Federal Court of Appeal | Cour d'appel fédérale

Date: 20190521

Docket: A-239-17

Citation: 2019 FCA 153

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
RIVOALEN J.A.

BETWEEN:

WAEL MAGED BADAWY

Appellant

and

WALDEMAR A. IGRAS
WALDEMAR A. IGRAS PROFESSIONAL CORPORATION

Respondents

Heard at Calgary, Alberta, on May 7, 2019.

Judgment delivered at Ottawa, Ontario, on May 21, 2019.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: DAWSON J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Wael Maged Badawy appeals from a decision of the Federal Court (2017 FC 619, per Manson J.) granting the respondents' motion for summary judgment in respect of Mr. Badawy's action against them, and dismissing the motion seeking judgment against Mr. Badawy in respect

of the respondents' amended Counterclaim. As there was no cross-appeal in this matter, the only issue before us is the Federal Court's decision in respect of Mr. Badawy's action.

[2] The Federal Court found that the said action properly raised only one specific issue, that is whether the respondents were liable for passing-off in contravention of subsection 7(b) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) for using "Igras Family Law" in association with Mr. Igras's family law practice (including mediation and arbitration) in Calgary, Alberta. I agree.

[3] Thus, on the motion for summary judgment, the Federal Court had to determine whether there was a genuine issue for trial in respect of this claim. The Federal Court concluded that there was simply no evidence (that is, nothing more than bald statements) that Mr. Badawy had a valid and enforceable unregistered trademark on which he could base his passing-off claim.

[4] The very unusual background and history of the proceedings are summarized at paragraphs 2 to 15 of the Federal Court's reasons. This action was only one of many proceedings between these parties before the Federal Court and the Court of Queen's Bench of Alberta, which were all instituted after Mr. Igras started representing Mr. Badawy's former wife in her divorce and matrimonial property action.

[5] In his memorandum of fact and law before this Court, Mr. Badawy raised a number of issues which are not relevant to the present appeal; for example, his action did not deal with copyright (appellant's memorandum of fact and law at paras. 58-66), and the questions of

registrability he raised are not in play given that it is not disputed that, at this stage, neither party has a registered trademark (appellant's memorandum of fact and law at paras. 40-42, 46-48). At the hearing, Mr. Badawy argued what he considered a central issue even if it was not properly articulated in his memorandum of fact and law. In his view, the Federal Court could not properly dismiss his action because Justice Simpson of the Federal Court had already dismissed a similar attack in November 2014, when she refused to grant the respondents' motion to strike his Statement of Claim. He also briefly explained why, in his view, there was an apprehension of bias and a breach of procedural fairness by the Federal Court. Finally, Mr. Badawy added that the Federal Court erred in awarding costs against him because he in fact succeeded in defending the motion in respect of the respondents' Counterclaim.

[6] The standards of review applicable are those set out by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Generally, the question of whether or not there is a genuine issue for trial for the purpose of summary judgment is, absent an extricable error of law, a question of mixed fact and law reviewable on a standard of palpable and overriding error: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 81 (*Hryniak*). Costs awards are discretionary decisions involving a question of mixed fact and law, which are also entitled to deference, and require that Mr. Badawy establish a palpable and overriding error: *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 at para. 6.

[7] In *Hryniak*, at paragraph 49, the Supreme Court held that there is no genuine issue for trial on a motion for summary judgment when the judge is able to reach a "fair and just determination on the merits", and that this will be the case when the process "(1) allows the

judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result." I am satisfied that the Federal Court applied the appropriate test to the motion before it (Federal Court's reasons at paras. 36-37).

[8] The Federal Court also properly directed itself as to the essential elements of Mr. Badawy's claim of passing-off by referring to the wording of subsection 7(b) of the Act, the definition of trademark under section 2, and what constitutes use of a trademark under section 4 (Federal Court's reasons at paras. 39-42).

[9] I agree with the Federal Court that in order to have a statutory cause of action under subsection 7(b) of the Act, Mr. Badawy must be in a position to prove that he had a valid and enforceable unregistered trademark at the time the respondents first began directing public attention to their own goods and services. The Federal Court found on the record before it that Mr. Igras started using the alleged unregistered trademark(s) sometime in early 2014. It was not satisfied that Mr. Badawy had used Igras Family Law as a trademark before then.

[10] As expressly set out in Rule 214 of the *Federal Courts Rules*, SOR/98-106, in responding to a motion for summary judgment, Mr. Badawy had to set out specific facts and adduce the evidence showing that there is a genuine issue for trial. He could not simply rely on what might be adduced as evidence at a later stage.

[11] Furthermore, this Court will only assess the merits of the appeal on the basis of the evidentiary record that was before the Federal Court. While Mr. Badawy attempted to adduce "new" evidence attached to his Notice of Appeal, the proper course would have been to make a motion pursuant to Rule 351 and meet the test applicable to such a request. No such motion was made, and the Court cannot consider the documents attached as Schedules A and B to the Notice of Appeal. Although Mr. Badawy admitted that Schedule A was clearly not available at the time of the hearing before the Federal Court, he suggested that the document in Schedule B was elsewhere in the Appeal Book. I have carefully reviewed the Appeal Book, including the transcript of the hearing before the Federal Court, and I am satisfied that this document is not in the Appeal Book and was not before the Federal Court. In any event, having reviewed the documents in Schedules A and B, I am also satisfied that they would not have met the test applicable to a motion under Rule 351.

[12] In order to prove "use" as a trademark at a certain date, one cannot rely on bald statements; one must produce actual evidence demonstrating use of the alleged trademark in association with one's goods or services. For example, one can produce invoices of sales of goods or of services under the trademark bearing a date within the relevant period, or actual advertisements made during the relevant period.

[13] The Federal Court found that aside from bald statements by Mr. Badawy, there was no evidence that he had ever used the unregistered trademark(s) in which he claims rights in association with electronic publishing, or negotiation, mediation and arbitration activities in Canada prior to 2014. It is clear from Mr. Badawy's own affidavit and the documents attached

thereto that Mr. Badawy only incorporated his company "IFL Igras Family Law ltd." in 2014, after he was informed that Mr. Igras would be practicing under the name of Igras Family Law.

[14] I note that the Federal Court expressly stated that its conclusion was not based on credibility issues because in this case Mr. Badawy's credibility did not require assessment.

[15] Having reviewed all the materials in the Appeal Book, I can discern no palpable and overriding error in the Federal Court's conclusion that Mr. Badawy had no basis for asserting any rights to an unregistered trademark that could properly serve as a basis for exercising a statutory cause of action under subsection 7(b) of the Act: see *Manitoba v. Canada*, 2015 FCA 57, 470 N.R. 187 at para. 15.

[16] I will now briefly address the argument concerning Justice Simpson's prior decision. It simply could not have any effect on the Federal Court's jurisdiction to deal with the motion for summary judgment. The motions at issue do not involve the same questions. To reach her decision, Justice Simpson had to assume that all the allegations in the Statement of Claim were true. It is on that basis that she assessed whether or not the Statement of Claim disclosed a reasonable cause of action. This exercise is completely distinct from the one to be carried out on a motion for summary judgment. Also, as mentioned by the Federal Court, Justice Simpson could not dismiss the action as frivolous because of the absence of evidence supporting the motion (*i.e.*, no affidavit). This is not simply a matter of procedure as suggested by Mr. Badawy.

[17] Before addressing the issue of costs, I ought to mention that Mr. Badawy's allegations that there is a reasonable apprehension of bias regarding Justice Manson and the case manager, Prothonotary Lafrenière (now Justice Lafrenière), are baseless and unsupported by any evidence. The fact that Justice Manson granted the respondents' motion in respect of his action cannot on its own be taken as evidence of the Federal Court judge's bias, real or apprehended. The case manager's conduct is not really relevant to this appeal; still, it is important to say that Mr. Badawy's argument that case manager wrongly directed that his motion for an interim injunction, which was filed before the motion for summary judgment, be heard after the latter motion is again not evidence of bias. In fact, considering the issues involved in these two motions, the said direction made good sense to ensure the most just and economical determination of the proceedings (see Rule 3 of the Rules). There is also no basis to find that the Federal Court breached procedural fairness. Mr. Badawy asserted that the Federal Court failed to review the evidence before it. This is a gratuitous statement, and it is apparent from the transcript that Mr. Badawy had ample opportunity to direct the Federal Court to the relevant "evidence on the record".

[18] Turning to the award of costs, I have not been persuaded that the Federal Court made a palpable and overriding error. I have reviewed the submissions of Mr. Badawy before the Federal Court which are included in the Appeal Book and reviewed the transcript; it was open to the Court to conclude that the respondents were successful on the main issue argued before it. Also, the Counterclaim was not dismissed on the basis of arguments raised by Mr. Badawy.

[19] I would therefore dismiss the appeal with costs set at an amount of $1,500.00, including disbursements and taxes.

"Johanne Gauthier"
J.A.

“I agree
Eleanor R. Dawson J.A.”

“I agree
Marianne Rivoalen J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MANSON DATED JUNE 23, 2017, NO. T-1289-14	
DOCKET:	A-239-17
STYLE OF CAUSE:	WAEL MAGED BADAWY v. WALDEMAR A. IGRAS, WALDEMAR A. IGRAS PROFESSIONAL CORPORATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MAY 7, 2019
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	DAWSON J.A. RIVOALEN J.A.
DATED:	MAY 21, 2019

APPEARANCES:

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