

Date: 20081208

Docket: T-64-08

Citation: 2008 FC 1351

Ottawa, Ontario, December 8, 2008

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

HENRY NEUGEBAUER

Applicant

and

ANNA M. LABIENIEC

Respondent

REASONS FOR ORDER AND ORDER

[1] This case involves an application by Henry Neugebauer (the Applicant) to expunge a Certificate of Registration of Copyright (Registration No. 1,639,825) issued by the Canadian Intellectual Property Office on July 12, 2006 (the Application). The Registration at issue concerns a literary work entitled *Gesi Puch* (the Book) and identifies Anna M. Labieniec (the Respondent) and the Applicant as the Book's owners and authors. The book is Mr. Neugebauer's memoir of the Holocaust and of Germany's occupation of Poland during World War II. It is written in Polish.

[2] This hearing was to be a default proceeding. However, the self-represented Respondent appeared and requested an adjournment based on the fact that she had not received the Applicant's application record. She had had no opportunity to respond and apparently wished to do so.

[3] The Respondent was served with the Notice of Application (the Notice) on January 18, 2008. It read in part as follows:

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you on a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

[4] Unfortunately, neither the Court's Notice of Application nor Form 305 mentions that a Notice of Appearance must be filed with the Court. As well, although Form 305 refers to Rule 305, it does not suggest that the Rule should be read for further information. In my view, a respondent would fairly assume, based on the above language, that timely service of a Notice of Appearance would entitle him or her to notice of subsequent proceedings.

[5] In this case, relying on the Notice, the Respondent prepared the Notice of Appearance (the Appearance) but did not serve it on counsel for the Applicant until January 31, 2008. This meant that it was late. Further, it was never filed. For this reason, the only pre-hearing document the Applicant received was the Court's order of July 29, 2008, setting the matter down for hearing. She also received a phone call from the Registry in which she confirmed that she would be present. Just

before the hearing, the Court received a letter dated November 25, 2008. It was written by a lawyer who said he would attend on the Respondent's behalf to ask for an adjournment (the Respondent's Counsel). However, he had not arrived when Court opened.

[6] In these circumstances, I asked Applicant's counsel to address the issue of an adjournment. She vigorously opposed saying that:

- allowing an adjournment would prejudice the Applicant. She pointed to the fact that the Applicant had prepared submissions and done everything he could to exercise his rights. She noted that the Applicant has been denied sole copyright for nearly two years and that the Applicant is in his eighties. She argued that, because copyright protection is limited to the life of the author plus fifty years, an adjournment would prejudice him owing to his advanced age. As well, she suggested that an adjournment would deny the public access to an important work.
- The Applicant had invested significant amounts of his limited money, resources and time preparing for the hearing.
- Self-represented parties are required to follow the Court's rules and the Appearance was not served in time. She relied on *Kalevar v. Liberal Party of Canada*, 2001 FCT 1261; 110 A.C.W.S. (3d) 236 (T.D.) aff'd 2002 FCA 246; 115 A.C.W.S. (3d) 358.

[7] When the Respondent's Counsel arrived, he argued that his client had done her best to follow the instructions on the Notice and that she had a response to make on the merits. He also

criticized the Applicant's counsel for proceeding in default when she knew that the Respondent wished to oppose the Application.

CONCLUSION

[8] The adjournment will be granted because counsel for the Applicant scheduled this hearing as a default proceeding knowing that the Respondent wished to oppose the Application.

ORDER

UPON the Respondent's request for an adjournment and upon hearing the submissions of counsel for both parties in Toronto on Wednesday, November 26, 2008;

AND UPON being satisfied, for the reasons given above, that a short adjournment is in the interests of justice;

AND UPON noting that the date given below is convenient for both parties;

AND UPON being satisfied that, because the Respondent failed to serve and file her Appearance in time under the *Rules* and because counsel for the Applicant failed to advise the Court that the Respondent wished to oppose the Application, this not a proper case for costs.

NOW THEREFORE THIS COURT ORDERS that:

1. This matter is adjourned for hearing on the merits before me in Toronto on January 22, 2008 at 9:30 a.m.
2. The Respondent is to serve and file a Notice of Appearance on or before Friday, December 12, 2008.

Sandra J. Simpson

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-64-08

STYLE OF CAUSE: HENRY NEUGEBAUER v. ANNA M. LABIENIEC

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 26, 2008

**REASONS FOR ORDER
AND ORDER BY:** SIMPSON J.

DATED: DECEMBER 8, 2008

APPEARANCES:

Jordana Sanft
Jill Melissa Daley FOR THE APPLICANT

Christopher Kozlowski FOR THE RESPONDENT

SOLICITORS OF RECORD:

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