

Federal Court



Cour fédérale

Date: 20101008

Docket: T-1787-08

Citation: 2010 FC 1001

Ottawa, Ontario, this 8th day of October 2010

Present: The Honourable Mr. Justice Pinard

BETWEEN:

APOTEX INC.

Plaintiff

and

SHIRE CANADA INC.

Defendant

REASONS FOR ORDER AND ORDER

[1] By this motion, the defendant, Shire Canada Inc. (“Shire”), appeals the Order of Prothonotary Tabib dated June 4, 2010 (Reasons for Order dated August 19, 2010) that denied, in part, its motion to amend the Amended Statement of Defence. Prothonotary Tabib made this decision in the exercise of her powers as the Case Management Prothonotary assigned to these proceedings.

[2] The Prothonotary denied Shire leave to amend its Defence in order to plead that the plaintiff, Apotex Inc. (“Apotex”), should be precluded from recovering damages in this proceeding pursuant to section 8 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, in the event that there is a finding of infringement of Canada Letters Patent No. 2,201,967 (the “’967 Patent”) in another action, Court File No. T-609-09.

[3] In denying Shire’s motion, Prothonotary Tabib found as follows:

[5] Instead of directly asserting as a defence against Apotex’s action a plea that the ‘967 Patent is valid and infringed and that Apotex should therefore not be entitled to recover damages based on the loss of infringing sales, Shire proposes to rely on the outcome of a separate infringement action commenced by Cephalon and to which it is not a party. Thus, it does not propose to bring any evidence in this action as to the validity of infringement of the ‘967 Patent so that the Court could make a direct determination of these issues in the context of this action. Rather, it proposes to rely strictly on the outcome of Cephalon’s action, as a fact. The allegations, as proposed, recognize clearly that the Cephalon action was only begun in April 2009 and has yet to be determined. The outcome of the Cephalon action, upon which depends the success of the proposed defence, is therefore clearly an uncertain future event which is not susceptible of being determined or even influenced in the context of the present action. In essence, Shire is alleging that if a certain event comes to pass (upon which neither the Court nor the parties have any control or any way of determining in the context of this action), then it will have a valid defence. This is the essence of a speculative and hypothetical pleading and ought to be struck (see *Bell Canada v. Pizza Pizza Ltd.* (1993), 48 C.P.R. (3rd) 129). Furthermore, if these allegations were allowed to be introduced in the Statement of Defence, the issues they raise could not be determined unless and until the proceedings brought by Cephalon against Apotex in that other Court file were resolved. This would unreasonably delay, embarrass and prejudice the trial of the present action.

[4] Shire submits that the amendments at issue, which are contained in paragraphs 55F to 55H of its proposed Second Amended Statement of Defence, go to the heart of whether or not Apotex is entitled to claim damages in respect of the '967 Patent. Shire further submits that the Prothonotary erred in reaching the conclusion that Shire's proposed defence is speculative and hypothetical, and that it would unreasonably delay, embarrass and prejudice the trial of the present proceeding.

[5] For its part, Apotex submits in essence that Shire's proposed plea to incorporate the allegations and result of another action, to which Shire is not a party, into the present proceeding by way of amendment is both impracticable and ill-founded at law.

[6] Counsel for both sides submit that the questions raised in the motion to amend are vital to the final issue of this case and that therefore this Court should exercise its discretion *de novo*. I agree.

[7] Upon hearing counsel for the parties and upon reading the material filed, I find that Shire's appeal ought to be denied for the following reasons:

1. There is no reasonable cause of action or defence raised by Shire. It cannot be the case that a cause of action is properly grounded where a party pleads, as a defence to an action, collateral contingency predicated on an unrelated proceeding. To the contrary, any such pleading is, by its very nature, unreasonable, as it seeks to insert into an action an allegation that cannot be resolved by the Court hearing the matter, and an allegation where the *lis* is not between the parties before the Court. (See, for example, *Merck & Co. v. Apotex Inc.*, [2004] 2 F.C.R. 459 at paragraphs 35-39 (C.A.) and *Chavali v.*

Canada et al. (2001), 202 F.T.R. 166 at paragraph 21 (F.C.), aff'd (2002), 291 N.R. 311 (F.C.A.)

2. A pleading which purports to import a separate proceeding involving different parties is baldly deficient and should not be permitted. As presently framed, the pleading fails to plead material facts in support of the defence of infringement and fails to permit Apotex the opportunity to defend the allegation of infringement on the merits in this proceeding. If Shire is of the view that it has a valid defence to Apotex's section 8 claim herein, on the basis that Apotex's product would, in the hypothetical period, have been infringing, it should have put forth a plea for infringement in accordance with the prescribed practice. It cannot circumvent the requirement to plead properly and in accordance with the *Federal Courts Rules, 1998*, SOR/98-106, in particular Rules 174 and 181, which require that every pleading contain "a concise statement of the material facts on which the party relies, and particulars of every allegation contained therein".
3. Because Shire is not a party to Court File No. T-609-09, which is an action only begun in April 2009 and has yet to be determined, and because Shire has failed to plead any material facts whatsoever as to the validity or infringement of the '967 Patent, the Court would likely be faced with issues upon which it could not make any direct determination. This would unreasonably delay, embarrass and prejudice the trial of this action.

[8] For the above-mentioned reasons, the defendant's motion is dismissed, with costs to the plaintiff.

ORDER

The defendant's motion is dismissed, with costs to the plaintiff.

“Yvon Pinard”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1787-08

STYLE OF CAUSE: APOTEX INC. v. SHIRE CANADA INC.

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 5, 2010

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

DATED: October 8, 2010

APPEARANCES:

Mr. Jerry Topolski FOR THE PLAINTIFF

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Mr. Viktor Haramina FOR THE DEFENDANT

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