

Federal Court



Cour fédérale

**Date: 20161221**

**Docket: T-1585-16**

**Citation: 2016 FC 1405**

**Ottawa, Ontario, December 21, 2016**

**PRESENT: The Honourable Mr. Justice Gleeson**

**BETWEEN:**

**CHARLES G. REESE JR.**

**Plaintiff**

**and**

**LES INVESTISSEMENTS NOLINOR INC.  
D/B/A NORLINOR AVIATION**

**Defendant**

**ORDER AND REASONS**

I. Overview

A. *The Motion*

[1] This is a motion by the defendant seeking an:

- A. extension of time for filing a Statement of Defence pursuant to Rule 8 of the Federal Court Rules, SOR/98-106 [Rules] pending determination of the issues raised in this motion;
- B. order requiring the plaintiffs to serve and file further and better particulars pursuant to Rule 181(2)
- C. order striking the claim of the plaintiff, Cabin Safety International Ltd. [Cabin Safety], pursuant to Rule 208;
- D. order that Cabin Safety give security for the defendant's costs pursuant to Rule 416 and that Cabin Safety retain counsel to represent it in this proceeding pursuant to Rule 120 if the claim of Cabin Safety is not struck; and
- E. order requiring the individual plaintiff, Mr. Reese, to give security for the defendant's costs pursuant to Rule 416.

[1] The plaintiffs did not serve and file a motion record.

[2] The plaintiffs delivered to the defendant an affidavit, sworn by Charles G. Reese Jr. on November 29, 2016, responding to the request for further particulars. That affidavit was received by the Registry but by the oral direction of Prothonotary Roger Lafrenière was not accepted for filing in advance of the hearing of this motion.

[3] The plaintiffs appeared for the hearing and sought to place a further affidavit before the Court sworn by Charles G. Reese Jr. on December 5, 2016. The affidavit was refused for filing on the basis of non-compliance with the Rules.

B. *The Underlying Claim*

[4] In the underlying action the plaintiffs allege the defendant has infringed their copyrights in “safety features cards”, cards that are used in the air transport industry to depict the safety features of passenger aircraft.

[5] Mr. Reese contacted the defendant in August 2016 expressing concerns that it has infringed the plaintiffs’ copyright. Mr. Reese claimed to represent himself and the corporate plaintiff, Cabin Safety. In September 2016, the plaintiffs initiated this action, alleging that: (1) the plaintiffs had produced and sold safety features cards to the defendant in 1996; (2) the plaintiffs had registered copyright in the safety feature cards in Canada and the United States; (3) the plaintiffs continue to publish safety feature cards to which the copyright registrations apply; and (4) in July 2016, the plaintiffs became aware of copyright infringement by the defendant.

[6] The Statement of Claim states that Cabin Safety is “incorporated and subsisting under the laws of the State of Delaware” and that Charles G. Reese Jr. is “a citizen of the United States of America”.

[7] Mr. Marco Prud'homme, Vice-President of the defendant Les Investissements Nolinor Inc., states, in an affidavit sworn in support of this motion, that the defendant is investigating the allegations of the plaintiffs. Mr. Prud'homme also notes that the alleged business dealings occurred more than 20 years ago and that the plaintiffs "have refused to provide any records whatsoever regarding the alleged dealings between Nolinor Aviation and the Plaintiffs, and the contractual basis of any dealings, and specifically, the circumstances of any creation of any design by the Plaintiffs ... and we have not been able to locate any records in this regard."

## II. Extension of Time to File a Statement of Defence

[8] Counsel for the defendant contacted the plaintiffs by email in October 2016 enclosing a request for particulars and advising that a Statement of Defence would be provided "promptly" upon receipt of the requested particulars. The plaintiffs refused to provide additional information "until compelled by the Court to do so" and further advised the defendant that there would be no consent to an extension of time for the filing of a Statement of Defence. It is within this context that the defendant now seeks an extension of time pursuant to Rule 8 of the *Rules*.

[9] Rule 8(1) and (2) of the *Federal Courts Rules*, SOR/98-106 provides that:

8(1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.	8 (1) La Cour peut, sur requête, proroger ou abrégé tout délai prévu par les présentes règles ou fixé par ordonnance.
(2) A motion for an extension of time may be brought before or after the end of the period sought to be extended.	(2) La requête visant la prorogation d'un délai peut être présentée avant ou après l'expiration du délai.

[10] A party seeking an extension of time must demonstrate (1) a continuing intention to pursue the matter; (2) that there is some merit in the position to be advanced; (3) that no prejudice arises from the delay; and (4) that there is a reasonable explanation for the delay (*Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 at para 3).

[11] In this case, the defendant has been diligent in retaining counsel and inquiring into the allegations set out in the Statement of Claim. The defendant has identified the difficulties the passage of time presents in determining the nature of any contractual relationship the parties may have entered into more than 20 years ago. The defendant has sought information from the plaintiffs, information the plaintiffs refused to provide until November 29, 2016. There is no evidence of prejudice to the plaintiffs in granting an extension of time.

[12] The defendant is granted an extension to time to serve and file a Statement of Defence in this matter.

### III. Further and Better Particulars

[13] The defendant's counsel indicated in oral submissions that the defendant was satisfied with the additional particulars disclosed in the Reese affidavit dated November 29, 2016. I need not address this issue.

IV. Strike the Claim of the Plaintiff, Cabin Safety

[14] The plaintiffs allege in the Statement of Claim that Cabin Safety is incorporated and subsisting under the laws of the State of Delaware. It is trite law that Mr. Reese has no standing to assert a cause of action on behalf of Cabin Safety; a corporation is separate and distinct from its shareholders, partners, or principals (*Bouchard v Canada*, 2016 FC 983 at paras 19 and 20 and *Salomon v Solomon & Co. Ltd.*, [1897] AC22 (HL)).

[15] In regard to the status of Cabin Safety as a separate and distinct legal entity, the defendant produced a certificate signed by the Secretary of State for the State of Delaware dated September 13, 2016 [Certificate] stating that Cabin Safety “is no longer in existence and good standing under the laws of the State of Delaware having become inoperative and void the first day of March, A.D. 1996 for non-payment of taxes.”

[16] Mr. Reese argued in oral submissions that, at the time of filing, Cabin Safety was understood to be an active entity. The plaintiffs however do not dispute that Cabin Safety was not, at the time the Statement of Claim was filed, and is not currently an existing corporate entity. The Certificate directly contradicts the representations made in the Statement of Claim.

[17] In *Tomchin v Canada*, 2015 FC 402, Justice Michael Manson set out the principles applicable to a motion to strike a pleading at paragraphs 21 through 23. Justice Manson stated at paragraph 23 that “Rule 221(2) of the Federal Court Rules provides that no evidence shall be

heard on a motion for an order under subparagraph (1)(a). However, evidence may be admitted in support of a motion to strike based on the other subparagraphs of Rule 221.”

[18] In this case, the defendant relies on the Certificate, Rule 208 and Rule 221(1)(f) to argue that Cabin Safety does not exist as a legal entity, has not existed for more than a decade and that the assertions made at paragraph 2 of the Statement of Claim amounts to an abuse of the Court’s process. The defendant submits that Cabin Safety should be struck as a party to the action. I agree.

[19] Mr. Reese asserts that he had no knowledge that Cabin Safety was no longer in existence and in good standing under the laws of the State of Delaware. While this may be so, it is evident that such information was readily available. This, however, is of little relevance. The undisputed evidence is that Cabin Safety “is no longer in existence... under the laws of the State of Delaware” and therefore has no legal standing to commence the action.

[20] It has been held by the Federal Court of Appeal that bald conclusory allegations, absent an evidentiary basis in a Statement of Claim amount to an abuse of process (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34 [*Merchant Law Group*] citing *AstraZeneca Canada Inc. v Novopharm Limited*, 2010 FCA 112 at para 5). I am of the opinion that the principle expressed in *Merchant Law Group* is equally applicable to a situation where an entity lacking any legal status is represented as a valid and subsisting legal entity for the purposes of commencing a proceeding before the Court.

[21] The Corporate plaintiff, Cabin Safety, is struck as a plaintiff in this proceeding. In light of my conclusion, I need not address security for costs or the retention of counsel matters as they relate to Cabin Safety.

V. Security for Costs – Mr. Reese

[22] The defendant seeks an order for security for costs against Mr. Reese. The defendant initially submitted that Mr. Reese is an American citizen who claims to reside in Canada but has not demonstrated that he has any assets in the jurisdiction. In the supplementary affidavit of Mr. Prud'homme, dated November 29, 2016, the defendant acknowledges that Mr. Reese had asserted proof of residence but “refused to put any such evidence in Affidavit form, and suggests to our counsel an intention to do so at the last minute.”

[23] Mr. Reese has, subsequent to the hearing of this matter, filed an affidavit establishing his ownership of a property in Kamloops, British Columbia. The affidavit attests to a 1999 declared value of \$250,000 and that the property is held, free and clear, of any mortgage or lien.

[24] In light of this evidence, it is clear that Mr. Reese owns assets in the jurisdiction and those assets are available to the defendant to satisfy any award of costs that might be made against the plaintiff as he pursues this claim. No order will be made for security for costs.



VI. Costs on this Motion

[25] The defendant, relying on Column III, Tariff B of the Rules, seeks costs in the amount of \$1200 inclusive of disbursements. Mr. Reese submits that in considering the question of costs, the Court should take note of the fact that he is semi-retired, that his access to liquid assets is limited and that it is because of limited financial resources that he is representing himself in this matter.

[26] Pursuant to Rule 400, an award of cost is a matter that falls within the “full discretionary power” of the Court. That same Rule identifies a number of factors the Court may consider in the exercise of its discretion including a party’s conduct, the failure to admit anything that should have been admitted and the necessity for steps taken in a proceeding.

[27] The fact that a party chooses to represent him or herself does not excuse that party from compliance with the *Rules* nor does it excuse disrespectful or discourteous conduct in dealings with the other party, counsel and the Court. In this case, defendant’s counsel advised Mr. Reese of the process involved in responding to this motion and offered to review any evidence Mr. Reese might advance. Mr. Reese rejected the courtesy extended by defendant’s counsel stating “I am aware of the procedure”. In subsequent correspondence he indicates that “I will likely respond to you in 24 hours prior to the hearing, allowing you to scramble to amend your motion.”

[28] Mr. Reese represented that he understood the motion process in his communications with defendant's counsel. The evidence indicates that he chose to withhold information until the last possible moment as a tactic aimed at inconveniencing the defendant. Of course, in doing so, he has also inconvenienced the Court and significantly extended the time required to hear this motion. Mr. Reese apologized to the Court and defendant's counsel in the course of his oral submissions, but the fact remains his conduct has required this Court to address issues that might well have been resolved amicably between the parties, or by way of a consent order.

[29] I recognize that the defendant has not had complete success on this motion as I have denied the request for security of costs. However, the fact is that security for costs were pursued as a direct consequence of Mr. Reese's decision not to provide relevant and readily available information to the defendant. I also recognize that Mr. Reese has complied with the request for further particulars, albeit very late in the process. Considering all of the circumstances, the defendant is awarded costs in the amount of \$1200 payable forthwith.

**ORDER**

**THIS COURT ORDERS that:**

- A. The defendant shall serve and file a Statement of Defence no later than January 27, 2017;
- B. The Corporate plaintiff, CABIN SAFETY INTERNATIONAL LTD., is struck as a plaintiff in this proceeding and the style of cause is amended accordingly;
- C. The plaintiff shall serve and file an amended Statement of Claim removing all references to The Corporate plaintiff, CABIN SAFETY INTERNATIONAL LTD., no later than January 12, 2017; and
- D. The defendant is awarded costs in the amount of \$1200 inclusive of disbursements payable forthwith.

"Patrick Gleeson"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1585-16

**STYLE OF CAUSE:** CHARLES G. REESE JR. v LES INVESTISSEMENTS  
NOLINOR INC. D/B/A NORLINOR AVIATION

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** DECEMBER 5, 2016

**ORDER AND REASONS:** GLEESON J.

**DATED:** DECEMBER 21, 2016

**APPEARANCES:**

Mr. Charles Reese

FOR THE PLAINTIFF  
(ON HIS OWN BEHALF)

Mr. Shaun Cody

FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

New Horizon Law  
Calgary, Alberta

FOR THE DEFENDANT