Federal Court  Cour fédérale

Date: 20120801

Docket: T-1520-11

Citation: 2012 FC 966

Vancouver, British Columbia, August 1, 2012

PRESENT: The Honourable Madam Justice Mactavish

SIMPLIFIED ACTION

BETWEEN:

THE SOURCE ENTERPRISES LTD.

Plaintiff

and

MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS and MINISTER OF NATIONAL REVENUE

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Public Safety and Emergency Preparedness (now the Minister of Public Safety Canada) and the Minister of National Revenue have brought a motion seeking the removal of this action from the operation of the rules governing simplified actions and for summary judgment dismissing this action.

[2] The Defendants assert that the claim does not disclose a reasonable cause of action against the Minister of National Revenue. Insofar as the claim against the Minister of Public Safety and Emergency Preparedness is concerned, the Defendants submit that the claim was commenced outside of the 90-day limitation period provided for in section 106(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.), with the result that it is statute-barred.

[3] For the reasons that follow, I have concluded that the relief sought by the Defendants should be granted.

Background

[4] I note that the Plaintiff chose not to file any evidence on this motion. The contents of the following two paragraphs are taken from the Statement of Claim, and are intended only to provide context for the discussion that follows. The remaining facts are taken from the affidavit of Michelle Beaulieu, a Superintendent at the Canada Border Services Agency [CBSA] which was filed by the Defendants in support of their motion for summary judgment.

[5] According to the Statement of Claim, "The Source Enterprises Ltd." carries on business in Vancouver. The company imports items from the United Kingdom such as antique furniture, books, bric-à-brac, stained glass, and products related to the game of darts.

[6] The Statement of Claim pleads that in July of 2009, the Directors of the Plaintiff, Frank and Lorraine Shorrock, packed a 40-foot container of merchandise to be shipped to Canada from the United Kingdom.

[7] The uncontroverted evidence of the Defendants' affiant is that the container arrived at the Montreal Gateway Terminal on September 10, 2009. On September 17 and 18, 2009, CBSA officers performed an examination of the container and the goods contained therein in order to verify compliance with the *Customs Act*. Upon completion of the inspection, the container and the goods were released for transportation to Vancouver.

[8] Although no evidence has been produced in this regard by the Plaintiff, its Statement of Claim alleges that upon the arrival of the container in Vancouver, it was discovered that some of the goods were damaged. The Plaintiff seeks damages in the amount of $9,538.95 in this regard.

[9] The Defendants have produced a letter signed by Mrs. Shorrock dated December 3, 2009 addressed to "Canada Border Services 'Program Services'". In her letter, Mrs. Shorrock states "We received a 40' container from the U.K. which was inspected by Canada Customs in Montreal. On receipt of the container I spoke (October 5/09) to Jacquie, Superintendent at your office to advise of the damage and broken glass in this container, and invited her to view the damage …"

[10] Based upon this correspondence, and in the absence of any contrary evidence from the Plaintiff, I find as a fact that the Plaintiff was aware of the damage to its goods by October 5, 2009 at the latest. I would also note that I do not understand the Plaintiff to dispute this fact.

[11] This action was commenced as a simplified action by way of a Statement of Claim issued on September 20, 2011, more than 23 months after the Plaintiff became aware of the damage to its goods.

[12] By Order of Prothonotary Lafrenière dated October 7, 2011, leave was granted under Rule 120 of the *Federal Courts Rules*, S.O.R./98-106 for Mr. Shorrock to represent the Plaintiff in this proceeding.

[13] The Defendants acknowledge that in accordance with the provisions of Rule 297 of the *Federal Courts Rules*, summary judgment is not ordinarily available in simplified actions. They submit, however, that this action should be removed from the ambit of the rules governing simplified actions, and summary judgment should be granted as there is no genuine issue for trial. According to the Defendants, there is no cause of action against one Defendant and the claim is statue-barred as against the other.

General Principles Governing Summary Judgment

[14] As the Supreme Court of Canada observed in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at paragraph 10, the summary judgment process serves an important purpose in the civil litigation system, as it prevents claims or defences that have no chance of success from proceeding to trial. That said, while being able to weed out such cases at an early stage can save scarce judicial resources, justice requires that claims involving real issues be allowed to proceed to trial.

[15] Summary judgment in the Federal Court is governed, in part, by Rule 215(1) of the *Federal Courts Rules*. This Rule provides that "If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly".

[16] Also relevant to this matter is Rule 214, which provides that "A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial".

[17] Although the burden lies with the moving party to establish that there is no genuine issue for trial, Rule 214 requires that the party responding to the motion for summary judgment "put his best foot forward": see *MacNeil Estate v. Canada (Indian and Northern Affairs Department)*, [2004] F.C.J. No. 201, 2004 FCA 50, at para. 37.

[18] This requires a responding party to "lead trump or risk losing": see *Kirkbi AG v. Ritvik Holdings Inc.* [1998] F.C.J. No. 912, at para. 18, quoting *Horton v. Tim Donut Ltd.* (1997), 75 C.P.R. (3d) 451 at 463 (Ont. Ct. (Gen.Div.)), aff'd (1997), 75 C.P.R. (3d) 467 (Ont. C.A.).

[19] Judges hearing motions for summary judgment can only make findings of fact or law where 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: see *Apotex Inc. v. Merck & Co.*, [2002] F.C.J. No. 811, 2002 FCA 210.

[20] Ultimately, the test is not whether a plaintiff cannot succeed at trial, but whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial: see *Ulextra Inc. v. Pronto Luce Inc.* [2004] F.C.J. No. 722, 2004 FC 590.

[21] In making this determination, a motions judge must proceed with care, as the effect of the granting of summary judgment will be to preclude a party from presenting any evidence at trial with respect to the issue in dispute. In other words, the unsuccessful responding party will lose its "day in court": see *Apotex Inc. v. Merck & Co.*, 2004 FC 314, 248 F.T.R. 82, at para. 12, aff'd 2004 FCA 298.

[22] With this understanding of the relevant principles governing motions for summary judgment, I turn now to consider the merits of the motion as it relates to each Defendant.

The Claim against the Minister of National Revenue

[23] Although the Minister of National Revenue is named in the style of cause as a Defendant in this action, the Statement of Claim makes no other specific reference to this Defendant.

[24] It is alleged in the first paragraph of the Statement of Claim that the goods in question were damaged "while in the care of the defendant", "defendant" being referred to in the singular. Throughout the claim, reference is made to a singular defendant, and whenever reference is made in the Statement of Claim to a named defendant, the reference is to "Canada Customs", "Border Services", "Canada Borders Services", and/or "Border Service Agency".

[25] The Plaintiff did not file a memorandum of fact and law in response to the Defendants' motion, nor did it produce any evidence to support its case. I did, however, allow Mr. Shorrock to make oral submissions at the hearing of the motion. All of his submissions related to the alleged liability of the Canada Border Services Agency, an organization that falls within the mandate of the

Minister of Public Safety Canada. The Plaintiff did not make any submissions with respect to the claim against the Minister of National Revenue.

[26] I understand the Plaintiff's claim to relate to damages allegedly caused to the Plaintiff's goods as a result of the negligence of officers of the Canada Border Services Agency performing duties under the *Customs Act*. Such a claim does not give rise to a cause of action against the Minister of National Revenue.

Section 106(1) of the *Customs Act*

[27] To the extent that the Plaintiff's claim is against the Minister of Public Safety and Emergency Preparedness for the actions of officers of the Canada Border Services Agency, these actions are governed by the provisions of the *Customs Act*.

[28] Section 106(1) of the *Customs Act* provides that:

106. (1) No action or judicial proceeding shall be commenced against an officer for anything done in the performance of his duties under this or any other Act of Parliament or a person called on to assist an officer in the performance of such duties more than three months after the time when the cause of action or the subject-matter of the proceeding arose. [emphasis added]	106. (1) Les actions contre l'agent, pour tout acte accompli dans l'exercice des fonctions que lui confère la présente loi ou toute autre loi fédérale, ou contre une personne requise de l'assister dans l'exercice de ces fonctions, se prescrivent par trois mois à compter du fait générateur du litige. [je souligne]

[29] The Federal Court of Appeal has already determined that a claim for damages arising out of acts or omissions of customs officers done in the performance of their duties, must be commenced within three months of the cause of action having arisen: *Ingredia S.A. v. Produits Laitiers Advidia Inc.*, [2010] FCA 176, [2010] F.C.J. No. 893 at para. 33.

[30] The Federal Court of Appeal further determined that the Crown is entitled to invoke subsection 106(1) as a defence to such a claim: *Ingredia S.A.* at para. 35.

[31] I have previously found that the Plaintiff was aware of the damage to its goods by October 5, 2009, at the latest. This is when its cause of action against the Minister of Public Safety and Emergency Preparedness arose: see *George Oriental Carpet Warehouse v. Canada*, 2011 FC 1291; 399 F.T.R. 296, at para. 14; *Ingredia S.A.*, above at paras. 28-29.

[32] The Statement of Claim was issued on September 20, 2011 – more than 23 months after the Plaintiff became aware of the damage to its goods. As such, the action is clearly statute-barred.

[33] In his oral submissions, Mr. Shorrock made reference to the involvement of a company by the name of "Lafrance" in this matter. It appears from correspondence appended to the Beaulieu Affidavit that Groupe Lafrance was a warehouse operator that transported containers from the Port of Montreal to the Montreal Container Examination Facility for inspection.

[34] As I understand Mr. Shorrock's submission, he alleges that the CBSA retained Groupe Lafrance to move the container in which the Plaintiff's goods were stowed, and that the damage to

the Plaintiff's goods occurred when the container was in the care of Groupe Lafrance. Mr. Shorrock objected to what he described as "the coziness" of CBSA's relationship with Groupe Lafrance, asserting that the CBSA was negligent for not ensuring that Lafrance did its job properly.

[35] I would start by noting that no evidence was led to show that Groupe Lafrance was in fact retained by the CBSA or that the damage occurred while the container was in the care of the company. Documentation appended to the Beaulieu Affidavit suggests that transportation companies are in fact retained by Container Examination Facilities: see Exhibit "D" to the affidavit of Michelle Beaulieu. I would further note that the Statement of Claim asserts that the damage occurred while the container was in the care of "the defendant", not Groupe Lafrance.

[36] Moreover, even if the Plaintiff had raised a triable issue as to whether Groupe Lafrance had been retained by the CBSA and whether it was liable for the actions of Groupe Lafrance as a result, the Plaintiff's argument that the CBSA is responsible for the actions of the company is still based upon the alleged negligence of CBSA officers in carrying out their duties under the *Customs Act*. As a consequence, the limitation period contained in subsection 106(1) of the *Customs Act* would still be engaged.

Removal of the Action from the Ambit of the Rules Governing Simplified Actions

[37] The purpose of the simplified action rules is to allow for claims worth less that $50,000 to be dealt with quickly, through a less cumbersome and expensive process than that associated with traditional civil litigation. To this end, the Rules limit the ability of parties to bring motions, including motions for summary judgment.

[38] The Court does, however, retain the discretion to remove an action from the operation of the rules governing simplified actions: see Rule 298(3)(a). This is an appropriate case for the Court to exercise that discretion.

[39] The key facts giving rise to the Defendants' limitations argument are not in dispute, and the limitation question is determinative of this action. The Plaintiff did not even respond to the Defendants' arguments relating to the claim against the Minister of National Revenue, and no genuine issue for issue has been identified in relation to the Defendant.

[40] In these circumstances, removing the action from the operation of the simplified action rules and deciding the summary judgment motion achieves a result that is consistent with the goal of promoting speedy and cost-effective justice in smaller claims that underlies the simplified action rules.

Conclusion

[41] As explained above, I have found that the Plaintiff has not demonstrated the existence of a cause of action against the Minister of National Revenue and its action against the Minister of

Public Safety and Emergency Preparedness is statute-barred. These findings are determinative of the Plaintiff's claim, and there is no genuine issue for trial in this case. Consequently, the Defendants' motion for summary judgment is granted and the Plaintiff's action is dismissed, with costs to the Defendants fixed in the amount of $500.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This action is removed from the operation of Rules 294 to 299 of the *Federal Courts Rules*;
2. The Defendants' motion for summary judgment is granted and the Plaintiff's action is dismissed;
3. The Defendants shall have their costs fixed in the amount of $500.

"Anne Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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