

Federal Court



Cour fédérale

Date: 20200602

**Dockets: T-920-17
T-1230-17**

Citation: 2020 FC 660

Ottawa, Ontario, June 2, 2020

PRESENT: The Associate Chief Justice Gagné

Docket: T--920-17

BETWEEN:

WHIRLPOOL CANADA LP

Applicant

and

ALLIANCE LAUNDRY SYSTEMS LLC

Respondent

Docket: T-1230-17

AND BETWEEN:

ALLIANCE LAUNDRY SYSTEMS LLC

Applicant

and

**WHIRLPOOL CANADA LP AND
WHIRLPOOL CORPORATION**

Respondents

ORDER REGARDING COSTS AND REASONS

I. Overview

[1] By Judgement and Reasons dated May 22, 2019 and reported at 2019 FC 724, the Court granted in part Whirlpool Canada LP's [Whirlpool CA] application against Alliance Laundry Systems LLC [Alliance], and dismissed Alliance's application against Whirlpool CA and its parent company Whirlpool Corporation [together, Whirlpool].

[2] The Court further ordered that costs be paid to Whirlpool CA in court file T-920-17 and to both Whirlpool entities in T-1230-17, but only for those costs incurred before both applications were consolidated by order of the Court dated October 12, 2017.

[3] On May 24, 2019, Alliance issued a Notice of Appeal and unsuccessfully sought a stay of the Court's judgment pending appeal.

[4] Alliance filed a Notice of Discontinuance of its appeal on November 19, 2019. Thirty (30) days later, Whirlpool filed the present motion for directions to obtain an elevated costs award in the lump sum of \$144,818.68.

[5] Alliance opposes Whirlpool's motion on the grounds that it was filed late, that this file does not warrant an award of costs as a lump sum, and, should the Court find that it does, awarding fifty percent of legal fees and disbursements incurred is excessive in the circumstances.

[6] For the reasons set out below, I am of the view that Whirlpool has failed to justify the seven-month delay in bringing its motion and that it should be dismissed.

II. Discussion

[7] Rule 403 (1) of the *Federal Courts Rules*, SOR/98-106 provides that should a party desire that the Court give directions to the assessment officer regarding factors to be considered in awarding costs, it shall do so by motion to the Court filed within thirty days of the judgment.

[8] In its written representations, Whirlpool puts great emphasis on the procedural history of the file, including the fact that Alliance filed its Notice of Appeal just two days after the judgment was rendered, and that it discontinued its appeal shortly before the hearing date. Whirlpool also argues that the result of the matter, the importance and complexity of the issues, the sophistication of the parties, and all other relevant considerations dictate that lump sum costs be awarded and that fifty percent is an appropriate percentage.

[9] At the end of its written representations, Whirlpool argues that, if necessary, the deadline to file the present motion should be extended. Whirlpool essentially takes the position that the thirty-day period provided for in Rule 403(1)(a) should be considered stayed pending the outcome of an appeal, and that its motion was in fact filed within thirty days of the filing of Alliance's Notice of Discontinuance.

[10] However, says Whirlpool, if the thirty-day time period is not treated as having been stayed, it should be extended since "Alliance has not suffered any prejudice as a result of any

delay in bringing this motion. In fact, Alliance has not responded to Whirlpool's requests to address the issue of costs."

[11] First, and as stated in Bridget Forberg's affidavit sworn December 19, 2019, Whirlpool's two written requests were made *after* Alliance had filed its Notice of Discontinuance, therefore long after the expiration of the thirty-day time period contemplated by Rule 403(1)(a). Had they been made within the statutory timeframe, Whirlpool may have been able to justify a short delay while it was expecting a response from Alliance.

[12] Second, Whirlpool sought a Stay of Execution of the Court's judgment that was denied by the Federal Court of Appeal; the judgment was thus executory notwithstanding Alliance's appeal. The thirty-day time limit to seek directions from the Court is not a formality that may be easily dispensed with absent very special reasons (*Maytag Corp. v Whirlpool Corp.*, 2001 FCA 250, at paras 15-16). Not wanting to influence the appeal has not been found to be a special circumstance warranting an extension of time (*Engine & Leasing Co. v Atlantic Towing Ltd.*, [1993] FCJ no 1167 (FCA)) and the same should be said regarding the potential of influencing an appellant's decision to discontinue an appeal. Waiting for the outcome of an appeal is simply not a valid reason to delay bringing a motion for directions.

[13] Third, Whirlpool has not shown that any of the four criteria to obtain an extension of time have been met. More importantly, Whirlpool has failed to file affidavit evidence upon which it seeks the positive exercise of the Court's discretion. It also failed to offer an adequate explanation for the delay, nor did it demonstrate a continuing intention to bring the present

Motion for directions (*Pfizer Canada Inc. v Canada (Minister of Health)*, 2010 FC 1236, at para 21).

[14] Considering these factors, the Court cannot justify granting an extension of time for the filing of the motion for directions with respect to Whirlpool's costs.

ORDER in T-920-17 and T-1230-17

THIS COURT ORDERS that:

1. Whirlpool Canada LP and Whirlpool Corporation's motion is dismissed;
2. Costs on this motion, assessed in accordance with Column III of Tariff B, are granted in favour of Alliance Laundry Systems LLC.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T--920-17

STYLE OF CAUSE: WHIRLPOOL CANADA LP v ALLIANCE LAUNDRY SYSTEMS LLC

AND DOCKET: T-1230-17

STYLE OF CAUSE: ALLIANCE LAUNDRY SYSTEMS LLC v WHIRLPOOL CANADA LP AND WHIRLPOOL CORPORATION

SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO THIS COURT'S JUDGMENT IN 2019 FC 724

ORDER AND REASONS: GAGNÉ A.C.J.

DATED: JUNE 2, 2020

WRITTEN REPRESENTATIONS BY:

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