Federal Court  Cour fédérale

Date: 20110228

Docket: T-1043-07

Citation: 2011 FC 234

Toronto, Ontario, February 28, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

GUTTER FILTER COMPANY, L.L.C.
D/B/A GUTTERFILTER COMPANY

Plaintiff

and

GUTTER FILTER CANADA INC., AND
TOTAL EAVESTROUGH PROTECTION INC.

Defendants

AND BETWEEN:

GUTTER FILTER CANADA INC. AND
TOTAL EAVESTROUGH PROTECTION INC.

Plaintiffs by Counterclaim

and

GUTTER FILTER COMPANY, L.L.C.
D/B/A GUTTERFILTER COMPANY,
ADAM'S EAVES AND
TORONTO CLEAR VIEW WINDOW CLEANING

Defendants by Counterclaim

REASONS FOR ORDER AND ORDER

[1] The Defendants are seeking an Order granting judgment in accordance with an alleged settlement of this action. They submit that a document dated December 16, 2009, sets out the terms of their agreement. The Plaintiff submits that the document does not constitute a binding settlement because the parties failed to agree on all of the essential terms of the proposed settlement.

[2] The Plaintiff commenced an action in this Court seeking an order striking out and expunging the trademark registration obtained by Gutter Filter Canada Inc. and damages. The Defendants alleged that the trademark was properly registered and commenced a Counterclaim against the Plaintiff for trademark infringement.

[3] There is parallel litigation between the parties in the United States District Court, Western District of Michigan (Case #1:08-cv-00019-GJQ) (the US Action).

[4] The parties attended a mediation session on December 16, 2009, which was presided over by a Prothonotary of this Court. It was only late in the afternoon that the parties reached an understanding, which they reduced to a written form (the Settlement Document). The Settlement Document, which was handwritten and signed by the parties, reads as follows:

MINUTES OF SETTLEMENT
THIS 16TH DAY OF DECEMBER 2009, IN TORONTO

THE PARTIES HERETO AGREE TO SETTLE THE CLAIM & COUNTERCLAIM ON THE FOLLOWING BASIS

> 1. THE DEFENDANTS SHALL PAY THE SUM OF FIFTY THOUSAND DOLLARS ($50,000) TO THE PLAINTIFF TO SETTLE THIS ACTION.
>
> 2. THE PLAINTIFFS [*sic*] WILL CEASE USING THE NAME AND MARK GUTTERFILTER AFTER A SUBSTANTIAL PAYMENT HAS BEEN RECEIVED FROM THE DEFENDANTS.
>
> 3. THE PARTIES WILL ENTER INTO COMPREHENSIVE MINUTES OF SETTLEMENT INCLUDING THE USUAL AND STANDARD TERMS, DEFAULT PROVISIONS, AND DISMISSAL ORDER OF ALL ACTIONS WITHOUT COSTS.
>
> 4. THIS MEDIATION IS ADJOURNED PENDING FURTHER NEGOTIATIONS.

[5] It was agreed that counsel for the Defendants would prepare a draft of the "comprehensive Minutes of Settlement" referred to in paragraph 3 of the Settlement Document. Regrettably, the draft was only provided some five months later, on May 27, 2010. In the interim, the relationship between the parties worsened with each alleging continuing misconduct on the part of the other.

[6] The draft comprehensive Minutes of Settlement were rejected by the Plaintiff by email sent June 9, 2010:

> David, the proposal you have put forth is wholly unacceptable. The terms of settlement discussed at the mediation, which was never completed, contemplated a much simpler resolution. Further, my client has a completely differing version of events since the mediation which, without getting into details, involves your client already selling into the US under a different corporate name. The timing of the payment is, with respect, completely unacceptable. There are many other items contained in your proposal which were never discussed at the mediation.
>
> In the circumstances I have been instructed to end settlement negotiations.

[7] The parties then contacted the Prothonotary as was contemplated by paragraph 4 of the Settlement Document. No further meeting was held as the Plaintiff informed the Court that it was not willing to participate in a further settlement discussion.

[8] On November 4, 2010, the Plaintiff obtained Default Judgment in the US Action and was awarded damages and attorney fees of US $111,916.99.

[9] An agreement to settle a claim is a contract. The Defendants submit that the Settlement Document is a valid and binding contract. The Plaintiff says the terms of the Settlement Document are not certain enough to make it enforceable.

[10] John McCamus, in *The Law of Contracts* (Toronto: Irwin Law, 2005), provides, at page 91, a pithy description of the requirement that to be enforceable the terms of a contract must be certain:

> In order for an agreement to be enforceable, the parties must have reached agreement on all the essential terms of their agreement. As is often said, the parties must make the agreement, the courts will not make it for them. Further, the parties "must so express themselves that their meaning can be determined with a reasonable degree of certainty." Where the parties either fail to reach agreement on all the essential terms of the agreement or express themselves in such fashion that their intentions cannot be divined by the court, the agreement will fail for lack of certainty of terms. [footnote omitted]

[11] The Settlement Document, and in particular paragraph 3, shows that the parties intended to settle all of their disputes, including the US Action. It is also clear that the parties intended that a further document, the comprehensive Minutes of Settlement, would be drafted and that there would be "further negotiations." The fact that a further document was required to formalize the agreement

between these parties is not an impediment to finding that the Settlement Document is a binding contract if the terms in the Settlement Document contain agreement on all of its essential terms.

[12] It was accepted by counsel for the parties at the hearing of this motion that the parties contemplated that the settlement funds would be paid over time – i.e. there would not be a single payment. There was no express agreement on how long a period of time that would be nor was there any express agreement on what was meant by "substantial payment."

[13] The mere fact that the parties intended to make a contract is not determinative of the enforceability of the contract. As Justice Morden, writing on behalf of the Ontario Court of Appeal in *Canada Square Corp et al v VS Services Ltd et al* (1981), 34 OR (2d) 250 (CA), explained at para. 29:

> … I am satisfied that the trial judge was right in finding that in executing the October 14, 1969, document the parties intended to make a contract. However, this does not end the matter. Notwithstanding that the parties may have thought they were bound, if the essential terms of the alleged contract lack certainty, either because they are vague or because they are obviously incomplete, the result will not be a binding contract: 9 Hals., 4th ed., para. 262; Trietel, The Law of Contract, 5th ed. (1979), at. p. 40; Corbin on Contracts at p. 394.

[14] In *Fieguth v Acklands Ltd* (1989), 59 DLR (4th) 114 (BCCA), the British Columbia Court of Appeal found that an agreement to settle an action on the payment of a sum of money did contain all of the essential terms of a contract despite there being no agreement on a date of payment as it could be implied that the payment would be made within a reasonable time after acceptance. Although *Fieguth* involved a situation where only a single payment was contemplated, it may be

that if the only uncertainty in the Settlement Document in this case was the timing of the payment(s) a reasonable period could possibly have been implied, as was submitted by the Defendants. However, that is not the only area of uncertainty in the Settlement Document.

[15] The parties also agreed that the Plaintiff was to cease using the disputed mark after it received a "substantial payment."

[16] "Substantial" is not a term of art, and "substantial payment" is not a turn of phrase which has any special legal meaning or clear definition. A valuable summary of the jurisprudence addressing the meaning of "substantial" was provided by Associate Chief Justice Bowman, as he then was, in *Watts v Canada*, 2004 TCC 535, at paras. 26-34. The cases cited in *Watts* make it clear that the theme running through judicial consideration of the word "substantial" is that the word has no one certain meaning. The following observation from the Australian Federal Court in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union and Others* (1979), 42 FLR 331 at 348, 27 ALR 367 (FCA), is particularly apt: "The word 'substantial' is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision."

[17] In light of the malleable meaning of the word "substantial," the language used in the Settlement Document, "after a substantial payment has been received," lacks certainty. "Substantial" in the context it was used could arguably mean a wide range of different amounts.

[18] Given this uncertainty, it must be asked whether this provision is an essential term of the contract. In my view, it is. The making of a "substantial payment" is what triggers the ceasing of

the use of the GUTTERFILTER trademark – the issue at the very heart of the agreement and the litigation. If the Court were to ascribe a certain dollar amount to the contract as being a "substantial payment" it would be arbitrary as the agreement contains no evidence of the parties' intentions as to what this amount might be.

[19] For these reasons, I find that the parties have no agreement to settle this litigation and the Defendants' motion is dismissed. The parties were in agreement that $3,000.00 was a reasonable sum to be awarded to the successful party; I agree.

ORDER

THIS COURT ORDERS that this motion is dismissed with costs to the Plaintiff of $3,000.00 inclusive of fees, disbursements and taxes.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1043-07
STYLE OF CAUSE:	GUTTER FILTER COMPANY L.L.C. v. GUTTER FILTER CANADA INC. ET AL
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 14, 2011
REASONS FOR ORDER AND ORDER:	ZINN J.
DATED:	February 28, 2011

APPEARANCES:

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David Seed	FOR THE DEFENDANTS

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