

Date: 20080318

Docket: A-44-07

Citation: 2008 FCA 104

Present: RICHARD C.J.

BETWEEN:

**9038-3746 QUEBEC INC., 9014-5731 QUEBEC INC.,
ADAM CERRELLI and CARMELO CERRELLI**

Appellants

and

MICROSOFT CORPORATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, on March 18, 2008.

REASONS FOR ORDER BY:

RICHARD C.J.

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REASONS FOR ORDER

[1] This is a motion dated February 28, 2008 brought by the respondent Microsoft Corp. in writing pursuant to Rule 369 of the *Federal Courts Rules* for an order requiring the payment into Court of the sum of \$70,354.35 by the appellants Carmelo Cerrelli and 9014-5731 Quebec Inc. as security for costs pursuant to Rule 416 and for an order that such security for costs be made by payment into the Court by April 1, 2008 failing which the appeal shall be dismissed with costs.

[2] The respondent seeks security of the costs of this appeal on the grounds that there are two outstanding costs awards in regards to the underlying action being appealed which remains unpaid, one dating from August 2005 and the other from June 2007.

[3] The judgment under appeal is dated December 18, 2006 and the hearing by the trial judge regarding costs was held on June 11, 2007 with a decision that costs be awarded on a solicitor-client basis made on June 20, 2007.

[4] By notice of appeal dated January 17, 2007 the appellants appealed the judgment of the Federal Court pursuant to subsection 27(1) of the *Federal Courts Act*.

[5] A motion brought by the appellants for a stay of the judgment pending their appeal was dismissed by this Court by Order dated February 20, 2007.

[6] The appellants do not deny that the assets of the appellants may be insufficient to satisfy the costs awarded against them but submit that the timing of the respondent's motion for security for costs is inappropriate considering that the notice of appeal in this matter was issued on January 17, 2007 and that the appeal has been set down for hearing on April 16, 2008.

[7] Further, the appellants claim that there are serious issues to be tried on the appeal and that it would be a grave injustice to make the hearing of the appeal conditional upon the appellants paying the security for costs requested by the respondent.

[8] The record before me discloses that the appellant Carmelo Cerrelli was examined in aid of execution of the judgment on his own behalf and on behalf of 9038-3746 Quebec Inc. and 9014-5731 Quebec Inc. on April 16, 2007. On this examination Carmello Cerrelli gave evidence that neither he nor the two corporate defendants had any assets or ability to satisfy the judgment.

[9] Thereafter, the procedural steps to perfect the appeal were undertaken by both the appellants and the respondent.

[10] The record discloses that motions were brought in 2007 relating to an extension of the time for the filing of the appeal book and relating to the contents of the appeal book. The respondent participated in these interim proceedings.

[11] The appeal book was filed and served and both the appellants and the respondent served and filed their memorandum of fact and law.

[12] The requisition for hearing contemplated by Rule 347 was filed by the appellants on November 21, 2007 and on November 22, 2007 counsel for the respondent confirmed in writing to the Court their availability for the hearing of the appeal.

[13] As of the date of the motion for security for costs all procedural steps in the appeal had been completed and the hearing of the appeal has been fixed to be heard on April 16, 2008.

[14] In these circumstances the respondent's motion for and order that the appellants give security for costs before proceeding with the appeal should not be allowed.

[15] Accordingly, the motion will be dismissed.

"J. Richard"
Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-44-07

STYLE OF CAUSE:

9038-3746 QUEBEC INC.,
9014-5731 QUEBEC INC.,
ADAM CERRELLI and
CARMELO CERRELLI

AND

MICROSOFT CORPORATION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

Richard C.J.

DATED:

March 18, 2008

WRITTEN REPRESENTATIONS BY:

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FOR THE RESPONDENT

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