

Federal Court



Cour fédérale

Date: 20170619

Docket: T-1765-13

Citation: 2017 FC 590

Ottawa, Ontario, June 19, 2017

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

PREMIUM SPORTS BROADCASTING INC.

Plaintiffs

and

**9005-5906 QUÉBEC INC. (doing business as
RESTO-BAR MIRABEL) and STEVE CARON**

Defendants

JUDGMENT AND REASONS

I. Nature of the matter

[1] The plaintiff, Premium Sports Broadcasting Inc. [Premium], alleges that the defendants, Resto-Bar Mirabel and Steve Caron, broadcast the “Ultimate Fighting Championship” [UFC] pay-per-view fight on March 16, 2013 [the Fight] without authorization, thereby violating

sections 21, 24 and 35 of the *Copyright Act*, RSC 1985, c C-42, and paragraphs 9(1)(c), (d) and (e) of the *Radiocommunication Act*, RSC 1985, c R-2.

[2] Premium holds the broadcast rights in Canada to a number of sporting events, including those related to the UFC pay-per-view fights, and it was not disputed that it held the rights to broadcast the Fight live from the Bell Centre in Montréal. The pay-per-view program of the Fight began at 10:00 p.m. and was to include several fights, including the first between Mike Ricci and Colin Fletcher.

[3] 9005-5906 Québec Inc., doing business as Resto-Bar Mirabel [Resto-Bar Mirabel], is a restaurant and bar located in Mirabel [the resto-bar or Resto-Bar Mirabel establishment], and Steve Caron is its sole director.

[4] Premium filed a motion for summary judgment against the defendants pursuant to rules 213 to 215 of the *Federal Courts Rules*, SOR/98-106, but discontinued the motion prior to the hearing. The defendants, meanwhile, submitted a motion for summary trial pursuant to rule 216, which is the subject of this judgment.

[5] In short, the Court agrees with the parties' position and concludes that a summary trial is an appropriate procedural vehicle in this case. Moreover, on the merits of the case, the Court finds that Premium has not proved, on a balance of probabilities, that the defendants broadcast the Fight, and will therefore dismiss the action.

II. Factual background

[6] On April 4, 2013, Premium sent a notice of default letter to Resto-Bar Mirabel, alleging that it had broadcast the Fight without authorization and without paying the fees, and demanding that it pay Premium \$9,000.00.

[7] On October 28, Premium filed an action against 49 defendants, including Resto-Bar Mirabel and Steve Caron, alleging that they had broadcast the Fight without authorization. Premium was claiming \$300,000.00 from them. On December 16, 2013, the defendants filed their defence, denying that they had broadcast the Fight and stating that on March 16, 2013, they had presented a “Harlem Shake”-type dance event, hosted by three disc jockeys.

[8] On November 13, 2013, Madam Justice Kane granted an interlocutory injunction against the defendants, including Resto-Bar Mirabel and Steve Caron, that among other things (1) prohibited the broadcast of UFC “Pay-per-View” fights without the written authorization of Premium or Zuffa International LLC; (2) ordered the source, description and means by which they accessed Premium’s UFC fights to be revealed, as well as the means used to intercept, decode, decrypt or download by internet these events; (3) ordered the information and devices used in such a context to be maintained and preserved; (4) ordered the production, further to a request by Premium to this effect, of statements of accounts that could be relevant to matters at issue between the parties.

[9] On November 19, 2013, by letter addressed to Premium, the defendants denied having broadcast the Fight.

[10] On December 22, 2014, Premium filed a notice of motion for summary judgment, and on September 23, 2015, the defendants filed a notice of motion for summary trial.

[11] Between 2013 and 2015, Premium came to agreements with a number of defendants and obtained default judgments against others, such that only Resto-Bar Mirabel and Steve Caron remained as named defendants.

[12] In March 2017, Premium discontinued its claim for \$300,000.00 and suggested instead that the amount of \$15,000.00 would be appropriate in the circumstances.

[13] A few days prior to the hearing, Premium discontinued its motion for summary judgment and did not challenge the motion for summary trial as procedural vehicle to resolve this case.

III. Parties' evidence and positions

A. *Premium's evidence and position*

[14] There is no question that the defendants did not have the right to broadcast the Fight.

[15] However, Premium alleges that Resto-Bar Mirabel [TRANSLATION] "was seen" broadcasting the Fight. On this point, Premium submits in evidence the observation report of Anthony Collin, a private investigator employed by Garda, dated March 16, 2013; the affidavit of Mr. Collin, dated October 22, 2013; the affidavit of Yves Lefebvre, Mr. Collin's supervisor at Garda, dated October 28, 2015; the observation report of Mr. Collin, amended on April 10, 2013 by Mr. Lefebvre; the affidavit of Rod Keary, Premium's director of operations, dated

September 29, 2014; and a number of other observation reports regarding other establishments, all completed by Mr. Collin on March 16, 2013. Premium also submitted in evidence the cross-examinations of Steve Caron, Simon Langevin and Mickael Carreau.

(1) Mr. Anthony Collin's observation report and affidavit

[16] Mr. Collin went to the Resto-Bar Mirabel establishment on March 16, 2013, and noted his findings in an observation report.

[17] In this observation report, Mr. Collin noted the following: (1) the start time at 10:00 p.m. and the end time at 10:10 p.m.; (2) there were four approximately 50-inch televisions in operation, and the fighters were identified as Mike Ricci and Colin Fletcher; (3) the fight was in Round 1; (3) the short colours were blue and orange; and (4) the logo on the television screens was identified as that of Videotron.

[18] Mr. Collin also signed an affidavit on October 22, 2013, initially submitted for the motion for summary judgment. In it, Mr. Collin states that he arrived at the Resto-Bar Mirabel establishment "at approximately 10:00 p.m.", where he could see the fight being presented on four television screens ("I could see the UFC 158 event being shown on four television screens"). Mr. Collin also states that the owner of the resto-bar allegedly told him that "they" would be presenting the main event, namely the fight between Saint-Pierre and Diaz ("The owner told me that they would be presenting the main UFC event, 'St. Pierre v. Diaz'.") and that he could see the Videotron, UFC, Tapout and Ecko logos.

(2) Mr. Yves Lefebvre's affidavit

[19] In his affidavit, Mr. Lefebvre states that he contacted Mr. Collin by telephone on or around April 10, 2013, to get additional details and include them in Mr. Collin's observation report of March 16, 2013. Mr. Lefebvre states that he then amended Mr. Collin's observation report to add the following: [TRANSLATION] "I arrived shortly after 10:00 p.m. Upon entering, I saw the screen with the fighters who were entering the ring, and their names appeared on screen. I also asked the owner if they were showing the main fight, and he said yes".

[20] Furthermore, in that same affidavit, Mr. Lefebvre paradoxically states that Mr. Collin confirmed that he had arrived at the resto-bar "just before 10 p.m."

[21] In addition to the amended observation report, Mr. Lefebvre attached to his affidavit other observation reports, completed by Mr. Collin the evening of March 16, 2013, one of which is for the bar called "Le Step" in Ste-Sophie, and in which Mr. Collin states he arrived at 10:25 p.m., or 15 minutes after the end of his observation at the resto-bar.

(3) Mr. Rod Keary's affidavit

[22] In his affidavit, Mr. Keary reports Premium's activities, the damage they suffer when events for which they hold the broadcast rights are broadcast without authorization, and various methods used to access satellite transmissions illegally. He also refers to the content of Mr. Collin's affidavit, and in particular to the fact Mr. Collin stated that he had seen a Videotron logo on the defendants' televisions.

[23] Mr. Keary attaches to his affidavit many exhibits, including a copy of a page from the Resto-Bar Mirabel website, which states, [TRANSLATION] “ Come watch the biggest special events live on our jumbo screens ” and [TRANSLATION] “ For hockey, boxing, UFC, NASCAR, F1 and more, make your reservation online now ”.

(4) Premium’s position regarding the defendants’ defence

[24] In addition to its evidence, Premium raises the weakness of the defence the defendants presented.

[25] It submits that their version of the facts is not credible and notes inconsistencies in the various affidavits and in the affiants’ cross-examinations. For example, in his affidavit, Mr. Caron states that the four televisions in the resto-bar were operational during the entire evening of March 16, 2013, and that it was entirely possible that they had broadcast the free part of the UFC program prior to the fight. During his cross-examination, however, Mr. Caron merely stated that two televisions were showing a hockey game and two others the free part of the fight. Premium notes that this response contradicts the statements Simon Langevin made on cross-examination, to the effect that the four televisions were all broadcasting the same sporting event, which is selected based on the clients’ requests. Similarly, Premium refers to statements made by Mickael Carreau, one of the guest disc jockeys from that evening, who stated on cross-examination that the dance only started at midnight. Premium thus argues that it was plausible that the defendants broadcast the fight before the start of their dance party.

[26] Premium also submits that the Court can draw a negative inference from the fact the defendants refused to produce some evidence; destroyed some evidence, including some electronic equipment; and would not allow Premium to question certain potential witnesses.

[27] Additionally, Premium draws the Court's attention to the fact that the defendants decided not to cross-examine Mr. Collin and Mr. Lefebvre, and submits that the Court must draw a negative inference (rule 216(4) and *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 at para 99 [*Louis Vuitton*]). According to Premium, the fact that the defendants did not cross-examine Mr. Collin and Mr. Lefebvre prevents them from submitting evidence that would contradict their testimony.

B. *Defendants' evidence and position*

[28] The defendants state that they did not broadcast the fight on March 16, 2013, but instead had a "Harlem Shake"-type dance event.

[29] They presented as evidence the affidavits of Steve Caron, director of Resto-Bar Mirabel; Mickael Carreau, manager of the resto-bar; and Simon Langevin, a guest disc jockey for the evening of March 16, 2013.

[30] The defendants also submitted the transcript of their cross-examination of Mr. Keary.

(1) Mr. Steve Caron's affidavit

[31] In his affidavit, Mr. Caron states that more than 6,000 promotional invitations for the dance night were sent out using the Facebook social media platform and that more than 200 people accepted the invitation. A screenshot of the Facebook event page is attached to the affidavit to support this statement. He also states that three disc jockeys were invited to the event and that they were paid through an admission fee collected from the participants.

[32] Mr. Caron also states that he enquired about the cost of a licence to present pay-per-view events, which varies from \$750.00 to \$10,000.00. Mr. Caron states that he did not obtain one because the price was too high, considering his clientele and the sales figures of Resto-Bar Mirabel.

[33] In addition to the screenshot of the Facebook event page, the following exhibits are attached in support of Mr. Caron's affidavit: two letters from the defendants' counsel to Premium's counsel, dated November 19 and 29, 2013, respectively; an affidavit by a Garda private investigator who went to another establishment targeted by Premium, including evidence collected by the investigator to show that the Fight had been broadcast in that establishment; and invoices and other billing data of the defendants' counsel in this case.

(2) Mr. Mickael Carreau's affidavit

[34] Mr. Carreau states that he worked as a disc jockey at the resto-bar between 5:00 p.m. and 3:00 a.m. the evening of March 16, 2013, that a "Harlem Shake"-themed dance night started

around 10:00 p.m., and that the resto-bar did not broadcast the fight during the “Harlem Shake” night.

(3) Mr. Simon Langevin’s affidavit

[35] Mr. Langevin’s affidavit indicates that he worked as manager of the resto-bar between 5:00 p.m. and 3:00 a.m. the evening of March 16, 2013. His affidavit contains the same statements as Mr. Carreau’s.

(4) Mr. Rod Keary’s cross-examination

[36] During Mr. Keary’s cross-examination, the defendants filed in evidence: a DVD with an excerpt from the Fight; an excerpt from a fight card given to Mr. Collin which shows Mike Ricci wearing blue shorts and Colin Fletcher wearing orange shorts; emails exchanged between counsel for the parties; a screenshot of Google Maps showing the distance between the Resto-Bar Mirabel establishment and the Le Step bar in Sainte-Sophie; details of Resto-Bar Mirabel’s Videotron package, indicating that it was subscribed to the TVA Sports network; and copies of the Videotron bills addressed to Resto-Bar Mirabel for the period including March 16, 2013.

(5) Defendants’ position

[37] With regard to Mr. Collin’s observation report, the defendants argue that the document is not sufficient to prove they broadcast the fight, and they note that even Mr. Lefebvre thought the report had gaps, leading him to ask Mr. Collin for clarifications.

[38] The defendants note the following gaps: (1) the report does not mention the lineup outside or the requirement of a tip to enter the resto-bar, when a tip was required at the door starting at 10:00 p.m.; (2) Mr. Collin did not collect any material evidence, such as photographs, to support his report; (3) Mr. Collin noted the shorts were blue and orange, while the photographs taken during the fight indicate that one of the fighters was wearing white shorts and the other, grey shorts; (4) in light of the various reports Mr. Collin filled out, he supposedly left the resto-bar at 10:10 p.m. and arrived at the Le Step bar in Sainte-Sophie at 10:25 p.m., 15 minutes later, when in fact, it takes 30 minutes to get from one to the other, according to the data from Google Maps. Additionally, the defendants contradict Mr. Collin's statement that the owner of the resto-bar told him that the fight between Saint-Pierre and Diaz would be presented, as Mr. Caron states that he never confirmed to anyone that the fight would be broadcast.

[39] The defendants refer to Mr. Keary's affidavit, in which he states that at 10:07 p.m., only the fighter Colin Fletcher was shown on screen and that Mike Ricci entered the arena after 10:10 p.m. According to Mr. Keary's timeline, the Fletcher-Ricci fight had not even begun yet at 10:10 p.m. (Answers to Written Examination of Rod Keary at paras 17-18), the time at which Mr. Collin states he ended his observation at the resto-bar. Moreover, this timeline of events contradicts the note in Mr. Collin's observation report, which indicates that the fight was in Round 1.

[40] As for Mr. Lefebvre, he contradicts Mr. Keary because he states that the first round of this fight was under way before 10:10 p.m. (Yves Lefebvre's Affidavit at para 5).

[41] The defendants also note that they do not use sports to attract their clients but instead rely on other types of events and programs, such as comedy shows. The presence of four La Cage aux Sports restaurants within a 15-kilometre radius of their establishment requires Resto-Bar Mirabel to distinguish itself by presenting something different from what its competitors offer.

[42] With regard to the Resto-Bar Mirabel website, the defendants note that it promotes UFC events in general, but not specifically pay-per-view ones. They submit that nowhere on the site is there an invitation to people looking to watch a pay-per-view sporting event to come to their establishment.

[43] In sum, the defendants point out that the plaintiff has the burden of proving the facts required to substantiate its claim, and they argue that this burden was not met.

[44] According to the defendants, the best evidence Premium presented was Mr. Collin's observation report. However, the various versions of the facts presented by Premium's witnesses do not even allow for a confirmation of the time Mr. Collin arrived at the resto-bar on March 16, 2013. There is a choice between (1) 10:00 p.m., as indicated in Mr. Collin's observation report; (2) approximately 10:00 p.m., as indicated in Mr. Collin's affidavit; (3) shortly before 10:00 p.m., as affirmed by Mr. Lefebvre in his affidavit; or (4) shortly after 10:00 p.m., as indicated in the amended observation report, which was amended by Mr. Lefebvre, not Mr. Collin.

[45] According to the defendants, this time, 10:00 p.m., is crucial because the UFC night was available for free before 10:00 p.m. After that, there was a UFC show on TVA Sports that was still free, as well as the pay-per-view fight.

[46] Moreover, Mr. Collin's departure at 10:10 p.m. would not have allowed him to "see" the first round of the fight at the resto-bar, or to see the fighters arrive in the ring, which appears to be confirmed by his incorrect description of the colours of the shorts. Additionally, if Mr. Collin left the resto-bar at 10:10 p.m., he could not have arrived at the Le Step bar in Ste-Sophie at 10:25 p.m.

[47] According to the defendants, the weakness of this evidence makes their evidence to the effect that a dance night was held on March 16, 2013, even more credible: it had been advertised, the place was prepared, and the televisions were turned off. The disc jockey had installed lights and was playing dance music for the clients, who consisted of young women and men there for the event.

[48] In regard to rule 216(4), which states that the Court may draw an adverse inference if a party fails to cross-examine on an affidavit or to file responding or rebuttal evidence, the defendants argue the following: (1) they cross-examined Mr. Keary; (2) Mr. Collin did not submit an affidavit for the summary trial, only for the summary judgment; (3) they presented rebuttal evidence. Therefore, the Court should not draw an adverse inference pursuant to rule 216(4).

[49] Finally, the defendants submit that they are entitled to their extrajudicial fees in this case, owing to the unfounded allegations presented by Premium, which constitute an abuse of process. Relying on rule 400, they ask this Court to order Premium to pay \$4,865.18, representing the amount of the extrajudicial fees incurred up to the filing and serving of their defence, in addition to a lump sum of \$5,000.00 for services rendered since then, including the preparation of the motion for summary trial, as well as costs.

IV. Issues

[50] The Court must first determine whether a summary trial is the appropriate procedural vehicle in this case.

[51] If so, and as rightly pointed out by the parties, it is then relevant to determine whether Premium has proved, on a balance of probabilities, that the defendants broadcast the Fight. The Court will therefore not address the alleged violations of the *Copyright Act* and the *Radiocommunication Act* unless there is a positive response to this question.

V. Analysis

A. *Is a summary trial the appropriate procedural vehicle?*

[52] Summary trials are provided for in rule 215(3). If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may, as a matter of discretion, hold a summary trial under rule 216 (*Manitoba v Canada*, 2015 FCA 57 at para 16).

[53] Under rule 216(5), the Court shall dismiss the motion for summary trial if (a) the issues raised are not suitable for summary trial; or (b) a summary trial would not assist in the efficient resolution of the action. Unless it is of the opinion that it would be unjust to decide the issues on the motion, the Court may grant judgment either generally or on an issue in particular if it is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexity of the issues and the existence of conflicting evidence (rule 216(6)).

[54] The moving party has the burden of demonstrating that a summary trial is appropriate (*Collins v Canada*, 2014 FC 307 at para 39 [*Collins*]). To determine whether a summary trial is appropriate, the court must consider factors such as:

- the amount involved;
- the complexity of the matter;
- its urgency;
- any prejudice likely to arise by reason of delay;
- the cost of taking the case forward to a conventional trial in relation to the amount involved;
- whether credibility is a crucial factor;
- the course of the proceedings; and
- any other matters that arise for consideration (*Louis Vuitton* at para 96; *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966 at paras 36-38; *Collins* at para 40).

[55] According to the case law, a summary trial is warranted where:

- the issues are well defined and their resolution will allow the action, or whatever remains of it, to proceed more quickly or be resolved between the parties;
- the facts necessary to resolve the issues are clearly set out in the evidence;
- the evidence is not controversial and there are no issues as to credibility; and
- the questions of law, though novel, can be dealt with as easily as they would be after a full trial (*0871768 BC Ltd v Aestival (Vessel)*, 2014 FC 1047 at para 58).

[56] If the Court dismisses the motion for summary trial in whole or in part, it may order the action, or the issues in the action not disposed of by summary trial, to proceed to trial or order that the action be conducted as a specially managed proceeding (rule 216(8)). However, if “ the Court finds that a case is suitable for summary trial, then the Court should hear the case on the merits in the same motion ” (*Collins* at para 41).

[57] The defendants submit that this case should be disposed of in a summary trial. In their motion for summary trial, the defendants ask this Court (1) to decide the true issue by summary trial; (2) to declare that they did not broadcast the fight on March 16, 2013; (3) to dismiss the action commenced against them by Premium; and (4) to order Premium to pay them \$4,865.18 in extrajudicial fees incurred until the defence was filed and a lump sum of \$5,000.00 for services provided since then, as well as costs.

[58] According to the defendants, a summary trial is warranted since (1) the issue is well defined; (2) the facts necessary to resolve the issue are clearly set out in the affidavits submitted in evidence; (3) no additional evidence is required; (4) credibility is not a major issue, in that the

documentary evidence alone allows for a fair and enlightened decision to be rendered; (5) the parties have had the opportunity to conduct written and oral examinations and cross-examinations; and (6) the principle of proportionality therefore argues in favour of committing the matter to summary trial.

[59] The Court shares the parties' opinion and finds that a summary trial is the appropriate vehicle, particularly in light of the amount sought, the complexity of the case, and the evidence presented to decide the matter.

B. *Has Premium proved on a balance of probabilities that the defendants broadcast the fight?*

[60] The Court finds that Premium has failed to prove, on a balance of probabilities, that the defendants broadcast the fight.

[61] The Court notes that Premium's arguments, as very able as they may be, are designed to minimize the weakness of its own evidence and divert the Court's attention to certain weaknesses in the defendants' position. Premium behaves as if its burden was one of making a *prima facie* case, allowing the onus of proof to be shifted to the defendants. However, such is not the case. The onus is not on the defendants to prove that they did not broadcast the fight, but on Premium to prove that they did. Therefore, the gaps Premium raises in the defendants' evidence do not allow it to meet or reverse its own burden of proof.

[62] The balance of probabilities, the usual standard that applies in civil matters, requires the Court to scrutinize "the relevant evidence with care to determine whether it is more likely than

not that an alleged event occurred” (*FH v McDougall*, 2008 SCC 53 at para 49. In French: “ pour déterminer si, selon tout vraisemblance, le fait allégué a eu lieu ”).

[63] The Court notes that the evidence presented by Premium is essentially based on Mr. Collin’s observation report, which states that he witnessed the broadcast of the fight. However, this evidence is fraught with significant contradictions or inconsistencies, particularly with regard to the time he arrived at the premises of the defendant, Resto-Bar Mirabel, and to the content broadcast on the televisions when he was present.

[64] The Court adopts the defendants’ position that the time Mr. Collin arrived and left the resto-bar is a determinative element in this case, considering that the Fight was broadcast only from 10 p.m. However, and as mentioned at paragraphs 17 to 21 of this judgment, several different scenarios have been submitted as evidence by Mr. Collin and Mr. Lefebvre regarding the time during which Mr. Collin was actually present at the resto-bar.

[65] In sum, the Court concludes that Premium has not shown, on a balance of probabilities, that the defendants broadcast the fight on March 16, 2013.

[66] The Court does not find it appropriate in the circumstances to exercise its discretion to draw adverse inferences from the fact that the defendants did not cross-examine Mr. Collin (*Collins* at para 81).

VI. Costs

[67] The defendants submit that they are entitled to extrajudicial fees in this case, owing to abusive and unfounded allegations made by Premium, who filed an action that, on its face, was doomed to fail. They also argue that this abuse of process was an attempt to intimidate Mr. Caron because there is no evidence or allegation in support of Premium's action that would allow the corporate veil to be lifted, thereby engaging Mr. Caron's liability.

[68] As this Court recently noted, "[i]t has now been well-established that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct or as a matter of public interest" (*Stryker Corporation v Umamo Medical Inc*, 2016 FC 378 at para 53).

[69] The Court does not consider there to be any extraordinary circumstances here that would justify awarding solicitor-client costs.

[70] Pursuant to the discretion conferred to it by rule 400, the Court awards costs to the defendants for a lump sum of \$5,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The motion for summary trial is allowed.
2. The action of Premium Sports Broadcasting Inc. is dismissed.
3. Costs are awarded to 9005-5906 Québec Inc. (doing business as RESTO-BAR MIRABEL) and Steve Caron for a total amount of \$5,000.00.

“Martine St-Louis”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1765-13

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