Federal Court		Cour fédérale

Date: 20110309

Docket: T-1273-10

Citation: 2011 FC 280

Montréal, Quebec, March 9, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LA FREIGHTLIFT PRIVATE LIMITED

Plaintiff

and

ENTREPOT DMS WAREHOUSE INC.
TEXWELL GROUP
and
AGO TRANSPORTATION INC.

Defendants

REASONS FOR ORDER AND ORDER

[1] The defendant, Entrepôt DMS Warehouse Inc. (DMS), appeals the decision of Prothonotary Morneau dated January 25, 2011, in which the Prothonotary refused DMS's motion to strike the claim of the plaintiff LA Freightlift Private Limited (LA Freightlift) and refused all other relief sought by DMS. For the reasons that follow, I have come to the conclusion that this appeal must be dismissed.

I. Facts

[2] According to the Re-Amended statement of claim filed on January 10, 2011, the plaintiff was retained by its customer Printech Fashion ("Printech") to arrange the carriage of four containers of clothing from India to Texwell Group ("Texwell"), its customer in Montréal. Texwell then appointed AGO Transportation Inc ("AGO"), an international freight forwarder and customs broker, to act as its local agent in a series of four shipments in March and April of 2008.

[3] In total, the cargo consisted of four containers of clothing with 2,504 packages containing 180,288 pieces weighing 38,884 kg with an invoice value of USD $477,732. Each of the four shipments were arranged under bills of lading naming the plaintiff as the shipper and AGO as the consignee to ensure that the goods would not be turned over to the importer Texwell until the purchase price for the goods on the cargo had been paid.

[4] The cargo apparently arrived as expected in good order and condition in Montreal between April and June of 2008.

[5] For reasons unknown to the plaintiff, Texwell was unwilling or unable to complete the financial arrangements for the purchase. Because the required payments were not made, Texwell was not entitled to receive original copies of the bills of lading, and did not take ownership of the cargo or have any right to obtain delivery of same.

[6] In June and July 2008, the cargo remained in storage while Texwell tried to arrange payment. In the meantime, in order to mitigate potential losses, the shipper and owner of the goods (Printech) attempted to find other Canadian buyers for the cargo. At some point during this time period, some or all of the defendants arranged for the cargo to be stored at a warehouse belonging to the defendant DMS. On or about August 5, 2008, all four containers of goods were reported missing and presumed stolen from that warehouse.

[7] The plaintiff alleges that some or all of the defendants conspired to effect the release of the goods in the full knowledge that the purchase price had not been paid, that the original bills of lading had not been presented, and in spite of the instructions of the owner of the goods through the plaintiff as their agent and as the shipper named on the Bills of Lading. The plaintiff states that those defendants knowingly arranged the illegal conversion of the goods to Texwell or to another party unknown to the plaintiff. A written notice of claim was issued to AGO and DMS in September 2008.

[8] The plaintiff also states that the owner of the cargo has brought a claim in the Court of India against the plaintiff for the unlawful conversion of the cargo. The plaintiff has denied liability and presented a "vigorous" defence before that Indian Court.

[9] All of the defendants were served with the Amended Statement of Claim dated September 30, 2010, and with the Re-Amended Statement of Claim dated January 10, 2011. The defendant Texwell has not responded and is in default under Rule 204. The defendants DMS and AGO

responded by filing motions to strike the plaintiff's action, pursuant to section 221.(1) of the *Federal Courts Rules* on December 22 and December 16, 2010, respectively.

[10] Both DMS and AGO argue that the plaintiff's action is premature, since it has not yet suffered any loss and since no liability has been determined as of yet in the Court of India. Indeed, DMS and AGO submit that the plaintiff has denied liability with regards to Printech's claim and, using the plaintiff's own words, has mounted "a vigorous defence" in the Indian lawsuit. Accordingly, it is quite possible that Printech's action there will be dismissed, in which case LA Freightlift would have no right of action against the defendants in the Canadian action before this Court. As such, DMS and AGO argue that the plaintiff's statement of claim should be struck because it is premature.

II. <u>The impugned decision</u>

[11] The Prothonotary dismissed the defendants' motion to strike essentially on the basis of the written submissions put forward by the plaintiff. The paragraphs of the plaintiff's submissions to which the Prothonotary explicitly referred with approval read as follows:

> 9. The facts as alleged raise not just a justiciable but a strong *prima facie* case against both participating defendants. The Cargo was unlawfully converted without presentation of the Bills of Lading. This unlawful conversion was carried out while the Cargo was in possession of the defendant DMS, contrary to its statutory duties as a warehouseman, and/or its contractual duties as a warehouseman, and/or under its common law duties as bailee for reward, and/or at admiralty or equity.
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> 10. This unlawful conversion was carried out with the direction or complicity of AGO transport, who is listed as the consignee on the Bills of Lading and who

knew that the cargo ought not be delivered up without original Bills of Lading but arranged such delivery contrary to their contractual obligations pursuant to the transport documents, and/or contrary to their obligations as agent, and/or contrary to admiralty and equity.

11. This honourable Court has jurisdiction to hear this claim based on s.22(2) of the *Federal Courts Act* as it arises out of an agreement relating to the carriage of goods under a bill of lading.

12. Although the plaintiff is not the owner of the Cargo, the plaintiff has standing to bring this claim in law, contract, and admiralty by virtue of being named as shipper on the relevant Bills of Lading. Further and in the alternative, the plaintiff brings this case in its capacity as agent for its customer, the exporter and cargo owner Printech Fashions. Both of these form prima facie legitimate bases for the Claim and present justiciable issues to be tried.

13. Further, it is trite law that a plaintiff may properly bring a claim for an indemnity, and the plaintiff has plead that it faces a claim in India that arises out of the primary liability of the defendants or some of them and for which claim it seeks to hold the defendants liable as the principal tortfeasors. This forms a legitimate basis for a Claim and presents a justiciable issue to be tried.

14. The plaintiff had pled the facts required to sustain its claim for an indemnity in the Statement of Claim of 5 August 2010 and in the <u>Amended</u> Statement of Claim that was served on the defendants in November 2010. While the <u>Re-Amended</u> Statement of Claim includes a new reference to an indemnity in the prayer for relief at paragraph 1, and was served and filed subsequent to the bringing of the present motions, this addition acts to clarify the facts already pled and does not purport to add a new cause of action.

[12] It must be pointed out that DMS is the only defendant bringing this appeal against the Prothonotary's decision. Moreover, counsel for the defendant DMS made it clear at the hearing that his client is only challenging the Prothonotary's decision as it pertains to the dismissal of its motion to strike the plaintiff's claim. Therefore, the defendant is not challenging the Prothonotary's other rulings; that is, the defendant is not appealing the Prothonotary's decisions to accept the affidavit sworn by counsel for the plaintiff, to reject DMS' right to reserve a right of cross-examination, and to accept that the Re-Amended Statement of Claim was validly issued and served.

III. Issue

[13] The only issue in this case is whether the Prothonotary erred in dismissing the motion of the defendant to strike the plaintiff's Statement of Claim.

IV. Analysis

[14] The standard of review to be applied on appeal of the decisions made by prothonotaries is well established. The Federal Court of Appeal stated the following in *Merck & Co. Inc. v Apotex Inc.*, 2003 FCA 488, at paragraph 19:

> Discretionary orders of Prothonotaries ought not to be disturbed on appeal to a judge unless: a) the questions in the motion are vital to the final issue of the case, or b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[15] I do not think it can be disputed that a motion to strike pleadings raises a question that is vital to the final issue of the case. Accordingly, this Court may exercise its discretion *de novo* in reviewing the order made by the Prothonotary in the exercise of his discretion.

[16] It is also trite law that on a motion to strike pleadings, all facts alleged must be taken as established and presumed to be true. The claim should be read generously and denied only where it is plain and obvious it cannot succeed. As the Supreme Court stated in *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, at p. 980:

> (…) assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.
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> See also: *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, [2002] 4 FC 550, at paras 3 and 15.

[17] I agree with the plaintiff that DMS has failed to meet this high threshold, and that the Prothonotary did not err in determining that there was a justiciable issue to be tried. Whether or not the plaintiff is successful in its defence to the action taken against it in India by Printech, its Statement of Claim in this Court does not rest exclusively on the indemnity for any amounts that the Indian court may require the plaintiff to pay to Printech. The plaintiff's action also rests on its claim that the defendants, or some of them, illegally arranged the delivery of the cargo without the original Bills of Lading, contrary to their contractual obligations pursuant to the transport documents, and/or contrary to their obligations as agent, and/or contrary to admiralty and equity. That claim is therefore not premature and may proceed irrespective of what may happen in India as between Printech and the plaintiff.

[18] Counsel for the plaintiff has asked for costs in this motion, arguing that it was doomed to fail and that it has caused delay and expense in completing the pleadings. I have not been persuaded, however, that the motion to strike brought by the defendant justifies this Court to exercise its discretion to award costs forthwith and in any event of the cause. As a result, costs shall be in the cause.

ORDER

THIS COURT ORDERS that this appeal is dismissed, with costs in the cause.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1273-10
STYLE OF CAUSE:	LA FREIGHTLIFT PRIVATE LIMITED v ENTREPOT DMS WAREHOUSE INC. et al.
PLACE OF HEARING:	Montréal (Quebec)
DATE OF HEARING:	March 7, 2011
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