

Federal Court



Cour fédérale

Date: 20110105

File: T-1444-09

Citation: 2011 FC 2

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 5, 2011

Present: The Honourable Mr. Justice Pinard

ADMIRALTY ACTION IN PERSONAM

BETWEEN:

**CAPITAINES PROPRIÉTAIRES DE LA
GASPÉSIE (A.C.P.G.) INC.
and
PAULIN COTTON
and
AXA ASSURANCES, INC.**

Applicants

and

**PÊCHERIES GUY LAFLAMME INC.
and
GUY LAFLAMME**

Respondents

REASONS FOR ORDER AND ORDER

[1] The applicants, by this motion, want to obtain a summary judgment in order to:

1. have the exclusion clause contained in the “boat handling” contract entered into by the parties on May 19, 2008, declared valid, operative and applicable between the parties;
2. have the respondents’ defence and counterclaim dismissed because of the application of the exclusion clause;
3. obtain any further order that this Court may consider appropriate in the circumstances;
4. the whole with costs against the respondents.

[2] The motion is made under sections 213, 214, 215, 359 and following and section 70 of the *Federal Court Rules*, SOR/98-106.

[3] At all material times in this matter, the Association des Capitaines-propriétaires de la Gaspésie (A.C.P.G.) Inc. (A.C.P.G.) was incorporated under part 1A of the *Companies Act*, its head office being at 1 de la Langevin, Rivière-au-Renard, Quebec, Canada.

[4] At all material times in this matter, the applicant Paulin Cotton was the employee of the applicant A.C.P.G. and the designated operator of the portal crane used by A.C.P.G.

[5] At all material times in this matter, the applicant AXA Assurances, Inc. (AXA Assurances) was the insurer of the applicant A.C.P.G. under a policy (Marine Liability Policy) numbered 7822850.

[6] The shareholders of the applicant A.C.P.G. are captains and owners of fishing vessels.

[7] One of these shareholders is the respondent Guy Laflamme (the respondent). He holds the majority of shares in the respondent company Pêcheries Guy Laflamme Inc., which has its head office at 232 Renard Boulevard East, Rivière-au-Renard, Quebec. The respondent Pêcheries Guy Laflamme Inc. (the respondent) itself owns the vessel Myrana I, official number 800832.

[8] The applicant A.C.P.G. offers its shareholders towage services and operates a fleet of vessels. It operates a portal crane used for launching vessels in the spring and storing them in the fall. These services are subject to the terms contained in a contract entitled “Manœuvre de bateau - Autorisation d’exécuter les manœuvres / cale de halage de Rivière-au-Renard”. This contract is also required to bill for services rendered by the applicant to fishing captains. The contract includes, among others, the following clause:

[TRANSLATION]

I, undersigned, _____, residing at _____, owner of the vessel V/M _____, registration number _____, declare that I take responsibility for any risk resulting from the towage, docking, wintering and/or launching of this vessel and I release the Owner of this slip dock and its Operator _____ of any civil liability resulting from these associated operations or handling.

[9] The contract signed by Guy Laflamme, dated May 19, 2008, for the launching of Myrana I stated that the operator was the applicant Paulin Cotton.

[10] On May 19, 2008, the respondent's vessel was launched using the portal crane operated by applicant Paulin Cotton following the terms of the contract. When the vessel had been lifted several metres from the surface of the water, a mechanical problem apparently caused the vessel to fall into the water. After this incident, the respondents claimed that the vessel had incurred damages of as much as \$552,181.07 and, by way of a letter from their counsel dated April 3, 2009, claimed this amount from A.C.P.G. and AXA Assurances.

[11] Denying any liability, the applicants then sued the respondents for the purpose of obtaining a declaration from this Court to the effect that the exclusion clause in the contract operates against the respondents and that, consequently, they could not claim damages from them.

[12] The applicants argue and base their action on Canadian maritime law as defined in section 2 of the *Federal Courts Act*, R.S.C. (1985), c. F-7.

[13] In their defence, the respondents deny that the exclusion clause in question applies in their case. They also filed a counterclaim against AXA Assurances on the basis that, when handling vessels, it was never a question of evading liability from the insurance company with which the respondent signed a contract as a member of the A.C.P.G. The counterclaim also alleges that AXA Assurances is requiring payment for an obligation it does not fulfill, a fact that gives the respondent a disadvantage as a consumer and asks that AXA Assurances compensate the respondents for the total amount of \$408,277.05 plus interest and the additional amount from the date of the demand.

[14] In its counterclaim, AXA Assurances argues that the majority of the alleged damages to the respondent's vessel are not a result of the incident of May 19, 2008; furthermore, it submits that the respondents are not insured under the insurance policy and that, therefore, there is no contractual relationship between it and the respondents. Finally, AXA alleges that the exclusion clause operates against the respondents and adds that even if the clause was not applicable, the respondent's damages should not exceed \$49,000.

[15] The applicants subsequently sent the respondent a summons to appear under section 91 of the Rules and an oral examination of the respondent took place on June 11, 2010. It was then that the applicants filed this motion for summary judgment.

* * * * *

[16] A summary judgment "prevents claims or defences that have no chance of success from proceeding to trial" (*Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372, para. 10). In *Apotex Inc. v. Merck & Co.*, [2003] 1 F.C. 242, at para. 49, the Federal Court of Appeal stated the following:

. . . It must be noted that the *Federal Court Rules*, 1998, insofar as they provide for summary judgment where there is no genuine issue for trial, are unique. The Federal Court Rules, 1998 empower a motions judge to make findings of fact or law necessary to dispose of the motion, provided the relevant evidence is available on the record, and does not involve a "serious" question of fact or law which turns on the drawing of inferences. In essence, where a trial would add detail, but not significant additional evidence, it is better for the motions judge to determine the question of law or fact in issue (see *Pawar v. Canada*, [1999] 1 F.C. 158 (TD), affirmed (1999), 247 N.R. 271 (FCA), leave to appeal to SCC denied (2000), 257 N.R.

398; *Warner-Lambert v. Concord Confections Inc.*, 2001 FCT 139;
Wetzel v. Canada, [2000] F.C.J. No. 155 (T.D.).

[17] In this case, while they acknowledge that they have the burden of proving that there is no genuine issue, the applicants refer to *Suntec Environmental Inc. v. Trojan Technologies Inc.*, 2004 FCA 140, at para. 4 (citing *Apotex Inc. v. Her Majesty the Queen et al.*, 2003 FCT 414, at para. 10), that “both parties must ‘put their best foot forward’ to enable the motions judge to decide whether or not there is a genuine issue for trial, and the judge is required to take ‘a hard look’ at the merits and, if possible, make findings of fact and law if the materials allow this”. The applicants also refer to the following paragraph of *Suntec*:

[19] The scope of the summary judgment rules was recently reviewed by this Court in *MacNeil Estate v. Canada (Indian and Northern Affairs Department)* (MacNeil), 2004 FCA 50. Sexton J.A. reviewed the ambiguity at the heart of subsections 216(2) and 216(3). On the one hand, a judge who finds a genuine issue for trial is to send the matter on for trial in the ordinary course. On the other hand, even where there is a genuine issue, the motions judge can decide the matter if he or she is able to find the facts necessary to decide the questions of fact and law. This ambiguity gives rise to the risk of motions for summary judgment becoming summary trials on affidavit evidence. While both are useful measures in the struggle to contain the length and cost of litigation, one ought not to be confused for the other.

It is important to note that *Suntec* reiterated that the case law is clear that issues of credibility must be left to the trial judge.

[18] It is with all these principles clearly in mind that I analyze the facts and the law in this matter.

[19] As regards, first, the respondents' arguments that provincial law applies in this case, specifically section 10 of the *Consumers Protection Act*, R.S.Q., c. P-40.1, prohibiting "any stipulation whereby a merchant is liberated from the consequences of his own act or the act of his representative" and the *Civil Code of Québec*, they seem to me to be without merit, since we are clearly dealing here with an issue that must be determined through the application of Canadian maritime law (see section 22 of the *Federal Courts Act* and *ITO – International Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752).

[20] Furthermore, the applicants raise an important issue of credibility related to the ability of the respondent, who claims to be illiterate, to fully understand the whole meaning and effect of the contract that he signed on May 19, 2008.

[21] In fact, upon examination on June 11, 2010, the respondent stated as follows:

[TRANSLATION]

- See, it's because I don't have my glasses and I quit school in seventh grade. I don't read fast and I have trouble reading and writing.

...

- And anyway, I quit school in seventh grade. I have trouble reading and writing. It takes me a month to read a page.

[22] Moreover, the respondent noted his lack of understanding of the scope of the contract in question and his illiteracy in his affidavit filed in support of his challenge of this summary judgment, particularly the following paragraphs:

[TRANSLATION]

14. I did not think that I would ever have to sue my own association for errors made in performing their duties as merchants;

16. It was never a question between the Association and me to exclude AXA Assurance Inc. of its obligations as an insurer to the members of the Association;

21. The Association (A.C.P.G.) and AXA Assurances Inc. have been trying to take advantage of me, a Quebec citizen without education who has managed to make an honest living with his boat, ever since I have owned a boat;

23. The Association (A.C.P.G.) and AXA Assurances Inc., by their abusive conduct toward an illiterate like me, are putting my future and my career as a fisherman at risk, which penalizes me in terms of the requirements of the programs of Fisheries and Oceans Canada;

[23] It therefore appears from the respondent's affidavit that he was not well educated, he had difficulty reading, he had believed that as a shareholder of A.C.P.G., he was registered under the AXA insurance policy, he believed he was in a position of trust with A.C.P.G. and would never have thought that this association would try to place an exclusion on him as the one placed by the applicants, given his difficulty with reading and his minimal education.

[24] In my view, the respondent's allegations raise an important issue related to his credibility, in determining the value of his consent as to the meaning and effect of the exclusion clause alleged by the respondents. The applicants submitted some evidence, such as similar previous contracts signed by the respondent, in an attempt to minimize the significance of his illiteracy with respect to his understanding of the exclusion clause in question. However, since everything is linked to the assessment of the applicant's credibility, this important issue must be left to the trial judge's

assessment, as Justice Denis Pelletier pointed out on behalf of the Federal Court of Appeal, in

Suntec, supra, at paragraph 20:

. . . The jurisprudence is clear that issues of credibility ought not to be decided on summary judgment applications (see *MacNeil, supra*, at para. 32). . . .

[25] For these reasons, the application for summary judgment is dismissed, costs to follow.

ORDER

The applicants' motion for summary judgment is dismissed. Costs in the cause.

“Yvon Pinard”

Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1444-09

STYLE OF CAUSE: CAPITAINES PROPRIÉTAIRES DE LA GASPÉSIE
(A.C.P.G.) INC. and PAULIN COTTON and AXA
ASSURANCES, INC. v. PÊCHERIES GUY LAFLAMME
INC. and GUY LAFLAMME

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 14, 2010

**REASONS FOR ORDER
AND ORDER:** Mr. Justice Pinard

DATED: January 5, 2011

APPEARANCES:

Jean-François Bilodeau FOR THE APPLICANTS

Guyline Gauthier FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Robinson Sheppard Shapiro, LLP FOR THE APPLICANTS
Montréal, Quebec

Guyline Gauthier FOR THE RESPONDENTS
Québec, Quebec