Federal Court  Cour fédérale

Date: 20110713

Docket: T-2168-10

Citation: 2011 FC 879

BETWEEN:

PRECISION DOOR & GATE SERVICE LTD.

Applicant

and

PRECISION HOLDINGS OF BREVARD, INC.

Respondent

ASSESSMENT OF COSTS – REASONS

Charles E. Stinson
Assessment Officer

[1] The evidence indicates the following sequence of events underlying the assessment of the Applicant's bill of costs, which I directed be addressed by way of written submissions:

(a) On December 24, 2010, the Applicant commenced an application under section 18 and subsection 57(1) of the *Trade-marks Act* to strike out three trade-mark registrations owned by the Respondent.

(b) On January 27, 2011, the Applicant consented to the Respondent's request for a five-day extension of the ten-day deadline for the latter's Notice of Appearance on

the assumption that the Respondent would extend the same courtesy concerning the Applicant's evidence if necessary.

(c) On March 2, 2011, the Respondent requested a 15-day extension (to March 21, 2011) of the 30-day deadline for the filing of its evidence. On March 4, 2011, counsel for the Applicant advised opposing counsel that he did not yet have instructions. On March 7, 2011, counsel for the Applicant refused a second request for an extension made earlier that day by opposing counsel.

(d) On March 7, 2011, the Respondent advised the Applicant that, to preserve its rights, it would be forced to file a motion to extend the deadline and attempted to serve the motion (of an even date) by facsimile. After being advised that the Applicant had not been served with the motion, and after no response to a request for consent to serve by facsimile, the Respondent on March 11, 2011 served and filed a motion dated March 10, 2011, to extend the deadline.

(e) On March 16, 2011, the Applicant served and filed its Reply Motion Record. On March 16 and 18, 2011, the Applicant consented to the Respondent's requests for an extension of the deadline for the latter's evidence. On March 22, 2011, the Respondent served and filed two Notices of Abandonment for the March 7 and 10, 2011 motions respectively.

I. The Applicant's Position

[2] Counsel for the Applicant noted that, had the Respondent disclosed its proposed evidence as invited to do so, his client might have been inclined to consent to an extension of the deadline (it had earlier consented to the late filing of the Respondent's Notice of Appearance), but as the

Respondent instead brought a motion, the Applicant was forced to prepare a Reply Motion Record. The motion was premature and ultimately unnecessary, thereby warranting maximum counsel fee item 5 costs (7 units x $130/unit for the Reply Motion Record) and mid-range costs (4 units) for fee item 26 (the assessment of costs). The disbursements of $90, $20 and $33.91 were respectively for photocopies, court agent and courier.

[3] The Applicant argued that there is no case law supporting the Respondent's premise that the Applicant's eventual consent to the requested time extension was an implicit consent to withdrawal of the motion without costs. Rule 402, which explicitly provides for costs forthwith further to an abandoned motion, requires a consent to avoid its effect, which did not occur here. Rather, the Applicant proposed a reasonable course, i.e. disclosure of the proposed evidence and the reasons for a delay, to preclude the need for the motion and the Reply Motion Record, but the Respondent chose to ignore this and should therefore pay the Applicant's resultant costs. The Respondent has not suggested an alternate amount of costs.

II. The Respondent's Position

[4] The Respondent argued that the Applicant's January 27, 2011 correspondence above implied that the parties would act cooperatively if and when extensions were required. The Respondent did as the Applicant requested by disclosing in the motion the reason for the requested extension, i.e. the Respondent's location in the United States. As the Applicant's eventual consent made the motion moot, it was therefore withdrawn. The motion had requested that no costs be awarded. The Respondent argued that these circumstances and the Applicant's implicit consent to

withdrawal of the motion without costs mean the Applicant has waived any costs that it may otherwise have been entitled to under Rule 402.

[5] The Respondent argued that the Applicant's actions forced it to bring the motion. The extension would not have prejudiced the Applicant. As the Applicant's deadline under Rule 369(2) for its Reply Motion Record was March 21, 2011 and as this matter was resolved by the Applicant's March 16 and 18 consents, the Applicant's choice to prepare, serve and file its response to the motion was premature and unnecessary, and contrary to its own March 7, 2011 suggestion for resolution prior to the expiry of the 15-day deadline. The Respondent promptly withdrew the motion to preclude improper waste of the Court's resources. The motion had raised only one issue, i.e. whether the Respondent could serve and file its evidence outside the 30-day deadline. The respective representations were 13 and 12 paragraphs in length. The Respondent argued that the Applicant should be denied Rule 402 costs and alternatively that any such costs should be at the lowest end of the scale.

III. Assessment

[6] I am not the "Court" as that term is used in Rule 402 and therefore I do not have the jurisdiction to dispense with Rule 402 costs as urged by the Respondent: see para 13 of *Madell v Canada*, [2011] FCJ No 432, 2011 FCA 105 (AO) [*Madell*]. Paragraphs 15 and 16 of *Madell* set out my general approach for assessments of costs and for counsel fee items respectively.

[7] Essentially, the Respondent needed or wanted to extend the deadline for its evidence. The Applicant wanted to see the proposed evidence before it would consider a consent. The Respondent decided to file a motion to protect its position concerning its proposed evidence.

The Applicant's counsel likely did some work on the Reply Motion Record prior to its service and filing on March 16, 2011, the date of the execution of his first consent to a time extension.

[8] There was nothing at all here to warrant anything above minimum tariff values for counsel fees, which I allow. I find the disbursements totaling $143.91 plus tax in order, except for $2.37 tax which I remove from the courier item because, although the bill of costs claims an HST charge of 12%, the evidence (Fed Ex invoice) clearly shows only a GST charge of 5%. The Applicant's bill of costs, presented at $1,762.78, is assessed and allowed at $886.81.

"Charles E. Stinson"
Assessment Officer

Vancouver, BC
July 13, 2011

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2168-10
STYLE OF CAUSE:	PRECISION DOOR & GATE SERVICE LTD. v. PRECISION HOLDINGS OF BREVARD, INC.

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS:	**CHARLES E. STINSON**
DATED:	July 13, 2011

WRITTEN REPRESENTATIONS:

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Robert A. MacDonald Lee A. Johnson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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