*, SOR/98-106 [FCR].

[9] The Defendants, however, have not served and filed the required Statement of Issues and Affidavit of Documents. The affidavit of a paralegal employed by the Plaintiff's counsel confirms that, as of December 17, 2020, the Defendants had not served either document on the Plaintiff. The Defendants thus continue to be in default in the proceeding. The Default Judgment provides that in the event of the Defendants' further default, the reference may proceed, on *ex parte* application by the Plaintiff, without notice to the Defendants.

(3) The Plaintiff's Current Motion

[10] By its current *ex parte* motion pursuant to the *FCR* Rule 369, the Plaintiff seeks, among other things, an Order granting leave to proceed to a reference on an *ex parte* basis (that is, to proceed with an *ex parte* reference) in writing or by oral hearing, at the Plaintiff's election. The Plaintiff further requests that the Order allow the Plaintiff to adduce its evidence by way of affidavit, permit the designation of a referee, and allow the Plaintiff to have the reference considered based on a written record, with costs to the Plaintiff for this motion fixed at \$500.00.

III. Issues

[11] The main issue for determination on this motion is whether Plaintiff is entitled to proceed with an *ex parte* reference. As mentioned, the Chief Justice already has designated a referee.

IV. Analysis

[12] Paragraph 8 the Default Judgment provides:

8. If the Defendants are in default of paragraph 6 above [regarding service and filing of the Defendants' Statement of Issues and Affidavit of Documents], the Plaintiff will be entitled upon application, which may be made *ex parte*, to a reference hearing which may be held without notice to the Defendants before a referee appointed by the Court on an *ex parte* basis, at which hearing the referee will determine the amounts referred to in paragraph 3 herein by way of affidavit evidence filed by the Plaintiff.

[13] By its evidence on this motion described above, I find the Plaintiff has established that the Defendants are in default regarding the service and filing of the Defendants' Statement of Issues and Affidavit of Documents required of them by the Default Judgment. Having regard to paragraph 8 of the Default Judgment, I am satisfied that in the circumstances, the Plaintiff is entitled to a reference hearing which may be held without notice to the Defendants. In other words, the reference may proceed on an *ex parte* basis.

[14] I further agree with the Plaintiff that, pursuant to the *FCR* Rule 156, the simplest, least expensive and most expeditious manner of conducting the reference is by way of affidavit evidence, and in writing if the Plaintiff so elects. In my view, paragraph 8 of the Default Judgment already contemplates the former (i.e. "...the referee will determine the amounts... [of the damages and profits owed to the Plaintiff by the Defendants] by way of affidavit evidence filed by the Plaintiff"). Pursuant to the *FCR* Rules 153(2) and 156, my Order thus will confirm, as requested, that the Plaintiff is permitted to adduce its evidence on the reference by way of affidavit, and that the Plaintiff may proceed with the reference in writing if it so elects.

ORDER in T-428-19

THIS COURT THEREFORE ORDERS that:

1. The Plaintiff's motion is granted.
2. The Plaintiff is granted leave to proceed with a reference in this matter on an *ex parte* basis [*ex parte* reference] in accordance with paragraph 8 of the Default Judgment dated September 9, 2019.
3. The Plaintiff is permitted to adduce its evidence on the *ex parte* reference by way of affidavit evidence.
4. The *ex parte* reference may be heard in writing at the Plaintiff's election, in which case the Plaintiff shall submit all affidavit evidence, written representations and any authorities being relied upon, within 30 days of this Order.
5. If the Plaintiff elects to have an oral hearing instead, Plaintiff may make a written request for the appointment of a place, date and time for the *ex parte* reference, such request to be made within 30 days of this Order, and in which case the Plaintiff shall file its affidavit evidence, written representations and any authorities being relied upon, one week before the date scheduled by the Court for the *ex parte* reference, unless otherwise directed by the referee.
6. The Plaintiff is awarded costs for this motion fixed at \$500.00 payable by the Defendants.

"Janet M. Fuhrer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-428-19

STYLE OF CAUSE: SOCIETY OF COMPOSERS, AUTHORS AND MUSIC
PUBLISHERS OF CANADA v 1730395 ALBERTA
LTD. COB AS SILVER POINT PUB & EATERY AND
YOGESH PATEL

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: FUHRER J.

DATED: AUGUST 4, 2021

APPEARANCES:

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FOR THE APPLICANT

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