Federal Court  Cour fédérale

Date: 20100323

Docket: T-722-07

Citation: 2010 FC 327

Montréal, Quebec, March 23, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

GALERIE AU CHOCOLAT INC.

Plaintiff

and

ORIENT OVERSEAS CONTAINER LINE LTD.

Defendant

REASONS FOR ORDER AND ORDER

[1] This is an appeal, pursuant to section 51 of the *Federal Courts Rules*, S.O.R./98-106 (the *Rules*), by Orient Overseas Container Line Ltd. (the defendant) against an order of Prothonotary Richard Morneau, date January 22, 2010, dismissing the defendant's request for a case management conference and ordering it to produce its pre-trial conference memorandum.

[2] On April 27, 2007, the plaintiff filed a statement of claim for damages of $115,599.95 for the loss of a cargo of decorative boxes (the cargo), manufactured by Balasi Exports and carried by the defendant from the Philippines to Montréal. The plaintiff alleges that the cargo was in good condition when shipped; the defendant alleges that it was not.

[3] The defendant began examinations on discovery of the plaintiff's representative, Gerson Vineberg, on September 9, 2008. The examinations continued until February 18, 2009. A number of objections were formulated and undertakings given and refused. On June 19, 2009, the defendant moved for an order to adjudicate objections and compel the plaintiff to give effect to its undertakings.

[4] On July 2, 2009, Prothonotary Morneau issued an order (July 2 Order) requiring the plaintiff to answer the questions to which it objected and comply with the undertakings at issue. The plaintiff was required, *inter alia*, to request information from third parties.

[5] The plaintiff provided answers to the questions and undertakings that were subject to Prothonotary Morneau's order, but the defendant deemed some of them unsatisfactory. There ensued, between September and December 2009, an exchange of correspondence between the parties as to the completeness of the plaintiff's answers. The plaintiff's position was, and remains, that its answers are complete; the defendant's was, and remains, that they are not.

[6] On January 6, 2010, the plaintiff filed its Requisition for a Pre-Trial Conference. The next day, Prothonotary Morneau issued a Direction requesting that the parties jointly submit a schedule for the completion of the case. The parties have not agreed on one.

[7] The defendant responded by requesting a case management conference in order to deal with the unresolved issues related to discovery, and in particular with the evidence the plaintiff intends to file on the issue of the condition of the cargo at the time of loading.

[8] On January 22, 2010, Prothonotary Morneau issued an order (January 22 Order) dismissing this request, and requiring the defendant to produce its pre-trial conference memorandum before March 5, 2010.

[9] The defendant now appeals this order.

[10] It is trite law that a discretionary order of a prothonotary ought not to be disturbed unless the issues it raises are vital to the final disposition of the case or the prothonotary exercised his or her discretion on the basis of a wrong principle or of a misapprehension of the facts (*Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459). Furthermore, in *Montana Indian Band v. Canada*, 2002 FCA 331, the Federal Court of Appeal

> emphasize[d] … the heavy burden upon litigants seeking to overturn an interlocutory order by a case management judge. This Court is loathe to

> interfere with interlocutory orders in any case due to the delay and expense which such appeals add to any proceeding. This is all the more so where an appeal is taken from an interlocutory decision of a case management judge who is intimately familiar with the history and details of a complex matter. Case management cannot be effective if this Court intervenes in any but the "clearest case of a misuse of judicial discretion" to echo the words of Mr. Justice Rothstein in *Sawridge Indian Band et al.* v. *Canada*, 2001 FCA 339, (2001) 283 N.R. 112.

[11] The defendant submits that the issues raised by its appeal are vital to the final disposition of the case, because the January 22 Order prevents it from obtaining key evidence and from commissioning and filing within the proper timelines essential expert reports.

[12] The plaintiff, however, disputes this qualification, and submits that issues related to discovery of evidence are not vital to the final disposition of the case. It adds that because Prothonotary Morneau was acting as a case management judge in the context of a specially managed proceeding, his order deserves an even greater deference. I agree.

[13] In *Ruman v. Canada*, 2005 FC 474, at para. 7, Justice James Hugessen cautioned that "it will be a rare case when it can be shown that the denial of further discovery or further documents will be vital to the final outcome" (see also *Stevens v. Canada (Attorney General)*, 2002 FCT 2). I do not think that this is one such "rare case."

[14] Justice Luc Martineau's decision in *Campbell v. Electoral Officer of Canada*, 2008 FC 1080, on which the defendant relies, is distinguishable. Justice Martineau held that the question whether the plaintiffs could produce additional evidence in support of

their application for judicial review was of vital importance to that case because the prothonotary's answer thereto affected the applicants' ability to pursue an essential part of the remedy they sought. The prothonotary's order had the effect of pre-judging a question which should have been left to the judge hearing the matter on the merits. That is not the case here. The issues raised by the defendant are not vital to the final disposition of the case, and this Court will not interfere with the January 22 Order unless it "was based upon a wrong principle or upon a misapprehension of the facts," and constituted a "clearest case of a misuse of judicial discretion."

[15] The defendant further submits that the plaintiff has not complied with all its obligations following from the July 2 Order. It notes that the *Rules* provide that a person subject to examination on discovery may be required to become better informed with respect to a question which he or she is unable to answer during the examination. It argues that the plaintiff has failed to request the information it was ordered to provide, or at least to provide evidence that it made such requests and an undertaking not to use at trial any information other than that which it has provided the defendant. It also submits that the January 22 Order "fails to take into account the possibility that the Defendant will want to seek leave … to examine representatives" of third parties. Therefore Prothonotary Morneau erred in stating that the plaintiff has already provided the defendant with "all that could be discoverable" under the *Rules*.

[16] I disagree. The defendant does not point to any mistake of Prothonotary Morneau that could be qualified as a misapprehension of facts. Prothonotary Morneau studied the

correspondence addressed to him by both parties. As a case-management judge, he is perfectly acquainted with the circumstances of this case, including the July 2 Order, which he had issued. His conclusion that the plaintiff has complied with its obligations under that order is not a “clearest case of a misuse of judicial discretion” and ought not to be disturbed.

[17] For these reasons, defendant’s appeal is dismissed with costs in accordance with Tariff B.

ORDER

THIS COURT ORDERS that:

1. This motion is dismissed;
2. The defendant shall serve and file within 10 days of this Order a Pre-Trial Conference Memorandum in accordance with the *Rules*, including any expertise in chief the defendant intends to rely on at trial;
3. Prothonotary Morneau shall provide the parties with revised availabilities to conduct the pre-trial conference in this matter; and
4. The costs of this motion shall be calculated in accordance with Tariff B.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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