

Date: 20080229

Docket: T-1767-07

Citation: 2008 FC 279

Vancouver, British Columbia, February 29, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

Dan Yang LIU

Plaintiff

and

**MATRIKON INC., NIZAR SOMJI
GRAHAM GOODWIN, RICK MIDDLETON
JAMES WELSH, GREG ADAMS
UNIVERSITY OF NEWCASTLE
THE ATTORNEY GENERAL OF CANADA**

Defendants

REASONS FOR ORDER AND ORDER

[1] The Defendant, the Attorney General of Canada (Attorney General), brings this motion to be decided on the basis of written representations for summary judgment pursuant to Rule 216 of the *Federal Courts Rules*, SOR/98-106. Alternatively, the Defendant asks that the Plaintiff be ordered to post security for costs pursuant to Rules 218(b), 416(f) and 416(g).

[2] The Defendant relies on the following grounds in support of its motion:

- a. The Plaintiff's action does not disclose a valid cause of action as against Canada;
- b. This Court lacks jurisdiction over all of the Defendants with the exception of Canada;
- c. The Plaintiff's action against Canada is barred by the *Limitations Act* of Alberta;
- d. The Plaintiff has previously attempted to obtain the same relief in the Court of Queen's Bench of Alberta;
- e. The Plaintiff is indebted to the Defendant, the Attorney General of Canada, for costs arising out of the Court of Queen's Bench action in Alberta; and
- f. The Plaintiff has previously been ordered to pay security for costs and has failed to do so.

[3] The Attorney General essentially contends that the Plaintiff has brought a duplicitous action that is vexatious and frivolous well after the limitation period. The Attorney General's submissions are largely based on the outcome of proceedings commenced in the Alberta courts, which include multiple interlocutory proceedings and appeals.

[4] The guiding principles for the granting of a summary judgment were outlined by Justice Tremblay-Lamer in *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.* [1996], 2 F.C. 853.

The principles relating to the purpose of a summary judgment and relevant to the present case can be summarized as follows:

- a. To allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried;
- b. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
- c. Each case should be interpreted in reference to its own contextual framework;

- d. The Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court; and
- e. On the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so.

[5] In his Statement of Claim, the Plaintiff makes the following two claims against the Defendants. First, the Plaintiff claims ownership of a computer program called model predictive controller (MPC) and alleges that the Defendants, other than the Attorney General, are responsible for the theft of the program. It is claimed that these Defendants have breached the copyright and/or proprietary rights of the program and related technologies and trade secrets. Second, the Plaintiff claims that the RCMP was negligent in the conduct of the investigation regarding the alleged theft of the MPC program and that it even encouraged one of the Defendants, Matrikon, “to deny the theft or possession of the plaintiff’s stolen computer program.”

[6] Concerning the first claim, a review of the materials filed on this motion shows a great degree of similarity between the underlying cause of action and the matters initiated before the Alberta courts. The Plaintiff’s evidence, however, indicates that the action before the Federal Court deals with a separate program, namely the MPC program, as opposed to the proportional integral derivative (PID) program which was the object of the action initiated in Alberta. The Statement of Claim also claims a breach of copyright and/or proprietary rights of the Plaintiff as well as a loss of profits and damages for the misuse of the Plaintiff’s intellectual property. Such matters are within the jurisdictional competence of the Federal Court. The within motion is brought by the Defendant, the Attorney General, a party not directly affected by this part of the Plaintiff’s claim. I have before

me no evidence or submissions from the other Defendants who are directly targeted by the Plaintiff on this claim. While the record on the motion in respect of the Plaintiff's proprietary title in the MPC program is sparse, the Plaintiff's evidence in support of his claim is essentially not challenged. Except for the bald statement by the Attorney General that the Court has no jurisdiction over the remaining Defendants, there is no other evidence to support the granting of a summary judgment against the remaining Defendants.

[7] With respect to the Plaintiff's first claim, upon considering the above-noted factors in *Granville Shipping* and for the above reasons, I am not persuaded that the factual determinations required on this motion can be made on the record before me. There is some evidence in support of the Plaintiff's claim and this evidence is essentially not challenged. I am not prepared in these circumstances to grant summary judgment.

[8] With respect to the Plaintiff's second claim, that the RCMP was negligent in the conduct of an investigation, the Plaintiff submits that the RCMP received evidence concerning the theft of the Plaintiff's program but kept the investigation secret. It is also claimed that the RCMP refused to continue its investigation and encouraged one of the Defendants, Matrikon, to deny the theft or possession of the stolen program. Here too, I am not persuaded that the questions of facts and law that must be answered can be on the material before the Court. The nature of the questions that arise will most likely involve conflicting accounts of events and require credibility determinations. In my view, such findings are best made in the context of a trial where the evidence can be properly tested and considered and not on a motion for summary judgment.

[9] Further, regarding the Attorney General's argument that the action against the Federal Crown is time-barred by the *Limitations Act*, the Plaintiff states that he first became aware that the Defendant Matrikon had possession of the program in October 2005, and the Australian defendants in March 2006, well within the two-year limitation period. It is also argued that the alleged negligence against the RCMP could only arise after the case was reported and the investigation commenced. The Plaintiff states that this claim for negligence of duty against the RCMP is also not time-barred. On this record, I am not prepared to find that the Plaintiff's action is time barred.

[10] Upon careful review of the material filed and upon consideration of the arguments of the parties, I am satisfied that this is not a case that is so doubtful that it does not deserve consideration by the trier of fact at a future trial. The motion for summary judgment will therefore be dismissed.

[11] I am, however, convinced that this is a proper case to award security for costs against the Plaintiff. I base this determination on the fact that there is an outstanding order for costs against the Plaintiff issued out of the Court of Queen's Bench of Alberta that remains unpaid. See: *Fortyn v. Canada*, [2000] F.C.J. 686. The Alberta case bears many similarities to the within case and a review of the materials filed on this motion relating to the Alberta proceedings has persuaded me that it would be in the interests of justice to exercise my discretion and grant the request sought for security for costs. The Plaintiff's claim that he is impecunious was also made before the Alberta

courts and rejected as he was found to be hiding money. This is a factual finding warranting deference by this Court and not challenged by the Plaintiff.

[12] For the above reasons, the motion will be allowed in part. The motion for summary judgment will be dismissed and an Order requiring the Plaintiff to post security for costs will issue.

[13] The Bill of Costs of the Defendant, the Attorney General of Canada, filed with the Court, is not challenged by the Plaintiff. I am satisfied that it represents a fair estimate of the costs likely to be incurred by the Attorney General of Canada should this matter proceed. I will, however, order that security be posted by the Plaintiff in stages.

ORDER

THIS COURT ORDERS that:

1. The motion for summary judgment is dismissed;
2. The Plaintiff shall post security for costs in the amount of \$10,000.00 for the costs of the Defendant, the Attorney General of Canada, up to the completion of pre-trial and pre-hearing procedures;
3. The Plaintiff shall post security for costs in the amount of \$7,520.00 prior to the commencement of the trial;
4. Given the mixed result on the motion, no costs are awarded.

"Edmond P. Blanchard"

Judge

I HEREBY CERTIFY that the above document is a true copy of the original filed of record in the Registry of the Federal Court the

_____ day of _____, A.D. 200 _____

Dated this _____ day of _____, 200 _____

Suzanna Lee, Registry Officer

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1767-07
STYLE OF CAUSE: Dan Yang LIU v. MATRIKON INC. et al.

MOTION IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ORDER AND ORDER: BLANCHARD J.

DATED: February 29, 2008

WRITTEN REPRESENTATIONS:

n/a FOR THE PLAINTIFF

Mr. Barry Benkendorf FOR THE DEFENDANT

SOLICITORS OF RECORD:

n/a FOR THE PLAINTIFF

John H. Sims, Q.C. FOR THE DEFENDANT
Deputy Attorney General of Canada