

Federal Court



Cour fédérale

Date: 20110616

Docket: T-36-09

Citation: 2011 FC 709

Ottawa, Ontario, June 16, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

SETANTA SPORTS CANADA LIMITED

Plaintiff

and

**840341 ALBERTA LTD. carrying on business as
THE BREW'IN TAPHOUSE,
MARK BECK and CASEY STEWART
BECKHUSON**

Defendants

REASONS FOR ORDER AND ORDER

I. Overview

[1] The plaintiff, Setanta Sports Canada Ltd, has presented a motion for summary judgment against the defendants for breach of copyright in the broadcast of Ultimate Fighting Championship [UFC] events. The corporate defendant is an Alberta bar; the individual defendants are officers and directors of the corporate defendant.

[2] The issues are:

1. Has Setanta established that it possesses the rights it seeks to enforce in this proceeding?
2. Has Setanta established that the defendants have breached those rights?
3. Is Setanta entitled to summary judgment?
4. Damages and costs

II. Issue One - Has Setanta established that it possesses the rights it seeks to enforce in this proceeding?

[3] According to the affidavit of Mr. Rod Keary, an officer and director of Setanta, in 2008, Setanta entered into an agreement with Zuffa LLC, the owner of UFC, and Canadastar Boxing Inc., a distributor of pay-per-view [PPV] events, which assigned copyright in UFC broadcasts to Setanta and charged Setanta with enforcing the others' intellectual property interests in Canada. The assignment states that Setanta is a joint holder of Zuffa's and Canadastar copyright, "so as to enable [Setanta] to enforce and to take legal proceedings . . . to enforce any right or remedy available to [Zuffa and Canadastar] in relation to their proprietary rights in the broadcasts of UFC PPV matches in Canada."

[4] The defendants make two arguments in respect of this contract. First, they suggest that the agreement amounts to a champertous arrangement. They submit that in this proceeding Setanta's

only role is to litigate on behalf of Zuffa and Canadastar, and divide any damages with those other companies. It has no interest of its own in the proceeding. As such, the defendants maintain that Setanta is really engaged in improper intermeddling in a law suit with no legitimate interest in it, and taking a share of the proceeds.

[5] In my view, the assignment grants Setanta a joint interest in Zuffa's and Canadastar's intellectual property, which enables it to enforce that interest for their joint benefit. It is not merely an assignment of the right of enforcement, although it includes that right. Accordingly, it is not an improper, champertous arrangement.

[6] The defendants' second argument is that the evidence tendered by Setanta does not accord with its pleadings set out in the statement of claim. In particular, the defendants contend that the statement of claim relies on Setanta's rights as a broadcaster, whereas the evidence, including the agreement described above, show that Setanta is merely enforcing rights held by others. Paragraph 20 of the statement of claim describes Setanta as the "exclusive distributor for and broadcaster, along with its partners, by way of closed-circuit broadcasts or pay-per-view [PPV] in Canada for Setanta Sports Events and holds all copyrights associated therewith". "Setanta Sports Events" is defined in paragraph 1 of the statement of claim as UFC PPV events, and events shown on the Setanta Sports Channel. Paragraph 22 explains that Setanta is either the licensee or owner of the copyright in Setanta Sports Events.

[7] The defendants argue that Setanta's written submissions and its evidence now represent Setanta as merely an enforcer of Zuffa's and Canadastar's intellectual property rights, not as an

exclusive distributor and broadcaster. The defendants claim to be prejudiced by this alleged change of focus in Setanta's materials.

[8] In my view, there is no significant discrepancy between the statement of claim and Setanta's submissions and evidence. The latter clarify the relationship between Setanta and its partners (i.e. the assignment agreement) which is alluded to in broad terms in the statement of claim. I cannot see any grounds for a complaint of prejudice. The defendants were in possession of Setanta's submissions and evidence for nearly a year before filing their responding materials on this motion.

[9] I find that Setanta has established that it possesses, by way of assignment, the rights it seeks to enforce in these proceedings.

III. Issue Two - Has Setanta established that the defendants have breached those rights?

[10] The evidence shows that the defendants broadcast a UFC PPV event on October 25, 2008. Setanta sent a letter to the defendants advising them to cease broadcasting UFC events without authorization. After receiving no response, Setanta obtained an injunction in this Court, issued by Justice Robert Barnes on January 27, 2009, against the defendants and served it on the defendants at their business address. Still, it appears that the defendants broadcast another UFC event on January 31, 2009, and another on November 21, 2009. Setanta continued to communicate with the defendants in writing, but received no response.

[11] The defendants argue that there is no factual or legal basis on which to find the individual defendants liable for infringing Setanta's copyright. The statement of claim alleges that the

individual defendants “exhibited or caused to be exhibited” Setanta Sports Events. However, they say that there is no supporting evidence put forward by Setanta of any particular infringing acts on their part. They rely on the case of *Sunsolar Energy Technologies (S.E.T.) Inc v Flexible Solutions International Inc*, 2004 FC 1205 at para 23, in which Justice Paul Rouleau held that the actual actions of a corporate officer must be pleaded in order for the officer to be found liable for infringement.

[12] Mr. Mark Beck and Mr. Casey Beckhuson are listed as officers and directors of the corporate defendant. They were specifically named in, and served with, Justice Barnes’ injunction. They were responsible for ensuring compliance with it. There is evidence before me that the injunction was ignored. I note that the defendants have not put forward any evidence about their knowledge or actions, or lack thereof, in response to Setanta’s allegations.

[13] As I read the statement of claim, Setanta alleges that the individual defendants intercepted and exhibited one or more broadcasts of Setanta Sports Events without authorization (para 24). Some action is specifically alleged against them. The evidence indicates that UFC PPV events were shown in the defendants’ establishment, even after this Court ordered otherwise. In these circumstances, I find that the individual defendants should be found liable, along with the corporate defendant. The evidence shows, at a minimum, that the individual defendants were indifferent to the risk that broadcast of UFC events would likely infringe on Setanta’s copyright (*Microsoft Corp v 9038-3746 Quebec Inc*, 2006 FC 1509 at para 92, citing *Ital-Press v Sicoli* (1999), 86 CPR (3d) 129 at para 148 (FCTD)).

[14] The defendants argue that I cannot find a breach of a court order without insisting on compliance with the *Federal Courts Rules*, SOR/98-116, respecting contempt of court (Rules 466 to 472). In my view, however, evidence of a failure to comply with a court order is relevant to deciding the question of the individual defendants' liability. It goes to their knowledge of the circumstances and their responsibility for infringement. Reference to that non-compliance, however, does not require that this proceeding be transformed into a contempt hearing.

IV. Issue Three – Is Setanta entitled to summary judgment?

[15] The defendants have not expressly argued that Setanta is not entitled to summary judgment, except to raise the issues discussed above. The defendants have not put forward any evidence to suggest that there remains a genuine issue for trial.

[16] On the other hand, Setanta has filed detailed affidavits in support of its motion; the evidence shows that the defendants have exhibited UFC PPV events without authority and, in doing so, infringed Setanta's copyright.

[17] I find that Setanta is entitled to summary judgment.

V. Issue Four - Damages and Costs

[18] The defendants submit that Setanta is entitled only to nominal damages as it has not shown any actual harm done, such as a loss of revenue, confusion or diminished reputation. Setanta's

evidence shows that the UFC event shown in October 2008 was attended by a mere 15 individual viewers.

[19] Setanta seeks statutory damages under s 38.1 of the *Copyright Act*, RSC 1985, c C-42. It asks for an award of \$40,000. Taking account of the factors set out in s 38.1(5), namely, good or bad faith, the conduct of the parties, and the need for deterrence, I am satisfied that an award of \$20,000.00 is appropriate. I note the following circumstances:

- failure of the defendants to respond to written communication from Setanta;
- failure of the defendants to comply with an order of this Court;
- failure of the defendants to submit evidence to support its pleadings;
- at least two clear violations of Setanta's copyright during the relevant time frame;
and
- the need for a significant damage award in order to deter future infringing activities.

[20] With respect to costs, the defendants asked for an opportunity to address this issue by way of further submissions. I will entertain any submissions filed by the parties within 10 days of this order.

ORDER

THIS COURT ORDERS that:

1. The motion for summary judgment against each of the following defendants jointly and severally with a damages award of \$20,000 is allowed:

(a) 840341 ALBERTA LTD. carrying on business as THE BREW'IN TAPHOUSE, MARK BECK and CASEY STEWART BUCKHUSON.

2. A permanent injunction is granted against each of the defendants, restraining each of them, their officers, directors, employees, agents, assigns, servants, or any person acting under their instructions, or any persons having knowledge from publicly showing, exhibiting or performing any of the following:

(a) All Ultimate Fighting Championship [UFC] pay-per-view [PPV] matches and events broadcast in Canada up to and including December 31, 2011;

(b) All matches and events broadcast exclusively by Setanta in Canada via the Setanta Sports Channel available via all major Canadian cable providers and via satellite transmission providers Bell TV and Star Choice; and

(c) From decoding, decrypting or downloading via the Internet, for exhibition, viewing, performing or from publicly showing any of the above noted matches and

events however broadcast or telecast, regardless of the source of broadcast or signal feed, without the written authorization and consent of the plaintiff.

3. The plaintiff shall have its costs in an amount to be set after considering any written submissions filed by the parties within 10 days of this order.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-36-09

STYLE OF CAUSE: SETANTA SPORTS CANADA LIMITED v 840341
ALBERTA LTD. carrying on business as THE
BREW'IN TAPHOUSE, MARK BECK and CASEY
STEWART BECKHUSON

**MOTION HELD VIA TELECONFERENCE ON JUNE 8, 2011 FROM
OTTAWA, ONTARIO, TORONTO, ONTARIO AND EDMONTON, ALBERTA**

**REASONS FOR ORDER
AND ORDER:** O'REILLY J.

DATED: June 16, 2011

ORAL AND WRITTEN REPRESENTATIONS BY:

Kevin W. Fisher FOR THE PLAINTIFF

Patrick D. Kirwin FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Basman Smith LLP FOR THE PLAINTIFF
Barristers and Solicitors
Toronto, Ontario

Kirwin LLP FOR THE DEFENDANTS
Lawyers and Trade-Mark Agents
Edmonton, Alberta