Date: 20090129

Docket: T-2009-07

Citation: 2009 FC 97

Ottawa, Ontario, January 29, 2009

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE (CPCC)

Plaintiff

and

RED COAST IMPORTS INC.

Defendant

REASONS FOR ORDER AND ORDER

Introduction

[1] This is an appeal, by Red Coast Imports Inc. (Red Coast), from the November 26, 2008 decision of Prothonotary Milczynski (the Prothonotary) striking out its Statement of Defence pursuant to Rules 97 and 227 of the *Federal Courts Rules*, *1998* (the *Rules*) as well as providing for ancillary relief and costs.

[2] Section 97 of the *Rules* enables the Court to strike a pleading or dismiss a proceeding where a person fails to attend an oral examination or produce a required document. Rule 227 likewise gives the Court power to strike out a pleading where a party fails to provide an accurate affidavit of documents.

Facts

[3] On November 18, 2008, the Canadian Private Copying Collective (CPCC) commenced an action in this Court claiming Red Coast failed to report and pay CPCC the private copying levies certified by the Copyright Board of Canada (the Board) as required by the *Copyright Act* (the *Act*) on account of the manufacture or importation into Canada and the sale or other disposition by the Defendant in Canada of blank audio recording media (blank tapes) and this for a period since December 18, 1999. CPCC also sought payment of the statutory penalty, an accounting and powers of audit.

[4] On January 7, 2008, Red Coast filed its statement of defence. CPCC did not file a reply.

[5] On April 10, 2008, CPCC filed and served its affidavit of documents and inquired of Red Coast's counsel about his client's availability for discovery. Telephone conversations took place between counsel; CPCC's counsel inquired in April/May 2008 when he might receive the Defendant's affidavit of documents whose production was delayed because Red Coast's principal who was often out of the country in 2008. The record indicates that CPCC's counsel was told that on May 16, 2008, Mr. Aminzada, Red Coast's principal would be back in Canada.

[6] On June 20, 2008, since CPCC had not heard further from the Defendant, it served and filed a motion to compel an affidavit of documents from the Defendant and asked for dates for discovery for July and August 2008.

[7] On July 7, 2008, Prothonotary Morneau issued an Order compelling the Defendant to "serve an accurate and complete affidavit of documents within ten (10) days of the Order". That Order directed Red Coast to disclose all relevant documents relevant to the importation of blank tapes into Canada by the Defendant such as purchase orders, invoices, shipping documents, customs documents, payment journals from December 1999, and all documents relevant to the purchase and sale of such tapes in Canada.

[8] On August 5, 2008, the Defendant produced a short affidavit from Mr. Aminzada dated the same day to the following effect:

1) to the best of his knowledge all documents relevant to the importation of blank tapes imported into Canada had been previously conveyed to CPCC's attorney;

2) no blank tapes had been purchased in Canada; and

3) to the best of his knowledge, all documents relevant to the sale of blank audio recording media in Canada by the Defendant had been previously filed with CPPC's attorneys. [My emphasis.]

[9] In the covering letter enclosing the affidavit which the record shows did not contain the deponent's original but a typed-in signature albeit certified as a true copy, Red Coast's counsel, Conrad Shatner, explains only one transaction had every been done. He indicated, if there was any documentation CPCC felt it did not have, he would obtain it. He advised his client would be leaving Montreal on August 13, 2008 and would be back for the whole of September; he would arrange discoveries if they were necessary.

[10] On August 13, 2008, CPCC's counsel wrote to Mr. Shatner stating the affidavit of documents he had received did not comply with the *Federal Courts Rules* and did not comply with the Prothonotary's July 7, 2008 Order. He did acknowledge on September 5, 2007, Red Coast had provided information regarding the purchase and sale of blank tapes, disclosed sales which outnumbered purchases and did not provide purchase invoices. He also said CPCC was aware of 2005 sales but had no invoices. He noted Red Coast's obligation to list all relevant documents.

[11] On September 5, 2008, In-House Litigation Counsel for CPCC in Toronto, Dana Hirsh communicated with Mr. Shatner, advising that should CPCC not receive a complete and accurate affidavit of documents by September 10, 2008, it would be forced to file a second motion to compel such an affidavit and seek other remedies under Rule 227. Ms. Hirsh also indicated CPCC would like to set up discoveries, was waiting on his client's availability and asked for dates.

[12] On September 8, 2008, Mr. Shatner responded to Ms. Hirsh. He advised his client was still out of the country and would only return "towards the end of the month". He advised: "I have communicated with his office in order to prepare a more detailed affidavit but again he is not here."

Mr. Shatner asked for a delay in producing the affidavit until his client's return to Montreal and would set up discoveries "at the earliest possible date before he leaves once again".

[13] On September 12, 2008, Ms. Hirsh responded agreeing to the delay until September 30, 2008 and advised should the affidavit not be forthcoming by then a second motion to compel would be filed. She asked for Mr. Aminzada's availability for discovery.

[14] I will summarize the next events. Mr. Aminzada did not return to Montreal in September 2008 and in a letter dated September 24, 2008 from Mr. Shatner, Ms. Hirsh was advised he would return on October 15, 2008 and be "signing the required affidavit". He would be available for discovery either on October 20, 21 or 22, 2008. Mr. Hirsh responded on October 7, 2008 by serving a direction to attend for an examination for discovery on October 22, 2008 which included a notice to produce copies of all purchase orders and sales invoices relating to the purchase and sale or other disposition of blank tapes. She also reminded of the need for a fresh, accurate and complete affidavit of document and of the deficiencies in the previous one. She stated it was imperative that CPCC receive the affidavit no later than October 16, 2008.

[15] On October 17, 2008, Mr. Shatner wrote to Ms. Hirsh confirming a telephone conversation with her in which he said his client had yet to arrive in Montreal but would definitely (his underlying) be in Montreal for November 17, 2008. He made the following suggestion:

> I have relied on your good graces up to now and I fully understand your position. I therefore suggest the following: namely, that you proceed as you would in any default against a Defendant who fails to comply. If in fact my client does not return by November 17th, you will be able to continue proceedings against him. I have impressed upon him the urgency of his attendance by November 15th [*sic*] at the

> latest. If he does not comply I will be in a position to provide you with all the documentation necessary and make sure that the examination of the principal will take place in the week following the production of the required documentation. [My emphasis.]

[16] Seemingly in response to Mr. Shatner's invitation in early November 2008, CPCC served on Mr. Shatner a motion to strike his client's statement of defence returnable in Toronto on November 10, 2008.

[17] On November 6, 2008, Mr. Shatner wrote to the Court stating he was unable to be in Toronto on November 10, 2008 but would be prepared to do so on November 17, 2008.

[18] On November 6, 2008, Prothonotary Milczynski issued an order adjourning the hearing of the motion to strike to the General Sittings in Toronto on November 17, 2000. As reason for doing so, she cited the fact the Defendant had only been served with the motion to strike in the afternoon of November 6, 2008 and the Defendant's request for an adjournment.

[19] On November 13, 2008, Prothonotary Alto issued the following directive:

> The Plaintiff's motion to strike is adjourned for one week to allow for the delivery of documents, to be served on the Plaintiff by Thursday, November 20th, failing which the motion will proceed on November 24, 2008. If the documents are delivered, the motion will be adjourned for a further week to allow for the examination of the Defendant which is scheduled to take place on November 27, 2008. The parties are to keep the Court abreast of the status of the motion to strike. Costs thrown away at $1460.00 payable to the Plaintiff forthwith. [My emphasis.]

[20] On November 21, 2008, which was a Friday, Mr. Shatner advised the Court his client arrived in Montreal the previous Friday (November 14, 2008) and "immediately set out to provide

the documentation requested by my learned colleague which proved to be a more difficult job than was anticipated". He explained why adding "my client also upon his arrival in Montreal had other commitments which made the task more onerous." He told the Court his client "guaranteed" him the documents would be in his hands the next day (Saturday, November 22, 2008) stating "since this is Saturday, I will not be able to prepare the necessary affidavit and forward the items until Monday (November 24, 2008) so that my learned colleague will receive them no later than Tuesday". He stated he would be in touch with the Court on Monday before 9:00 a.m. to inform you whether I have received the documents requested.

[21] The record indicates Mr. Shatner's letter of November 21, 2008 was shown by the Registrar to Prothonotary Milczynski who directed that both parties be advised that the Court would hear the motion as scheduled, that is, November 24, 2008, at 9:30. The recorded entries for this action indicate the Registrar advised the parties over the telephone that day the matter was proceeding.

[22] The recorded entries also show that on November 24, 2008, the matter proceeded before Prothonotary Milczynski in Mr. Shatner's absence. CPCC's motion to strike was granted. On November 26, 2008, the Prothonotary signed a formal order striking the Defendant's statement of defence. In her recitals, she noted as follows:

> In preparation for general sittings in Toronto, the Court Registry was in contact with counsel for the Defendant, who was made aware of today's proceedings. Counsel for the Defendant did not request an adjournment, and did not indicate that he could not attend. I am satisfied with the Plaintiff's written and oral submissions that there has been a history of delay in this file for which no satisfactory explanation has been provided. Accordingly, the order as requested, should be granted. [My emphasis.]

[23] CPPC's motion record on this appeal is supported by the affidavit of Laurie Gelbloom, CPCC's General Counsel (the General Counsel). That affidavit essentially sets out the chronology stated in these reasons. It also contains the following two paragraphs:

> 33. On November 25, 2008, the CPCC received a folder of documents from counsel for the Defendant without a covering letter. The folder primarily consisted of purchase invoices and bills of lading and only a couple of sales invoices.
>
> 34. The Defendant has never provided the Plaintiff with a complete and accurate affidavit of documents. [My emphasis.]

The appeal

[24] On December 18, 2008, the Defendant appealed the Prothonotary's order. The appeal was supported by one affidavit – that of Mr. Shatner. In his affidavit, Mr. Shatner states:

1) At paragraph 8(c) that he notified the Court on Friday, November 21, 2008 "that the material would not be available until November 24, 2008 and asked for a stay so that the material might be sent to the Plaintiff".

2) At paragraphs 9 to 13, he states:

> 9. Attorney for the Defendant brought to the attention of the Prothonotary and was asked whether attorney for Defendant would be present in Court in Toronto on November 26th, 2008 [*sic*].
>
> 10. Attorney for the Defendant informed the Court that he was involved in a case that would take the whole day, Monday, in Montreal.
>
> 11. That on the morning of November 26th, the Prothonotary rendered the judgement, copy of which is produced as Plaintiff's Exibit A.
>
> 12. The same day the documents requested arrived in the office of the Attorney for the Defendant and were delivered by overnight delivery.

13. Attorney for the Defendant contacted attorney for the Plaintiff and requested an abeyance of the order and offered to make the Principal of the Defendant available for examination as scheduled for November 27th.

14. Attorney for the Plaintiff refused to give relief and indicated that because of the judgement rendered by the Prothonotary that she no longer wished to examine the Defendant who subsequently returned to the Middle East. [My emphasis.]

Analysis

(a) The Preliminary objection

[25] Ms. Hirsh, citing rule 82 of the *Federal Courts Rules, 1998* (the Rules), objected to Mr. Shatner arguing this appeal before me (via teleconference) based on his own affidavit. According to the rule, he could do so only if he obtained leave of the Court. Nothing put to me in argument which satisfied me I should make an exception in this case and I also observed that Mr. Shatner had taken the precaution of having other counsel with him to present the argument if required. I maintained the objection.

[26] Counsel for CPCC made another preliminary objection. She said I should disregard Mr. Shatner's affidavit because it contained new evidence which was not before the Prothonotary. I made no ruling on the point as the objection was not pursued in argument.

(b) The Standard of Review

[27] The leading cases governing appeals to this Court, from discretionary orders of Prothonotories, are two Federal Court of Appeal decisions: (1) *Merck & Co. v. Apotex Inc.*, 2003 FCA 488 (*Merck & Co.*) and (2) *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (*Aqua-Gem*).

[28] In *Merck*, Justice Décary, on behalf of the Federal Court of Appeal, re-calibrated the *Aqua Gem* test which applies to discretionary orders made by prothonotaries. He wrote the following at paragraph 19:

> **19** To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read:
>
> > Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
> >
> > a) the questions raised in the motion are vital to the final issue of the case, or
> >
> > b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts. [My emphasis.]

[29] In his reasons, Justice Décary also focussed on what is meant in *Aqua-Gem* a prothonotary's order "raises questions vital to the final issue of the case". After quoting Justice MacGuigan's reasons in *Aqua-Gem*, at pages 464-465, Justice Décary wrote at paragraph 18 in *Merck*:

> **18** …
>
> This is why, I suspect, he uses the words "they (being the orders) raise questions vital to the final issue of the case", rather than "they (being the orders) are vital to the final issue of the case". The emphasis is put on the subject of the orders, not on their effect. In a case such as the present one, the question to be asked is whether the proposed amendments are vital in themselves, whether they be allowed or not. If they are vital, the judge must exercise his or her discretion de novo. [My emphasis.]

[30] The question raised in CPCC's motion is whether Red Coast's conduct warranted the sanction requested – the striking out of its statement of defence. The question before Prothonotary Milczynski was vital to the final issue of the case, i.e. to its final resolution. I must, therefore, exercise the discretion set out in Rules 97 and 227 *de novo* (see also *Ferrostaal Metals Ltd. v. Evdomon Corp.*, [2000] 196 F.T.R. 66 (*Ferrostaal*)).

[31] In exercising the discretion conferred, I must review the two Rules invoked by CPCC and the relevant jurisprudence of this Court and the Federal Court of Appeal on the application of the two Rules as well as the case law interpreting prior versions of those Rules as they relate to affidavits of documents and examination for discovery.

[32] The focus of counsel for CPCC's submission is that Red Coast is in breach of Prothonotary Morneau's July 7, 2008 order which was very specific as to the type of documents which should be listed in a proper affidavit of documents and produced for examination. Counsel adds what Red Coast has produced to date is still in breach of Prothonotary Morneau's order and the fact remains that the Defendant has yet to provide CPCC with an accurate affidavit of document which complies with the Rules.

[33] The jurisprudence on striking out a pleading for non-compliance with procedural rules or a Court order is consistent, reaches back to two decades and is to the following effect:

1) Striking out a statement of defence is a "very drastic remedy for procedural failures and it ought not to be provided except where it is very clear that the Defendant party's conduct

constitutes an abuse of the process of this Court" (see *H. Smith Packing Corp. v. Gainvir Transport Ltd.,* [1991] 46 F.T.R. 62 (*Smith Packing*), a decision rendered by Justice MacKay who relied upon Muldoon J.'s judgment *in Hansen, et al. v. The Ocean Victoria Daichi Tanker K.K. et al,* [1985] 1 F.C. 451).

2) In *Pioneer Grain Co. v. Far-Eastern Shipping Co.,* [1999] F.C.J. No. 1968, Prothonotary Hargrave wrote the following at paragraph 15:

> **15** At issue is the breach of four Court Orders, with some rationalization, but without any excuse. Now a court will not generally strike out a claim when production of documents does not comply with a court order, for that is a drastic remedy. Yet orders are meant to be obeyed so long as it is reasonably possible to do so. When the failure to comply is conduct amounting to an abuse an action will be terminated and here I would refer to Smith Packing Corporation v. Gainvir Transport Ltd. (1992), 46 F.T.R. 62, a decision of Mr. Justice MacKay. In Smith Packing the plaintiffs sought to strike out a defence because a list of documents filed by the defendant, pursuant to Court Order, did not comply either with the Court's Order or with the Federal Court Rules. Mr. Justice MacKay noted that:
>
> The relief sought, striking the defence, is a very drastic remedy for procedural failure and it ought not to be provided except where it is very clear that the defendant party's conduct constitutes an abuse of the process of the Court. (Page 70)

3) The appeal from Prothonotary Hargrave's decision was dismissed by Justice Muldoon at (2000), 181 F.T.R. 161 (see also Prothonotary Hargrave's decision in *Haylock v. Norwegian Cruise Lines Ltd.*, 2005 FC 501 and Prothonotary Morneau's decision in *Ferrostaal Metals Ltd. v. Evdomon Corp.* (2000), 181 F.T.R. 265); appeal dismissed by Justice Denault at (2000),196 FTR 66, who wrote the following at paragraph 7:

> **7** The Supreme Court has long held "that a party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the

> consequences of such error without injustice to the opposing party";[10] but the party must not itself be largely responsible for the delay. In the case at bar, it clearly is not beyond reproach, as it did not provide its counsel with the documents to support an action brought in 1995 until the summer of 1999, whereas a schedule set by the Court gave the parties until May 10, 1999 to serve their affidavits of documents.

4) Ultimately, this jurisprudence is to the effect that whether the Defendant's conduct is so serious as to warrant striking out his defence is fact specific and all relevant circumstances must be considered.

(c) Application to this case

[34] Applying the relevant jurisprudence to the facts of this case, I find CPCC's motion to strike is warranted even though the remedy is drastic. The conduct of Red Coast's principal, Mr. Aminzada, needs to be sanctioned by this Court. He has shown complete disregard with the process of this Court to the point he completely and negligently ignored CPCC's action despite the warning of his counsel who in embarrassment endorsed the remedy that CPCC ultimately took a motion to strike the defence. He did not respect the undertakings and promises which his counsel gave. He was never available to complete them. Other matters were far more important.

[35] I might have been somewhat more sympathetic to the Defendant, if at the last hour, he had complied with the order of Prothonotary Morneau issued six months earlier. The evidence I have is that he is still in default and has yet to comply.

[36] During the hearing, I expressed my concern with the following statement at paragraphs 10 and 11 of his affidavit which are paragraphs 9 and 10 of this motion record:

10. Attorney for the Defendant brought this to the attention of the Prothonotary and asked whether Attorney for the Defendant would be present in Court in Toronto on November 26, 2008.

11. Attorney for the Defendant informed the Court that he was involved in a case that would take the whole day, Monday, in Montreal.

[37] My concern was this information was at odds with the Court record in two ways: (1) After being shown Mr. Shatner's letter of November 21, 2008, Prothonotary Milczynski issued a directive that day stating CPCC's motion was to be heard the following Monday, November 24, 2008 and Mr. Shatner was so advised; (2) Prothonotary Milczynski's order states Mr. Shatner did not request an adjournment and did not indicate he could not attend.

[38] After examining this issue, I believe Mr. Shatner may have been confused about his request for an adjournment. This is evident from the error about the hearing date of CPCC's motion. Moreover, his letter of November 21, 2008 which was before Prothonotary Milczynski, does not ask for an adjournment nor does it say he would be in Court all day Monday, November 24, 2008.

[39] Ms. Hirsh asked that I fix costs to $1,920.00 in fees and disbursements at $390.00. She provided me with appropriate details. I fix the total fees and disbursements at $2,310.00 plus GST payable forthwith.

ORDER

THIS COURT ORDERS that this appeal from Prothonotary Milczynski's November 26, 2008 order striking out the Statement of Defence of the Defendant Red Coast Imports Inc. and providing for other relief is dismissed with costs fixed at $2,310.00 plus applicable goods and services taxes payable forthwith.

"François Lemieux"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2009-07
STYLE OF CAUSE:	CANADIAN PRIVATE COPYING COLLECTIVE (CPCC) v. RED COAST IMPORTS INC.
PLACE OF TELECONFERENCE HEARING:	Montreal, Quebec and Toronto, Ontario
DATE OF TELECONFERENCE HEARING:	January 12, 2009
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DATED:	January 29, 2009

APPEARANCES:

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Conrad Shatner Sol Apel	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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Me. Conrad Shatner Barrister & Solicitor Montreal, Quebec	FOR THE DEFENDANT