Date: 20071102

Docket: T-174-06

Citation: 2007 FC 1134

Ottawa, Ontario, November 2, 2007

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

MGM WELL SERVICE, INC.

Plaintiff
(Defendant by Counterclaim)

and

MEGA LIFT INCORPORATED

Defendant
(Plaintiff by Counterclaim)

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] This is an appeal by a non-party, Mega Lift Systems LLC (MLS), against paragraphs 2 and 3 of an Order made by the prothonotary following a status review. The whole Order reads as follows:

> 1. The action shall continue as a specially managed proceeding.
>
> 2. Mega Lift Systems LLC shall forthwith, and no later [sic] July 16, 2007, take the appropriate and required steps to obtain standing to carry on the proceeding by or on behalf of the Defendant.

3. The Plaintiff is dispensed from the requirement to serve and file a reply and defence to counterclaim pending further order or directions of the Court.

THE FACTS

[2] MLS is a 50% shareholder of the defendant Mega Lift Incorporated (MLI). On January 31, 2006, the plaintiff MGM Well Service, Inc. (MGM) filed a statement of claim in this action alleging that MLI had infringed a number of claims of its Canadian Patent No. 2,425,573. A statement of defence and counterclaim on behalf of MLI were filed April 18, 2006. Although ordered, particulars of this latter pleading were never supplied. There is parallel litigation in the United States in which MGM has now obtained final judgment in its favour.

[3] On November 15, 2006, on consent the Alberta Court of Queen's Bench ordered MLI wound up. Two individuals were appointed as joint liquidators, one being the principal of MLS and the other being the holder of the remaining 50% of the shares of MLI. The Order purported to give MLS leave to intervene in the present action and "to defend, compromise or discontinue the Federal Court Action as it deems advisable in its sole and absolute discretion".

ANALYSIS

[4] MLS argues that the prothonotary's decision is subject to review both because it in part decides the final issue in the case and because it is based on a wrong principle of law. Both submissions are sadly misconceived. The Order is purely procedural in nature and does no more than indicate to MLS that if it wishes to exercise the powers purported to have been given to it by the Alberta Court it must take steps to become a party to this action. That can have no more than a

peripheral impact upon the final outcome of the action which, as indicated, is for alleged patent infringement. The suggestion, apparently argued seriously in the reply submissions, that non-compliance with the Order might put MLS at risk of being found in contempt of Court, is quite simply ludicrous; the Order does not require MLI to do anything and, in my view the most serious consequence to which non-compliance would expose MLS is that the action against its subsidiary or affiliate, MLI, might continue to judgment by default. It is up to MLS as to whether or not it wishes to exercise control over the conduct of MLI's defence and counterclaim, but if it does it must do so in the manner specified by the Order.

[5] The proposition that MLS has “directorial control” (whatever that may mean) over MLI's conduct of its defence of the action without itself having to take any steps herein appears to me to be very dubious; it would seem to me that the use of the conjunctive “and” in the Alberta Order linking the power to intervene with the exercise of control over the conduct of the action has the effect of making the latter conditional upon the former. Any other view would have the strange effect of allowing MLS to conduct litigation in the name of a company in liquidation without the intervention of the liquidators and without itself being exposed to any costs consequences in the event of failure. Since MLI is now in liquidation it would seem probable that it is a mere shell; MLS, as a non-resident, may of course be subject to a requirement to post security for costs but only if and when it becomes a party.

[6] Finally, to suggest as does MLI in its submissions, that the prothonotary erred in law by wrongly holding that Rule 117 applied to the position of MLS is, again, quite simply wrong; while

the Reasons do indeed refer to Rule 117 it is neither clear that the latter is inapplicable in the circumstances nor, more crucially still, that the Order itself precludes reference to other possibly applicable provisions, notably Rule 109. The Order only requires MLS to take steps to obtain standing without specifying what those steps must be.

[7] There are a number of other technical and procedural points taken by the solicitors acting for MLS and MLI which I must mention for the sake of completeness. First it is said that MLS did not receive notice of the status review; those same solicitors had themselves written to the Court previously stating that they acted for both MLI and MLS pursuant to the Alberta Order. It ill-behoves them now to contend that MLS did not have notice of the status review. In any event, since MLS has participated fully through those same solicitors in the proceedings leading up to the Order and in the present motion it has clearly suffered no prejudice from any alleged lack of notice.

[8] The same consideration applies to the argument by those solicitors to the effect that the responding motion record herein was improperly served and filed out of time. To the extent necessary I would remedy such alleged defect and order that the responding motion record shall for all purposes be deemed to have been properly and timely served and filed, the moving party having suffered no prejudice from any alleged defects.

[9] I said at the outset that the present motion was brought by a non-party. That is the reality. To hold otherwise would be a triumph of form over substance and would allow MLS to participate actively in the defence of the action without its engaging any potential liability toward the plaintiff.

The Court will not tolerate that. In my view the conduct of MLS and its solicitors herein has been devious and not in accordance with the spirit of the Rules generally and of Rule 3 in particular. The present motion should not have been brought. MLS should bear the costs of this motion fixed in the amount of $2,500 payable forthwith and in any event of the cause.

ORDER

THIS COURT ORDERS that

The motion is dismissed with costs payable by MLS in the amount of $2,500 forthwith and in any event of the cause.

"James K. Hugessen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-174-06
STYLE OF CAUSE:	MGM WELL SERVICE, INC. and MEGA LIFT INCORPORATED
MOTION IN WRITING PURSUANT TO RULE 369	
REASONS FOR ORDER AND ORDER:	HUGESSEN J.
DATED:	November 2, 2007

WRITTEN SUBMISSIONS BY:

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