Federal Court  Cour fédérale

Date: 20120320

Docket: T-1384-11

Citation: 2012 FC 328

Ottawa, Ontario, March 20, 2012

PRESENT: The Honourable Mr. Justice Boivin

ADMIRALTY ACTION IN PERSONAM

BETWEEN:

SEANAUTIC MARINE INC.
DOING BUSINESS AND OPERATING AS
(UNION AFRICA LINE)

Plaintiff/Respondent

and

JOFOR EXPORT INCORPORATED

Defendant/Applicant

REASONS FOR ORDER AND ORDER

[1] Jofor Export Incorporated (Jofor), the Defendant/Applicant, seeks to appeal, pursuant to section 51 of the *Federal Courts Rules*, SOR/98-106 (the Rules), an Order rendered by Prothonotary Tabib dated December 8, 2011, which dismissed Jofor's Motion to Stay or Strike the action filed by Seanautic Marine Inc. (Seanautic), the Plaintiff/Respondent.

Facts

[2] This appeal stems from a dispute over certain events that date back to November 2009. The parties entered into a contract of carriage, wherein Seanautic undertook to transport two containers belonging to Jofor to Mombassa, Kenya. This agreement was documented by two Bills of Lading. Seanautic invoiced Jofor for the outstanding freight charges and demurrage totaling $19,429.95 CDN, which was not paid by Jofor thereafter.

[3] On July 30, 2010, Seanautic filed a claim before the Superior Court of Justice, Small Claims Court, in Ottawa, Ontario. Jofor responded by filing a Defence and Counterclaim.

[4] On February 2, 2011, a mandatory settlement conference was held before a Judge with the Small Claims Court. The parties, represented by Mr. Jide Uwechia (acting for Jofor) and Mr. Alfred Muelly (President of Seanautic), did not come to a settlement and the Judge of the Small Claims Court noted in the settlement conference memorandum that the action be listed for trial.

[5] On February 16, 2011, the parties were notified that the action could proceed to trial and that failing to do so would result in the dismissal of the claim for abandonment. On February 23, 2011, the parties were notified again that the clerk of the court would dismiss the claim as abandoned without further notice unless the action was set down for trial or disposed of by court order within 45 days of the notice. On June 29, 2011, the Small Claims Court issued an order dismissing the claim as abandoned pursuant to Rule 11.101(2) of the *Rules of the Small Claims Court*, Ontario Regulation 258 (the *Small Claims Court Rules*).

[6] In a letter dated June 27, 2011, Seanautic reminded Jofor of the outstanding freight charges and informed them that they intended to file an action with the Federal Court if they failed to respond. Seanautic also sent invoices to Jofor which detailed the amounts owing.

[7] On August 26, 2011, Seanautic filed a Statement of Claim with the Federal Court. The Statement of Claim was then amended on or about September 27, 2011.

[8] Jofor filed a Defence and Counterclaim with the Federal Court on October 3, 2011. Subsequently, Seanautic filed a Reply and Defence to Counterclaim on October 13, 2011.

[9] On November 7, 2011, Jofor filed a Motion to Stay or Strike Seanautic's action, citing *forum non conveniens* and reproaching Seanautic for abuse of court process and for conduct likely to bring the administration of justice into disrepute.

[10] On December 5, 2011, Seanautic filed its Motion Record which contained the affidavit of Mr. Alfred Muelly that stated that, during the course of the settlement conference, the Judge of the Small Claims Court and both parties agreed that the matter proceed before the Federal Court. In the affidavit, Mr. Muelly submits that, notwithstanding that agreement, the Judge allowed Seanautic the opportunity to list the action down for trial with the Small Claims Court if Seanautic elected to do so. However, in the end, Mr. Muelly indicates that Seanautic opted not to set the matter down for trial before the Small Claims Court as it decided to proceed before the Federal Court.

[11] Jofor's motion was heard by the Prothonotary on December 6, 2011, who dismissed the matter with costs.

[12] Jofor filed a motion for an appeal of the decision of the Prothonotary on December 16, 2011.

The Decision under Appeal

[13] In her decision, the Prothonotary dismissed Jofor's Motion to Stay or Strike Seanautic's action as she concluded that the doctrines of collateral attack, *lis pendens*, *res judicata*, issue estoppel and judicial comity that had been advanced by Jofor were not applicable in the present action. The Prothonotary also found that the doctrine of *forum non conveniens* could not apply in the present case as the Small Claims Court of the Superior Court of Justice was not seized of the same action, as the parties had validly agreed to the abandonment of the Ontario proceeding, and as there was no evidence to suggest that the Superior Court of Justice was a better forum to adjudicate the matter.

[14] The Prothonotary recognized that the administrative dismissal of the Ontario proceedings by the Small Claims Court had been explicitly based on the deemed abandonment of the action by Seanautic. As such, in light of the case law, the Prothonotary affirmed that this did not prevent Seanautic from filing an action before the Federal Court as their action before the Small Claims Court did not purport or have the effect of determining the merits of the disputes between the parties.

[15] Moreover, the Prothonotary did not accept Jofor's contention that, because there was no record of the parties' agreement that the matter proceed before the Federal Court in the Ontario records of proceedings or in writing, the evidence of Mr. Muelly had to be viewed as false, discredited or disregarded. The Prothonotary held as true the facts alleged in Mr. Muelly's affidavit as she concluded that they were left uncontradicted by Jofor. In addition, the Prothonotary observed that Jofor had not expressed an intention or a desire to cross-examine Mr. Muelly regarding his affidavit. The Prothonotary also noted that Jofor failed to express a desire or an intention to adjourn the hearing of its motion so that it could cross-examine Mr. Muelly on his affidavit. The Prothonotary also stated that, at the outset of the hearing, Jofor had not voiced any objection as to the timeliness of the service or filing of the Seanautic's motion record and had not raised any concerns as to the adequacy of his opportunity to cross-examine Mr. Muelly on his affidavit. Rather, the Prothonotary noted that Jofor only requested an adjournment of the hearing in order to cross-examine Mr. Muelly once she had made her conclusions and had informed Jofor. As such, she concluded that Jofor's request was untimely. Thus, the Prothonotary refused Jofor's request for an adjournment, as she concluded that there were sufficient opportunity to cross-examine Mr. Muelly prior to the hearing and Jofor had elected not to do so.

Issues

[16] The following issue arises on this appeal:

> *Did the Prothonotary err by dismissing Jofor's Motion to Stay or Strike the action filed by Seanautic?*

Applicable Legislation

[17] The following provisions of the *Federal Courts Rules* are applicable in the matter at hand:

Appeals of Prothonotaries' Orders	*Appel des ordonnances du protonotaire*
Appeal	Appel
51. (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	**51.** (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.
Service of appeal	Signification de l'appel
(2) Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of the motion.	(2) L'avis de la requête est signifié et déposé dans les 10 jours suivant la date de l'ordonnance frappée d'appel et au moins quatre jours avant la date prévue pour l'audition de la requête.
Content of affidavits	Contenu
81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	**81.** (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.
Affidavits on belief	Poids de l'affidavit
(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.	(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

Use of solicitor's affidavit	Utilisation de l’affidavit d’un avocat
82. Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.	**82.** Sauf avec l’autorisation de la Cour, un avocat ne peut à la fois être l’auteur d’un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

[18] Moreover, the following provisions of the *Rules of the Small Claims Court*, Ontario Regulation 258 (the *Small Claims Court Rules*), are also applicable:

RULE 11.1 DISMISSAL BY CLERK	RÈGLE 11.1 REJET PAR LE GREFFIER
Dismissal — Defended Actions	Rejet — actions contestées
11.1.01 (2) The clerk shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:	**11.1.01** (2) Le greffier rend une ordonnance rejetant une action pour cause de désistement si les conditions suivantes sont remplies, sauf ordonnance contraire du tribunal :
1. More than 150 days have passed since the date the first defence was filed.	1. Plus de 150 jours se sont écoulés depuis la date de dépôt de la première défense.
2. Revoked: O. Reg. 56/08, s. 3 (2).	2. Abrogée : Règl. de l’Ont. 56/08, par. 3 (2).
3. The action has not been disposed of by order and has not been set down for trial.	3. L’action n’a pas été décidée par ordonnance ni inscrite pour instruction.
4. The clerk has given 45 days notice to all parties to the action that the action will be dismissed as abandoned.	4. Le greffier a donné à toutes les parties à l’action un préavis de 45 jours indiquant que l’action sera rejetée pour cause de désistement.

RULE 13 SETTLEMENT CONFERENCES	RÈGLE 13 CONFÉRENCES EN VUE D'UNE TRANSACTION
Memorandum	Procès-verbal
13.06 (1) At the end of the settlement conference, the court shall prepare a memorandum summarizing,	**13.06** (1) À l'issue de la conférence en vue d'une transaction, le tribunal rédige un procès-verbal dans lequel sont résumés :
(a) recommendations made under rule 13.04;	a) les recommandations faites en vertu de la règle 13.04;
(b) the issues remaining in dispute;	b) les questions en litige non encore réglées;
(c) the matters agreed on by the parties;	c) les questions sur lesquelles les parties se sont entendues;
(d) any evidentiary matters that are considered relevant; and	d) toutes questions en matière de preuve qui sont jugées pertinentes;
(e) information relating to the scheduling of the remaining steps in the proceeding.	e) les renseignements relatifs au calendrier des autres étapes de l'instance.
(2) The memorandum shall be filed with the clerk, who shall give a copy to the trial judge.	(2) Le procès-verbal est déposé auprès du greffier, qui en donne une copie au juge qui préside le procès.
Withdrawal of Claim	Retrait de la demande
13.09 After a settlement conference has been held, a claim against a party who is not in default shall not be withdrawn or discontinued by the party who brought the claim without,	**13.09** Après la tenue d'une conférence en vue d'une transaction, une demande présentée contre une partie qui n'est pas en défaut ne doit pas être retirée ni faire l'objet d'un désistement par la partie qui l'a introduite sans, selon le cas :
(a) the written consent of the	a) le consentement écrit de la

party against whom the claim is brought; or	partie contre laquelle la demande est présentée;
(b) leave of the court.	b) l'autorisation du tribunal.

Analysis

[19] The test setting out the standard of review for discretionary orders of Prothonotaries was outlined by the Federal Court of Appeal in *Canada v Aqua-Gem Investments Ltd.*, (FCA) [1993] 2 FC 425, 149 NR 273. This test was subsequently affirmed by the Supreme Court of Canada in *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27, [2003] 1 SCR 450 and was then reformulated by the Federal Court of Appeal in *Merck & Co. v Apotex Inc.*, 2003 FCA 488 at para 19, [2004] 2 FCR 459:

> [19] … Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
> (a) the questions raised in the motion are vital to the final issue of the case, or
> (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[20] The Court notes that the vitality issue was not raised by either party in the case at hand. The Court recognizes that recent jurisprudence has held that an appeal from the dismissal of a motion to strike does not raise a question that is vital to the final issue of the case (see *Ridgeview Restaurant Ltd. v Canada (Attorney General)*, 2010 FC 506 at para 24, [2010] FCJ No 613; *Chrysler Canada Inc. v Canada*, 2008 FC 1049 at para 4, [2009] 1 CTC 145; *Apotex Inc. v AstraZeneca Canada Inc.*, 2009 FC 120 at para 25, [2009] FCJ No 179; *AYC Pharmacy Ltd. v Canada (Minister of Health)*, 2009 FC 554 at para 9, 95 Admin LR (4th) 265; and *Horseman v Horse Lake First Nation*, 2009 FC 368 at para 2, [2009] FCJ No 476; *Lundbeck Canada Inc. v Canada (Minister of Health)*, 2008 FCA 265 at para 14, [2008] FCJ No 1275; and *Peter G. White Management Ltd. v Canada*, 2007 FC 686

at para 2, [2007] FCJ No 931). Therefore, the Court concludes that, given the context and nature of the questions raised in the appeal and in light of the case law above, this matter does not raise a question that is vital to the final issue of the case and thus should not be reviewed *de novo*.

[21] Accordingly, the Prothonotary's decision should only be disturbed in the event the Court was to find that the Prothonorary's Order is clearly wrong in the sense that her exercice of discretion was based upon a wrong principle of law or upon a misapprehension of the facts. The Court now turns to this consideration.

[22] In the present case, Jofor submits that the Prothonotary erred in refusing to grant an adjournment or provide Jofor with the opportunity to cross-examine Mr. Muelly on his affidavit or submit its own affidavit refuting Mr. Muelly's statements. Jofor alleges that they were served with Seanautic's Motion Record one day prior to the hearing before the Prothonotary. As such, Jofor contends that they were not given the chance to adequately challenge Mr. Muelly's allegations in his affidavit and thus that they were denied the opportunity to develop their court record. More specifically, Jofor takes issue with Mr. Muelly's statement that an agreement existed between the Small Claims Court Judge and both parties that the matter proceed before the Federal Court. Jofor submits that this assertion is false and maintains that the Prothonotary should not have accepted the misstatements contained in Mr. Muelly's affidavit to be true. Moreover, Jofor contends that Mr. Muelly is liable for perjury, fraud, contempt of court and abuse of court process.

[23] Seanautic disagrees and argues that the Prothonotary did not err in dismissing Jofor's motion. Seanautic submits that Jofor only asked the court for permission to cross-examine Mr.

Muelly after the Prothonotary had rendered her decision. As such, Seanautic points to the Prothonotary's statement that Jofor's request was untimely. As well, Seanautic further submits that Jofor failed to ask for an adjournment and also failed to file another affidavit refuting the allegations of Mr. Muelly. Moreover, Seanautic argues that Jofor has not provided any evidence to support its allegations of fraud and abuse of court process. Seanautic strongly contends that Mr. Muelly's affidavit is in no way fraudulent or false and that it does not contain any misstatements. Furthermore, Seanautic is of the view that Jofor is attempting to introduce new arguments and evidence that were never put forth during the hearing before the Prothonotary.

[24] After considering the parties' submissions on this issue, the Court is of the opinion that the Prothonotary did not err by refusing to grant Jofor the opportunity to cross-examine Mr. Muelly or adjourn the hearing. In addition, the Court finds that the Prothonotary did not err by relying on the affidavit submitted by Mr. Muelly. More particularly, although the file record indicates that Seanautic only submitted their Motion Record one day prior to the hearing before the Prothonotary, the Court cannot find that the Prothonotary erred in accepting Mr. Muelly's evidence in light of Jofor's failure to (i) indicate its wish to cross-examine Mr. Muelly, (ii) adjourn the hearing or, (iii) submit a new affidavit. Based on the evidence on record, Jofor only made these requests once the Prothonotary had made her decision, and thus after the fact. Further, there is no evidence to support Jofor's allegation that Mr. Muelly's affidavit is fraudulent or false and that it contains misstatements. This argument also fails.

[25] Jofor also argues that Seanautic could not bring its action to the Federal Court due to the fact that it abandoned its action before the Small Claims Court. Essentially, Jofor argues that during the

settlement conference before the Small Claims Court, the parties and the Judge had agreed that the action could be listed for trial and after Seanautic had failed to do so, the action was subsequently dismissed pursuant to Rule 11.1.01(2) of the *Small Claims Court Rules* as it was deemed to be abandoned. Jofor maintains that, contrary to the allegations of Mr. Muelly, there was no agreement to litigate the matter before the Federal Court. Jofor advances that under rule 13.06 (1)(c) of the *Small Claims Court Rules*, such terms would have been expressly included in the settlement conference memorandum. As such, Jofor contends that the settlement conference memorandum benefits from a legal presumption of validity and from the best evidence rule and that the Prothonotary erred by preferring Mr. Muelly's affidavit as conclusive evidence. Jofor maintains that the contradiction between Mr. Muelly's affidavit and the settlement conference memorandum amounts to fraud on the part of Seanautic. Moreover, Jofor relies on the case of *Sauvé v Canada*, 2002 FCT 721, [2002] FCJ No 1001 [*Sauvé*], and suggests that the dismissal of Seanautic's case before the Small Claims Court was prejudicial and prevented it from further litigating the matter before the Federal Court. Jofor submits that allowing Seanautic to proceed would amount to an abuse of process.

[26] On the other hand, Seanautic contends that the proceedings before the Small Claims Court in no way prevented it from litigating the matter before the Federal Court. Seanautic argues that the dismissal for abandonment by the Small Claims Court was merely an administrative dismissal and did not constitute a final judgment on the merits. Seanautic maintains that its abandonment was justified as it was intent on instituting proceedings with the Federal Court – a Court with specific expertise in the matter of maritime law. Moreover, Seanautic advances that the applicable case law indicates that abandonment is not a bar from proceeding before the Federal Court; essentially, a

party is allowed to recommence an action so long as there is a justification and no judgment on the merits was pronounced (see *Envireen Construction (1997) Inc. v Canada*, 2007 FC 70, [2007] FCJ No 113, [*Envireen*]; *Jazz Air LP v Toronto Port Authority*, 2007 FC 624, [2007] FCJ No 841, [*Jazz Air*]). Seanautic maintains that it has met these requirements in the case at hand.

[27] Furthermore, Seanautic submits that Jofor has created confusion between the legal weight that a settlement conference memorandum carries and that of a judgment on the merits. Seanautic explains that the evidence of a consent to have the matter adjudicated before the Federal Court (apparent in Mr. Muelly's affidavit), does not contradict the settlement conference memorandum or attempt to circumvent the rules of the Small Claims Court. Rather, Seanautic contends that this consent explains why the action before the Small Claims Court was abandoned.

[28] After reviewing the parties' arguments and the applicable case law, the Court cannot accept Jofor's arguments. The Court finds that Seanautic was in no way barred from submitting its action with the Federal Court. In the Court's view, the case of *Sauvé*, above, can be distinguished from the present case. In *Sauvé*, the plaintiff had instituted two actions with the Federal Court – though the first action had been dismissed for delay – the plaintiff then filed a new claim with the same cause of action. The Court ultimately struck out the second action as it concluded that given the particular context, where the plaintiff had deliberately contravened a Federal Court case management order, the plaintiff's filing of a second action constituted an abuse of process. The Court observes that in *Sauvé*, Justice Lemieux also included Justice Rothstein's comments in the case of *Lifeview Emergency Services Ltd. v Alberta Ambulance Operators Association*, [1995] FCJ No 1199 64 CPR (3d) 157, where he stated that:

> [13] As to whether it is an abuse of the process to discontinue in one court and commence action in another having concurrent jurisdiction, I do not think that there is any general rule of law to this effect. Of course, in particular cases, discontinuing and commencing afresh may be found to be abusive whether it be in the same or a different court. But such a finding would be based on the facts of the case. Further, it may be that in the case of particular statutory schemes or particular schemes of the rules of court, a second action in a court of concurrent jurisdiction will be precluded if a party has first elected to proceed in one court.

[29] As well, Justice Lemieux provided the following guidelines as to the application of the principle of abuse of court process:

> [19] As I see it, the case law has established the following parameters surrounding the doctrine of abuse of process:
> (1) it is a flexible doctrine, not limited to any set number of categories;
> (2) its purpose is a public policy purpose used to bar proceedings that are inconsistent with that purpose;
> (3) its application depends on the circumstances and is fact and context driven;
> (4) its aim is to protect litigants from abusive, vexatious or frivolous proceedings or otherwise prevent a miscarriage of justice;
> (5) a particular scheme of the rules of court may provide a special setting for its application.

[30] Moreover, the Court notes that since the *Sauvé* decision was issued, other decisions have subsequently considered this issue and have outlined the key considerations to take into account when determining whether an abuse of process has occurred (*Envireen*, above, at para 14; *Jazz Air*, above, at paras 25-37).

[31] In the present case, the Court is not faced with a situation where Seanautic has attempted to deliberately circumvent a Federal Court order or has filed multiple actions with the Federal Court. Indeed, in her decision the Prothonotary did recognize that the administrative dismissal of the Ontario proceedings by the Small Claims Court had been explicitly based on Seanautic’s deemed

abandonment of the action. The Prothonotary concluded that this dismissal did not prevent Seanautic from filing an action before the Federal Court as their action before the Small Claims Court did not purport or have the effect of determining the merits of the disputes between the parties and was justified in the circumstances at hand. The Court finds that in the circumstances the Prothonotary correctly applied the principles developed in *Sauvé*, above, and the subsequent case law (see *Envireen*, *Jazz Air*, above). Moreover, the Court observes that Jofor did fail to submit any case law which indicates that a party is barred from instituting an action with the Federal Court if it has already initiated and abandoned an action before the Small Claims Court of the Superior Court of Justice.

[32] Although Seanautic raised the subsidiary issue that Mr. Uwechia's affidavit in support of Jofor's Motion Record should be struck pursuant to Rule 82 of the Rules, as an attorney cannot both depose to an affidavit and present argument to the Court based on that affidavit, the Court finds that it is not necessary to discuss this issue given the Court's conclusions above. Finally, Jofor's arguments have not convinced the Court that the Prothonotary erred in deciding that the doctrines of collateral attack, *lis pendens*, *res judicata*, issue estoppel, judicial comity and *forum non conveniens* are not applicable in the case at bar.

[33] Hence, the Court is satisfied that the Prothonotary identified the applicable principles of law in the circumstances and did not err in applying these principles to the facts before her. For all of the above reasons, the Court finds that the Prothonotary's Order is not clearly wrong in the sense that her exercise of discretion was based upon a wrong principle or a misapprehension of the facts. It follows that the Court's intervention in not warranted and the appeal will be dismissed.

ORDER

THIS COURT ORDERS that

1. Jofor's appeal of the Prothonotary's Order dated December 8, 2011 is dismissed;

2. The whole with costs payable in favour of Seanautic.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1384-11
STYLE OF CAUSE:	Seanautic Marine Inc. v Jofor Export Incorporated
PLACE OF HEARING: **BY VIDEOCONFERENCE**	Ottawa, Ontario
DATE OF HEARING:	February 21, 2012
REASONS FOR ORDER: **AND ORDER**	BOIVIN J.
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APPEARANCES:

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