

Federal Court



Cour fédérale

Date: 20190923

Docket: T-1555-17

Citation: 2019 FC 1199

Ottawa, Ontario, September 23, 2019

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ROWAN WILLIAMS DAVIES & IRWIN INC.

Applicant

and

**PROWISE ENGINEERING INC.
AND REAGAN JING**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] In this application, Rowan Williams Davies & Irwin (RWDI) seeks a declaration that ProWise Engineering Inc and Reagan Jing (ProWise) have infringed RWDI's copyright in an engineering report, namely, a pedestrian wind assessment that it prepared in respect of a condominium project. RWDI also requests an injunction preventing ProWise from further infringing on its works, as well as damages.

[2] ProWise responds by stating that most of RWDI's evidence is inadmissible. It also contends that RWDI's work is not protected by copyright and, even if it were, ProWise's use of RWDI's work was fair dealing and RWDI suffered no damage from it.

[3] In my view, this case turns on the evidence or, more accurately, the lack of it. I agree with ProWise that RWDI has not properly supported its application with admissible evidence. RWDI attempted to remedy that situation by requesting leave to file supplementary evidence on the eve of the hearing of its application. However, RWDI did not justify its failure to provide that evidence on a timely basis. I have, therefore, denied RWDI's request. In the end, there is insufficient admissible evidence before me in support of RWDI's application. I must, therefore, dismiss it.

II. Background

[4] The parties are both engineering firms. In 2015, ProWise contacted RWDI proposing a subcontracting arrangement in respect of a pedestrian wind assessment analysis at a condominium project. RWDI provided a quote and an official proposal to ProWise, but no contract was achieved.

[5] ProWise prepared and submitted the pedestrian wind assessment to the City of Waterloo.

[6] In 2017, a former RWDI employee contacted RWDI stating that she had seen a ProWise wind assessment that closely resembled RWDI's work. Based on a comparison of the two reports, RWDI commenced this application. RWDI alleges that ProWise plagiarized RWDI's

previous wind assessment report on another building, and that this previous report was readily available through the City of Waterloo webpage.

III. The Evidence

[7] ProWise submits that the evidence presented by RWDI is seriously deficient. ProWise filed a motion to strike much of that evidence because it was not admissible on this application. RWDI disputes ProWise's submissions but, nevertheless, sought to remedy its alleged evidentiary shortcomings by requesting permission to file a supplementary affidavit of Mr Hanqing Wu, an engineer at RWDI, just before the hearing of this application. ProWise objected to RWDI's request.

[8] ProWise seeks to strike several schedules to RWDI's notice of application, as well as other schedules attached to RWDI's memorandum of fact and law, and the original affidavit of Mr Wu.

[9] I agree with ProWise that the bulk of RWDI's proffered evidence is inadmissible and should be struck.

[10] RWDI sought to introduce a great deal of the documentary evidence allegedly supporting its application simply by attaching it as schedules to its notice of application and memorandum of fact and law. This is insufficient to make it admissible evidence. Evidence must be attached to a witness's affidavit (*Canadian Copyright Licensing Agency (Access Copyright) v Alberta et al*, 2015 FCA 268 at para 20, and *Kahnpace v Canada*, 2010 FCA 70 at para 4).

[11] RWDI points out that in pre-hearing cross-examinations some witnesses identified some of the contested documents. However, that does not make them admissible evidence on this application.

[12] ProWise also submits that the original Wu affidavit purported to introduce inadmissible hearsay evidence from the former employee who brought the ProWise report to RWDI's attention. In that affidavit, Mr Wu stated that a former employee of RWDI informed him that she had seen a wind assessment "that closely resembled an RWDI report." The affidavit also stated that the former employee believed that the assessment she had seen "so closely resembled the work of RWDI" that she wondered if it had been created by another former employee. She said that she thought ProWise was using RWDI criteria and graphics.

[13] RWDI contends that these elements of the Wu affidavit simply included facts that were within Mr Wu's personal knowledge, not amounting to hearsay.

[14] To the extent that the Wu affidavit relies on communications from the former employee to prove similarity between the two reports in issue, it clearly contains inadmissible hearsay. If the purpose of those references was simply to relate what the former employee said to Mr Wu, it would be admissible non-hearsay. However, the main thrust of the affidavit was to provide evidence of similarity. Since the former employee's statements cannot help prove that the reports were similar, the principal components of the affidavit contain inadmissible evidence.

[15] These deficiencies in RWDI's evidence were brought to its attention months before the hearing, but it took no steps to address them until the eleventh hour. In my view, these efforts fell short.

[16] RWDI sought leave to introduce a supplementary affidavit of Mr Wu attaching some of the schedules that were previously appended to its notice of application. It claims that its earlier failure to file the evidence in a proper form was the result of an inadvertent clerical error. The new affidavit provides additional information, including a statement from Mr Wu that he assisted in the drafting of the RWDI report. It also claims that RWDI owns the copyright in Mr Wu's work given that he is an employee of the firm. It also sets out additional details about how Mr Wu became aware of the ProWise report and compared it to the RWDI report.

[17] RWDI submits that ProWise would not be prejudiced by the admission of this new affidavit since ProWise was already aware of the contents of the schedules attached to it.

[18] In response to RWDI's motion to file supplementary evidence, ProWise notes that RWDI has not explained its failures to present its evidence in a proper form and to respond in a timely manner once the deficiencies in its record were brought to its attention. ProWise has detailed the various missteps and delays in RWDI's prosecution of this application and submits that RWDI's evidentiary shortcomings represent one example among many of its lack of diligence. Further, ProWise maintains that RWDI has not addressed the test for filing a supplementary affidavit.

[19] I agree with ProWise. A supplementary affidavit can be filed if it contains admissible, relevant evidence, but the Court must also consider whether the evidence could have been provided earlier, whether the evidence will assist the Court, and whether the party opposite would suffer any prejudice. In addition, the party proffering the new affidavit must provide an explanation for its late presentation (*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at paras 6, 9-10).

[20] RWDI has not met, nor has it tried to meet, these criteria. While on its face the new evidence might have been relevant and otherwise admissible, and might have assisted the Court, it was certainly available sooner and RWDI has given no explanation for its late filing. In addition, it would prejudice ProWise to allow RWDI to enrich its evidence now. The supplementary affidavit of Mr Wu contains new evidence, described above, to which ProWise has not had an opportunity to respond.

[21] Therefore, I will grant ProWise's motion to strike the evidence that was improperly included in RWDI's notice of application and memorandum, and I will deny RWDI's motion to file supplementary evidence to address its evidentiary deficiencies.

[22] In the result, therefore, there is insufficient admissible evidence before me supporting RWDI's application.

IV. Conclusion and Disposition

[23] RWDI has failed to present sufficient evidence to support its allegation of copyright infringement against ProWise. I must, therefore, dismiss its application, with costs.

JUDGMENT IN T-1555-17

THIS COURT'S JUDGMENT is that the application is dismissed, with costs.

"James W. O'Reilly"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1555-17

STYLE OF CAUSE: ROWAN WILLIAMS DAVIES & IRWIN INC. v
PROWISE ENGINEERING INC. AND REAGAN JING

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 27, 2019

JUDGMENT AND REASONS: O'REILLY J.

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