

Date: 20080123

Docket: T-1758-06

Citation: 2008 FC 87

[ENGLISH TRANSLATION]

Montréal, Quebec, January 23, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

**CHANEL S. DE R.L., and
CHANEL INC.**

Plaintiffs

and

**GENÈVE ACCESSOIRES INC.
BIJOUTERIE GENÈVE INC.,
HENRI SEBAG AND/OR THE INDIVIDUAL
OR COMPANY OPERATING
UNDER THE TRADE NAME GENÈVE AND/OR
GENÈVE ACCESSOIRE AT PLACE ALEXIS NIHON,
1500 ATWATER, MONTRÉAL, QUEBEC AND
AT CENTRE LAVAL, 1600 CORBUSIER, CHOMEDEY, LAVAL**

Defendants

REASONS FOR ORDER AND ORDER

[1] By motion filed in Court on April 5, 2007 (motion to set aside), the Defendants are seeking an order under Rule 399 of the *Federal Courts Rules*, SOR/98-106, as amended (the Rules), to set

aside the default judgment rendered against them on March 22, 2007. The Defendants are also seeking to have set aside the Plaintiffs' amended statement of claim dated December 1, 2006, in addition to exemplary damages of \$150,000 for Mr. Sebag [TRANSLATION] "for damage to his reputation and . . . to deter multinational companies . . . from taking legal action in a cavalier manner and from using the Canadian justice system in an abusive manner."

[2] The Plaintiffs, Chanel S. de R.L. and Chanel Inc. (together, Chanel), are the registered owners of trade-mark Nos. 143,648; 345,284; 339,904 and UCA 18537 on the Canadian Trade-marks Registry. On October 5, 2006, Chanel filed a statement of claim against the Defendants, in which it claimed that the Defendants were violating its rights in the trade-marks that are the subject of registration numbers 345, 284 and UCA18537 (the CHANEL trade-marks). On November 7 and December 1, 2006, Chanel filed amended statements of claim. The Defendants filed no statement of defence. The 30 days set out in Rule 204 of the Rules expired when Chanel filed an *ex parte* application to obtain a default judgment from the Court.

[3] On March 22, 2007, the Court rendered the default judgment against the Defendants and thereby declared that the Defendants:

- (a) infringed, or are deemed to have infringed, the CHANEL trade-marks;
- (b) caused the depreciation of the market value associated with the CHANEL trade-marks; and,

- (c) attracted public attention to their merchandise by creating confusion in Canada between their merchandise, services and activities and the complainants' merchandise, services and activities.

[4] Among other things, the Court issued a permanent injunction prohibiting the Defendants (and their agents, clerks, employees, representatives and successors) from offering for sale, selling, importing, manufacturing, printing, distributing, advertising, promoting, shipping, storing and displaying articles associated with the CHANEL trade-marks. The Court also ordered the Defendants, jointly and severally, to pay immediately the sum of \$12,000 in conventional compensatory damages and the sum of \$4,952.65 in costs and disbursements.

[5] On April 5, 2007, the Defendants filed this motion to set aside, which was scheduled for hearing on November 21, 2007. At the hearing, I authorized Mr. Sebag, who was representing himself, to also represent the Defendants Genève Accessoires and Bijouterie Genève Inc. I also allowed the motion to set aside to be decided on the basis of additional written submissions that I considered before issuing the following order dismissing the motion to set aside with costs.

[6] According to the Defendants' submissions, Mr. Sebag, the primary Defendant, had to change [TRANSLATION] "law firms twice with no results [*sic*]." The Defendants claim that they did not have the means to pay for the services of a major law firm: Bijouterie Genève Inc. and Accessoires Genève Inc. do not have the financial resources to cover the costs of a lawyer without jeopardizing their survival.

[7] The Plaintiffs' statements were written and served in English. Consequently, the Defendants claim that a default judgment cannot be obtained pursuant to Rule 68(1) of the Rules. The Defendants state that they asked the Plaintiffs' law firm numerous times to send all correspondence and Court orders in French. This was not done: Mr. Sebag did not receive copies of the affidavits in French signed by Sylvain Gagnon, Nanette Minichiello, H  l  ne Dor  , Sylvie Caron, Luc L  onard and Mario Boyerand. Rule 74 of the Rules entitles the Court to order that a document that is not filed in accordance with the Rules be removed from the Court file. Moreover, the Defendants claim that the default judgment was written in English and therefore is an illegal document within the meaning of section 20 of the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.).

[8] Lastly, the Defendants argue that Chanel has demonstrated a lack of credibility, and that its counsel has demonstrated poor ethics. Thus, the Defendants dispute the legality of the affidavit signed by Nanette Minichiello, sales director at Chanel Inc. Given that this affidavit confirms under oath the facts reported by her daughter, Vanessa Willberg, this evidence is inadmissible and must be rejected by the Court. Furthermore, the Defendants claim that the amended statement of claim dated December 1, 2006, is an abuse of procedure since it is based on false allegations. The allegation that the Defendants continued to sell counterfeit Chanel jewellery at the Gen  ve jewellery store in Laval is false and erroneous. Since that jewellery store was sold to 9156-5793 Qu  bec Inc., Mr. Sebag no longer has any personal interest. Moreover, the photo of a piece of Chanel jewellery (according to the amended statement of claim dated December 1, 2006, this piece was sold at the Gen  ve jewellery store in Laval) includes no affidavit, no alleged fact and no specific date. This

photo is therefore a gratuitous statement. Lastly, Mr. Sebag has very limited education and great difficulty in reading and writing.

[9] Under Rule 399(1) of the Rules, the Court may set aside an order that was made *ex parte* if the party against whom the order is made discloses a *prima facie* case why the order should not have been made. The test for setting aside a default judgment is well-established. In short, the purpose of this judgment is to answer the following questions:

- a) Do the Defendants have a reasonable explanation for their failure to file a statement of defence?
- b) Do the Defendants have a *prima facie* defence on the merits to Chanel's claim?
- c) Have the Defendants brought this motion within a reasonable time?

(See in particular *Taylor Made Golf Co. Inc. et al. v. 1110314 Ontario Inc.* (1998), 148 F.T.R. 212; *SEI Industries Ltd. v. Terratank Environmental Group*, [2006] F.C.J. No. 271 (QL), 2006 FC 218 (SEI)).

[10] Firstly, note that the Defendants filed their motion to set aside promptly. Therefore, the third criterion is met. But what about the other two criteria?

[11] With regard to the first criterion, having considered the parties' written submissions and the evidence on file, I am of the opinion that the Defendants did not provide a "reasonable explanation" or "satisfactory excuse" for their failure to file a statement of defence. The fact that a solicitor has

only recently come on a file or changing one's lawyer will rarely, if ever, justify delaying the progress of a lawsuit (*General Motors Corp. v. Diabco International Inc.*, [2007] F.C.J. No. 554 (QL), 2007 FC 399). Regardless, there are no particular or special circumstances in this case.

[12] Contrary to the Defendants' claim, Chanel is entitled to choose to use French or English before this Court. In *Lavigne v. Canada (Human Resources Development)*, [1995] F.C.J. No. 737 (QL), Justice Noël states the following at paragraph 15:

I am also unable to identify any legal basis for the contention that the Crown or a federal institution has an obligation to provide a party with a translation of the affidavits sworn to by its witnesses, when it is written in the official language other than that chosen by the other party. Such an obligation, insofar as it is said to arise under either the Constitution, the Charter, or the *Official Languages Act*, would have to result from a constitutionally enshrined guarantee, or from the wording of the Act. As noted earlier, the constitutional guarantee pertaining to the use of either official languages in court proceedings are those of the writers or issuers of written pleadings and not those of the readers thereof. There is therefore no constitutional right entitling a party to read affidavit evidence in the official language which he or she has chosen, and hence no corresponding obligation on the part of the governmental party to provide a translation.

[13] Moreover, in the same case, *Lavigne v. Canada (Human Resources Development)*, [1995] F.C.J. No. 1629 (QL), Justice Richard noted that the *Official Languages Act* and the Rules do not obligate the Court to provide a translation in either official language of documents (such as affidavits) used in Court. The Defendants therefore are not entitled to receive copies of the Plaintiffs' affidavits in French. I also reject the Defendants' claim that the original judgment is an illegal document within the meaning of section 20 of the *Official Languages Act*. Moreover, I note that the default judgment has since been translated into French. There does not seem to have been

any breach of the rules of natural justice. In fact, I note that some of Mr. Sebag's letters to Chanel and to this Court are written in English. In addition, the invoices issued by Sun Jewelry & Art Inc. in Miami, Florida, for CHANEL-brand jewellery are in English. I also note that while Mr. Sebag has very limited education, he is able to understand the nature of proceedings in this case.

Therefore, Mr. Sebag is not an ill-informed party. He is acting on behalf of companies in which he is the president and primary shareholder. He was able to read the correspondence from Chanel and to write to this Court.

[14] In short, the Defendants did not give "convincing reasons" for their failure to file a statement of defence at the appropriate time. Regardless, I do not find that the Defendants have a *prima facie* defence on the merits to Chanel's claim.

[15] Recall that Chanel's right to the exclusive use of the CHANEL trade-mark is deemed to have been infringed by a person not entitled to its use and who sells, distributes or advertises goods or services in association with a confusing trade-mark or trade-name (*Trade-marks Act*, R.S.C., 1985, c. T-13, section 20). To determine whether there is confusion, all circumstances in the case must be considered, including:

- (a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;
- (b) the length of time the trade-marks or trade-names have been in use;
- (c) the nature of the goods, services or business;
- (d) the nature of the trade; and

(e) the degree of resemblance (*SEI*, supra, at paragraph 17).

[16] Rule 81(1) of the Rules provides that affidavits shall be confined to facts within the deponent's personal knowledge except on motions, in which statements as to the deponent's belief, with the grounds for it, may be included. According to Rule 81(2), where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts. Nanette Minichiello's affidavit was made in support of a motion. Therefore, even though she confirms facts reported by another person, this does not in itself make it an "illegal" document. In addition, the fact that she is a Chanel employee is not sufficient reason to remove this evidence from the Court file. In this case, Chanel submitted several pieces of evidence (affidavits signed by Sylvain Gagnon, Nanette Minichiello, H  l  ne Dor  , Sylvie Caron, Luc Leonard and Mario Boyerand to support its motion in writing, which was compliant with Rule 210). The evidence submitted by Chanel constituted a solid and convincing basis on which to conclude that the Defendants had violated Chanel's rights to the CHANEL trade-marks, hence, the order issued by Justice Harrington.

[17] Since the default judgment was rendered, the Defendants have not provided any serious evidence or arguments against the conclusions of infringement. Today, the Defendants are basing their argument on an invoice issued by Sun Jewelry & Art Inc. in Miami, Florida, which they allege demonstrates that CHANEL-brand jewellery was purchased legally. The Defendants also submitted an affidavit signed by Mr. Sebag stating that he purchased this jewellery in good faith, thinking that the store in Miami had the required authorizations to sell CHANEL products. The Defendants

[TRANSLATION] “question the professional ethics and motives of the Plaintiffs and their counsel,” claiming that it is the Royal Canadian Mounted Police’s responsibility to seize counterfeit products bearing a trade-mark and to issue fines. It is also alleged that Chanel and Bijouterie Almar Inc. reached an out-of-court settlement for \$2,000 in a similar lawsuit.

[18] I note that even if the Defendants purchased the CHANEL-brand products in good faith, this is not a valid defence to infringing on a trade-mark (*Parfums Christian Dior, S.A. v. Di Iorio*, [1980] F.C.J. No. 1001 (QL), (1980), 53 C.P.R. (2e) 145; *Henkel Kommanditgesellschaft Auf Aktien v. Super Dragon Import Export Inc.*, [1984] F.C.J. No. 1020 (QL), (1984), 2 C.P.R. (3d) 361; affirmed [1986] F.C.J. No. 313 (F.C.A.) (QL); 69 N.R. 234). Moreover, Mr. Sebag has over 30 years of experience in the jewellery industry. The prices the Defendants paid for the items purchased were extremely low, which should have raised suspicions (*Microsoft Corp. v. 9038-3746 Québec Inc.*, [2006] F.C.J. No. 1965 (QL), 2006 FC 1509). I am also of the opinion that the out-of-court settlement in another infringement case between Chanel and Bijouterie Almar Inc. has absolutely no connection with the questions at issue. Lastly, Chanel could pursue its action before this Court, regardless of the fact that the RCMP could conduct a criminal investigation.

[19] Consequently, I am not satisfied that the Defendants have a *prima facie* defence demonstrating why the impugned order should not have been issued in this case.

[20] Therefore, this motion must be dismissed, and the Plaintiffs will be entitled to costs.

ORDER

THE COURT ORDERS that the present motion to set aside the order for default judgment dated March 22, 2007, be dismissed with costs in favour of the Plaintiffs.

“Luc Martineau”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1758-06

STYLE OF CAUSE: CHANEL S. DE R.L. ET AL.
v GENÈVE ACCESSOIRES INC. ET AL.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 21, 2007

**REASONS FOR ORDER
AND ORDER:** Martineau J.

DATED: January 23, 2008

APPEARANCES:

Louis Gratton FOR THE PLAINTIFFS

Henri Sebag FOR THE DEFENDANTS
(representing himself)

SOLICITORS OF RECORD:

Ogilvy Renault LLP, s.r.l. FOR THE PLAINTIFFS
Montréal, Quebec