

Date: 20070911

Docket: T-1581-07

Citation: 2007 FC 899

Toronto, Ontario, September 11, 2007

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

SETANA SPORT LIMITED

Plaintiff

and

**2049630 ONTARIO INC. carrying on business as VERDE MINHO TAPAS & LOUNGE,
JORGE MONTEZO, JOAQUIM BARBOSA, TOTAL SPORTS BAR INC.,
TOTAL SPORTS BAR LTD. carrying on business as TOTAL SPORTS BAR,
MANUEL ARAUJO, MANUEL TAVARES, CERVEJARIA DOWNTOWN INC.,
LUCIANO ALVES also known as LOU ALVES, JOSE MARTINS also known as
JOE MARTINS, O CAMPINO RESTAURANTE INC. carrying on business as
O CAMPINO RESTAURANTE, NELSON CALDEIRA,
RICARDO OLIVEIRA CALDEIRA, 1174264 ONTARIO INC. carrying on business as
NATIONAL SPORTS BAR also known as NATIONAL SPORTS BAR & RESTAURANT,
NORBERT E. SILVA, 1280 SPORTS BAR INC. carrying on business as
IMPERIAL SPORTS BAR, SERGIO MASSA,
PENICHE COMMUNITY CLUB TORONTO, JOEL FILIPE, FERNANDO FILIPE,
LEONEL SANTOS, SEVERINO SILVA**

**Defendants
(Ontario)**

and

**171761 CANADA INC. carrying on business as CLUB DE BILLARD LE SKRATCH, 9030-
4353 QUEBEC INC., 9034-3112 QUEBEC INC., 9030-4304 QUEBEC INC. also carrying on
business as CLUB DE BILLARD LE SKRATCH, GEORGE DIMOPOULOS,
ATHANASIOS RETSINAS, STRATOS ROUMANIS,
9179-9809 QUEBEC INC. carrying on business as CAFÉ BAR HESTIA also known as
HESTIA CAFÉ BAR, TAKOUHI MANOUKIAN**

**Defendants
(Quebec)**

REASONS FOR ORDER AND ORDER

[1] The Plaintiff Setana Sport Limited has brought a motion for an interlocutory injunction to restrain each of the Defendants, largely sports bars and the like, from displaying on television sets located in their premises certain European soccer matches which are transmitted to Canada by means of encrypted satellite signals. The Plaintiff claims that it owns copyright and what it terms “broadcast rights” for North America in those soccer matches as they have been or will be televised.

[2] I am dismissing the motion for the following Reasons.

[3] First, the Plaintiff’s evidence as to copyright is defective. A pleading in the Statement of Claim that it owns copyright is simply a conclusion of law. No facts to support that conclusion have been pleaded and, even if pleaded, such facts cannot be presumed to be true unless accepted in a Defence or proved by way of proper evidence on the motion. No Defences have been filed; most Defendants appear to have been served only within the last ten (10) days and none have appeared on the motion before me. The supporting affidavit of Rod Keary merely repeats the assertion that the Plaintiff owns copyright. No substantive evidence has been given in that or any other affidavit.

[4] The Plaintiff relies on a number of certificates of registration of copyright. On their face, those certificates are defective. First, they all refer to the works in which copyright is said to subsist as dramatic works of which “Setana Sport Limited” is the “author”. An author must be a human being or a group of human beings. Copyright endures for the lifetime of an author plus fifty (50) years (*Copyright Act*, R.S.C. 1985, c. C-42, section 6). Provision is made where there are several

authors to deal with the death of one before the other (section 9). A corporation such as Setana has no “lifetime”. Where the *Copyright Act* contemplates some non-human entity as being the original party to acquire rights, such as a “broadcaster” or a “maker” or the “owner of a negative” of a photograph, it does so explicitly.

[5] Copyright subsists in accordance with section 5 of the *Copyright Act, supra*, where the author was, at the date of making of the work, a citizen or subject of, or ordinary resident in, a convention country and, if the work was published then first published in that country. None of this is set out in the pleadings, or affidavit evidence or certificate of registration.

[6] Secondly, as to copyright, it is clear that registration has been made in respect of works not yet in existence at the time of registration. In accordance with section 5 of the Act referred to above, a work has first to be made before copyright it can subsist. Paragraph 39.1(2)(b) permits the Court, in its discretion to extend an injunction otherwise made in respect of subsisting copyright in works to work not yet in existence but, again, the likelihood of future existence and authorship must be put in evidence.

[7] Thirdly, the Plaintiff relies on paragraph 9(1)(c) of the *Radiocommunication Act, R.S.C. 1985, c. R-2* which prohibits a person from decoding an encoded signal otherwise than with the authorization of the “lawful distributor”. The Plaintiff has simply pleaded, and the Affidavit evidence simply states that the Plaintiff has “broadcast rights for North America”. The nature of those rights is not explained, nor is the acquisition of those rights. We do not know if the Plaintiff is

a “lawful distributor” as defined in the Act. Who did the Plaintiff get these “rights” from? Is the unnamed source the proper owner of the “rights”? How far do the “rights” extend? Are they exclusive or non-exclusive? The Court has not been given sufficient information.

[8] Fourthly, the injunction sought is in the widest terms respecting “all matches” shown on the Setana Sport Channel. The Court is not told what they are, whether copyright subsists in any or all of those matches and whether Setana is the only lawful distributor of those matches in Canada.

[9] Failure of the Plaintiff to prove its case has previously been pointed out to Counsel in *1395047 Ontario Inc. v. New Atlantico Café and Restaurante Inc.*, 2005 FC 1358. Counsel should be sensitive to these issues.

[10] The motion will be dismissed without prejudice to reapply on better evidence. No costs are awarded.

ORDER

For the Reasons given:

1. The motion is dismissed without prejudice to the Plaintiff to reapply on better evidence.
2. No costs.

“Roger T. Hughes”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1581-07

STYLE OF CAUSE: SETANTA SPORT LIMITED and
2049630 ONTARIO INC. ET AL

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 10, 2007

**REASONS FOR ORDER
AND ORDER :** HUGHES J.

DATED: September 11, 2007

APPEARANCES:

Kevin Fisher FOR THE PLAINTIFF

SOLICITORS OF RECORD:

BASMAN SMITH LLP
Toronto, Ontario FOR THE PLAINTIFF