Federal Court of Appeal | Cour d'appel fédérale

Date: 20170705

Docket: A-395-16

Citation: 2017 FCA 148

Present: **WEBB J.A.**

BETWEEN:

ARCTIC CAT, INC. and
ARCTIC CAT SALES, INC.

Appellants

And

BOMBARDIER RECREATIONAL
PRODUCTS INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 5, 2017.

REASONS FOR ORDER BY: WEBB J.A.

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REASONS FOR ORDER

WEBB J.A.

[1] The appellants have brought a motion seeking leave to file a five page supplemental memorandum of fact and law. This would be in addition to the 30 page memorandum of fact and law that the appellants filed in this matter on April 3, 2017. The appellants state that the respondent introduced an additional issue for determination on appeal in its memorandum of fact

and law that had not been addressed by the appellants – the issue of the inventorship of the patent in issue.

[2] It is necessary to review this request in context. This appeal is an appeal from the judgment of the Federal Court related to the action for infringement of certain claims found in Canadian patent number 2,322,738. In dismissing the claim for infringement, the Federal Court judge first found that the respondent did not infringe any of the asserted claims. In paragraphs 208 (at the commencement of the infringement analysis) and paragraph 248 (at the end of the infringement analysis), the Federal Court judge noted that:

> 208 For the reasons that follow, I find that the asserted claims, once properly construed, have not been infringed by BRP. If one of the claims has been found to have been infringed because of a different construction put on that claim, I would find that the claim thus constructed would be invalid by reason of obviousness.
>
> …
>
> 248 Accordingly, the Court must conclude that the five asserted claims have not been infringed.

[3] Following this conclusion, the Federal Court judge noted that:

> 249 If I am wrong in the conclusion that the 738 Patent has not been infringed in the case at bar, I would have to consider if the 738 Patent is valid. BRP claims it is not. Given the considerable effort that was expended at trial, a short examination of the issue might be of assistance.

[4] His conclusion is found in paragraph 309:

> 309 It follows that whatever reading one gives to the claims, the subject-matter defined by those claims would have been obvious. This invention lacks

> inventiveness and it would therefore constitute a complete defense to the allegation of infringement.

[5] Following these findings, he states at paragraph 330:

> 330 Given the conclusion reached about infringement and validity, there is no need to reach a firm conclusion on inventorship. However, having reviewed the evidence of the stated inventor, Mr. Spaulding, the Court would have been inclined to find on a balance of probabilities that Mr. Spaulding is not the inventor on the record presented to the Court. Had there been a contribution, he would have been expected to have clear and cogent evidence to that effect. What was it, specifically, and when did that occur? Such was not the case. A concise statement would have been enough. A document from AC would bring corroboration. That evidence, or something approaching evidence of the specific contribution of Mr. Spaulding, would have been enough.

[6] The appellants' argument is that the Federal Court judge did not make a finding that Mr. Spaulding was not the inventor and these comments on inventorship were made in *obiter*. Therefore, the appellants did not address inventorship in their memorandum of fact and law. However, the appellants did raise the issue of inventorship in paragraph 7 of their notice of appeal in relation to the grounds of appeal.

[7] It would not be appropriate in a preliminary motion to make any determination with respect to whether the Federal Court judge's comments on inventorship should be construed as findings that were made by him. For the purposes of this motion, there are two possible outcomes to the question of whether the Federal Court judge's comments should be construed as findings – either he made the finding that Mr. Spaulding was not the inventor or he did not make this finding.

[8] If the Federal Court judge made this finding, then the appellants should have addressed the issue of inventorship in their memorandum of fact and law since the appellants raised this issue in their notice of appeal. As a result, there would be no basis to grant the appellants leave to file an additional five page memorandum (which would be in addition to their 30 page memorandum that they have already filed).

[9] If the Federal Court judge did not make this finding, then it is far from clear why either party should be referring to arguments related to inventorship in this case. Findings of fact are to be made at the trial level and the role of this Court is to determine whether there was a palpable and overriding error in the finding of fact, not to make findings of fact that were not made by the trial judge (*AB Hassle v. Canada (Minister of National Health and Welfare),* 2002 FCA 421, 22 C.P.R. (4th) 1, at paras. 29 and 30; and *Brokenhead First Nation v. Canada (Attorney General),* 2011 FCA 148, 419 N.R. 289, at paras. 51 and 52). If no such finding of fact was made by the Federal Court judge then it would not be appropriate for such finding to be made on appeal. As a result, in this case there would be no basis to allow the appellants to file an additional memorandum of fact and law in relation to a finding of fact that was not made by the Federal Court judge.

[10] As a result, the appellants' motion is dismissed with costs.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-395-16
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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	JULY 5, 2017

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