

Date: 20090317

Docket: A-193-08

Citation: 2009 FCA 87

**CORAM: RICHARD C.J.
LÉTOURNEAU J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

SC PRODAL 94 SRL

Appellant

and

SPIRITS INTERNATIONAL B.V.

Respondent

and

REGISTRAR OF TRADE-MARKS

Respondent

Heard at Ottawa, Ontario, on March 17, 2009.

Order delivered from the Bench at Ottawa, Ontario, on March 17, 2009.

REASONS FOR ORDER OF THE COURT BY:

RICHARD C.J.

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[1] The respondent moves to quash this appeal on the grounds that the appellant waived its rights in the Court below and the substance of the appeal had already been decided.

[2] The respondent contends that the appellant had express written notice of the consequences of failure to oppose the respondent's application by virtue of the notice of application itself. The document specifically states "if you fail to oppose this application, judgment may be given in your absence and without further notice to you". According to the respondent, the appellant failed to file a notice of appearance pursuant to Rule 305. In so doing, the appellant waives its rights and acquiesced that judgment be given in its absence.

[3] Justice Evans determined in *Desormeaux v. Ottawa (City)* (2005), 332 N.R. 378, 2005 FCA 110, that failure to file a notice of appearance under Rule 145 of the *Federal Courts Rules* does not necessarily prevent a party from appealing a decision in which it was a respondent if there is evidence that the respondent did not intend to waive all rights as a party.

[4] We are not persuaded that the appellant acquiesced to the granting of relief in circumstances where it did not have notice of the relief being requested.

[5] The respondent advances various arguments in an effort to demonstrate that the appeal is bereft of merit. In our view, the breadth of the arguments alone is sufficient to demonstrate that the issues are arguable. The test is not that success is guaranteed. Rather, it is whether there are arguable issues.

[6] The motion to quash will be dismissed with costs.

"J. Richard"
Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-193-08

STYLE OF CAUSE: SC PRODAL 94 SRL v. SPIRITS
INTERNATIONAL B.V. and
REGISTRAR OF TRADE-MARKS

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: March 17, 2009

REASONS FOR ORDER OF THE COURT BY: Richard C.J.

DELIVERED FROM THE BENCH BY: Richard C.J.

APPEARANCES:

Bruce Morgan FOR THE APPELLANT

Bayo Odutola FOR THE RESPONDENT (SPIRITS
INTERNATIONAL B.V.)

No appearance FOR THE RESPONDENT
(REGISTRAR OF TRADE-MARKS)

SOLICITORS OF RECORD:

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Ottawa, Ontario

Odutola Law Chambers FOR THE RESPONDENT (SPIRITS
INTERNATIONAL B.V.)
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