

Date: 20080129

Docket: T-1873-07

Citation: 2008 FC 117

[ENGLISH TRANSLATION]

Montréal, Quebec, January 29, 2008

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

MICROSOFT CORPORATION

Plaintiff

and

**CARMELO CERRELLI,
9061-8240 QUEBEC INC., 9069-8697 QUEBEC INC.,
9126-6411 QUEBEC INC., 9134-7245 QUEBEC INC.,
9140-1349 QUEBEC INC., 9145-2029 QUEBEC INC.,
VSOP WEB INC., SYSTÈMES IVORCOM INC.,
TECHNOLOGIES KUMO INC., MAXIMUS TÉLÉCOM INC.,
INFODMI CORP., CARMELO CERRELLI (A TRUST),
CARMELO CERRELLI TRUST, CERRELLI TRUST,
CERRELLI FAMILY TRUST, CERRELLI CHILDREN TRUST,
JOHN DOE, JANE DOE and DOE CO.**

Defendants

REASONS FOR ORDER AND ORDER

[1] UPON motion by the Plaintiff under Rules 75 and 104 of the *Federal Courts Rules* (the Rules) to amend its statement of claim for the purposes of adding Shelly-Ann Gray as a Defendant.

[2] WHEREAS with respect to the principles that apply to the amendment of pleadings, the following passage from *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.), at page 10, clearly reflects the latitude that the Court must demonstrate in this matter:

... while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[3] WHEREAS as a backdrop to these observations, it may be added that in the case of an amendment, as in an application to strike a proceeding, the amendment should be allowed unless it is plain and obvious that the amendment is bound to fail (see *Raymond Cardinal et al. v. Her Majesty the Queen*, unreported decision of the appeal division of this Court dated January 31, 1994, docket A- 294- 77, Heald, Décary and Linden JJ.A.).

[4] WHEREAS in the case at bar, it appears essentially that it is the dynamic described in paragraph 63 of the amended statement of claim giving rise to the dispute between the parties as to whether Ms. Gray should be added as a Defendant.

[5] WHEREAS paragraph 63 reads as follows:

63. At all times, the Defendant Shelly-Ann Gray was aware of the copyrighted Microsoft Programs and Associated Works,

and the Microsoft Trade-marks, and was aware that the activities of the Defendant Carmelo Cerrelli and the legal entity Defendants were an infringement of the intellectual property rights of the Plaintiff. Shelly-Ann Gray is the director, president and majority shareholder of the Defendant VSOP Web Inc. (which uses the business name InfoDMI), and is the director and president of the Defendant 9134-7245 Québec Inc. (which uses the business name Tycotel). Wire transfers obtained during execution of the Anton Piller Order show that funds obtained as a result of the infringing activities described above have been transferred, and continue to be transferred, between a U.S. bank account in the name of InfoDMI and a Jamaican bank account in the name of Tycotel. As noted above, Shelly-Ann Gray is also an officer and director of other legal entity defendants and of corporations identified during the execution of the Anton Piller Order. The Defendant Shelly-Ann Gray has personally, deliberately and knowingly obtained a financial benefit from the infringing acts of corporations that she controls and through which her husband Carmelo Cerrelli carries out his illegal activities.

[6] WHEREAS paragraph 8 of the same amended statement of claim indicates that Ms. Gray's involvement with Tycotel dates back to May 9, 2007.

[7] WHEREAS pages 121, 124, 135, 137 and 140 of the Plaintiff's motion record appear to demonstrate that fund transfers, some of which were to Jamaica, have been performed since that date of May 9, 2007, between InfoDMI and Tycotel, it is not plain and obvious that paragraph 63 reveals no reasonable cause for action. Given the circumstances, I find that adding Ms. Gray as a Defendant meets the criteria of Rule 104(1)(b) of the Rules to ensure that all matters of trademark and copyright infringement in the proceeding may be effectually and completely determined.

[8] WHEREAS as a result of the above and the claims in the amended statement regarding Ms. Gray, it cannot be argued, as counsel for the Defendants did, that the main objective sought in adding Ms. Gray to the case is to exert undue pressure on her and her spouse, Carmelo Cerrelli.

[9] WHEREAS the affidavits submitted by Mr. Cerrelli and Ms. Gray do not lead the Court to change its opinion on this point, nor to consider that this addition of Ms. Gray could, if unfounded, cause harm to her not compensable by an award of costs.

[10] For these reasons, the Plaintiff's motion to amend is allowed, the whole with costs to follow.

ORDER

The Plaintiff is granted leave to serve and file within ten (10) days of the date of this order an amended statement of claim in the same language as that it attached to Appendix A of its motion record.

“Richard Morneau”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1873-07

STYLE OF CAUSE: MICROSOFT CORPORATION
Plaintiff
and
CARMELO CERRELLI,
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TRUST, CERRELLI FAMILY TRUST, CERRELLI
CHILDREN TRUST, JOHN DOE, JANE DOE and
DOE CO.
Defendants

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 28, 2008

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: January 29, 2008

APPEARANCES:

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FOR THE DEFENDANTS