

Federal Court



Cour fédérale

Date: 20090511

Docket: T-1779-05

Citation: 2009FC488

Ottawa, Ontario, May 11, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

**JULES JORDAN VIDEO, INC. AND
ASHLEY GASPER**

Plaintiffs

and

**ALAIN ELMALEH, JACKY ELKESLASSY,
GERALD OUZZAN, 144942 CANADA INC. (COB KAYTEL
VIDEO DISTRIBUTION), LEISURE TIME CANADA INC.,
TRANSWORLD SALES AGENCY LTD., JACKY'S ONE STOP DISTRIBUTION INC.,
SYLNET DISTRIBUTION INC., JOHN DOE, JANE DOE AND OTHER PERSONS,
NAMES UNKNOWN, WHO DEAL IN UNAUTHORIZED OR
COUNTERFEIT EA MERCHANDISE**

Defendants

and

**ALAIN ELMALEH AND 144942 CANADA INC.
(COB KAYTEL VIDEO DISTRIBUTION)**

Plaintiffs by Counterclaim

and

**JULES JORDAN VIDEO INC., ASHLEY GASPER,
SABIN BRUNET AND JACKY ELKESLASSY**

Defendants by Counterclaim

REASONS FOR JUDGMENT AND JUDGMENT

[1] The question posed by the defendants, Alain Elmaleh and Kaytel Video, in this motion for summary judgement is whether the plaintiff, Jules Jordan Video Inc., has standing to seek an injunction for alleged breach of copyright. The answer, they say, is that the other plaintiff Ashley Gasper is the owner of the copyrighted works and that, therefore, the action in the name of Jules Jordan Video should be dismissed.

[2] According to the plaintiffs, Ashley Gasper and his one-man company, Jules Jordan Video, the proper question is which of the two has standing to seek the injunction. They submit that the answer to that question is both, but if it is only one the answer can only be determined by the trier of fact at trial and that, therefore, the motion is premature and should be dismissed. I agree.

[3] The plaintiff, Ashley Gasper, of Los Angeles, is the president, chief executive officer, sole shareholder and employee of Jules Jordan Video, Inc., a California corporation. Mr. Gasper writes, directs, produces and performs in “adult content” films created and manufactured by his company Jules Jordan Video. At issue are thirteen (13) copyrighted works. Mr. Gasper is shown on the Canadian Copyright Register as the owner thereof. The 13 works are also registered with the United States Copyright Office, and again Mr. Gasper is shown as the owner thereof.

HISTORY OF THE PROCEEDINGS

[4] Gasper and Jules Jordan, together with another company, John Stagliano Inc., instituted action in this Court against Alain Elmaleh, 144942 Canada Inc. (Kaytel Video Distribution), and others for alleged breach of copyright in the thirteen works currently in issue, as well as in other copyrighted works. They sought a declaration that they, jointly or severally, have the exclusive right to enforce copyright either by way of copyright ownership or by way of exclusive worldwide distribution agreements. They sought a permanent injunction, but did not specifically claim damages or an accounting of the defendants' profits as they had taken an action for same in the United States.

[5] By way of an interlocutory *ex parte* motion, they sought and obtained an Anton Piller order which was later set aside (2006 FC 585). While Madam Justice Gauthier was satisfied that there was some clear evidence of infringement with respect to at least two works, and that the plaintiffs had suffered some damage, she was not satisfied that damages would not be an adequate remedy and so set aside the injunctive order, with costs. However she did not order that the costs be paid forthwith. They are estimated by Alain Elmaleh and Kaytel to be in the \$120,000 range.

[6] The action in the name of John Stagliano Inc. has been discontinued. Elmaleh and Kaytel have also counterclaimed against Gasper and Jules Jordan as well as against two of their co-defendants, Brunet and Elkeslassy.

[7] Gasper obtained judgment in California which is currently under appeal. He was awarded damages on what were called his "right of publicity claim". This claim is not part of the Canadian

action. The copyright aspect of the Californian action was dismissed. Registration in Gasper's name was defective because he was an employee of Jules Jordan and copyright ownership vests in the employer. Jules Jordan's action was dismissed because it was not the registered copyright owner. This is not the situation in Canada where copyright need not be registered.

[8] Mr. Gasper was examined on discovery in this case both personally and as representative of Jules Jordan. He clearly "admitted" that he, not his company, is the owner of the copyright.

ANALYSIS

[9] The parties had some difficulty focusing on the motion before the Court. Counsel for Elmaleh and Kaytel contends that the action never had any merit as against them, and that it is now moot as all that is sought is a permanent injunction, and they no longer distribute the works in question. Furthermore, the action has not been prosecuted diligently. This is not, however, a motion to dismiss on the merits or for want of prosecution. The only issue is whether Jules Jordan has standing.

[10] Counsel for Gasper and Jules Jordan says that the real motive behind the motion is costs. As the plaintiffs are foreign, security for costs is in place. If the action is dismissed, Elmaleh and Kaytel will be able to realize on that security. Furthermore, Gasper and Jordan intend to seek leave to amend the Statement of Claim to seek statutory damages, as permitted by the *Copyright Act*. The real mischief is that if this motion is granted, it will then be followed by another motion to have Gasper's action dismissed as s. 13 of the *Copyright Act* raises a presumption that the employer, and

not the employee, is the owner of copyrighted works. However, neither a motion to amend nor a motion to strike Gasper's action is before me.

[11] The test on motions for summary judgment was succinctly summarized by Mr. Justice Linden in *Premakumaran v. Canada*, [2007] 2 F.C.R. 191 at paragraph 8:

The defendant brought a motion for summary judgment, seeking to dismiss the appellants' claims under Rule 213 of the *Federal Court Rules*, which permits the Court to do so where there is "no genuine issue for trial". The test to be applied by the Motions Judge is whether the case is so doubtful that it "does not deserve consideration by the trier of fact at a future trial". One need not show that the plaintiff "cannot possibly succeed", only that the case is "clearly without foundation". (See *N.F.L. Enterprises L.P. v. 1019491 Ontario Ltd.* (1998), 85 C.P.R. (3d) 328, at p. 329; see also *Feoso Oil Limited or "Sarla" (The)*, [1995] 3 F.C. 68, para. 13; *ITV Technologies Inc. v. WIC Television Ltd.* (2001), 199 F.T.R. 319 at para. 4 (F.C.A.)).

[12] In the *Sarla*, above, Mr. Justice Stone made favourable reference to the following words of Morden A.C.J.O. in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.) at pages 550-551:

A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense. Rule 20 exists as a mechanism for avoiding these failures of procedural justice.

[13] As stated in the oft-cited decision of *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853, the general principle as recited therein by Madam Justice Tremblay-Lamer is not

whether a party cannot possibly succeed, but rather whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial. If there is a genuine issue to be tried, the case should proceed. Although the Court may determine questions of both fact and law without a trial, this can only be done if the motion record material is sufficient.

[14] These cases also state that the respondent cannot simply rely on the pleadings. It must put its best foot forward.

[15] Although the allegation is made that Gasper and Jules Jordan have not put their best foot forward, both sides have left the Court in the dark. The fact of the matter is that there are no pertinent writings as to the relationship between the two of them, or at least none listed in the affidavit of documents. Gasper did not take legal advice when he incorporated, and did not specifically set out his relationship with Jules Jordan. Jules Jordan creates and distributes the copyright works, which Gasper writes, directs and produces, and in which he performs.

[16] Mr. Gasper's "admission" that he owns the copyright is of little value. According to *Phipson on Evidence*: "Admissions are receivable to prove matters of law...though...these are generally of little weight, being necessarily founded on mere opinion (section 4-11, p. 78)". The fact that Mr. Gasper is shown on the Canadian Register as owner merely creates a rebuttable presumption in his favour (David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 247).

[17] There are any number of ways in which the relationship between Mr. Gasper and his company could be characterized in law. There is not enough material in the record to allow me to

come to any conclusion. For instance, Jules Jordan, as employer, may be the owner pursuant to s. 13 of the *Copyright Act*, should the necessary conditions have been fulfilled.

[18] Their relationship may be a joint venture, principal and agent, assignor and assignee, or licensor or licensee, be it on an exclusive or non-exclusive basis. Section 36 of the *Copyright Act* contemplates that an assignor may be named as a co-plaintiff. One might also have to consider the distinction between legal ownership on the one hand, and beneficial ownership on the other. See *F.C. Yachts Ltd. v. Splash Holdings Ltd.*, 2007 FC 1257.

[19] The financial arrangement between the plaintiffs was not probed. How was income treated? Did it all go to Jules Jordan, except for Gasper's salary? Standing to sue is not a question to be answered simply by looking at the Copyright Register.

[20] All and all I am not satisfied that there is no genuine issue to be tried as to the standing of Jules Jordan Video Inc. Furthermore, there is a sound administration of justice aspect to bringing an action to an end before trial. Court time is precious and should not be squandered. Nothing whatsoever would be gained by granting summary judgment, as the action would continue. Even Jules Jordan would still be in the action as a defendant by counterclaim.

[21] For these reasons, the motion shall be dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The motion is dismissed, the whole with costs.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1779-05

STYLE OF CAUSE: Jules Jordan Video Inc. and Ashley Gasper v. Alain Elmaleh and 144942 Canada Inc. (cob Kaytel Video Distribution), et al

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: APRIL 27, 2009

REASONS FOR JUDGMENT AND JUDGMENT: HARRINGTON J.

DATED: MAY 11, 2009

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