

Close Up international Ltd. v. 1444943 Ontario Ltd.

Between
Close Up international Ltd., and
1444943 Ontario Ltd.
And between
Close Up International Ltd., and
1614622 Ontario Ltd.
And between
Close Up International Ltd., and
International Discount Food, et al.

[2006] O.J. No. 1167
Court File Nos. 05-CV-297955PD3, 05-CV-297961PD3
and 05-CV-297964SR

Ontario Superior Court of Justice
Toronto, Ontario
Master J. Egan

March 17, 2006.
(57 paras.)

Counsel:

Vadim Kats, for the moving parties, the Defendants 1444943 Ontario Ltd. et. al. in Action 05-CV-297955PD3

Inna Kogan, for the responding party, the Plaintiff Close Up International Ltd.

Robert Levine, for the moving party, the Defendant Yakubovsky in Action 05-CV-297955PD3

Shana Dale, for the moving parties, the Defendants 1614622 Ontario Ltd. et. al. and International Discount Food et. al. in Actions 05-CV-297961PD3 and 05-CV-297964SR

Endorsement

(Defendants' motion returnable March 15, 2006)

¶ 1 **MASTER J. EGAN:**— These reasons apply to 5 motions in 3 actions: 05-CV-297955PD3; 05-CV-297961PD3 and 05-CV-297964SR. Regarding the later action, on consent, the action is transferred out of the simplified procedure. The SR description in the action number

is replaced by PD3. Counsel are to use this designation in all future documents displaying the action number.

Plaintiffs Request for an Adjournment

¶ 2 The Plaintiff is a non-resident corporation. There are 4 motions in 3 actions for security for costs.

¶ 3 The Plaintiffs counsel eventually asked for an adjournment of the motions. I say "eventually" because she kept changing her mind about whether she was asking for an adjournment. Prior to lunch I asked Plaintiffs counsel if she was ready to argue this motion and she said she was.

¶ 4 However, she also said she wanted to add a party. When questioned further she asked for an adjournment but changed her mind yet again. When counsel were told to come back at 2:15 p.m., my understanding was that no adjournment was being requested. Plaintiff's counsel had a motion for leave to file further material for the motion - because Master Abrams' Order of February 23, 2006 required leave as a term of an adjournment at that time.

¶ 5 Prior to the lunch break Plaintiffs counsel advised that she had a number of loose documents - Without an Affidavit -that she also wanted to file. I directed her to give all counsel copies of the documents and to leave a copy with my Registrar.

¶ 6 Prior to the lunch break I examined the documents and one was a draft Order for an adjournment of the motion.

¶ 7 When the motions were called at 2:15 p.m. I once again asked Plaintiff's counsel whether she was asking for an adjournment and she said she was doing so.

¶ 8 The thrust of the adjournment request was that the Plaintiff wanted to bring a motion to amend the Statement of Claim add a non Plaintiff - Close-Up Holdings Canada Incorporated. This corporation was apparently incorporated a few days ago With its office in Toronto.

¶ 9 According to Plaintiffs counsel, if the new corporation was added as a Plaintiff, the Plaintiff would have a defence to the motion for Security for Costs. One document submitted was a "memorandum of understanding" dated the day prior to the motion in which the original Plaintiff was the licensor and the new corporation was the licensee regarding what Plaintiffs counsel argues are the "Subject works" as defined in the Statement of Claim.

¶ 10 The said memorandum expires December 31/07 and prior to that date the parties "have the right to negotiate a license."

¶ 11 The Defendants view these eleventh hour tactics as a scheme to defeat their motions by introducing a new nominal corporation and opposed the adjournment,

¶ 12 When asked what assets the new corporation had, Plaintiffs counsel advised that it had a bank account of \$25,000. That in itself would not defeat the motions.

¶ 13 Some further background is provided as follows:

¶ 14 The Statement of Claim in each action was issued on October 4, 2005. I am told there are 14 such actions in Toronto and about 8 in other parts of Ontario,

¶ 15 Mr. Kats advised Ms. Kogan in a letter dated November 1, 2005 that he was bringing this motion for security for costs and requested her available dates.

¶ 16 Ms. Kogan advised in a letter dated December 1, 2005 that she was going to bring a motion for an interim injunction and asked about his availability for dates in January. That motion has not been brought yet in action 05-CV-297955PD3 according to the case history.

¶ 17 The case histories in the other 2 actions disclose that such motions were brought but eventually adjourned so that Defendants' counsel could bring motions for Security for Costs.

¶ 18 The motions were to be heard on February 23, 2006. In a letter dated February 17, 2006 to Mr. Kats and Mr. Levine, Ms. Kogan requested an adjournment of their 2 motions because "Mr. Farace" was being retained to argue the motions and he was not available on February 23, 2006.

¶ 19 On February 23, 2006 Ms. Kogan was ill and Master Abrams adjourned the motions to March 15, 2006.

¶ 20 Ms. Kogan did not give as a reason for the adjournment request that "Mr Farace" was going to argue the motions. For unknown reason, Ms. Kogan appeared on the motions.

¶ 21 The adjournment request has been made too late. The Plaintiff has known for months that it had to gear up for such motions. Indeed, the Plaintiff must have known prior to issuing The Statement of Claim in each action that there was a good chance of such motions.

¶ 22 Ms. Kogan has known since February 23, 2006 of the return date of this motion. The Plaintiff should have been ready for the motions. There is no Affidavit to explain the eleventh hour tactics regarding the new corporation or why such tactics could not have been employed much earlier - even assuming they are proper and would benefit the Plaintiff in defeating the motions. As of now the new corporation only has \$25,000 and a "memorandum of understanding". It appears to be as impecunious as the current Plaintiff professes to be.

¶ 23 Under all the circumstances the request for an adjournment is dismissed.

Plaintiffs Motion for Leave to File Material

¶ 24 The Plaintiff brought one motion in action 05-CV-297955PD3 for leave to file additional evidence in the motions to that action. Presumably Plaintiffs counsel meant to have the motion

apply to all 3 actions although she should have brought 3 motions. In any event, I treated the request as applying to all motions in all actions.

¶ 25 The motion was confusing in that if leave was granted an Order was sought that the evidence be "for the Judge's eyes only" Given that the motion was served with the evidence I cannot understand the request. Counsel thought it relevant that that would be further evidence sought to be provided to me only but that did not occur.

¶ 26 It is interesting to note that the Motion - dated March 10, 2006 - did not request an adjournment. That was the case even though the Affidavit of Ms. Samerkhanova, sworn on March 10, 2006, contained a reference in paragraph 23 that evidence sought to be admitted consists of the fact that a Canadian corporation - Close Up Canada Inc. "is being joined to the lawsuit" (this is also part of the circumstances described earlier to dismiss the adjournment request).

¶ 27 Since Ms. Kogan only brought in documents about the new corporation on the morning of the motion (March 15/06) the reference to such a corporation in an Affidavit of March 10/06 was more mysterious than anything else. Once again, the motion itself was confusing.

¶ 28 Counsel originally opposed the motion to introduce new evidence. When I told counsel I would allow the evidence but give them an adjournment if they so wished, they decided not to oppose the motion and all of the evidence was filed including the loose documents Ms. Kogan brought into court.

Motions for Security for Costs

¶ 29 In a related action on February 21, 2006 I ordered Security for Costs (05-CV-297957PD2 Close Up v. 1562944 Ontario). The basis for my ruling was that there was no mention about the ability of shareholders of the Plaintiff to post Security for Costs.

¶ 30 In the motions before me, the Plaintiffs Counsel agrees that there is no evidence about the identification of the shareholders on their specific assets. There are only bald statements that it is "impossible" for the unidentified shareholders to post Security for Costs and general statements that they basically have few assets and have debts.

¶ 31 The Affidavit of Natalia Ganim, the president of the Plaintiff sworn on March 2, 2006 states in paragraph 8 that she can provide documents in support of such statements but "for security and privacy reasons I can show those documents to court only and not to any of (sic) Defendants".

¶ 32 Ms. Kagan did not pursue the contents of that paragraph, i.e. she did not offer to provide me with further documents or requests that she be allowed to do so without the Defendants also being provided with copies.

¶ 33 I therefore have no idea why paragraph 8 was part of the said Affidavit. It just added another level of confusion to the Plaintiff's material and otherwise confusing oral argument.

¶ 34 When a Plaintiff chooses to sue, it is basically surrendering a certain level of privacy. This Plaintiff, notwithstanding the law of such motions, refuses to identify its shareholders and provide complete financial disclosure. The price to be paid for that position is to pay Security for Costs. (see *Kurzela v. 526442 Ontario Ltd.*, [1988] O.J. No. 1884 (Div. Ct.) and *Shadows v. Travelers Canada Corp.*, [1990] O.J. No. 24 (H.C.J.))

Motions for Security for Costs in Action 05-CV-297955PD3

¶ 35 For reasons provided, the Plaintiff has not discharged its onus to prove that it is impecunious and Security for costs is to be provided to both sets of Defendants.

¶ 36 Mr. Kats argued that because there are allegations of fraud, security should be provided on a substantial indemnity basis. He did not refer to any case law regarding this issue and I decline to order Security for Costs on that scale.

¶ 37 Security for Costs is sought up to and including the Pre-Trial. Ms. Kogan stated that she was not going to bring a motion for an interim injunction or bring back such a motion regarding all 3 actions at this time. Based on that representation, I have deducted any amounts for such a motion.

¶ 38 I am also deducting amounts in the draft Bill of Costs for this motion (which will be dealt with separately) for undertakings and refusals motions since costs would be ordered at that time.

¶ 39 I am reducing Mr. Kats' hourly rate to \$200.00 an hour and reducing the amount for an expert witness to \$6,000 since the \$10,000 fee in the draft Bill of Costs is speculative given that there is no evidence about specific fees for an expert.

¶ 40 The Plaintiff is to post Security for Costs of the Defendants represented by Mr. Kats in the amount of \$26,750.00 inclusive of GST in 2 stages i.e. \$24,550.00 30 days prior to discoveries and \$2,220.00 60 days prior to the Pre-Trial.

¶ 41 Regarding Mr. Levine's client, I have deducted amounts for interlocutory motions and reduced the fee for the expert, as above.

¶ 42 Mr. Levine's hourly rate of \$300.00 is accepted. He is a 1978 call.

¶ 43 The Plaintiff is to post Security for Costs of the Defendant Yakubovsky in the total amount of \$42,300.00 including GST in 2 stages i.e. \$39,100.00 30 days prior to discoveries and \$3,200.00 60 days prior to the Pre-Trial.

Motion for Security for Costs in Action 05-CV-297964SR (now 05-CV-297964PD3)

¶ 44 This motion is by the Defendants Alex Zaretsky and IDF Video (2019586 Ontario Inc.). Those Defendants have a Counterclaim for damages for libel and slander.

¶ 45 The Counterclaim is partially based on "libel and slanderous statements" in the Statement of Claim which I view as untenable and therefore frivolous.

¶ 46 There are also allegations that the Plaintiff "and their counsel" are publicizing the litigation against "various corporations including the Defendants" and slandering such corporations. The allegations against counsel, and that non-party corporations have been defamed are improper. There is no material facts plead in support of claims of publication.

¶ 47 Paragraph 34 of the Counterclaim states that the Defendants "have reason to believe" that unspecified slanderous statements contained in the Statement of Claim have been repeated to unidentified persons and "spread within the community and the customer base of the Defendants."

¶ 48 The elements of the facts of slander and libel are not pleaded in the Counterclaim.

¶ 49 I view the Counterclaim as frivolous and untenable. Security for Costs may not be ordered where there is a Counterclaim arising from the same circumstances as the Claim. (Toronto-Dominion Bank v. Szilacgyi Farms Ltd., [\[1988\] O.J. No. 1223](#) (C.A.) and Better Business Bureau of Metropolitan Toronto v. Tuz, [\[1999\] O.J. No. 1359](#) (Gen. Div.)).

¶ 50 Under these circumstances, in the exercise of discretion, the motion for Security for Costs is dismissed.

Motion for Security for Costs in Action 05-CV-297961PD3

¶ 51 The same counsel appears in this Action as described above. For the same reason, the motion for Security for Costs is dismissed.

Motions to Strike Out Paragraphs of Statement of Claim

¶ 52 In Action 05-CV-297955PD3 there are 2 motions by both sets of Defendants to strike out paragraphs 31, 32 and 42 of the Statement of Claim. In argument it was clarified that only the first sentence of paragraph 42 is under attack.

¶ 53 The thrust of paragraphs 31 and 32 is to plead similar facts, that is, that the Defendants entire business - not just that including the subject works described in the Statement of Claim - consists of infringing copyrighted works.

¶ 54 In Prism Data Services Ltd. v. Neopost Inc., [\[2003\] O.J. No. 2994](#) I reviewed various principles at paragraph 9 that apply when a party seeks to plead allegations of similar facts (I am not going to repeat the 5 factors here - see decision). The Plaintiff has not followed any of the principles outlined in its pleading and paragraphs 31 and 32 are therefore struck out. The first sentence of paragraph 42 is not a material fact, is irrelevant and is struck out (alternatively, it is evidence).

¶ 55 In the other 2 Actions similar motions are brought but the motions contain incorrect paragraph numbers. My reasoning applies to whatever are the correct paragraph numbers and the same paragraphs and sentence are struck out.

¶ 56 Costs

1. The Plaintiff chose to file an abundance of material that did not respond to the crucial issue on the motion. That material had to be reviewed by counsel. Mr. Kats took the lead on the motion. The Plaintiff is to pay Mr. Kats' clients \$6,500.00 in costs by April 18, 2006.
2. The Plaintiff is to pay the Defendant Lidia Yakubovsky \$4,000.00 in costs by April 18, 2006.
3. Regarding the other 2 motions, costs submissions were only made if Ms. Dale was successful. Ms. Kogan is to fax Ms. Dale and myself brief written submissions regarding costs by March 27, 2006. Ms. Dale is to fax brief written submissions to Ms. Kogan and myself by April 3, 2006.

¶ 57 Other Motions

1. Ms. Dale also asked to "consolidate" the 2 Actions she is involved with. Time did not permit for that to be dealt with (the motions were scheduled for just over 1 hour and took 3 hours). She agreed to make that a separate motion in future if she was still instructed to bring such motions.
2. Plaintiff's counsel is to cease serving and/or filing motion material that is not bound or tabbed.
3. I suggested to Plaintiff's counsel that she consider following procedure in paragraph 17 of the Practice Direction found before Rule 78 in Watson & McCowan's 2006 Rules to get the 14 Toronto Actions Case Managed.
4. I am not seized of any future motion in any of these Actions or related Actions.

MASTER J. EGAN

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