Federal Court  Cour fédérale

Date: 20100414

Docket: T-79-10

Citation: 2010 FC 406

Montréal, Quebec, April 14, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

ADMIRALTY ACTION *IN REM* AGAINST THE SHIP "ATCHAFALAYA" AND *IN PERSONAM* AGAINST PROTEUS CO.

BETWEEN:

KEYBANK NATIONAL ASSOCIATION,
A CORPORATE BODY

Plaintiff

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "ATCHAFALAYA" and **PROTEUS CO.**

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion for leave to intervene and to set aside the *in rem* portion of a summary judgment rendered by Justice Johanne Gauthier on February 23, 2010, and an Order of Appraisal and Sale rendered by Justice Heneghan on March 11, 2010, brought pursuant to sections 109 and 399 of the *Federal Courts Rules*, S.O.R./98-106 (the *Rules*), by Dragage Verreault Inc. (DV).

BACKGROUND FACTS

[2] DV arrested the defendant ship "Atchafalaya" (the Ship) on December 23, 2008. It is involved in proceedings *in rem* against the Ship and *in personam* against its owners in this Court's file T-1290-08. DV has notified the plaintiffs, Keybank National Association (Keybank), of that action on July 5, 2009.

[3] On January 13, 2010, Keybank's solicitor, Mr. Spicer, contacted DV's solicitor, Mr. Buteau, and was provided with a copy of DV's pleadings in its action against the Ship and its owners. Keybank filed the present action against the Ship and its owners on January 18, 2010. It did not serve or otherwise notify DV at the time. DV learned of this action by February 4, 2010.

[4] Mr. Buteau then wrote to Mr. Spicer, requesting a copy of Keybank's pleadings and asking whether and when they had been served upon the Ship. Mr. Spicer replied that this had been done on January 26. However, as DV eventually found out, this was not the case: Keybank only served the pleadings on the *in personam* defendants.

[5] On February 16, 2010, Keybank moved for summary judgment in the action. It did not notify DV of its motion. Upon consent of the defendants, Justice Gauthier granted summary judgment on February 23, 2010, as requested by Keybank. DV's solicitors were not present at or aware of the hearing which led to this judgment.

[6] Keybank forwarded a copy of the summary judgment to DV on February 24, 2010, and notified it that it intended to move for the sale of the Ship. DV apparently only became aware of this

in early March of 2010, due to Mr. Buteau being away from his office. It also became aware that Keybank's statement of claim had not been served on the Ship.

[7] On March 11, upon Keybank's motion, Justice Elizabeth Heneghan rendered an Order of Appraisal and Sale of the Ship. DV had been served with the notice of motion and attempted to have its hearing postponed, but did not seek leave to intervene in the action, and as it was not a party, its requests were denied.

[8] DV is now seeking leave to intervene in the action and requests that the *in rem* portion of the summary judgment as well as Justice Heneghan's Order of Appraisal and Sale be set aside. Pursuant to Justice Gauthier's direction, it has filed its motion for hearing at a general sitting of the Court, rather than before her.

ISSUES

[9] There are three issues for this Court to decide:

a. Should DV be granted leave to intervene in this case?

b. Should the *in rem* portion of the summary judgment be set aside?

c. Should the Order of Appraisal and Sale be set aside?

DISCUSSION

Should DV be granted leave to intervene in this case?

[10] DV argues that, having arrested the Ship, it has an interest in it which may be adversely affected by the outcome of this action. The Ship is the only security for a claim it is pursuing against

its owners. In fact, the identity of the Ship's owners is matter of controversy, and will be decided at the trial of DV's action (T-1290-08), as Prothonotary Morneau (*Admiralty Action In Rem v. M/V Atchafalaya (Ship)*, 2009 FC 273) and Justice Luc Martineau (in an unpublished order) both recognized. DV should, therefore, be allowed to intervene to protect its interests by moving to have the summary judgment and the ensuing Order of Appraisal and Sale set aside.

[11] Keybank opposes DV's intervention. While it acknowledges DV's interest in the Ship, it argues that the Order of Appraisal and Sale protects this interest by ensuring that the Ship will be sold at a fair market price. Furthermore, there is no real public interest which DV's intervention would protect; interest in the proper service on the Ship of the *in rem* proceedings is merely academic. In addition, DV failed to seek leave to intervene at the earliest possible time, whether after having learned of these proceedings on February 4, 2010, or after having learned of Keybank's intention to move for an Order of Appraisal and Sale in late February or early March. Accepting DV's intervention at this late stage would cause considerable disruption. Finally, the interests of justice would not be served by allowing the intervention, because it is based on a technicality; would present no new arguments to the Court; and, in any event, there is no evidence that it is necessary to protect DV's interests.

[12] I do not accept Keybank's arguments.

[13] First, I agree with DV that its interest in the Ship entitles it to intervene in the action. In *Shibamoto & Co v. Western Fish Producers Inc. (Trustees of)*, (1991), 50 F.T.R. 231 (F.C.T.D.), this Court concluded that a party whose interest in a *res* can be adversely affected by the outcome of

in rem proceedings has the right to participate in such proceedings. This principle applies in the case at bar, because a judicial sale of the Ship resulting from the summary judgment will adversely affect DV's interests if the sale price is insufficient to satisfy its claim against the Ship's owners. In fact, participation in proceedings *in rem* by a party having such an interest can occur as matter of course, without that party bringing a formal motion to intervene. (See, for example, the Court's recorded entries in its file T-1620-01, showing appearances by solicitors for "Crew Members in the file T-1266-01" and "Plaintiff in the file 1266-01" at the hearing of a motion for the sale of the ship "Arcadia" on November 6, 2001; see also the Court's recorded entries in its files T-531-03 and T-470-03; T-2009-00; and T-1705-00.)

[14] Second, DV was not late in moving to intervene. While DV was aware of this action by the time Keybank moved for (and the *in personam* defendant consented to) summary judgment, Keybank did not notify DV of its motion. Further, Keybank brought its motion for summary judgment before the expiry of the normal delay for filing a defence in the action, so that DV did not know what the *in personam* defendant's position was. It could not anticipate that the *in personam* defendant would not defend the action and would consent to summary judgment against it. Thus it could not make an informed decision as to whether or how to intervene. Therefore, in my view, DV cannot be said to have been negligent in not having sought to intervene at that stage. In fact, it did not seek to intervene in the action because Keybank failed to give it notice of its motion for summary judgment despite having recognized that DV could be "directly affected" as an *in rem* creditor if the proceeds of the Ship's sale do not amount to its fair market value.

[15] Finally, in my opinion, DV's intervention will serve the interests of justice. It is in the interests of justice that a party who ought to have made its views on a matter known to the Court be able to do so, in accordance with the principle *audi alteram partem*. This is all the more so where, as here, the matter proceeded on consent of the *in personam* defendant of the action and thus DV's intervention is necessary if the Court is to be presented with any debate on the remedies sought by Keybank. As for Keybank's argument that an intervention at such a late stage is disruptive, it cannot stand. Keybank has only itself to blame for the disruption, which it could have avoided by taking easy and obvious steps to give notice to DV, whose interest in this case it had already acknowledged.

[16] Thus leave to intervene is granted to DV.

Should the in rem *portion of summary judgment in this case date February 23, 2010, be set aside?*

[17] The *Rules* provide that, on motion, this Court can vary a previous order if, *inter alia*, it was made "in the absence of a party who failed to appear … by reason of insufficient notice of the proceeding," (para. 399(1)(*b*)) or "by reason of a matter that arose or was discovered subsequent to the making of the order" (para. 399(2)(*a*)).

[18] DV contends that such is the situation in this case. It expected that the plaintiff, whom it had made aware of its own proceedings against the Ship, would return the courtesy and notify it of its own action. But it did not get notice of these proceedings, in which it had an interest. Nor did it get notice of the application of summary judgment, and thus could not make its position known to the Court before summary judgment was rendered. In addition, solicitors for the plaintiff failed to serve

their statement of claim in this action on the Ship; as the provisions of the *Rules* that apply to service on an *in rem* defendant are mandatory, a judgment resulting from proceedings not properly served is a nullity.

[19] Keybank submits that DV's argument is based on a mere technicality, *i.e.* its failure to serve the statement of claim on the Ship. Furthermore, paragraph 399(1)(*b*) of the *Rules* only applies to a "party," which DV was not at the time of the summary judgment, so that it cannot avail itself of this provision. As for paragraph 399(2)(*a*), the Court ought not to apply it lightly, given the public interest the finality of judgments, and should not apply it in this case because the matter was properly decided between the parties, while DV failed to seek leave to intervene.

[20] In any event, the "matter that arose or was discovered subsequent to the making of the order," to which paragraph 399(2)(*a*) of the *Rules* refers, must have a determinative influence on the decision. According to Keybank, a technical irregularity of the service *in rem* could not have such an influence, and service in the case at bar complied with the spirit, if not the letter, of the *Rules*. The aim of service *in rem* is "to get the true defendants into court," and this has been accomplished by serving the statement of claim on the Ship's owners. Alternatively, it is to give notice of the action to all those concerned, and this has also been done. In any case, the Ship is currently neither manned nor working; complying with the formalities of the *Rules* would have been futile.

[21] Further, Keybank contends that even if its failure to serve the statement of claim on the *in rem* defendant was a violation of the *Rules*, the Court should not set aside the summary judgment. A procedural irregularity can be cured, especially if the party whom it affects suffered no real

prejudice. Such is the case here: DV has been aware of the proceedings since February 4, 2010, and has not alleged that it would have done anything differently had Keybank properly served the Ship. Alternatively, the proper remedy in case of an irregularity of service is to re-effect the service in compliance with the *Rules*. Such a remedy, however, would be moot here, since all those interested in the Ship already participate in the proceedings.

[22] Again, I am not persuaded by Keybank's arguments. I do not take as narrow a view as it does of the "matter" which "was discovered subsequent to the" summary judgment. The difficulty in this case is not merely that Keybank failed to follow the *Rules'* procedural requirements. Much more importantly, because of its failure to give notice of its early motion for summary judgment to DV, Justice Gauthier rendered the summary judgment unaware of DV's interest in the Ship and of its position with respect to Keybank's proposed course of action. Those are the "new matters" which are potentially determinative of the Court's disposition of this case.

[23] As I explained above, DV cannot be faulted for having failed to intervene in this case before Justice Gauthier rendered the summary judgment part of which it now seeks to have set aside. Because Keybank kept it in the dark as to the course of these proceedings, it is disingenuous for it to claim that the matter was properly decided between the parties. Even though DV was not a party at the time the summary judgment was delivered, it had an interest in this matter, and Keybank's actions prevented it from asserting this interest.

[24] Accordingly, I set aside the *in rem* portion of the summary judgment.

Should the Order of Appraisal and Sale dated March 11, 2010, be set aside?

[25] DV submits that, having set aside the in rem portion of the summary judgment in this matter, this Court should also set aside the Order of Appraisal and Sale, since it "was obtained by Keybank on the basis of a judgment which is a nullity." DV adds that it had insufficient notice of Keybank's notice of motion, which resulted in the Order of Appraisal and Sale. Furthermore, and in any event, Keybank simply cannot have the Ship sold without having arrested it, which it has not.

[26] DV insists that the carrying out of the Order of Appraisal and Sale will cause it prejudice. The sale of the Ship, which is highly specialized and may be of interests to operators of such vessels around the world, is insufficiently advertised under the terms of the order, no broker is involved to promote it. Furthermore, the sale is not by sealed bids, and thus not in accordance with the standard practice under the recent decisions of this Court. In addition, the appraiser appointed under the order has already acted for both Keybank and the *in personam* defendant in this action.

[27] Finally, DV submits that if this Court finds that the Order of Appraisal and Sale may only be set aside or varied by Justice Heneghan, it should be stayed pending a continuation of the hearing of this Motion before Justice Heneghan.

[28] Keybank, for its part, relies on subsection 399(3) of the *Rules*, which provides that "[u]nless the Court orders otherwise, the setting aside or variance of an order ... does not affect the validity or character of anything done or not done before the order was set aside or varied." It also contends that its right to have the Ship sold depends not on the summary judgment, but on the fact that the Ship has been arrested, and also on its contract with its owners. Finally, the terms of the Order of

Appraisal and Sale are sufficient to protect the creditors, including DV. It should not be interfered with, especially since it is already being carried out.

[29] In my view, the setting aside of the *in rem* portion of the summary judgment is a "matter that arose … after the making of the" Order of Appraisal and Sale within the meaning of paragraph 399(2)(*a*) of the *Rules*. Thus it may justify setting aside of this order. However, the decision to do so or not should be made by Justice Heneghan, who issued the Order of Appraisal and Sale. I will, therefore, stay its operation until Justice Heneghan takes a final decision on this matter.

[30] For these reasons, DV's motion for leave to intervene is granted; the *in rem* portion of the summary judgment is set aside; and the operation of the Order of Appraisal and Sale is stayed until Justice Heneghan hears the motion to have it set aside. Costs of this motion are payable by Keybank to DV in accordance with Column 5 of Tariff B.

ORDER

THIS COURT ORDERS that:

1. DV's motion for leave to intervene is granted;
2. The *in rem* portion of the summary judgment rendered by Justice Gauthier on February 23, 2010, is set aside;
3. The operation of the Order of Appraisal and Sale is stayed until Justice Heneghan hears DV's motion to have it set aside; and
4. The costs of this motion are payable by Keybank to DV and shall be calculated in accordance with Column 5 of Tariff B.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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