Federal Court  Cour fédérale

Date: 20070110

Docket: T-2064-06

Citation: 2007 FC 17

[ENGLISH TRANSLATION]

BETWEEN:

PRADO TECHNOLOGIES INC.
and
LES PRODUITS INNOVAPLAS INC.

Plaintiffs

and

9167-9027 QUÉBEC INC.,
(carrying on business as LES PRODUITS DE RÉSINE ACCES,S),
GESTION BOURGAULT & THÉBERGE INC.
and
JEAN BOURGAULT

Defendants

REASONS FOR ORDER

PROTHONOTARY MORNEAU

[1] This is a motion by defendants Jean Bourgault and Gestion Bourgault & Théberge Inc. (Gestion B & T) for an order under paragraphs 221(1)(a), (c), (d) and (f) of the *Federal Courts*

Rules (the Rules) to strike out the statement of claim filed against defendant Jean Bourgault by the plaintiffs on November 24, 2006 (the Statement).

Background

[2] The plaintiffs are involved in the marketing of plastic products.

[3] More specifically, plaintiff Prado Technologies Inc. (Prado) is the holder of patent no. 2,409,866 for an invention called "Swimming pool stairs," one of its main characteristics being that the tapered structure of the stairs makes it possible to pile up many stairs, which would be advantageous for transporting, handling and storing them.

[4] Through their action, the plaintiffs are accusing defendant 9167-9027 Québec Inc., with respect to this, and defendant Gestion B & T, concerning the period before May 2006 (when Gestion B & T was known under another name: Les Produits de Résine Acces,s Inc.) of having marketed counterfeit pool stairs.

[5] Also included in the group of defendants is Mr. Jean Bourgault as an individual.

[6] According to defendants Jean Bourgault and Gestion B & T, the statement does not reveal any sufficient material facts that would allow this Court to find that defendant Jean Bourgault is personally liable, hence this application to strike, which aims to exclude him from the action.

[7] The main allegations concerning the presence of Mr. Bourgault in the action are at paragraphs 12, 19 and 21 of the statement. These paragraphs read as follows:

[TRANSLATION]

> 12. (…) Mr. Bourgault is the president and administrator of defendant Gestion B & T, a business he co-owns, through his holding company 3969029 Canada inc.
>
> […]
>
> 19. The defendant, Jean Bourgault, deliberately, intentionally and knowingly led the defendant, Gestion B & T (at the time when it was known under the name of Les Produits de Résine Acces,s inc.), to make and market pool stairs that included the aforementioned items and to use a method to maintain them that includes the aforementioned steps after seeing the plaintiffs' pool stairs that incorporate the Invention and after having been informed of the plaintiffs' rights in the Prado patent without regard to the risk of counterfeiting.
>
> (Emphasis added)
>
> […]
>
> 21 Deliberately, intentionally and knowingly leading the defendant, Gestion B & T, by defendant Jean Bourgault to become involved in the aforementioned activities, which were likely to result in infringing on the plaintiffs' intellectual property rights, or which showed indifference to this risk, makes defendant Bourgault personally, jointly and solely responsible for the acts of counterfeiting committed by Gestion B & T.

Analysis

Criteria for striking out

[8] As we are reminded by the following excerpt from the decision of the Federal Court of Appeal in *Sweet et al. v. Canada* (1999), 249 N.R. 17, at paragraph 6 on page 23, striking out takes place only under one or the other paragraphs of Rule 221 only if the situation in question is plain and obvious:

> [6] Statements of claim are struck out as disclosing no reasonable cause of action only in plain and obvious cases and where the Court is satisfied that the case is beyond doubt (see *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735 at 740; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 and *Hunt v. Carey Canada. Inc.*, [1990] 2 S.C.R. 959). The burden is as stringent when the ground argued is that of abuse of process or that of pleadings being scandalous, frivolous or vexatious (see *Creaghan Estate v. The Queen*, [1972] F.C. 732 at 736 (F.C.T.D.), Pratte J.; *Waterside Ocean Navigation Company, Inc. v. International Navigation Ltd et al.*, [1977] 2 F.C. 257 at 259 (F.C.T.D.), Thurlow A.C.J.; *Micromar International Inc. v. Micro Furnace Ltd.* (1988), 23 C.P.R. (3d) 214 (F.C.T.D.), Pinard J. and *Connaught Laboratories Ltd. v. Smithkline Beecham Pharma Inc.* (1998), 86 C.P.R. (3d) 36 (F.C.T.D.) Gibson J.). The words of Pratte J. (as he then was), spoken in 1972, in *Creaghan Estate, supra,* are still very much appropriate:
>
> "… a presiding judge should not make such an order unless it be obvious that the plaintiff's action is so clearly futile that it has not the slightest chance of succeeding ..."

[9] The question that must now be asked is the following: Is it plain and obvious that the statement does not disclose any reasonable cause for action on the grounds that it would not contain sufficient material facts to engage the responsibility of Mr. Bourgault as a defendant in a personal capacity?

[10] For the following reasons, I think that in the context of this motion to strike—which requires a greater test—that the question asked above must receive a negative answer.

[11] Generally, I think the statement that concerns us—which essentially constitutes paragraph 19 thereof—was written carefully enough to raise, at this point, although by a slight margin, the allegation at paragraph 19 of the statement above the general allegations that were denounced in some landmark decisions, such as *Mentmore Manufacturing Co., Ltd v. National Merchandise*

Manufacturing Co. Inc. (1978), 40 C.P.R. (2d) 164 (hereinafter *Mentmore*) or *Dolomite Svenska Aktiebolag v. Dana Douglas Medical Inc.* (1994), 58 C.P.R. (3d) 531 (hereinafter *Dolomite*).

[12] In *Dolomite,* the Court summarized as follows at page 533 what must be alleged by a plaintiff for an infringement action to take place in a personal capacity regarding an administrator or director of a corporation:

> In order to properly establish a cause of action against an individual as the directing mind of a corporation, a plaintiff cannot merely plead the facts of the defendant's capacity as a director or officer. The plaintiff must allege that the defendant knowingly and willingly authorized the infringing actions which form the basis of the cause of action. A statement of claim must particularize the circumstances from which it is reasonable to conclude that the purpose of the director or officer is not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it, but the deliberate, willful and knowing pursuit of a course of conduct that is likely to constitute infringement or reflects an indifference to the risk of infringement: *Mentmore Manufacturing Co., Ltd. v. National Merchandise Manufacturing Co. Inc.* (1978), 40 C.P.R. (2d) 164 at p. 174, […] Individuals who are officers and directors of corporations are not *ipso facto* responsible for infringement committed by their corporation: *Katun Corp. v. Technofax Inc.* (1988), 22 C.P.R. (3d) 269 at p. 270, 21 C.I.P.R. 270.
>
> (Emphasis added)

[13] The excerpt from *Mentmore* to which the Court refers in *Dolomite* reads as follows:

> [T]here must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but deliberate, willful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it.

[14] Here, the second part of paragraph 19 of the statement alleges first that defendant Bourgault saw the plaintiffs' stairs that incorporate the invention and heard about the plaintiffs' rights to the patent at issue. I think that these indications are allegations of sufficient material facts to lead us to remember or understand, at least for the moment, that the first part of paragraph 19 of the statement aims at knowing behaviour displayed by defendant Bourgault that goes beyond managing the business of Gestion B & T, namely an inference that Gestion B & T deliberately served as a conduit for defendant Bourgault so that counterfeiting could be carried out.

[15] Whether this claim, like the situation in *Mentmore*, will essentially fall at the stage of trial on the merits is another debate altogether. However, I must conclude at this point that it is not plain and obvious under paragraph 221(1)(a) of the Rules that the statement does not reveal any reasonable grounds for action against defendant Bourgault. As stated by the Supreme Court in *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959, at page 980, concerning the striking out of an action on motion:

> […] assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the *British Columbia Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).
>
> (Emphasis added)

[16] For the same reasons, to which must be added what was gleaned from Mr. Bourgault's cross-examination on affidavit, I do not believe that it is plain and obvious that the other paragraphs of Rule 221 apply in this case.

[17] Thus, the motion by defendants Jean Bourgault and Gestion B & T will be dismissed with costs. The same defendants, as well as defendant 9167-9027 Québec Inc., will have to serve and file their defence within thirty (30) days of the date of the order that accompanies these reasons.

"Richard Morneau"
Prothonotary

Montréal, Quebec
January 10, 2007

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2064-06

STYLE OF CAUSE: PRADO TECHNOLOGIES INC. ET AL
Plaintiffs
and
9167-9027 QUÉBEC INC. ET AL
Defendants

WRITTEN MOTION REVIEWED AT MONTRÉAL WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: JANUARY 10, 2007

WRITTEN SUBMISSIONS:

Marc-André Huot	FOR THE PLAINTIFFS
François Grenier	FOR THE DEFENDANTS GESTION BOURGAULT & THÉBERGE INC. AND JEAN BOURGAULT

SOLICITORS OF RECORD:

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