

Date: 20110420

Docket: T-1228-07

Citation: 2011 FC 478

Montreal, Quebec, April 20, 2011

Present: Mr. Richard Morneau, Prothonotary

[ENGLISH TRANSLATION]

BETWEEN:

JYGA CONCEPT INC.

Plaintiff

and

**PIGBOSS SUIVI CROISSANCE INC.
9132-1877 QUÉBEC INC.
JACQUES CIMON
GÉRALD BEAUDOIN
RENÉ BEAUDOIN**

Defendants

AND BETWEEN:

PIGBOSS SUIVI CROISSANCE INC.

Plaintiff by Counterclaim

and

**JYGA CONCEPT INC. and
DISTRIBUTION GILLES FILLION INC.**

Defendants by Counterclaim

and

9210-6517 QUÉBEC INC.

**Defendant and Plaintiff by Counterclaim
in continuance of suit**

REASONS FOR ORDER AND ORDER

[1] Before the Court in this case are two motions.

[2] One of those motions is brought by the plaintiff and defendant by counterclaim Jyga Concept Inc. (JYGA) under rules 415 and 416(1)(b) of the *Federal Courts Rules* (the Rules) to have the defendant and plaintiff by counterclaim in continuance of suit 9210-6517 Quebec Inc. (9210) give security in the amount of fifty thousand dollars (\$50,000) as security for payment of costs that may be awarded to JYGA at the end of these proceedings.

[3] The other motion is brought by 9210 and essentially seeks, in the Court's understanding, to allow 9210 to abandon its counterclaim without payment of costs and to recognize the action for patent invalidity lodged by JYGA (9210's motion for abandonment without payment of costs).

Background

[4] It appears that, in July 2007, JYGA brought a action for patent invalidity (patent 2,556,959, hereinafter patent '959) under section 60 of the *Patent Act* given that it was facing threats of infringement by the defendants in connection with patent '959 that the defendants had apparently obtained for a computerized pig-feeding system.

[5] According to JYGA, some former employees of JYGA, namely Mr. Cimon, Mr. Gérald Beaudoin and Mr. René Beaudoin, all defendants in this case, had left JYGA to go to Pigboss Suivi

Croissance Inc. (Pigboss) (the titular predecessor of 9210) in order to establish the patent in which Mr. Jacques Cimon, also an ex-employee of JYGA, was apparently also indicated as inventor in the patent.

[6] Naturally, as is often the case in any type of similar action, the validity of the patent is supported in defence, and the plaintiff by counterclaim (now 9210) maintains that JYGA is infringing patent '959.

[7] According to the notice of continuance of suit produced by 9210 on December 3, 2010, the latter acquired the rights in patent '959 further to Pigboss signing an agreement for voluntary abandonment and for taking in payment all of Pigboss' real property.

[8] However, according to the amended notice of continuance of suit produced by 9210, the latter has since become owner of all Pigboss' real property.

[9] On the strength of this background, it is first appropriate to address 9210's motion for abandonment without payment of costs. If that motion is dismissed, it will be appropriate to look at JYGA's motion for production of security.

I. 9210's motion for abandonment without payment of costs

[10] In its conclusion, this motion seeks to have the Court issue an order:

- a) **PERMITTING** 9210-6517 Québec inc. (hereinafter referred to as “9210”) to refrain from appearing in continuance of suit under the following terms;
- b) **ORDERING** 9210 to serve and file a notice of abandonment within five (5) days of the judgement on this motion;
- c) **ORDERING** that the abandonment be without payment of costs or alternatively for a maximum amount of ONE THOUSAND DOLLARS (\$1,000);
- d) **ACKNOWLEDGING** 9210's consent to agree without payment of costs to the invalidity of patent 2,556,959;
- e) **AWARDING** against Jyga Concept inc. the costs in the event of the latter challenging this motion;

[11] Rule 402 reads as follows:

[12] As noted by my colleague Lafrenière at paragraph [5] of *Dark Zone Technologies Inc. v. 1133150 Ontario Ltd. et al*, 2002 FCT 1 (*Dark Zone*):

[13] In this case, 9210 is essentially maintaining that the vast majority of the costs incurred in the case happened before its arrival in the case, that essentially its continuance of suit in December 2010 occurred without it or its attorneys being aware of the details of the case, and that, once aware of the case, it came to the conclusion that:

Given the extent of the case, 9210 felt that the costs in time and money needed to bring the case to completion taking the route of a trial will be very high and will exceed the value of the benefit it will be able to derive from it;

[14] I do not believe that these reasons are sufficient to allow 9210's motion.

[15] First, 9210's continuance of suit in December 2010 cannot result in it being exonerated from the costs falling under the responsibility of Pigboss. I believe that, in December 2010, 9210 became the rights and obligations of Pigboss.

[16] Second, although 9210 is now of the opinion that the benefit of a trial is no longer a viable option in light of the costs, the fact remains that it was up to it even before the continuance of suit in December 2010 to become more informed about the situation with this Court record.

[17] Thus, even though the Court is aware that a party must not be discouraged from abandoning an action, the fact here remains that the circumstances of the case are much different from those in *Dark Zone, supra*. Here, the circumstances of the case and the interests of justice necessitate that, if 9210 wants to abandon, that it be with assessable costs and not without payment of costs or with an amount, essentially a minimum of \$1,000; all subject of course to any agreement between the parties, which is not the duty of the Court under a motion under rule 402 to impose.

[18] For these reasons, this motion by 9210 is dismissed, all with costs that the Court sets at \$500.

[19] For the purpose of this finding, the Court heard 9210's attorney in reply, but did not factor in the written reply that this party served in the last few hours before the hearing on April 18, 2011 at 2 p.m. because that approach is irregular and is not provided for by the Rules when a motion for oral hearing is involved. Therefore, that reply will not be filed.

[20] Even so, the Court adds that it read said reply and that, even if it had factored it in, reading it leads the Court to find that the reply would not have altered the Court's approach and finding regarding this motion from 9210.

II. JYGA's motion for production of security

[21] Given that 9210's counterclaim must be seen as continuing, it is appropriate to look at this motion from JYGA that is based on rules 415 and 416(1)(b). Those rules read as follows:

[22] At paragraph [2] of his decision in *Early Recovered Resources Inc. v. Gulf Log Salvage Co-Operative Association et al*, 2001 FCT 524, (2001), 205 F.T.R. 127, my former colleague Hargrave summarized, as follows, the test to be applied under paragraph 416(1)(b) of the Rules:

[My underlining.]

[23] I believe that paragraphs 10 to 15 of Mr. Alain Lefebvre's affidavit dated March 16, 2011, and made by JYGA in support of its motion, meet and are sufficient to find that it is appropriate to believe that 9210 does not have sufficient assets in Canada within the meaning of paragraph 416(1)(b) of the Rules. Those paragraphs from that affidavit read as follows [translation]:

[10] Beyond the rights that 9210 claims to have in regards to patent '959, I know that the latter has no other known assets in Quebec;

[11] In addition, according to the information available in the *Registre des entreprises du Québec* (“REQ”), I know that 9210 appears to be a “management company” that has no marketing activity and therefore no revenue, as shown in a statement of information about a corporation from the REQ, a copy of which is attached at **Annex A** hereof;

[12] I know that the company 9210 has only one single director and shareholder, namely Mr. François Bilodeau, as shown in Annex A hereof;

[13] I know that 9210 has no employees, as shown in Annex A;

[14] I know that 9210 does not appear to be the owner of a building because its principal place of business is at the personal residence of 9210's single director and shareholder, Mr. François Bilodeau, i.e. at 1367 Tracel St., Quebec City QC, J1Y 3L3;

[15] According to the admission made to me by the single director and shareholder, Mr. François Bilodeau, and the one made to me by the former director of the Defendant Pigboss, Mr. Alain Laroche, the business activities of Pigboss have not been resumed by 9210 since the end of Pigboss' operations;

[24] Moreover, I do not find the following general and vague allegations found at paragraphs 7 to 9 of Mr. François Bilodeau's affidavit dated April 14, 2011 and made by 9210 in opposition to JYGA's motion to be sufficient to fulfil its burden of proof and establish that it does indeed have sufficient assets [translation]:

7. In fact, even though 9210 is a start-up company, it is the owner of various assets for having taken them in payment from its mortgagor Pigboss Suivi Croissance inc. (herein after referred to as “Pigboss”);
8. Those assets will enable it to run its company and generate revenue from it;

9. 9210 is in a better financial situation than Pigboss, from which JYGA has never required security;

[25] Thus, security will have to be given by 9210. However, the \$50,000 amount claimed by JYGA is essentially not brought up by JYGA until paragraph 24 of its notice of motion and is not reiterated by Mr. Lefebvre in his affidavit. No draft bill of costs breaking down the claimed amount is attached to an affidavit, as the practice usually requires.

[26] In light of the foregoing and given that the Court cannot disregard the fact that this case may not go to trial, the Court now sets \$25,000 as the security that 9210 will have to give.

[27] Thus, JYGA's motion for production of security is allowed as follows:

- a) sets \$25,000 as the security for JYGA's costs that 9210 will have to give in accordance with rule 418;
- b) given the delays that are building up in this case, the Court allots 9210 ten (10) days as of this order to comply with it;
- c) reserves JYGA the right to request an increase in the amount awarded;
- d) All with costs of \$500.00 in favour of JYGA.

“Richard Morneau”

Prothonotary

FEDERAL COURT

COUNSEL OF RECORD

DOCKET: T-1228-07

STYLE OF CAUSE: JYGA CONCEPT INC. ET AL.
v.
PIGBOSS SUIVI CROISSANCE INC. ET AL.

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: April 18, 2011

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATE OF REASONS: April-20-11

APPEARANCES:

Sébastien Roy FOR THE PLAINTIFF

Stéphan Charles-Grenon FOR THE DEFENDANT AND PLAINTIFF BY
COUNTERCLAIM
IN CONTINUANCE OF SUIT
9210-6517 QUÉBEC INC.

Alain Béland FOR THE DEFENDANTS
GÉRALD BEAUDOIN and
RENÉ BEAUDOIN

COUNSEL OF RECORD:

Fasken Martineau DuMoulin LLP FOR THE PLAINTIFF
Quebec City, Quebec

BCF LLP FOR THE DEFENDANT AND PLAINTIFF BY
COUNTERCLAIM
IN CONTINUANCE OF SUIT
9210-6517 QUÉBEC INC.

Béland & Guay FOR THE DEFENDANTS
Quebec City, Quebec GÉRALD BEAUDOIN and
RENÉ BEAUDOIN