Federal Court Cour fédérale

Date: 20160617

Docket: T-1280-13

Citation: 2016 FC 685

Ottawa, Ontario, June 17, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

NOV DOWNHOLE EURASIA LIMITED AND DRECO ENERGY SERVICES ULC

Appellants/Plaintiffs

and

TLL OILFIELD CONSULTING LTD. AND ACURA MACHINE INC.

Respondents/Defendants

ORDER AND REASONS

[1] This is an appeal by the plaintiffs from the Order of Prothonotary Milczynski dated April 7, 2016, in which she dismissed the plaintiffs' (now the appellants') motion to amend their Statement of Claim in the form set out in Schedule A attached to the Notice of Motion. Essentially the plaintiffs sought to add Troy Lorenson, David Nicholson and Petr Macek as defendants in the underlying action. In that Order, Prothonotary Milczynski also dismissed the plaintiffs' alternative request that they be relieved from their implied undertaking not to rely on documents produced in the underlying proceeding to commence a separate proceeding against

those three individuals. I note that throughout the proceedings Prothonotary Milczynski was acting in her capacity as the case management judge, having been so assigned by the Chief Justice on November 7, 2013.

[2] The appellants face a heavy burden in requesting this Court set aside the discretionary order of a case management judge. On appeal, this Court is to afford significant deference to the discretionary order of a prothonotary. Such orders ought not to be disturbed unless the questions raised are vital to the final issue of the case, or unless the order is based upon a wrong legal principle or upon a misapprehension of the facts: *Merck & Co Inc v Apotex Inc*, 2003 FCA 488, [2003] FCJ No 1925 at para 19; *Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425, [1993] FCJ No 103. In addition to the discretionary nature of her Order, I also note that Prothonotary Milczynski made the impugned Order in her capacity of a case management judge. In that role, she is very familiar with the context and complexities of the case. This Court should not interfere with a case management judge's decision except "[…] in the clearest case of misuse of judicial discretion" (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52, [2011] FCJ No 402).

[3] Mr. Lorenson is a director, officer and shareholder of TLL Oilfield Consulting Inc. [TLL], Mr. Nicholson is a director, officer and shareholder of Acura Machine Inc. [Acura]. Petr Macek worked in the oil and gas industry, and has designed and manufactured machined parts for oil and gas equipment. Mr. Macek is not an employee, officer or director of either of the corporate defendants. The underlying motion states that during the discovery process, the appellants learned that those three individuals designed and developed the "Jigger tool" which is the subject of two patent applications. Messrs. Lorenson, Nicholson and Macek are named as

inventors of the patents and have assigned their rights to the corporate defendants TLL and Acura.

[4] Before Prothonotary Milczynski, the appellants asserted that Mr. Lorenson, Mr. Nicholson and Mr. Macek are personally profiting from the transfer of monies from TLL and Acura through excessive payments of salaries, dividends and royalties. The appellants fear that should they be successful in the underlying action, TLL and Acura will be judgment proof.

[5] With respect to Messrs. Lorenson and Nicholson, the plaintiffs essentially seek a piercing of the corporate veil. In order to do so, it is incumbent upon them to plead facts that, if true, would demonstrate that Messrs. Lorenson and Nicholson stepped outside their roles and duties as corporate officers and directors: *Mentmore Manufacturing Co v National Merchandise Manufacturing Co* (1978), 40 CPR (2d) 164 FCA and *Zero Spill Systems (Intl) Inc v 614248 Alberta Ltd*, 2009 FC 70. Prothonotary Milczynski concluded the facts pleaded were insufficient to demonstrate they acted beyond the scope of corporate and normal business activities or that they intended to convert the corporate defendants into shell corporations. With respect to Mr. Macek, she concluded there were insufficient facts pleaded of infringement, induced or direct.

[6] The appellants assert that Prothonotary Milczynski mischaracterized and failed to consider certain allegations set out in the Statement of Claim. After careful review of the appellants assertions and Prothonotary Milczynski's Order, I am satisfied the appellants have not established a clear case of misuse of judicial discretion by Prothonotary Milczynski, nor have

they established that the questions raised are vital to the final issue of the case or that her Order was based upon a wrong principle or upon a misapprehension of the facts.

[7] The appellants contend Prothonotary Milczynski improperly weighed the evidence and failed to presume the facts pleaded could be proven. While I understand the appellants' contention given the analysis conducted by Prothonotary Milczynski, her approach is understandable given her role as the case management judge. I do not find it inappropriate for her to summarize her knowledge of the facts in reaching her conclusion on the plaintiff's motion. More importantly, however, I note she applied the correct test. She specifically refers to the "facts pleaded", not to the sufficiency of the evidence, when she concluded at page 5 of her Order:

> There are insufficient material facts pleaded to support the relief sought that they [Mr. Lorensen, Mr. Nicholson and Mr. Macek] should be personally, and jointly and severally liable with the corporate defendants for any infringement found of the 065 Patent.

[8] With respect to the implied undertaking, Prothonotary Milczynski concluded:

> […] there is no basis to relieve the Plaintiffs of their obligations under the implied undertaken rule. The main concern appears to be whether the corporate defendants are judgment proof, but the satisfaction of any judgment is no basis to add parties to a proceeding or to permit the Plaintiffs to rely on documents produced in the within proceeding to commence an action in the provincial courts for unjust enrichment.

[9] Prothonotary Milczynski adequately addressed the issues raised in the plaintiff's motion. I am in substantial agreement with her analysis and conclusions and see no meritorious basis for reversal.

[10] In the circumstances, I would award costs in the cause to be paid by the appellants to the respondents. In the event the parties cannot agree upon the costs on appeal, I will fix them following the receipt of written submissions which are to be received by the Court no later than 4:30 p.m. (EDT) on July 5, 2016.

ORDER

THIS COURT ORDERS that the appeal from the Order of Prothonotary Milczynski dated April 7, 2016 be dismissed with costs payable jointly and severally, in the cause, by the appellants to the respondents.

"B. Richard Bell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1280-13
STYLE OF CAUSE:	NOV DOWNHOLE EURASIA LIMITED AND DRECO ENERGY SERVICES ULC v TLL OILFIELD CONSULTING LTD. AND ACURA MACHINE INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 3, 2016
ORDER AND REASONS:	BELL J.
DATED:	JUNE 17, 2016

APPEARANCES:

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Bruce W. Stratton	FOR THE DEFENDANTS

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