

Federal Court



Cour fédérale

**Date: 20170210**

**Docket: T-231-15**

**Citation: 2017 FC 172**

**Ottawa, Ontario, February 10, 2017**

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

**BETWEEN:**

**CHARLES AUGUSTUS STEEN III**

**Plaintiff**

**and**

**DR. SEUSS ENTERPRISES, L.P.,  
AUDREY GEISEL, TISH RABE,  
JOE MATHIEU, JACK PRELUTSKY,  
RANDOM HOUSE OF CANADA AND  
KARL ZOBELL**

**Defendants**

**ORDER AND REASONS**

[1] In February 2015, the Plaintiff commenced an action seeking damages from the Defendants for copyright infringement as well as for various acts alleged to have occurred in the United States (U.S.), including criminal fraud and conspiracy, perjury, forgery, wrongful arrest, malicious prosecution, fabrication of evidence, obstruction of justice and intentional infliction of emotional distress.

[2] This action is the most recent chapter in a saga that goes back to the mid 1990's and which was prompted by the publication, in the U.S., of a children story-book entitled "*Daisy-Head Mayzie*". The Plaintiff has since been claiming that this book plagiarizes, in several ways, his unpublished work "*The Pains of Being Pure of Heart*" for which he obtained a U.S. copyright registration in 1991. In 2001, the Plaintiff initiated two proceedings in the U.S., one in Albuquerque, New-Mexico, and the other in Portland, Oregon, alleging infringement and other wrongdoings by various named defendants in those actions.

[3] The Albuquerque action was ultimately dismissed for want of prosecution. A motion filed in 2013 to re-open that case was dismissed. The Portland action, which was commenced against 23 defendants, including three of the present defendants, Dr. Seuss Enterprises, L.P., Audrey Geisel and Karl Zobell (the Seuss Defendants), as well as Random House Inc., the U.S. parent company of the Random House Defendant in the present instance, contained various claims that were dismissed as being frivolous or malicious. The remaining parts of that action were ultimately dismissed for want of prosecution. In the midst of these proceedings, things got nasty and charges were laid against the Plaintiff for extortion related to comments made to Ms. Geisel and Mr. Zobell. In March 2004, the Plaintiff pleaded guilty to one count of felony extortion in a California Court.

[4] The Plaintiff claims that although the copyright for his work "*The Pains of Being Pure of Heart*" was registered in the U.S., it is enforceable in Canada by virtue of the *Berne Convention for the Protection of Literary and Artistic Work*, 9 September 1886, 828 UNTS 221, as amended.

[5] On June 10, 2016, Prothonotary Kevin R. Aalto, on a motion brought by the Defendants, struck out, without leave to amend, all the allegations of the Statement of Claim save and except the copyright infringement allegations which, in turn, were stayed on the basis of *forum non conveniens* “to allow the Plaintiff to pursue such proceedings in the United States as he so chooses”. Applying the factors set out in *Van Breda v Village Resorts Ltd*, 2012 SCC 17 [*Van Breda*] and taking into consideration the interests of justice, as mandated by *Lexus Maritime Inc v Oppenheim Forfait GmbH*, [1998] AQ 2059 (CA), Prothonotary Aalto found that the copyright infringement allegations were more connected to California than Canada and should therefore be tried in that jurisdiction.

[6] Presently before the Court is a motion in writing filed by the Plaintiff on October 27, 2016 under rule 51 of the *Federal Courts Rules*, SOR/98-106 (the Rules), for an Order setting aside Prothonotary Aalto’s Order, reinstating the copyright infringement complaint and extending the time to file the said motion. According to rule 51(2) of the Rules, the Plaintiff’s deadline for challenging Prothonotary Aalto’s Order was June 20, 2016. This deadline, therefore, has been exceeded by a little more than four (4) months.

[7] The Defendants oppose the Plaintiff’s motion on all counts.

[8] The Court must first determine whether the Plaintiff has satisfied the jurisprudential four-part test for an extension of time. If he has not, then the Plaintiff will not be permitted to pursue his appeal of Prothonotary Aalto’s Order.

[9] This test requires the Plaintiff to establish that (i) he had a continuing intention to pursue the said appeal; (ii) a reasonable explanation for the delay exists; (iii) no prejudice to the Defendants arises from the delay; and (iv) his position in the appeal has some merit (*Canada (Attorney General) v Hennelly*, [1999] 167 FTR 158, 89 ACWS (3d) 376 (FCA) [*Hennelly*]).

[10] To begin with, it is important to note that the Plaintiff does not take issue with that part of Prothonotary Aalto's Order striking out, without leave to amend, all the Statement of Claim's non-copyright infringement allegations. The appeal the Plaintiff wishes to undertake only concerns Prothonotary Aalto's finding that the *Van Breda* factors favour the U.S. as the appropriate jurisdiction to entertain the Statement of Claim's copyright infringement cause of action.

[11] The main - and sole - basis for the Plaintiff's request for an extension of time is that new evidence has been discovered since Prothonotary Aalto issued his Order. That evidence is the publication in the U.S., on July 5, 2016, of a new version of the book "*Daisy-Head Mayzie*" (the New Evidence) where the Defendants, according to the Plaintiff, have intentionally "eliminated all of the incriminating evidence of copyright infringement, in art, plot and language" and have therefore, "clearly exposed themselves to blatant copyright infringement" [...].

[12] The Plaintiff claims that when the Defendants' motion to strike was argued before Prothonotary Aalto in March 2016, he knew that new drawings for "*Daisy-Head Mayzie*" were being created but ignored that the Defendants were making a new version of that book. He says

that it is only on October 18, 2016, after he had relocated in Montreal, that he “put it all together”.

[13] The main difficulty with the Plaintiff’s motion is that he has shown no intention whatsoever of challenging Prothonotary Aalto’s Order, let alone a continuing intention to do so as it is clear from the record that if it had not been for the New Evidence, there would have been no challenge to that Order. This explains why there is nothing in the Plaintiff’s motion material pointing to any reviewable error on the part of Prothonotary Aalto in concluding, on the basis of the material that was before him, that the *Van Breda* factors favour the U.S. as the appropriate jurisdiction to entertain the Statement of Claim’s copyright infringement cause of action. More particularly, there is nothing pointing, as now required by *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*], to Prothonotary Aalto having made a “palpable and overriding error” in determining the facts and applying them to the *Van Breda* legal test, which the Plaintiff concedes to have been correctly set out by Prothonotary Aalto.

[14] This is particularly evident from the Plaintiff’s reply to the Defendants’ responding motion materials where the Plaintiff’s main – and sole – focus is to attempt to show how the New Evidence might have altered Prothonotary Aalto’s decision if it had been before him when he made that decision. This is of no assistance to the Court when it comes to determining whether the challenge to Prothonotary’s Order has, on the basis of the standard of review established in *Hospira*, some merit as required by the *Hennelly* test.

[15] The fact of the matter is that what the Plaintiff is ultimately asking the Court to do is to reconsider the Defendants' motion to strike, and in particular the *forum non conveniens* analysis, in light of the New Evidence. However, this goes beyond the scope of an appeal of a prothonotary's decision as the general rule is that such appeals are to be decided on the basis of the material that was before the prothonotary (*Shaw v Canada*, 2010 FC 577, at para 8). In other words, the Court should not admit new evidence on an appeal from a prothonotary (*Apotex Inc v Wellcome Foundation Ltd*, 2003 FC 1229, at para 10).

[16] The Supreme Court of Canada decision in *R v Palmer*, [1980] 1 SCR 759 [*Palmer*], on which the Plaintiff relies in order to claim that the New Evidence should be admitted for the purposes of his motion, has to be read with caution here. Indeed, that case was decided in a criminal law context and dealt with the application of a specific provision of the *Criminal Code* providing appellate courts, in certain circumstances and under certain conditions, with the authority to admit fresh evidence on appeal. It reaffirmed, among other things, the principle that the rules applicable to the introduction of new evidence in civil case appeals was not to be applied with the same force in criminal matters, thereby establishing a principled distinction between civil and criminal law matters in this respect (*Palmer*, at p. 775). In addition to not dealing with a criminal law matter, the Court, when seized of a motion under rule 51 of the Rules, is not a court of appeal *per se* and the guiding principle regarding the admission of new evidence on such motions is that it should not be admitted. *Palmer*, which was rendered more than 35 years ago, has not altered that principle. This case is, therefore, of no assistance to the Plaintiff.

[17] Therefore, the delay resulting from the fact the Plaintiff allegedly only discovered the New Evidence in October 2016 is irrelevant in the case at bar. In other words, this does not constitute a reasonable explanation within the meaning of the *Hennelly* test, for the time taken by the Plaintiff to file his rule 51 motion in the present case. Furthermore, the Plaintiff has provided no explanation as to why he was only in a position to “put it all together” in October 2016, once he had relocated in Montreal. As the prescribed deadline for the filing of his rule 51 motion has been exceeded by more than five (4) months, such lack of explanation would, in the ordinary course, normally be fatal to the Plaintiff’s request for extension of time.

[18] The proper way to seek reconsideration of a matter on the basis of fresh evidence is normally to bring a motion under rule 399(2) of the Rules. That provision empowers the Court to set aside or vary an order by reason of a matter that arose or was discovered subsequent to the making of the order.

[19] An order is open to be varied or set aside in such context if the moving party establishes that the new matter was discovered subsequent to the order, could not with reasonable diligence have been discovered sooner and is of such character that if it had been brought forward sooner, it would have altered the order (*Saywack v Canada (Minister of Employment and Immigration)*, [1986] 3 FC 189 (CA)). As judicial policy strongly favors finality of court orders so as to ensure the integrity of the judicial process, rule 399(2) cannot be used as a vehicle for revisiting orders or judgments every time a change in the facts occurs (*Zeneca Pharma Inc v Canada (Minister of National Health and Welfare)*, [2000] FCJ No 2134 (CA)).

[20] Here, if I was to consider the Plaintiff's motion as a motion brought under rule 399(2) or, for that matter, if I was to admit the New Evidence as part of the Plaintiff's challenge to Prothonotary Aalto's Order, I would conclude that this evidence is not of such character that if it had been brought forward sooner, it would have altered Prothonotary Aalto's Order. In other words, it offers no assistance for this Court being a more appropriate forum for the Plaintiff's copyright infringement cause of action or, for that matter, for a claim of a breach of copyright in Canada.

[21] As counsel for the Defendant, Random House of Canada, points out, the New Evidence, consisting of the version of the book "*Daisy-Head Mayzie*" published in July 2016, was clearly published and printed in the U.S., not Canada, by Penguin Random House LLC, not Random House of Canada, and has, as a result, no bearing on the Plaintiff's Canadian copyright infringement claim. The New Evidence is, according to the Plaintiff, further and confirmatory evidence that the Seuss Defendants and Defendant Joe Mathieu have conspired to steal his copyright work and in doing so, "have clearly exposed themselves to blatant copyright infringement". However, none of these Defendants have a direct connection to Canada, nor does the publication of the new version of the book "*Daisy-Head Mayzie*" in July 2016.

[22] I agree, therefore, with counsel for the Defendants that the New Evidence would not have assisted the Plaintiff on the *forum non conveniens* issue had it been available before Prothonotary Aalto.



[23] Having found that the New Evidence would not have altered Prothonotary Aalto's Order if it had been brought to his attention, I will deal with the Plaintiff's accusation that counsel for the Defendants intentionally and unethically concealed the fact that a new version of that book "was already 'secretly' being printed by Penguin Random House" just to say that such accusations are so serious that they can only be proven with clear and convincing evidence, not, as is the case here, with suppositions, innuendos or speculative assertions. This wholly unsubstantiated allegation will therefore, be given no weight.

[24] For all these reasons, the Plaintiff's request for an extension of time must fail and with it, his challenge to Prothonotary Aalto's Order.

**ORDER**

**THIS COURT ORDERS** that the motion is dismissed, with costs.

“René LeBlanc”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-231-15

**STYLE OF CAUSE:** CHARLES AUGUSTUS STEEN III v DR. SEUSS  
ENTERPRISES, L.P., AUDREY GEISEL, TISH RABE,,  
JOE MATHIEU, JACK PRELUTSKY, RANDOM  
HOUSE OF CANADA AND, KARL ZOBELL

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO  
RULE 369 OF THE *FEDERAL COURTS RULES***

**ORDER AND REASONS:** LEBLANC J.

**DATED:** FEBRUARY 10, 2017

**WRITTEN REPRESENTATIONS BY:**

Charles Augustus Steen III

FOR THE PLAINTIFF  
(ON HIS OWN BEHALF)

David W. Foulds  
Brendan Clancy  
Brian MacLeod Rogers

FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

DLA PIPER (CANADA) LLP  
Barristers and Solicitors  
Toronto, Ontario  
Brian MacLeod Rogers  
Barrister and Solicitor  
Toronto, Ontario

FOR THE DEFENDANTS