Federal Court Cour fédérale

Date: 20250602

Docket: T-1412-24

Citation: 2025 FC 979

Ottawa, Ontario, June 2, 2025

PRESENT: The Honourable Mr. Justice Duchesne

BETWEEN:

DERMASPARK PRODUCTS INC.
POLLOGEN LTD.

Plaintiffs

and

AVEENA COSMETIC CLINIC INC.
FATEMAH FAKOURNA

Defendants

ORDER AND REASONS

[1] The Plaintiffs have brought of a motion for default judgment against the Defendants pursuant to Rule 210 of the *Federal Courts Rules*, SOR/98-106 (the *Rules*).

[2] For the reasons that follow, the Plaintiffs' motion is dismissed, and the action will proceed to trial pursuant to Rule 210(4)(c) of the *Rules.*

I. Procedural Background

[3] A plaintiff may seek and obtain default judgment against a defendant pursuant to Rule 210 of the Rules. Rule 210 and the jurisprudence that has interpreted it establish that a plaintiff seeking default judgment must establish that: a) the defendant did not file a statement of defence within the time prescribed by Rule 204 of the *Rules* or by an order of the Court; and b) establish its claim(s) on a balance of probabilities by affidavit evidence. The requirement to establish the asserted claims on the basis of evidence exists because the allegations in a statement of claim are deemed denied unless they are admitted (Rule 184; *Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 at para 35 [*Trimble*]; *Ragdoll Productions (UK) Ltd v Doe*, 2002 FCT 918 at paras 23-24).

[4] Default judgment is a discretionary order. The Court must scrutinize the evidence submitted by the plaintiff with care and the evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test applicable to each claim advanced (*Trimble*, at para 36 and the jurisprudence cited therein).

[5] The evidence in the record on this motion reflects that the Plaintiffs filed their Statement of Claim in this proceeding on June 11, 2024.

[6] The Plaintiffs have produced a copy of the corporate Defendant Aveena Cosmetic Clinic Inc.’s (Aveena) corporate profile information as filed by or on behalf of Aveena with the Government of Canada and the Government of Ontario pursuant to governing corporate legislation regarding corporate registration. The Aveena corporate profiles produced were extracted from the applicable registry on April 28, 2025, and January 19, 2024, respectively.

These corporate profile reports reflect that Aveena's registered office is on Yonge Street in Toronto, Ontario, and that its sole director is the named personal Defendant, Fatemeh Fakournia (Ms Fakournia).

[7] The Plaintiffs have also filed a copy of the affidavit of service of Cordel Mulder affirmed on July 3, 2024. The affidavit of service reflects that the Statement of Claim was served upon the Defendants personally on June 28, 2024, at the Defendants' registered office. The affidavit of service filed on this motion reflects that service was effected upon the Defendants in accordance with Rules 126, 128(a) 130(1)(a)(ii). The service effected constitutes good and sufficient service pursuant to the *Rules*.

[8] The Defendants did not thereafter serve or file a statement of defence within the time provided by Rule 204. The Court file does not reflect that the Defendants have sought any extension of time to serve and file a statement of defence.

[9] I am satisfied that the Plaintiffs have established that the Defendants are in default. They may proceed to seek default judgment in writing pursuant to Rules 210 and 369 of the *Rules.*

II. **The Statement of Claim**

[10] The Plaintiffs seek the following relief as pleaded at paragraph 1 of their Statement of Claim:

> a) A declaration that the Plaintiff Pollogen Ltd. (Pollogen) is the owner of the common-law rights associated with the Geneo, Geneo+, Oxygeneo, OxyGeneo, Pollogen, Pollogen Design

trademarks, 3-in-1 super facial, Oxygeneo 3-in-1, OxyPod and Tripollar RF trademark (the "Common Law Trademarks"), as well as any exclusive rights conferred to by the *Trademarks Act* for Canadian trademark registrations TMA1032928 for GENEO+, TMA1032944 for OXYGENEO, TMA1041360 for 3-in-1 super facial, TMA1032940 for geneo+ design, and TMA1184661 for OXYPOD (the "Registered Trademarks"), and that the same are valid (collectively, "Pollogen's Trademarks")

b) A declaration that the Plaintiff Pollogen, and its permitted licensees, have the exclusive right to use the Pollogen's Trademarks, or any confusingly similar variant thereof, throughout Canada for use in association with the following goods and services:

i. Cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment;

ii. Facial skin treatment service for humans for cosmetic purposes;

iii. Esthetic skin care treatment, namely, facial exfoliation, oxygenation massages and skin treatment;

iv. Cosmetic creams, face and body creams;

v. Cosmetic gels, face and body gels;

vi. Anti-aging facials and body contouring treatments;

vii. Training and educational services with cosmetic apparatus;

(collectively, the "Plaintiffs' Goods and Services")

c) A declaration that the Defendant has infringed Pollogen's Trademarks, contrary to sections 19 and 20 of the TA;

d) A declaration that the Defendant has, contrary to subsection 7(b) of the TA, directed public attention to their business, goods and services in such a way so as to cause confusion in Canada between their business, goods and services and those of the Plaintiffs;

e) A declaration that the Defendant, by their misconduct and contrary to section 7(c) of the TA have passed off their goods and services as and for the Plaintiffs' Goods and Services;

f) A declaration that the Defendant, by their misconduct and contrary to section 22 of the *Trademarks Act*, have damaged the goodwill and reputation attaching to the Plaintiff Pollogen's Trademarks and to the Plaintiffs' business and have caused damages to the Plaintiffs through foregone sales, lost profits and reduced market share by misappropriating sales the Plaintiffs would have otherwise made;

g) Interim, interlocutory and permanent injunctions enjoining and restraining the Defendant, by themselves or by their shareholders, directors, officers, employees, representatives and agents or by any company, partnership, trust, entity or person under their authority or control, or with which they are associated or affiliated (the "Related Parties"), from any and all use of Geneo, Geneo+, Oxygeneo, OxyGeneo, Pollogen, Pollogen Design trademarks, 3-in-1 super facial, Oxygeneo 3-in-1, OxyPod and Tripollar RF or any other word or mark confusingly similar thereto, as a trade name, trademark, domain name, social media account name, curriculum courses name, or otherwise in association with their business, goods or services;

h) An order requiring the Defendant to recall and deliver up to the Plaintiff DermaSpark all documents, records, articles, products, packaging, displays, advertisements, signs, whether in electronic form or otherwise, and any and all other items in the possession, custody or control of the Defendant which offend in any way against any order which may be made herein;

i) An order requiring the Defendant to inform any affected third parties, by way of prescribed form of letter, of the subject matter of this proceeding and any interim, interlocutory or final orders made herein;

j) Damages for, and arising from, the Defendant's misconduct, amounting to direct infringement, estimated to exceed $50,000.00 as of the date of filing the Statement of Claim or an accounting of the profits illegally made by the Defendant as the Plaintiffs may elect after proper inquiry, for acts that are contrary to the *Trademarks Act*;

k) Punitive and exemplary damages;

> l) Pre-judgment and post-judgment interest on any award or damages, profits and costs calculated on a semi-annual, compounded basis;
>
> m) Costs of this action on a solicitor and client basis, or such basis deemed appropriate by this Honourable Court, plus QST and GST, including expert's fees, on the highest allowable scale.

[11] The claims advanced in the Statement of Claim are supported by pleaded material allegations of fact generally consistent with the relief sought. As the evidence to support their claims will be discussed below it suffices at this juncture to summarize the key alleged facts at a very high level.

[12] The Plaintiff Pollogen Ltd. ("Pollogen") is a manufacturer of a full line of anti-aging facials and body contouring treatments that are popular and well known in Canada. These include the OxyGeneo cosmetic apparatus which uses OxyGeneo products.

[13] The Plaintiff DermaSpark Products Inc. ("DermaSpark") is the exclusive authorized distributor of Pollogen's products in Canada pursuant to an agreement between DermaSpark and Pollogen.

[14] The Plaintiffs allege that the Defendants have since January 14, 2024, unlawfully and without licence or right used Pollogen's trademarks on their website and Instagram to market and sell services through the use of the Plaintiffs' OxyGeneo skincare device and OxyGeneo products, while substituting those goods, including the OxyGeneo skincare device, with counterfeit goods or goods of lesser quality on which they can realize a greater profit. The

Plaintiffs also allege that the Defendants have purposefully used Pollogen's trademarks to create confusion in the marketplace.

III. **Issue**

[15] The only issues on this motion are whether the Plaintiffs have established their claims as pleaded, and if so, what relief they are entitled to receive.

IV. **Analysis**

[16] The Plaintiffs have led affidavit and documentary evidence in support of their claims.

[17] The first affidavit is the affidavit of Moshe Ben-Shlomo, a DermaSpark director. Mr. Ben-Shlomo produces 32 exhibits to his affidavit and provides the narrative evidence pertaining to the Plaintiffs' trademarks, rights of ownership in and to the trademarks, the Defendant's infringing conduct, the harm caused to the Plaintiffs, and how the Defendants are using counterfeit devices contrary to the *Medical Devices Regulation,* SOR/98-282.

[18] The Plaintiffs also rely on the affidavit of Mr. Moshe Gurevitch, a Pollogen Vice President for International Sales and Professional Products. Mr. Gurevitch has not attached any exhibits to his affidavit. Mr. Gurevitch's affidavit is focused on the matter of Pollogen's authorized exclusive licensees throughout the world, that Pollogen has not sold any of its products to the Defendants within Canada, and that the Defendant has no right to use Pollogen's Trademarks or products for any purpose.

[19] Lastly, the Plaintiffs rely on the affidavit of Felix Breton, an employee of the Plaintiffs' solicitors. He deposes to the post-judgment interest rate applicable in Ontario, as well as to the legal fees incurred by the Plaintiffs in this proceeding.

[20] I have considered the content of each of these affidavits in dismissing this motion.

A) Claim 1a): Declaratory Order of Common Law and Registered Trademark ownership

[21] The Plaintiffs' action rests on the allegation that they both hold rights in Pollogen's Trademarks pursuant to the TA and that those rights have been violated by the Defendants.

[22] Their first claim advanced is for a declaration that Pollogen is the owner of the Pollogen Trademarks as claimed. These Pollogen Trademarks are alleged to include Common Law Trademarks and Registered Trademarks.

[23] The evidence led through Mr. Ben-Shlomo's affidavit is that Pollogen manufactures and offers a line of clinically proven, non-invasive, safe and effective anti-aging facials and body contouring treatments for a wide range of aesthetic applications. These products and treatments include the "3-in-1 super facial" and all the consumables (gels), spare parts and accessories used in connection with the treatments provided with the OxyGeneo cosmetic apparatus or device identified as "Geneo+" (hereafter "Pollogen Products").

[24] Mr. Ben-Shlomo's affidavit also leads narrative affidavit evidence that the "Geneo+" (or "Geneo Plus") cosmetic device is a device that uses micro-vibration, radio frequency, and ultrasound for aesthetic facial and body skin treatments in association with esthetical products such as the OxyGeneo pods (Oxypods) and gel kits. The "Geneo+" device, so deposes Mr. Ben-Shlomo, is a Class III medical device associated with the active licence listing no. 95002, first issued in Canada on 10th April 2015. A copy of the Government of Canada's active licence information reflecting licence no. 95002 is attached to Mr. Ben-Shlomo's affidavit.

[25] Mr. Ben-Shlomo's narrative affidavit evidence is as follows:

> "Pollogen is the owner of the common-law rights associated with the "Geneo", "Geneo+", "Oxygeneo", "OxyGeneo", "Pollogen", "Pollogen Design trademarks", "3-in-1 super facial", "Oxygeneo 3-in-1", "OxyPod" and "Tripollar RF" trademarks (hereinafter the "Common Law Trademarks"), as well as the owner of any exclusive rights conferred to by the TA for Canadian trademark registrations TMA1032928 for "GENEO+", TMA1032944 for "OXYGENEO", TMA1041360 for "3-in-1 super facial", TMA1032940 for a Geneo+ design mark, and TMA1184661 for "OXYPOD" (hereinafter the "Registered Trademarks") and that the same are valid (collectively referred to herein as "Pollogen's Trademarks") as evidenced from printouts in bulk of the CIPO database, attached hereto as Exhibit MB-3"

[26] The Exhibit MB-3 printout produced is a table that contains columns bearing the titles "Application Number", "IR Number", "Trademark", "Type", "CIPO Status", "Nice Class", and "Representations". No aspect of the table produced suggests that it is a reproduction of any information or record produced, published, maintained or exhibited by the Canadian Intellectual Property Office (CIPO) in any manner. There is no CIPO identifier on the produced table and no webpage header or footer that suggests that the table was printed from the CIPO website. There is no field in the table that suggests or identifies who registered the trademark, who the current

owner of the trademark is or are, when the trademark was registered, when the trademark expires, or which goods or services the trademark is filed in relation to.

[27] Despite that the table produced by Mr. Ben-Shlomo includes 7 hypertext links to representations of trademarks and that those links connect to webpages bearing an address that includes CIPO within it (i.e, “https://ised-isde.canada.ca/cipo/trademark-search/media/1419999.png”), none of the links lead to evidence incorporated by reference beyond the representations and designs of the trademarks that are alleged to be owned by Pollogen. No trademark ownership interests can be identified from the links.

[28] Mr. Ben-Shlomo’s affidavit explicitly refers to and relies on Exhibit MB-3 to “evidence” Pollogen’s registered trademark and common law trademark ownership rights. As the analysis set out above shows, Exhibit MB-3 does not establish Pollogen’s trademark ownership to any of the trademarks alleged in this proceeding, whether registered or at common law.

[29] There are no other documents such as a copy of a trademark registration attached to Mr. Ben-Shlomo’s affidavit and none of the fields in the exhibit to Mr. Ben-Shlomo’s affidavit is a hypertext link to any other documentation from any other source. There is no evidence led of trademark ownership beyond the bald content of the paragraph of Mr. Ben-Shlomo’s affidavit reproduced above.

[30] Identifying trademark registrations by their number and alleging ownership of the trademarks purportedly registered in a trademark registration bearing the identified registration

number in an affidavit without providing any additional documentary information supporting the affidavit narrative evidence does not establish trademark ownership on a motion for default judgment. More evidence than what is filed here is required to establish one's right of ownership in intellectual property and to establish the right to exercise trademark rights as provided by the TA.

[31] Exhibits MB-25 and 26 to Mr. Ben-Shlomo's affidavit are reproductions of webpages archived through the use of the Wayback Machine, an internet archive of webpages that has been accepted by this Court as a reliable source as to the state of websites in the past (*Candrug Health Solutions Inc v Thorkelson*, 2007 FC 411 at para 21, reversed on other grounds in 2008 FCA 100; *GNR Travel Centre Ltd. v. CWI, Inc*., 2023 FC 2, at para 72). The documents reflect the use of "OxyGeneo" on the "www.geneo.ca" webpage on January 27, 2019, and again on September 19, 2019. I take judicial notice that the use of the ".ca" suffix in a website domain name reflects that the website is associated with Canada and is accessible and may appear on computer screens in Canada.

[32] The specific wording used in the exhibits is "OxyGeneo, by Pollogen". The same exhibits show wording such as "Pollogen, a company by Lumenis", and "The OxyGeneo is brought to you by Pollogen, a company of Lumenis".

[33] While these exhibits reflect the use of "OxyGeneo" in Canada by at least January 27, 2019, they shed no greater or determinative light on the identity of the owner of the right to use the "OxyGeneo" trademark in Canada as it appears on the archived webpage. While

"OxyGeneo" may be related to or owned by Pollogen, it may just as easily be a trademark that is owned by "Lumenis", who may also be Pollogen's parent company.

[34] Considering the foregoing, I must conclude in light of the evidence led by the Plaintiffs on this motion and in this proceeding as to trademark ownership that they have not led sufficient evidence to establish that Pollogen has ownership rights to any of the trademarks as claimed in this proceeding.

[35] The Plaintiffs have not established that Pollogen is the owner of the trademarks identified and claimed in their Statement of Claim. They have not met their burden on this motion with respect to the claim set out in subparagraph 1a) of their Statement of Claim.

B) Claims 1 b), c), d), e), f), g), h), i), j), k), l), m) and n) of the Statement of Claim

[36] The Plaintiffs' claims as pleaded at subparagraphs 1 b), c), d), e), f), g), h), i), j), k), l), m) and n) of their Statement of Claim are predicated and reliant upon Pollogen establishing its ownership rights in the Pollogen Trademarks, both registered and at common law, as claimed.

[37] As I have determined that the Plaintiffs have failed to establish those rights of ownership on the balance of probabilities on the evidence led on this motion, none of the claims advanced in the Statement of Claim that rely upon Pollogen's trademark ownership may be established on a balance of probabilities.

[38] Considering that all of the Plaintiffs' remaining claims as pleaded as subparagraphs 1 b), c), d), e), f), g), h), i), j), k), l), m) and n) of the Statement of Claim rely on Pollogen establishing its right of ownership to the trademarks at issue, I must find that the Plaintiffs have not established their claims as pleaded in those subparagraphs on this motion.

V. **Conclusion and Disposition**

[39] The Plaintiffs have not met their burden on this motion due to insufficient evidence in the record filed. While I am unable to grant judgment on the evidence filed, I am not persuaded by the record that the Plaintiffs are without evidence to meet their burden to establish their claims.

[40] This motion for default judgment is therefore dismissed and the action shall proceed forward to trial pursuant to Rule 210(4)(c) of the *Rules*.

[41] Considering the passage of time since the commencement of this proceeding and the Defendant's default, the Plaintiffs shall be required to set this matter down for trial or commence a further motion for default judgment on a different evidentiary record within a fixed time as set out below.

ORDER in T-1412-24

THIS COURT ORDERS that:

1. The Plaintiff's motion for Default Judgment is dismissed.
2. This action shall proceed forward to trial pursuant to subrule 210(4)(c) of the *Rules.*
3. The Plaintiffs shall within thirty (30) days of the date of this Order requisition a case management conference to set a timetable for the next steps in this proceeding leading to trial and to seek a trial date.
4. Notwithstanding paragraph 2, the Plaintiffs are not precluded from commencing a further motion for default judgment on a different evidentiary record.
5. No costs are awarded on this motion.

"Benoit M. Duchesne"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1412-24
STYLE OF CAUSE:	DERMASPARK PRODUCTS INC ET AL. v. AVEENA COSMETIC CLINIC INC. ET AL.
ORDER AND REASONS:	DUCHESNE, J.
DATED:	JUNE 2, 2025

MOTION IN WRITING CONSIDERED IN OTTAWA, ONTARIO PURSUANT TO RULES 210 AND 369 OF THE *FEDERAL COURTS RULES*.

WRITTEN SUBMISSIONS BY:

Santiago Avelar	FOR THE PLAINTIFFS

SOLICITORS OF RECORD:

Pinto Legal Montréal, Québec	FOR THE PLAINTIFFS