



[2021] 4 F.C.R. D-20

PRACTICE

Related subject: Copyright

Appeal from Federal Court judgment (2021 FC 216) allowing appeal of Prothonotary's decision dismissing underlying action brought by appellants for copyright infringement in respect of cinematographic works appearing on respondents' "Pornhub websites" — Matter dealing with proper remedy when undue delay found pursuant to *Federal Courts Rules*, SOR/98---106 (Rules), r. 167 — More specifically, addressing whether Court should start with presumption of dismissal if undue delay is found or whether Court's discretion unfettered, dismissal only to be used as remedy of last resort — Respondents made request for particulars on September 23, 2019, which was met with partial response on September 30, 2019; full response on October 21, 2019; however, appellants refused to provide most of requested particulars — Appellants' responses referred to intent to file amended statement of claim, which occurred on February 13, 2020 — On March 11, 2020, respondents submitted new demand for particulars; also mentioned that they would move for particulars and/or to strike if requested information not received by March 25, 2020 — Shortly thereafter, Court responded to emerging COVID-19 pandemic by suspending running of time in relation to deadlines imposed by Rules, in stages, beginning March 16, 2020; suspended until June, July 2020, for different parts of Canada — Not having heard from appellants, respondents followed through with March 11 letter, filed motion to dismiss for delay on May 11, 2020 — On June 4, 2020, appellants provided particulars requested by respondents; undertook to provide further amended statement of claim, which filed on June 16, 2020 — On October 16, 2020, Prothonotary dismissed respondents' motion for leave to file reply evidence in form of affidavit from specific individual sworn on July 13, 2020, but granted dismissal motion in part — On leave motion, Prothonotary found that additional evidence concerned events that occurred after dismissal motion had been filed; that evidence was thus not useful since not pertaining to events prior to filing of motion — Therefore, Prothonotary not finding that interests of justice warranted granting leave, dismissed motion — On dismissal motion, Prothonotary found that respondents had never been in default of Rules, had been justified in holding off serving their statement of defence until they received particulars requested, thereby satisfying first requirement of r. 167 — Also determined that respondents had discharged their burden of showing existence of inordinate delay — Satisfied that three-part test for undue delay met, Prothonotary then ruled that case should proceed under case management; found that respondents appeared ready to move forward despite delay — On leave motion, Federal Court held that Prothonotary erred in failing to consider whether reply affidavit was relevant when assessing remedy for undue delay; found reply affidavit relevant to issue of remedy, that leave should have been granted — Regarding motion to strike, Federal Court found that questions of whether respondents were in default, whether there had been undue delay not properly before Court — Also found that Prothonotary failed to consider relevant evidence that pointed to inappropriateness of case management in circumstances — Whether appellants filed appeals in compliance with *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 27(2); whether Federal Court erred in granting leave to file reply evidence; whether Federal Court erred in dismissing proceeding for delay — Act, s. 2 defining final judgment as "any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding" — Act not defining "interlocutory judgment" — However, in previous case, Court holding that any order being appealed not determining substantive rights is interlocutory — Had Federal Court ruled on reply evidence motion in stand-alone judgment, no doubt it would have been considered interlocutory judgment — Scope of available evidence is clearly procedural right, not substantive one — In case at bar, Federal Court

made single judgment on both motions, which were argued together, closely intertwined — Admission of reply evidence clearly instrumental in decision to dismiss underlying action — To require appellants to file two separate appeals in those circumstances would not favour sound administration of justice — Thus, reply evidence appeal filed in timely manner, should be entertained — Three questions must be addressed under r. 167: (1) whether moving party is in default of Rules; (2) if not, whether there has been undue delay by plaintiffs in prosecuting matter; and (3) if so, whether matter should be dismissed or other sanctions be imposed — Given discretionary nature of Court's power to dismiss proceeding or impose another sanction, Prothonotary should have turned her mind to whether evidence would assist her in determining appropriate remedy in circumstances — Was inconsistent for Prothonotary to give appellants credit for events that occurred after motion was filed, while denying respondents possibility to file affidavit evidence on post-filing activity that provided context on appellants' own behaviour — Prothonotary making palpable, overriding error in her assessment of usefulness of reply affidavit for which respondents sought leave to file; Federal Court justified in intervening, setting aside her decision in that respect — Existing Federal Court case law laying out three-pronged test for determining if proceeding should be dismissed for delay — Court must determine whether: (1) there has been undue delay; (2) whether delay is excusable; and (3) whether defendants (respondents) likely to be seriously prejudiced by delay — Appellants challenged Court's decision to set aside sanction imposed by Prothonotary (case management), to substitute dismissing action as appropriate remedy, after reading into r. 167 presumption of dismissal triggered once elements of rule met; argued that Federal Court erred by imposing this presumption — Interpretation of r. 167 that would import presumption of dismissal when undue delay has been found would not align with text, context, purpose of rule at issue — Central element of r. 167 is discretionary power granted to Court to impose any type of sanction it sees fit to ensure orderly, timely prosecution of proceeding — Federal Court erred in law in finding that presumption of dismissal applying if undue delay found — Neither wording of r. 167, its purpose, nor case law supporting such an interpretation — Judicial delay should never be condoned; complacency in face of obfuscation, delay tactics, sheer lack of diligence in advancing case ought to be strongly discouraged — Federal Court's error respecting burden of proof or presumptive remedy was material in its decision to reverse discretionary decision of Prothonotary to order case management — Prothonotary's discretionary decision should have been left to stand — Prothonotary not committing error when ordering case management — While Prothonotary should have accepted reply evidence, such error not overriding since not changing result — Opposition to case management not stripping Federal Court of its remedial powers under case management, its inherent power to control its own process, or its ability to hold parties in contempt for failing to comply with court orders — Federal Court erring in law by interfering with Prothonotary's findings absent palpable, overriding error — Appeal allowed in part — Federal Court's judgment in relation to r. 167 set aside; Prothonotary's Order that underlying action proceed as specially managed proceeding reinstated.

SWEET PRODUCTIONS INC. V. LICENSING IP INTERNATIONAL S.A.R.L. (A-100-21, 2022 FCA 111, de Montigny J.A., reasons for judgment dated June 10, 2022, 21 pp.)