

Federal Court



Cour fédérale

Date: 20130812

Docket: T-1106-12

Citation: 2013 FC 864

Ottawa, Ontario, August 12, 2013

**PRESENT:** The Honourable Mr. Justice Roy

**BETWEEN:**

**ADMIRALTY ACTION *IN REM*  
AND *IN PERSONAM***

**LAKELAND BANK**

**Plaintiff/Cross-Defendant**

**and**

**THE SHIP “NEVER E NUFF”,  
HULL NO. DNAZ8012C303**

**and**

**PATRICK SALVAIL  
SAINT-GERMAIN**

**and**

**LOCATION HOLAND (1995)  
LTÉE**

**Defendants/Cross-Plaintiffs**

**and**

**BREEN P. McMAHON**

**Defendant**

**AND BETWEEN**

**THE SHIP “NEVER E NUFF”,  
HULL NO. DNAZ8012C303**

**and**

**PATRICK SALVAIL  
SAINT-GERMAIN**

**and**

**LOCATION HOLLAND (1995)  
LTÉE**

**Plaintiffs in Warranty**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The plaintiff, Lakeland Bank is an American banking institution. It believes it is entitled to a summary judgment, in accordance with Rule 213 of the *Federal Courts Rules*, SOR/98-106 (the Rules).

[2] The plaintiff claims that the rights over a vessel, the “Never E Nuff” (the vessel), are uncontested. It seeks to execute on its *in rem* rights and dispose of the vessel in a prompt manner.

[3] For the reasons that follow, the motion for summary judgment is dismissed.

**I. Facts**

[4] For the purpose of the motion, the plaintiff offers the affidavit of one of its vice-president who deposes on matters that have occurred in the United States of America.

[5] It would appear that the plaintiff entered into an agreement with one Breen McMahon, an American citizen of the state of New York, for the purchase of the vessel. Mr. McMahon would have entered into a First Preferred Ship’s Mortgage with the plaintiff on January 17, 2007, in New York State.

[6] Patrick Salvail Saint-Germain and Location Holand (1995) Ltée (the defendants), did not take part in the transaction granting the plaintiff the First Preferred Ship's Mortgage.

[7] Without the knowledge of the plaintiff, Mr. McMahon would have indicated that he thought he had sold the vessel to one "Patrick" but, in fact, he would have sold the vessel to Location Holand (1995) Ltée. It would appear that the sale took place in April 2007. Mr. McMahon would have ceased to make the loan payments to the plaintiff in March 2008.

[8] The plaintiff proceeded to obtain a judgment in default against Mr. McMahon in the United States District Court, Northern District of New York. The purported judgment, bearing the date of August 24, 2010, is for an amount of more than USD \$190 000. It allows the plaintiff to take possession of the vessel and dispose of it. The problem was that Mr. McMahon had disposed of the vessel, which was in a jurisdiction outside the United States.

[9] The plaintiff arrested the vessel on June 11, 2012, in the province of Québec, in the hands of Mr. Salvail Saint-Germain.

[10] It will suffice, for the purpose of the present motion, to state that the defendants oppose the motion. There was a relationship involving the two defendants, but it is not relevant and there is no need to explore it in order to dispose of the motion for summary judgment, other than to state that Mr. Salvail Saint-Germain, after having leased, through a corporate identity he controlled, the said vessel, purchased it from Location Holand (1995) Ltée. The circumstances under which "Never Enough" was acquired by Location Holand (1995) Ltée are unknown at this stage.

[11] The plaintiff alleges that its cause of action is *in rem* against the vessel and that it is not concerned with the dispute between the defendants that is presented as being *in personam*. Having a right to the vessel, the plaintiff wishes to be granted a summary judgment.

## II. Analysis

[12] As it was discussed during the hearing of the motion, the plaintiff would have to show a clear right to the vessel. As paragraph 215(1) of the Rules state:

**215.** (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

**215.** (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

[13] Here, at this stage, the plaintiff refers to contracts entered into and a judgment rendered in a foreign jurisdiction, under laws that are foreign to this jurisdiction, affecting parties other than the two defendants who have owned and have been in possession of the vessel. Indeed, section 23 of the *Canada Evidence Act*, RSC, 1985, c C-5, requires the exemplification of the record of any court of record of the United States before it can be admitted in evidence, let alone acted upon. The plaintiff, instead, seeks to introduce those instruments through an affidavit of one of its vice-presidents. That cannot be done. They must be proved. On that sole basis, the motion could be dismissed, without more, in view of the burden on the plaintiff and the lack of evidence before this Court.

[14] Furthermore, on its face the plaintiff seeks the recognition and enforcement of a foreign decision. It wants to enforce what is presented as the judgment in default against an American citizen.

[15] The plaintiff has argued that *Maritime Law* applies in the circumstances. However, it never explained the significance it was putting on this, especially as to how a foreign judgment, which was not even exemplified in this country to at least be in evidence before the Court, could be the basis for execution, without more.

[16] The Court is not satisfied that there is no genuine issue for trial. On the contrary, I believe that a full hearing, with evidence properly presented and tested need to take place. As Tetley put it in *Maritime Liens and Claims, Business Law Communications Ltd*, 1985, in the context of the integrity of a judicial sale: “Although a judgment may not be enforced without being recognized, it may easily be recognized without being enforced.”

[17] Not only is there no proper evidence before this Court on the motion for summary judgment *per se*, but the issue of the enforcement of a foreign judgment is central to the claim. In *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 SCR 372, one can read, at paragraph 11, that evidence is needed (in that case, it was the defendant who was seeking summary judgment). The person who seeks summary judgment “cannot rely on mere allegations or the pleadings.” As the Court put it “. . . the bar on a motion for summary judgment is high.”

[18] The defendant, Location Holand (1995) Ltée, argues that no security was registered in the Province of Québec. Both defendants raise issues about the application of the *Civil Code of Québec*, SQ, 1991, c 64. Presumably, the plaintiff will argue that the application of *Maritime Law*, if it is appropriate, takes away any argument based on the *Civil Law of Quebec*. This is an issue that should be explored properly.

[19] Assuming, without deciding, that *Maritime Law* applies to this case, there will remain the issue of the execution of a foreign judgment obtained against a foreigner, without any involvement of the defendants who vehemently contest and raise the application of the *Civil Code of Québec*.

[20] This matter is not fit for summary judgment. Genuine issues are for trial. As a result, the motion for summary judgment sought by the plaintiff will be dismissed.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the motion for summary judgment sought by the plaintiff is dismissed, with costs in favour of the defendants, Location Holand (1995) Ltée and Patrick Salvail Saint-Germain.

“Yvan Roy”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1106-12

**STYLE OF CAUSE:** Lakeland Bank  
v. The Ship "Never E Nuff" et al

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** June 19, 2013

**REASONS FOR JUDGMENT:** ROY J.

**DATED:** August 12, 2013

**APPEARANCES:**

Matthew Hamerman FOR THE PLAINTIFF

Adrian Legault FOR THE DEFENDANT

Harvey Shaffer THIRD PARTY  
RESPONDENT/DEFENDANT IN WARRANTY

**SOLICITORS OF RECORD:**

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