Federal Court  Cour fédérale

Date: 20101221

Docket: T-746-09

Citation: 2010 FC 1315

Ottawa, Ontario, December 21, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

CONCEPT DEVELOPMENTS LTD.

Plaintiff

and

CHARLES WEBB and
LORNA WEBB

Defendants

and

HIGH GRADE HOMES INC.

Third Party

REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] The Plaintiff has brought a motion for summary judgment against the Defendants, Mr. and Mrs. Webb (Webbs), pursuant to Rule 213. The other Defendant, High Grade Homes Inc. (High Grade), has been released from the litigation for a payment of $25,000.

II. BACKGROUND

[2] The Plaintiff is the creator of home building designs and the builders of the homes it designs. It has registered copyright in the plans for a bi-level home called the "Stratford Plan" and a building design for the same home called the "Stratford Building".

[3] The basic premise of the Plaintiff's claim is that the Defendants Webb authorized High Grade to build a home which is substantially similar to the Stratford Building (with some minor modifications) and that High Grade built such a home. The Plaintiff claims $124,000 for direct loss, which is essentially loss from not building the home – it being a requirement to use the Stratford Plan that Concept build the home – as well as an amount of $40,000 for intangible loss. The Plaintiff also seeks exemplary/punitive damages.

[4] While not all the facts have been established, what can be accepted for purposes of this motion is that the Webbs saw a model Stratford home, disliked Concept's quoted price to build the home and subsequently took their business to High Grade, another home building company. The Webbs showed High Grade the Stratford Plan and informed High Grade that they wanted something similar to what was in the plan, albeit with some modifications. The Webbs drew up what they wanted and gave that drawing to High Grade. Whether High Grade gave any assurance to the Webbs that their design would not infringe the Plaintiff's copyright is less clear.

[5] There is little doubt that at this time, there is significant dispute as to who did what in relation to ensuring non-infringement. Therefore, there is also significant dispute as to who may be

liable and for what. The history of the plans, the ebb and flow of ideas between the parties, and the ultimate amalgam of ideas are important facts to be determined prior to any conclusions being reached as to who actually committed any act of infringement.

[6] There is a threshold issue of whether the Webbs' plans and the house which was actually built infringed copyright. A key aspect of that issue is whether any differences between the Webbs' plan and the Stratford Plan are significant.

[7] The other critical issue is whether the Webbs authorized infringement. The Plaintiff claims that knowledge of the infringement is immaterial so long as there is infringement. Even if the Plaintiff was correct that fore knowledge is irrelevant, the degree and nature of such knowledge is an important factor in assessing the remedies available.

[8] The Plaintiff acknowledged in argument that its proposition, that a builder whose copyright is infringed becomes entitled to loss of profits, is a novel one. The Plaintiff extends the line of authority called the "architects cases" to include designer/builders.

III. ANALYSIS

[9] The legal issue on this motion is whether the Defendants' case is so flawed that it does not deserve consideration by a court. The onus on the Plaintiff to establish such a condition is high.

[10] In *Society of Composers, Authors and Music Publishers of Canada v. Maple Leaf Sports & Entertainment*, 2010 FC 731, the Court summarized the applicable principles on this type of motion at paragraphs 14-16:

> **14** The summary judgment, and now summary trial, procedures are important tools for a court to control its case load. Particularly with respect to summary judgments, the Supreme Court of Canada has confirmed its importance in the administration of justice.
>
> > ... The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
> >
> > *Canada (Attorney General) v. Lameman*, 2008 SCC 14, para. 10
>
> **15** However, these summary procedures have their limits. Trials are the ways by which true disputes are resolved. People have a right to their day in court to deal with legitimate claims. Courts must be mindful that the effect of a summary judgment motion can deprive a party of that right.
>
> **16** In *Granville Shipping Co. v. Pegasus Lines Ltd. (T.D.)*, [1996] 2 F.C. 853, this Court outlined the general principles applicable to summary judgments.
>
> > **8** have considered all of the case law pertaining to summary judgment and I summarize the general principles accordingly:
> >
> > > 1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al*, [1994] F.C.J. No. 1631);

> 2. there is no determinative test (*Feoso Oil Ltd. v. Sarla (The)*, [1995] F.C.J. No. 866) but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie*, [1990] O.J. No. 2011. 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;
>
> 3. each case should be interpreted in reference to its own contextual framework (*Blyth*, [1994] F.C.J. No. 560, and *Feoso*);
>
> 4. provincial practice rules (especially Rule 20 of the Ontario Rules of Civil Procedure, [R.R.O. 1990, Reg. 194]) can aid in interpretation (*Feoso* and *Collie*, [1996] F.C.J. No. 193);
>
> 5. this 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 (this is broader than Rule 20 of the Ontario Rules of Civil Procedure) (*Patrick*, [1994] F.C.J. NO. 1216);
>
> 6. 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 (*Pallman*, [1995] F.C.J. NO. 898, and *Sears*, [1996] F.C.J. No. 51);
>
> 7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (*Forde*, [1995] F.C.J. No. 48, and *Sears*). The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (*Stokes*, [1995] F.C.J. No. 1547).
>
> [Emphasis added]

[11] The Plaintiff's motion must fail for a number of reasons:

(a) the necessary facts cannot be found at this stage. The question of actual infringement and that of how substantial the Webbs' changes to the Stratford Plan were cannot be

determined on the evidence. The issue of substantial change or whether the Webbs' plan was substantially similar to the Stratford Plan is one of fact and degree best left to a trial judge in this case.

(b) there are serious issues of credibility including the Webbs' explanation, the role of High Grade, whether any assurances of non-infringement were made and exactly who actually infringed.

(c) the question of "authorization" is both legally and factually complex. It is best described in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at paragraph 38:

> **38** "Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182, at p. 193; *De Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "[g]ive approval to; sanction, permit; favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: …

These are determinations best left to a trial judge to weigh in the context of all of the evidence.

(d) the measure of damages is not established. The invocation of a novel proposition for damages is but one factor which indicates that this issue is deserving of a trial. Any exemplary damages require a complete factual matrix; a separate trial of the damages issue would not be an efficient use of court resources as it would entail much of the liability evidence.

[12] Therefore, this motion will be denied with costs to the Defendants Webb at the usual scale.

ORDER

THIS COURT ORDERS that the motion is denied with costs to the Defendants Webb at the usual scale.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-746-09
STYLE OF CAUSE:	CONCEPT DEVELOPMENTS LTD. and CHARLES WEBB and LORNA WEBB and HIGH GRADE HOMES INC.
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	December 16, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	December 21, 2010

APPEARANCES:

Mr. Anthony Lambert	FOR THE PLAINTIFF
Mr. G. Bruce Comba	FOR THE DEFENDANTS, CHARLES WEBB and LORNA WEBB

SOLICITORS OF RECORD:

LAMBERT INTELLECTUAL PROPERTY LAW Edmonton, Alberta	FOR THE PLAINTIFF
EMERY JAMIESON LLP Barristers & Solicitors Edmonton, Alberta	FOR THE DEFENDANTS, CHARLES WEBB and LORNA WEBB