

**Date: 20060914**

**Docket: T-1779-05**

**Citation: 2006 FC 1096**

**Montréal, Quebec, September 14, 2006**

**Present: Richard Morneau, Prothonotary**

**BETWEEN:**

**JOHN STAGLIANO, INC., JULES JORDAN VIDEO, INC.  
and ASHLEY GASPER**

**Plaintiffs**

**and**

**ALAIN ELMALEH, JACKY ELKESLASSY, GERALD OUZZAN,  
144942 CANADA INC. (cob KAYTEL VIDEO DISTRIBUTION),  
LEISURE TIME CANADA INC.,  
TRANSWORLD SALES AGENCY LTD.,  
JACKY'S ONE STOP DISTRIBUTION INC.,  
SYLNET DISTRIBUTION INC.,  
JOHN DOE, JANE DOE and OTHER PERSONS,  
NAMES UNKNOWN, WHO DEAL IN UNAUTHORIZED  
OR COUNTERFEIT EA MERCHANDISE**

**Defendants**

**and**

**ALAIN ELMALEH and 144942 CANADA INC.  
(cob KAYTEL VIDEO DISTRIBUTION)**

**Plaintiffs by Counterclaim**

**and**

**JOHN STAGLIANO, INC., JULES JORDAN VIDEO, INC.,  
ASHLEY GASPER, SABIN BRUNET  
and JACKY ELKESLASSY**

**Defendants by Counterclaim**

**REASONS FOR ORDER AND ORDER**

[1] WHEREAS this is a motion by the defendants 144942 Canada Inc. and Alain Elmaleh (the defendants) under paragraphs 416(1)(a), (b) and (f) of the *Federal Courts Rules* (the Rules) for an order, firstly, requiring the plaintiffs in this action for infringement of copyright to give security for the defendants' costs and, secondly, for an order paying out the sum of \$20,000, which the plaintiffs have already paid into court as security for costs;

[2] WHEREAS the plaintiffs are not disputing that the defendants are entitled to a certain amount as security for their costs, since the plaintiffs fall within the ambit of paragraphs 416(1)(a) and (b) of the Rules;

[3] WHEREAS, however, the plaintiffs dispute the sum of \$163,000 that the defendants are claiming as security, and whereas these same plaintiffs dispute that an order can be made at this stage to pay out the \$20,000 that they have already paid into court as security for the defendants' costs;

**I. Motion for payment out of court**

[4] WHEREAS first, the motion by the defendants for payment out of court is based on the central fact that, on May 10, 2006, the defendants obtained an order against the plaintiffs in this matter for costs of \$40,000 plus taxable disbursements and expert costs, and that this order was

made after this Court set aside an Anton Piller order that the plaintiffs had previously obtained against the defendants;

[5] WHEREAS, however, it must be kept in mind that this motion to pay monies out is limited to \$20,000 because this is the only amount that has been paid into Court at this time, and that therefore the defendants' approach here could also apply ultimately to any amount posted by the plaintiffs, up to the total amount awarded by this Court on May 10, 2006, currently fixed at \$40,000;

[6] WHEREAS, in addition and most importantly, on May 10, 2006, the Court did not order – despite being invited to do so by counsel for the defendants – that any amount of costs ordered by the Court – under subsection 401(2) of the Rules or on any other basis – be payable forthwith;

[7] WHEREAS the order made by the Court on May 10, 2006, is in some way tantamount to an award of costs in favour of the defendants in any event of the cause;

[8] WHEREAS these three latter conclusions lead the Court to apply the approach that it set out in *Waterfurnace Inc. v. 803943 Ontario Ltd.*, [1991] F.C.J. No. 912, where it was stated that:

. . . costs awarded on an interlocutory motion are not payable until the conclusion of the trial unless specifically ordered payable forthwith or payable forthwith after taxation.

My view in this regard appears to be supported by the statement in *Jowitt's Dictionary of English Law*, Second Edition at page 482 where it is written:

The costs of an interlocutory application are sometimes ordered to be the costs of one of the parties in any event; so that even if he loses the action he loses the action he is entitled to set off the amount of those costs against the costs in the cause which he has to pay.

I deduce from that statement that the costs of interlocutory proceedings are not payable before the costs of the action are determined, otherwise set-off would not be possible.

[9] WHEREAS in this case, at this preliminary stage, one cannot rule out the possibility that if the plaintiffs are ultimately successful in their action, they may want to set off the costs that they would then be entitled to against those already awarded by the Court on May 10, 2006;

[10] WHEREAS, for all these reasons, the Court does not intend to authorize the payment out to the defendants of the \$20,000 that the plaintiffs have already paid into Court.

**II. Security for costs to be paid by the plaintiffs**

[11] WHEREAS the evolution of this file since the agreement between the parties in December 2005 regarding the amount of the aforementioned security for costs cannot be viewed as impeding this motion by the defendants for further security;

[12] WHEREAS however, at this preliminary stage of the proceedings, the defendants' costs must be evaluated conservatively, and could, if necessary, be the subject of a motion for reassessment.

[13] WHEREAS in the judgment of this Court dated May 10, 2006, only the sum of \$40,000 is clearly fixed, and the disbursements and expert costs are currently the subject of an assessment that is not yet completed, and it would be pointless at this stage for this Court to award any amount under this head because the plaintiffs are currently disputing before an assessment

officer both the appropriateness of the defendants' request for an assessment at this stage and the amount itself of their fees and disbursements;

[14] WHEREAS, nonetheless, in the plaintiffs' submissions at the assessment on September 6, 2006, they calculated the amount of fees and disbursements to be \$20,837.18, which I am rounding off to \$21,000 for our purposes;

[15] WHEREAS this \$21,000 must be added to the \$40,000 already fixed on May 10, 2006, and this amount of \$61,000 should be increased by an award for fees and costs up to and including the examinations for discovery, which I estimate at \$20,000;

[16] WHEREAS of this total amount of \$81,000, it must be noted that this Court already has \$20,000, which leaves \$61,000 to be paid by the three plaintiffs collectively in accordance with the schedule set out below and section 418:

1. \$40,000 within 20 days;
2. \$21,000 no later than 30 days before the examinations for discovery commence;

**III. Address for service**

[17] WHEREAS lastly, regarding the dispute between the defendants and the plaintiff John Stagliano, Inc., the defendants, in accordance with section 2, shall serve all documents on this plaintiff by complying with the definition of "address for service" in the said section 2;

**ORDER**

**THE COURT ORDERS** that the part of the motion by the defendants for an order paying out security to them is dismissed.

The part of the motion by the defendants for an order for security for costs is granted as follows. The three plaintiffs collectively shall give security for the defendants' costs in accordance with the schedule set out below and section 418:

1. \$40,000 within 20 days;
2. \$21,000 no later than 30 days before the examinations for discovery commence.

In accordance with section 2, the defendants shall serve all documents on the plaintiff John Stagliano, Inc. by complying with the definition of "address for service" in the said section 2.

In view of the divided success on this motion, there will be no award of costs.

**“Richard Morneau”**

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Prothonotary

Certified true translation  
Mary Jo Egan, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1779-05

**STYLE OF CAUSE:** JOHN STAGLIANO, INC. ET AL.  
and  
ALAIN ELMALEH ET AL.

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** September 11, 2006

**REASONS FOR ORDER:** PROTHONOTARY MORNEAU

**DATED:** September 14, 2006

**APPEARANCES:**

Gary Rivard FOR THE PLAINTIFF  
JOHN STAGLIANO, INC.

France Lessard FOR THE PLAINTIFFS JULES JORDAN  
VIDEO INC. AND ASHLEY GASPER

Serge Segal FOR THE DEFENDANTS ALAIN ELMALEH  
Maxime Bourret AND 144942 CANADA INC.

**SOLICITORS OF RECORD:**

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