

Federal Court



Cour fédérale

Date: 20190925

Docket: T-2138-18

Citation: 2019 FC 1229

Ottawa, Ontario, September 25, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CANMAR FOODS LTD.

Plaintiff

and

TA FOODS LTD.

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] This is a motion for leave to file a Further Supplemental Affidavit of Jeff Hart dated August 20, 2019 [the Further Supplemental Hart Affidavit] as evidence in respect of the Defendant's Summary Judgment Motion.

II. Background

[2] The Plaintiff's evidence responding to the Defendant's Summary Judgment Motion was due on July 10, 2019. The Plaintiff filed the affidavit of Jeff Hart, dated July 9, 2019.

[3] On July 22, 2019, the Plaintiff filed the Supplemental Affidavit of Jeff Hart, dated July 19, 2019, on consent.

[4] On August 15, 2019, alleged new evidence came to the Plaintiff's attention. On August 21, 2019, the Plaintiff sought the Defendant's consent to file the Further Supplemental Hart Affidavit, but the Defendant refused.

[5] The Plaintiff filed this motion on August 28, 2019.

III. The Affidavit

[6] The Further Supplemental Hart Affidavit states that the Plaintiff was informed by BG Health Group that the Defendant was their private label manufacturer of roasted flax seed sold under the "Alligga" brand.

[7] On August 15, 2019, BG Health Group provided the Plaintiff with a bag of the Alligga brand roasted flax seed, purportedly manufactured and packaged by the Defendant. Pictures of this bag are attached to the affidavit as Exhibit A.

[8] Mr. Hart states that based on his examination of the Alligga product and the ink jet stamp of the “best before” date on the package, he believes the best before date is consistent with the format and type of printing the Defendant uses on its products. To this end, a picture of the best before date on one of the Defendant’s products is attached as Exhibit B to the affidavit.

IV. Issues

[9] The issues on this motion are:

- A. Does the Further Supplemental Hart Affidavit satisfy the test to introduce new evidence under Rule 84(2) of the *Federal Courts Rules*, SOR/98-106?
- B. Does the collateral facts rule bar the admission of the Further Supplemental Hart Affidavit?

V. Analysis

[10] Rule 84(2) of the *Federal Courts Rules* governs the filing of affidavits after cross-examination has occurred. A party who has cross-examined the deponent of an affidavit filed in a motion may not subsequently file an affidavit in that motion, except with the consent of all other parties or with leave of the Court.

[11] The factors to be considered on a Rule 84(2) application are (*Pfizer Canada Inc v Rhoxalpharma Inc*, 2004 FC 1685 at para 16):

- i. The relevancy of the proposed affidavit
- ii. The absence of prejudice to the opposing party
- iii. Assistance to the Court
- iv. The overall interests of justice

[12] The final factor includes consideration of whether the further evidence was available and/or could not be anticipated as being relevant at an earlier date (*Janssen-Ortho Inc v Canada (Health)*, 2009 FC 1179 at para 9).

[13] The Plaintiff submits that the Further Supplemental Hart Affidavit contains evidence that is relevant to the issues on the Summary Judgment Motion, including the credibility of Mike Popowich. Because the Defendant knew the facts contained in the affidavit, the introduction of the affidavit into evidence will not prejudice the Defendant.

[14] As Mr. Popowich's evidence is essential the Summary Judgment motion, the Plaintiff believes the Court should have the best information available to determine whether Mr. Popowich is a credible witness.

[15] The Plaintiff also alleges that the evidence contained in the Further Supplemental Hart Affidavit was not available to the Plaintiff when the Summary Judgment Motion evidence was due.

[16] Mr. Popowich's evidence is that the Defendant has only used the flax cooking process described in his affidavit, and this process has always involved a Micronizer. The Defendant uses the terms cooked, heated, roasted, and pasteurized interchangeably, depending on the context.

[17] The statement that the Plaintiff was told that the Defendant was BG Health Group's private label manufacturer of Alligga roasted flax seed constitutes hearsay. This evidence is neither reliable nor necessary. This part of the affidavit is inadmissible.

[18] What remains is a picture of a bag of Alligga brand flax seed. The Plaintiff connects the Alligga brand flax seed to the picture of the Defendant's milled flax seed by way of a generic best before date stamp. This connection is tenuous at best.

[19] The picture of the bag of Alligga roasted flax seed provides no evidence about the *process* by which the flax was produced. The picture is therefore not relevant in determining whether Canadian Patent No. 2,582,376 is infringed, as all the asserted claims and the issue of infringement are dependent upon prescribed methods of producing roasted flax seed.

[20] To the extent the affidavit is submitted to impugn Mr. Popowich's credibility, the late introduction of this evidence violates the collateral facts rule.

[21] That rule can be stated as follows (*Pyne (In Trust) v Footman*, 2007 CarswellOnt 3019 (Ont Sup Ct J) at paras 9 and 15):

If a witness is cross-examined on collateral issues for the purpose of testing his credibility, then the witness' answer are final. Any

further evidence is not admissible if it is presented solely to contradict the witness' answers on those collateral issues [...] counsel is not permitted to impugn the credibility of another witness by calling direct evidence on a collateral issue.

[22] Therefore, I find that the motion to file the Further Supplemental Affidavit of Jeff Hart is refused.

JUDGMENT in T-2138-18

THIS COURT'S JUDGMENT is that

1. The motion is dismissed.
2. Costs to the Defendant in any event of the cause.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2138-18

STYLE OF CAUSE: CANMAR FOODS LTD. v TA FOODS LTD.

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: SEPTEMBER 10, 2019

JUDGMENT AND REASONS: MANSON J.

DATED: SEPTEMBER 25, 2019

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