

Date: 20090123

Docket: T-279-07

Citation: 2009FC70

Edmonton, Alberta, January 23, 2009

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

**ZERO SPILL SYSTEMS (INT'L) INC.,
KATCH KAN HOLDINGS LTD.,
QUINN HOLTBY and
KATCH KAN RENTALS LTD.**

Plaintiffs

and

**614248 ALBERTA LTD. dba LEA-DER
COATINGS, BILL HEIDE dba CENTRAL
ALBERTA PLASTIC PRODUCTS
RAT PLASTIC LTD. and
1284897 ALBERTA LTD.**

Defendants

AND BETWEEN:

**614248 ALBERTA LTD and
1284897 ALBERTA LTD.**

**Plaintiffs by Counterclaim
(Defendants)**

and

**ZERO SPILL SYSTEMS (INT'L) INC.,
KATCH KAN HOLDINGS LTD., and
QUINN HOLTBY**

**Defendants by Counterclaim
(Plaintiffs)**

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is a motion on behalf of the Plaintiffs appealing Prothonotary R. Lafrenière's order of December 3, 2008 granting a motion to strike all references to the Defendants Derwin Joelson and Leah Joelson (the Joelsons) from the amended statement of claim. The motion also seeks costs to the Plaintiffs on a solicitor-client basis.

II. Background

[2] The Plaintiffs commenced this action by way of a statement of claim issued February 9, 2007 alleging, *inter alia*, that the corporate Defendants, and the Joelsons in their personal capacity, infringed certain claims of four Canadian patents and design (the Patents).

[3] The Joelsons served and filed a statement of defence, and 614248 Alberta Ltd. (614248) served and filed a statement of defence and counterclaim, all dated April 16, 2007.

[4] The Plaintiffs filed an amended statement of claim September 21, 2007 wherein it is alleged that the Joelsons knew of, or were wilfully blind or reckless of, the fact that the Patents and inventions existed, and that they personally directed, ordered, induced and authorized the infringing acts. It is useful to reproduce the two pertinent paragraphs of the amended statement of claim, namely paragraphs 38 and 39:

38. The Defendants Derwin Joelson and Leah Joelson knew that Lea-Der, and those entities it controls, had no licence, permission or consent of Zero Spill, KKHL or Quinn Holtby. Further Derwin Joelson and Leah Joelson knew of or were wilfully blind or reckless of the fact that said Patents and inventions existed.

39. The Defendants Derwin Joelson and Leah Joelson personally directed, ordered and authorized the infringing acts of Lea-Der (and those entities it controls). Derwin Joelson and Leah Joelson induced Lea-Der (and those entities it controls) to infringe said Patents, and their associated claims, rights, privileges and liberties as set out more fully above.

[5] In their defence, the Joelsons and 614248 denied the allegations of wilful blindness, recklessness, and infringement, and argue that the Plaintiffs failed to disclose a cause of action against the Joelsons personally.

[6] The Joelsons and 614248 brought a motion to strike which was heard on October 10, 2008.

On the motion they argued:

...the Amended Statement of Claim alleges no facts concerning the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it. There are no pleaded facts from which it is reasonable to conclude that the purpose of either of the Joelsons was anything other than the direction of the manufacturing and selling activity of the corporation in the ordinary course of business.

The Amended Statement of Claim does not disclose any allegation of conduct on the part of the Joelsons which is tortious in itself, or which exhibits a separate identity of interest from that of 614248 Alberta Ltd. Such as to make the act of patent infringement that of the Joelsons.

[7] In reply to this motion to strike, the Plaintiffs allege that the Joelsons were, at all material times, the directors, officers, shareholders and directing minds of Lea-Der; that the Joelsons knew that they had no license, permission or consent from the Plaintiffs; that the Joelsons personally directed, ordered and authorized the infringing acts; and that the Joelsons deliberately infringed the listed patents and designs. Furthermore, they argue that the Joelsons defended the original statement of claim in which they were named and did not seek particulars of the allegations against them, they produced detailed affidavits, and Derwin Joelson has been cross-examined on his affidavit. It was only five (5) months after the first round of discovery of Mr. Joelson and one month after the delivery of the Plaintiffs' notice of motion seeking answers to questions improperly refused on examination for discovery that the motion to strike was filed. The Plaintiffs argue that the answers to these questions go to the root of the allegations made against the Joelsons.

[8] By order dated December 3, 2008, Prothonotary Lafrenière granted the Defendants' motion to strike with costs.

III. Standard of Review

[9] A discretionary decision of a prothonotary should be reviewed *de novo* if the questions raised in the motion are vital to the final issue in the case (*Merck & Co. v. Apotex Inc.*, 2003 FCA 488). The parties agree that this appeal should proceed on a *de novo* basis. There is no question that striking a party from a proceeding is a question that is vital to the final issue in the case. I will, therefore, proceed to consider this appeal on a *de novo* basis.

IV. Analysis

[10] In addition to reiterating the arguments made before the Prothonotary on the motion to strike, the Plaintiffs advance the following arguments on this appeal:

- (1) The discovery process has revealed material facts relating to the Joelsons' involvement with the alleged infringing acts. It is argued that the timing of the motion is pre-mature since the discovery process is far from complete. A second round of examinations for discovery is scheduled and will provide answers to many answers to undertakings provided by Mr. Joelson on the first round.
- (2) The Joelsons had obtained a legal opinion on infringement that they neglected to produce. The Prothonotary should have drawn a negative inference as a result.
- (3) The question of whether the Joelsons are personally liable for the infringing acts of 614248 is one of mixed fact and law and ought to be dealt with by the trial judge.
- (4) That the Prothonotary was clearly wrong in finding that it was "plain and obvious" that the amended statement of claim discloses no reasonable cause of action.

[11] I will turn first to the question of what evidence, if any, can be considered on such an appeal. The Plaintiffs seek to rely on the affidavit of Quinn Holtby (the Affiant) sworn December 10, 2008 in support of their appeal. Mr. Holtby, a named plaintiff in the action, annexes to his affidavit true copies of the compressed examinations for discovery of Mr. Derwin Joelson and Mr. Darrell Demers which was before the Court in related motions to compel answers. The Affiant also gave

evidence in relation to the second round of discoveries, particularly in respect to the timing and reason for postponement of the discoveries. The Plaintiffs essentially argue that this evidence was on the record of the Court and therefore it is appropriate that it be considered on this appeal.

[12] It is clear that the affidavit of Quinn Holtby was not before the Prothonotary at the hearing of the motion to strike. A review of the contents of the affidavit indicates that the facts sworn therein could have been put before the Prothonotary at the hearing of the motion to strike. For this reason alone, it would be improper to consider the affidavit on appeal. In any event, pursuant to Rule 221(2), on a motion to strike under Rule 221(1)(a), no evidence shall be heard. The jurisprudence also makes it clear that on such a motion, the reviewing court is limited to the language of the pleadings and is not to consider any evidence: see *Coca-Cola Ltd. v. Pardhan* (1999), 85 C.P.R. (3d) 489 at 493 (F.C.T.D.), [1999] F.C.J. No. 484 at paragraph 8 (QL). The Holtby affidavit is therefore not properly before the Court on this appeal and shall not be considered.

[13] The *Coca-Cola* case also resolves the issue raised by the Plaintiffs regarding the timeliness of the motion of strike. The Court of Appeal stated that while normally an application to strike a pleading should be brought before pleading over it, it is permissible to bring a motion to strike at any time on the basis that the pleading discloses no reasonable cause of action: see paragraph 8 of *Coca-Cola*, above.

[14] In respect to the negative inference the Plaintiffs ask be drawn on the failure of the Joelsons to adduce a legal opinion obtained on infringement, no authority was submitted in support of this

proposition. Suffice it to say that I cannot imagine a negative inference being drawn against a party by reason of its failure to disclose information that is essentially protected by privilege.

[15] I now turn to the substantive argument of the Plaintiffs that the Prothonotary was clearly wrong in finding that it was “plain and obvious” that the amended statement of claim discloses no reasonable cause of action.

[16] The applicable test on a motion to strike out a pleading is whether it is “plain and obvious” that the claim discloses no reasonable cause of action: see *Hunt v. Carey*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at paragraph 32 (QL). In doing so, the facts pleaded are to be taken as proven (*ibid.*, at paragraph 30).

[17] The issue here is whether the claim set out in the amended statement of claim discloses a personal cause of action against the Joelsons. In the circumstances, the legal issue relates to directors’ liability. A succinct summary of the personal liability of directors of corporations is found in *Petrillo v. Allmax Nutrition Inc.*, 2006 FC 1199 at paragraphs 27-36. As a general rule, incorporated businesses have a legal personality separate and distinct from those of its directors and officers who will ordinarily enjoy the benefits of the limited liability that incorporation provides.

[18] In *Mentmore Manufacturing Co. Ltd. v. National Merchandising Manufacturing Co. Inc.* (1978), 89 D.L.R. (3d) 195, 22 N.R. 161, at paragraph 28, the Federal Court of Appeal determined that to attract personal liability on the part of a corporate director or officer:

[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 the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it.

[19] The jurisprudence teaches that personal liability will only attach when the actions of the director or officer are either such that the director's own behaviour is tortious or when the corporation is used as a cloak for the personal activities of the director such that the director's conduct serves an interest other than that of the corporation: see *Dimplex North America Ltd. v. Globaltec Distributors Ltd.* 2005 FC 298, (2005), 270 F.T.R. 310 at paragraph 13 and *Halford v. Seed Hawk Inc.* 2004 FC 88 at paragraphs 317-339, (2004), 31 C.P.R. (4th) 434 at pages 554-556 (F.C.T.D.) affirmed with respect to the trial judge's finding of no personal liability 2006 FCA 275 at paragraphs 51-55, (2006) 54 C.P.R. (4th) 130 (F.C.A.) at 148-149.

[20] It is not enough for the Plaintiffs to assert personal liability on the part of an officer or director of a company in a statement of claim in the hope that evidence to support the allegation will be uncovered during the discovery process. A lawsuit is not a fishing expedition, and to do so is an abuse of the court's process: see *Painblanc v. Kastner*, [1994] F.C.J. No. 1671, 58 C.P.R. (3d) 502.

[21] The impugned paragraphs of the statement of claim quoted above use the very same words employed by the Court of Appeal in the *Mentmore* case. They do not, however, state any facts upon which it could be concluded that the Joelsons "deliberately, wilfully and

knowingly” caused or directed the alleged infringement. There must be sufficient facts pleaded to indicate to the individual defendants the kind of control over the company or the kind of personal conduct being complained of. *Mentmore* rejects the proposition that individuals who are officers and directors of corporations are *ipso facto* responsible for infringement allegedly committed by their corporations. The Plaintiffs in their amended statement of claim have not alleged against the individual defendants specific facts to show that their conduct was tortious in and of itself, as required by *Mentmore*.

V. Conclusion

[22] For the above reasons the appeal will be dismissed. I am satisfied that it is plain and obvious that the amended statement of claim discloses no reasonable cause of action.

Prothonotary Lafrenière was not wrong in granting the motion and striking all references to the Defendants Derwin Joelson and Leah Joelson from the amended statement of claim.

ORDER

THIS COURT ORDERS that:

1. The appeal of the December 3, 2008 Order of Prothonotary R. Lafrenière is dismissed with costs.

“Edmond P. Blanchard”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-279-07

STYLE OF CAUSE: ZERO SPILL SYSTEMS (INT'L) INC. et al. v. 614248
ALBERTA LTD. dba LEA-DER COATINGS, et al.

PLACE OF HEARING: Edmonton, Alberta

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REASONS FOR ORDER
AND ORDER: Mr. Justice Blanchard

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