Federal Court Cour fédérale

Date: 20180813

Dockets: T-123-15
T-311-12
T-546-12

Citation: 2018 FC 832

Ottawa, Ontario, August 13, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

BAUER HOCKEY LTD.

Plaintiff

and

SPORT MASKA INC. dba CCM HOCKEY

Defendant

ORDER AND REASONS

[1] This is an appeal of a decision of Prothonotary Richard Morneau (the prothonotary) dated December 20, 2017, bearing the neutral citation 2017 FC 1174, which dismissed a motion by the defendant Sport Maska Inc., d.b.a. CCM Hockey (CCM) seeking dismissal of three intellectual property infringement actions against it (the Actions).

I. Background

[2] CCM's motion followed a proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, under which the original plaintiff in the Actions, Bauer Hockey Corp. (Bauer 1) sought protection from its creditors. That proceeding was commenced in October 2016. Among the results of this proceeding was a stay of the Actions. In February 2017, the Ontario Superior Court approved a transaction whereby a new company, now called Bauer Hockey Ltd. (Bauer 2), acquired the bulk of the assets and liabilities of Bauer 1 (the Transaction).

[3] Prior to the approval of the Transaction, CCM sought assurance from Bauer 2's counsel that the Transaction would not impact CCM's defences in the Actions. CCM was assured that it would not. In June 2017, Bauer 2 took steps to "reactivate" the Actions, advising CCM's counsel of the Transaction, and seeking CCM's consent to the filing of amended statements of claim whereby Bauer 2 would replace Bauer 1 as the plaintiff. In July 2017, CCM responded refusing to consent and taking the position that Bauer 2 had no right to sue for past or future infringement. CCM also requested all information and documents related to Bauer 2's acquisition of rights, as well as assurances that its rights in the Actions would not be compromised. Later in July 2017, Bauer 2's counsel provided the relevant transaction documents and the requested assurances.

[4] In October 2017, unsatisfied with Bauer 2's response, CCM brought the motion to dismiss which resulted in the decision currently under appeal. In its motion, CCM cited Bauer 2's failure to comply with the requirements of rules 117 and 118 of the *Federal Courts Rules*, SOR/98-106. Rules 117 and 118 provide as follows:

Assignment, transmission or devolution of interest or liability

117 (1) Subject to subsection (2), where an interest of a party in, or the liability of a party under, a proceeding is assigned or transmitted to, or devolves upon, another person, the other person may, after serving and filing a notice and affidavit setting out the basis for the assignment, transmission or devolution, carry on the proceeding.

Cession de droits ou d'obligations

117 (1) Sous réserve du paragraphe (2), en cas de cession, de transmission ou de dévolution de droits ou d'obligations d'une partie à une instance à une autre personne, cette dernière peut poursuivre l'instance après avoir signifié et déposé un avis et un affidavit énonçant les motifs de la cession, de la transmission ou de la dévolution.

Objection to person continuing

(2) If a party to a proceeding objects to its continuance by a person referred to in subsection (1), the person seeking to continue the proceeding shall bring a motion for an order to be substituted for the original party.

Opposition

(2) Si une partie à l'instance s'oppose à ce que la personne visée au paragraphe (1) poursuive l'instance, cette dernière est tenue de présenter une requête demandant à la Cour d'ordonner qu'elle soit substituée à la partie qui a cédé, transmis ou dévolu ses droits ou obligations.

Court may give directions

(3) In an order given under subsection (2), the Court may give directions as to the further conduct of the proceeding.

Directives de la Cour

(3) Dans l'ordonnance visée au paragraphe (2), la Cour peut donner des directives sur le déroulement futur de l'instance.

Failure to continue

118 Where an interest of a party in, or the liability of a party under, a proceeding has been assigned or transmitted to, or devolves upon, a person and that person has not, within 30 days, served a notice and

Sanction du défaut de se conformer à la règle 117

118 Si la cession, la transmission ou la dévolution de droits ou d'obligations d'une partie à l'instance à une autre personne a eu lieu, mais que cette dernière n'a pas, dans les 30 jours, signifié l'avis et

affidavit referred to in subsection 117(1) or obtained an order under subsection 117(2), any other party to the proceeding may bring a motion for default judgment or to have the proceeding dismissed.	l'affidavit visés au paragraphe 117(1) ni obtenu l'ordonnance prévue au paragraphe 117(2), toute autre partie à l'instance peut, par voie de requête, demander un jugement par défaut ou demander le débouté.

[5] Together, these rules require that a person purporting to have acquired an interest of a party in a proceeding must, within 30 days, serve and file a notice and affidavit setting out the basis for the acquisition, failing which another party to the proceeding may move for default judgment or dismissal. Where the notice and affidavit is duly served and filed, a party to the proceeding may object to the purported acquirer continuing as a party, and require the purported acquirer to move for an order substituting it for the original party.

[6] CCM argued, and continues to argue, that Bauer 2 failed to respect the 30-day deadline for the notice and affidavit, and hence the Actions should be dismissed.

[7] In its responding motion materials filed in November 2017, Bauer 2 provided, among other things, a notice and affidavit as contemplated in rule 117.

II. The Prothonotary's Decision

[8] As indicated above, the prothonotary refused to dismiss the Actions. He was satisfied that Bauer 2 had complied with rule 117 by means of its notice and affidavit filed in November 2017, and he was not convinced that the mere failure to comply with the 30-day deadline contemplated

in Rule 118 should necessarily result in dismissal. The prothonotary also refused CCM's alternative request for security for costs.

[9] With regard to the motion to dismiss, the prothonotary reasoned that, though the text of rule 118 contemplates a motion to dismiss, it does not provide that the Court must grant that motion. The result of the motion is subject to the Court's discretion.

[10] Based on his reasons, the prothonotary's exercise of discretion relied on the fact that: (i) Bauer 2 had provided sufficient information concerning its acquisition of Bauer 1's interest in the Actions to justify allowing them to proceed; (ii) CCM had long known of the transaction in question but never, prior to bringing its motion, demonstrated a concern about obtaining the formal notice and affidavit contemplated in rule 117; and (iii) the notice and affidavit included with Bauer 2's responding motion material fulfilled the requirements of rule 117.

[11] With regard to the alternative motion for security for costs, the prothonotary reasoned that there was no evidence that Bauer 2 would have insufficient assets in Canada to pay any award of costs that might be made against it in the Actions.

III. Standard of Review of a Prothonotary's Decision

[12] The parties appear to be agreed that the standard of review of a decision of a prothonotary is as set out in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 and *Housen v Nikolaisen*, 2002 SCC 33: factual conclusions are reviewed on a standard of

palpable and overriding error, whereas questions of law or of mixed fact and law where there is an extricable legal principle at issue are reviewed on a standard of correctness.

IV. Analysis

A. *Rules 117 and 118*

[13] I have not been directed to any jurisprudence that is of assistance on the central question of whether a motion to dismiss brought under rule 118 must be granted once it is established that the 30-day deadline has been missed.

[14] I agree generally with CCM that the purpose of rules 117 and 118 is to ensure that parties before the Court know who their opponents are, and that they are informed of any purported changes in that regard so that they can raise appropriate objections.

[15] Rule 117 clearly contemplates a motion by the person seeking to continue the proceeding in the event that a party objects to that continuance. In addition, rule 118 clearly contemplates a motion to dismiss where an interest of a party in the proceeding has been assigned to another, but no notice and affidavit as contemplated in rule 117 has been served and filed within 30 days.

[16] However, there is nothing indicating clearly that a motion to dismiss under rule 118 must be granted. Moreover, I am not convinced that such a requirement should be inferred, given (i) the potentially important consequences of a dismissal of a proceeding, (ii) the relatively minor

consequence of missing a deadline, and (iii) the ease with which rule 118 could have been written to provide explicitly for automatic dismissal.

[17] In my view, rules 117 and 118 are intended to be procedural in nature. They are not intended to decide a dispute between a party and a purported assignee of rights as to the effect of the purported assignment: *Tacan v Canada*, 2003 FC 915 at paras 4 and 5; *Cameco Corporation v Ship "MCP Altona"*, 2012 FC 324 at para 13. CCM will remain entitled to challenge Bauer 2's interest in the Actions and the underlying intellectual property rights.

[18] To close on the consequences of failing to meet the deadline contemplated in rule 118, I bear in mind the words of the Supreme Court of Canada that, as a general principle, the rules of procedure should be the servant of substantive rights and not the master: *Reekie v Messervey*, [1990] 1 SCR 219 at p 222. Generally speaking, the failure to comply with procedural requirements should not automatically result in the loss of substantive rights.

B. *The Prothonotary's Analysis*

[19] I have found no errors in the prothonotary's reasoning.

[20] I agree that rule 118 does not provide for automatic dismissal, and that the Court has discretion not to grant dismissal.

[21] CCM argues that, even if the Court does have discretion in respect of rule 118, that discretion is not unfettered, and the Court should consider the same factors as are relevant to a

motion under rule 8 for an extension of a deadline. The Federal Court of Appeal stated in *Canada (Attorney General) v Hennelly* (1999), 244 NR 399, 1999 CanLII 8190 at para 3 [*Hennelly*], that the proper test for a deadline extension is whether the applicant has demonstrated:

1. a continuing intention to pursue his or her application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from the delay; and
4. that a reasonable explanation for the delay exists.

[22] CCM argues that the prothonotary failed to consider whether Bauer 2 had a reasonable explanation for its delay in serving and filing its notice and affidavit under rule 117. I disagree. Much of the prothonotary's analysis was devoted to a consideration of whether Bauer 2's actions were reasonable in the circumstances. The prothonotary considered the chronology of communications between Bauer 2 (and its counsel) and CCM (and its counsel) about the Transaction, and concluded that dismissal was not justified. In reaching this conclusion, the prothonotary was aware of CCM's assertion that the 30-day deadline in rule 118 has been missed.

[23] At the hearing before me, CCM also argued that Bauer 2 had failed to demonstrate the other requirements enumerated in *Hennelly*. Though none of these requirements was addressed explicitly in the prothonotary's decision, I am satisfied that Bauer 2 demonstrated a continuing intention to pursue the Actions, that there is some merit to its assertion of having complied with rule 117 (albeit late), and that CCM was not prejudiced by the lateness of the formal notice and affidavit.

[24] CCM also argues that the prothonotary considered a number of irrelevant factors in the exercise of his discretion. For example, CCM argues that it was irrelevant for the prothonotary to consider that much of the information about the Transaction was public. CCM also argues that it was irrelevant to consider CCM's actions before it brought its motion in October 2017, and Bauer 2's surprise about the motion. I am not convinced that the prothonotary erred in considering these issues. He was entitled to consider them as part of his assessment of the surrounding circumstances which were relevant to the reasonableness of Bauer 2's explanation for the delay.

[25] CCM also argues that, regardless of whether the requirements for a deadline extension under rule 8 are met, it is inappropriate for the Court to grant such an extension without a motion by Bauer 2, which was never made: *Nowoselsky v Canada (Treasury Board)*, 2004 FCA 418 at para 7. In my view, this matter does not concern a deadline extension under rule 8, even if the requirements therefor are being considered. Those requirements are considered at CCM's urging, and as part of the exercise of discretion in respect of the motion to dismiss, not in respect of a deadline extension.

[26] CCM argues that the prothonotary erred in fact by finding that CCM had never raised an objection under rule 117(2). I disagree that the prothonotary made any such finding of fact. What the prothonotary actually found was that CCM had never raised an objection to the absence of a formal notice and affidavit under rule 117 until it filed its motion to dismiss. That was true. CCM argues that this was irrelevant because the obligation to provide a notice and affidavit as contemplated in rule 117 exists regardless of whether another party raises an objection. I

conclude that it was indeed relevant to consider CCM's silence on the failure to respect rule 117. This was pertinent to Bauer 2's explanation for the delay.

[27] CCM also argues that it did not have an opportunity to properly respond to Bauer 2's notice and affidavit because those documents were produced only after CCM had already filed its motion materials. CCM argues that it was therefore denied procedural fairness. I do not accept this argument. There were several steps CCM could have taken in order to put the adequacy of Bauer 2's notice and affidavit in issue before the prothonotary. It could have cross-examined the affiant. It could also have sought leave to file supplementary evidence or submissions. In the end, CCM has made little effort, either before the prothonotary or before me, to counter Bauer 2's assertion that it has acquired the bulk of the assets and liabilities of Bauer 1.

[28] In the end, the only real shortcoming in Bauer 2's efforts to comply with rules 117 and 118 is the failure to meet the 30-day deadline in rule 118. I see no error in the prothonotary's decision not to dismiss the Actions for that reason.

C. *Security of Costs*

[29] CCM argues that the prothonotary erred in refusing to order security for costs because he neglected to consider that the documents produced by Bauer 2 concerning its acquisition of Bauer 1's assets and liabilities (i) indicate that Bauer 2 is not responsible for court costs incurred prior to the transaction; and (ii) do not indicate the extent of any assets that would be available for paying costs that might be awarded to CCM in the Actions.

[30] In my view, these facts do not justify an order for security for costs. Bauer 2 has undertaken to CCM to pay any costs that may be awarded to it in the Actions, including costs incurred prior to the transaction. CCM expresses concern that there is no evidence that Bauer 2 has the assets necessary to comply with that undertaking. That concern is purely speculative. Bauer 2 has recently made a major investment to acquire most of the assets and liabilities of a large organization and to continue it is a going concern.

[31] Rule 416 provides for the circumstances in which security for costs may be payable. Under paragraph (1)(b) of that rule, security for costs can be awarded where there is reason to believe that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant if ordered to do so. The burden of proof lies with the moving party. There is no reason that Bauer 2's ability to pay costs in the Actions should be subject to greater scrutiny than any other party before this Court.

[32] I conclude that the prothonotary did not err on the motion for security for costs.

V. Conclusion

[33] For the reasons discussed above, CCM's motion will be dismissed with costs in the amount of $5,000.

ORDER in T-123-15, T-311-12 & T-546-12

THIS COURT ORDERS that:

1. The present motion is dismissed with costs in the amount of $5,000.

2. A copy of this Order be placed on files T-311-12 and T-546-12.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-123-15, T-311-12, T-546-12
STYLE OF CAUSE:	BAUER HOCKEY LTD. v SPORT MASKA INC. DBA CCM HOCKEY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 9, 2018
ORDER AND REASONS:	LOCKE J.
DATED:	AUGUST 13, 2018

APPEARANCES:

François Guay	FOR THE PLAINTIFF
Jay Zakaïb	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Smart & Biggar Barristers and Solicitors Montréal, Quebec	FOR THE PLAINTIFF
Gowling WLG (Canada) LLP Barristers and Solicitors Ottawa, Ontario	FOR THE DEFENDANT