Federal Court  Cour fédérale

Date: 20240306

Docket: T-1517-21

Ottawa, Ontario, March 6, 2024

PRESENT: Case Management Judge Benoit M. Duchesne

BETWEEN:

THE BAY LIMITED PARTNERSHIP

Plaintiff

and

ZELLERS INC., ZELLERS CANADA INC., ZELLERS HOLDINGS INC., ZELLERS CONVENIENCE STORE INC., ZELLERS RESTAURANT INC., MARIA ALMERINDA MONIZ SOUSA, MANUEL MONIZ, ROBERT MONIZ, CARLOS MONIZ, ZELLERS PLAZA INC.

Defendants

ORDER

[1] On February 7, 2024, the Court ordered as follows on a peremptory basis against the Defendants:

> 1. The Defendants shall **by no later than February 28, 2024**, inform the Plaintiff of whether and when they are prepared to voluntarily participate in a dispute resolution conference. The parties may thereafter request a case management conference to fix a timetable for the exchange of dispute resolution conference materials and a dispute resolution conference date.
>
> […]
>
> 7. Unless this Court orders otherwise, the Defendants shall comply strictly with the dates and steps set out in this timetable regardless of their appointment of a new solicitor of record or not,

> as this timetable Order is being made an Order peremptory against the Defendants other than the defaulted Defendant Zellers Plaza Inc. This Order being made peremptory against the Defendants other than the defaulted Defendant Zellers Plaza Inc. means that any failure by the Defendants to take the steps set out in this Order within the time set out in this Order shall result in the Defendants' pleadings being automatically struck retroactively to the date of their breach of this Order following the Court's receipt of notice of the Defendants' breach of this Order from the Plaintiff.

[2] The Plaintiff has requested that the Statement of Defenced filed by the Defendants Zellers Inc., Zellers Canada Inc., Zellers Holdings Inc., Zellers Convenience Store Inc., Zellers Restaurant Inc., Maria Almerinda Moniz Sousa, Manuel Moniz, Robert Moniz, Carlos Moniz (the "Defendants") be struck because they did not comply with paragraph 1, above. The Defendants have filed correspondence in their opposition to the Plaintiff's request.

[3] The background to the Court's peremptory Order is found in the text and the dispositive paragraphs of the Court's January 12, 2024, and February 7, 2024, Orders, as well as in the Orders issued in this proceeding up to this date.

[4] As noted in the January 12, 2024, Order, the Defendants have for a considerable period of time engaged in conduct that is consistent with an approach to litigation that avoids engaging meaningfully with the case as long as possible and to delay its progress.

[5] The rotating cast of unartful "stop-gap" lawyers who write to the Court to explain that the Defendants are not communicating with them appropriately or at all, that they will be seeking to be removed from the record, that they are insufficiently knowledgeable in the subject matter of the litigation, the Defendants' repeatedly stated inability to retain the elusive "new lawyer" that

they seek without providing compelling evidence that they are undertaking such efforts in a *bona fide* way over the past 12 to 18 months, and the Defendants' general failure to comply with this Court's Orders until the last second – and sometimes beyond the last second – remain features of this litigation.

[6] The Court issued a peremptory timetable Order on February 7, 2024, in order to ensure that the Defendants engage with the litigation within the time set out in the timetable or have their pleadings struck due to their failure to comply with the Court's Order.

[7] For the purposes of this Order, I am accepting the correspondence referred to herein and received from the parties, the solicitors for the parties, and from M[e] Ashenmil, in connection with the Defendants' alleged breach of the Court's Order as evidence as if they had been properly produced on a motion and in a motion record.

[8] On February 19, 2024, M[e] Harold W. Ashenmil, K.C., wrote to the Court and to the parties unsolicited. He confirmed having received a copy of the Court's February 7, 2024, Order. He also confirmed that he had been approached by the Defendants to act as their solicitor in this proceeding but that he was unable to agree to act for them unless the Court extended the time set out in the February 7, 2024, Order. No motion for an extension of time was brought thereafter by the Defendants. The Defendants therefore continued to be represented by their current solicitor of record, M[e] Kaufman.

[9] On February 29, 2024, the Plaintiff wrote to the Court to provide the notice referred to in paragraph 7 of the Order, reproduced above. The Plaintiff asked that the Statement of Defence filed by and for the Defendants be struck effective as of February 28, 2024, on the grounds that

the Defendants failed to comply with paragraph 1 of the Court's peremptory timetable Order made on February 7, 2024.

[10] The solicitor of record for the Defendants, M[e] Kaufman, sent two unsolicited letters to the Court in response to the Plaintiff's solicitor's letter February 29, 2024, letter. M[e] Kaufman's letters attempt to justify or explain his clients' conduct. I shall consider the content of those letters below. These letters, respectively dated February 29, 2024, and March 1, 2024, with attached printed versions of emails also dated February 29, 2024, and March 1, 2024, demonstrate the difficult situations that the Court had sought to regulate through its Orders.

[11] M[e] Kaufman's letters to the Court are each marked as being made "without prejudice". Sending correspondence to the Court on a "without prejudice" basis is pointless. Correspondence sent on a without prejudice basis is correspondence that is sent with the explicit intention that its content ought not to be admitted as evidence against the sender's interest, usually because it contains content that is directed to settlement discussions that are typically privileged pursuant to the law on settlement privilege. The Court expects that a solicitor of record who writes to it communicates information that the Court can and should rely upon, even if it may ultimately be contrary to the party's interest. Considering the pointlessness of without prejudice communications to the Court and that the correspondence received contains no suggestion of any settlement discussions with anyone much less with the Court, I shall consider M[e] Kaufman's correspondence as entirely with prejudice. The alternative is to reject M[e] Kaufman's correspondence altogether.

[12] Me Kaufman's first letter is dated February 29, 2024. In that letter, he informs the Court that he had in fact informed the Plaintiff that the Defendants will be available for a dispute resolution conference within the time set out in the February 7, 2024, Order. Me Kaufman's correspondence to the Court includes a copy of his email to the Plaintiff's solicitor of record sent on February 28, 2024, at 7:35 pm, wherein he informed the Plaintiff's solicitor that he had, *"received news that Me Harold Ashenmil will be taking over this file and he wishes to set up a dispute resolution conference, he is available on March 20, 21, 22 or 25."* Me Kaufman's email was sent after 5 pm, he says, "due to a power outage from a storm that passed through yesterday, but we were finally able to send out the email by 7:35 pm, on the 28th of February".

[13] The Plaintiff's solicitor recalls in his letter to the Court that Me Ashenmil, the purported future new counsel for the Defendants, had previously written unsolicited to the Court on February 19, 2024, to inform the Defendants, their solicitor of record Me Kaufman, the Plaintiff, and the Court that he was unable to act for the Defendants in this proceeding and would not be representing them.

[14] Me Kaufman's email to the Plaintiff's solicitor was sent on February 28, 2024, after 5:00 pm. Rule 143 of the *Federal Courts Rules* provides that service of a document that is made after 5:00 pm on any date is effective on the next day that is not a holiday. The Court's February 7, 2024, Order required the Defendants to "inform the Plaintiff of whether and when they are prepared to voluntarily participate in a dispute resolution conference". The Order did not require the Defendants to "serve" the Plaintiff with that information. It follows that the transmission of the Defendants' information to the Plaintiff's solicitor by Me Kaufman at 7:38 pm ET is not out

of time and contrary the Court's Order because the email was sent to the Plaintiff's solicitor prior to midnight on February 28, 2024.

[15] The question now is whether the content of M[e] Kaufman's email to the Plaintiffs satisfied paragraph 1 of the February 7, 2024, Order.

[16] M[e] Kaufman's email was clear in its statement that the purported future new solicitor of record, M[e] Ashenmil, wished to set up a dispute resolution conference and provided dates as to his availability. The email did not reflect that the Defendants wished to participate in a dispute resolution conference; it communicated only that M[e] Ashenmil, a person who is not involved in this litigation and had previously refused to represent the Defendants, was available on certain dates. The email also did not reflect that M[e] Kaufman had in fact had direct communications with M[e] Ashenmil that might serve as reliable information that M[e] Ashenmil had in fact agreed to consider being retained by the Defendants and had reversed his position as set out his February 19, 2024, unsolicited letter to the Court. The source of M[e] Kaufman's reported "news" is unidentified.

[17] On March 1, 2024, M[e] Ashenmil wrote an email to M[e] Kaufman. M[e] Kaufman attached that email to his March 1, 2024, letter to the Court. The salient parts of M[e] Ashenmil's March 1, 2024, email are as follow:

> Re: THE BAY LIMITED PARTNERSHIP vs. ZELLERS INC. et al
>
> Federal Court: T-1517-21
>
> Dear Me Kaufman,
>
> I received a copy of a letter, dated February 29, 2024, in which the attorneys for the Plaintiff in the above-noted legal proceedings

> informed the Chief Administrator, Court's Administration Service, of the Federal Court, that correspondence from you had suggested that I had agreed to accept a mandate to act on behalf on one or more of the Defendants. The fact is even to this day, I have not accepted such a mandate.
>
> I have had several conversations with one of the Defendants, Robert Moniz, requesting that I act as legal counsel to you with respect to the above-noted case, but I clearly explained that my professional and personal obligations would prevent me from so acting based on the delays specified and contemplated in the decisions that Mr. Robert Moniz explained to me had been rendered by the Federal Court. I met with Mr. Robert Moniz this morning and I reiterated my position that I did not have the capacity to act as sole legal counsel with respect to this matter but that commencing at the beginning of April, I was prepared to act as counsel to you providing the Court and the Plaintiff were prepared to modify the stipulated and contemplated delays that would enable me to accept in good conscience the duties that this case will impose.
>
> From my personal perspective, I suggest that you inform the Federal Court and counsel for the Plaintiff that to date there has been no agreement on my part to act as in this case.
>
> […]
>
> I would appreciate it if you would inform the Court and the Attorneys for the Plaintiff that any suggestion that I agreed to act or would agree to act without being afforded reasonable time to familiarize myself with the matter was not in conformity with any discussion that I have had with any of the Defendants or with you.
>
> Harold W. Ashenmil K.C.

[18] M[e] Kaufman's letter of March 1, 2024, to which M[e] Ashenmil's email is attached attempts to explain away or at least correct the content of his email February 28, 2024, email to the Plaintiff's solicitor and his February 29, 2024, letter to the Court. M[e] Kaufman mentions on at least two occasions that M[e] Ashenmil would be prepared to accept a mandate to represent the Defendants provided he is accorded the proper time commencing on March 25, 2024, to study and become familiar with the file. One of the difficulties with M[e] Kaufman's letter is that M[e]

Ashenmil's email that is attached to it does not suggest what M[e] Kaufman says it does. In fact, M[e] Kaufman's letter misstates M[e] Ashenmil's position directly.

[19] The remainder of M[e] Kaufman's March 1, 2024, letter is tantamount to an informal request for an extension of time without proceeding in the appropriate manner as required by the Court's *Amended Consolidated* General *Practice Directions* dated December 20, 2023. The request for an extension of time is rejected again as it is not brought properly.

[20] It is therefore plain that that which had been represented by M[e] Kaufman to the Plaintiff's solicitors in his February 28, 2024, email was not true at the time and remains untrue. The information that had been provided to the Plaintiff purportedly in compliance with paragraph 1 of the Court's peremptory Order was untrue.

[21] The Defendant Mr. Robert Moniz apparently wrote to the Plaintiff's solicitors of record on February 28, 2024, at or about 8:17 pm local time. The Court has not been provided with a copy of that correspondence. It appears from the Plaintiff's solicitor's notice letter dated February 29, 2024, that Mr. Moniz wrote to him on behalf of all of the Defendants to say that they had instructed their solicitor of record, M[e] Kaufman, that they were willing to participate in a dispute resolution conference through the Teams videoconferencing software with an attorney with knowledge of trademarks and federal court proceedings. Mr. Moniz also purportedly wrote that, "we [the Defendants] are retaining new counsel and intend to actively participate in a dispute resolution conference with new counsel".

[22] The Court also received a letter dated February 28, 2024, from Mr. Moniz. In light of the similarity in language used in the letter sent to the Court and the letter reportedly received by the

Plaintiff's solicitors, it is likely that the letter sent to the Court by Mr. Moniz has the same content as that letter that had been sent to the Plaintiff's solicitor, although it is immaterial to this Order if it does or does not. In that letter, Mr. Moniz wrote:

> "For the record the defendants have instructed the current attorney that all the defendants in the federal court case T1517-21 are willing to voluntarily participate in a dispute resolution conference by teams with an attorney with knowledge of trademarks and federal court proceedings.
>
> We are retaining new council and intend to actively participate in a dispute resolution with the new council."

[23] Mr. Moniz' letter to the Court as referred to above, if binding upon the Defendants, does not comply with the Court's February 7, 2024, peremptory Order. It does not set out when the Defendants may be prepared to voluntarily participate in a dispute resolution conference. Perhaps more crucially, it also sets out that the Defendants' desire to participate in a dispute resolution conference is conditional upon retaining a new solicitor. Leaving aside the question of whether Mr. Moniz has any authority to speak on behalf of the other Defendants when they continue to be represented by M^{e} Kaufman as their solicitor of record, the statements set out in his letter to the Court reflect that the Defendants are prepared to participate in a dispute resolution conference with a new solicitor of record who has knowledge that their current lawyer, M^{e} Kaufman, by his own admission made during the virtual case management conference held on January 11, 2024, does not have. The Defendants, through Mr. Moniz, again say that they "are retaining new council". As appears from M^{e} Ashenmil's March 1, 2024, email, and despite Mr. Moniz's written stated understanding to the contrary, M^{e} Ashenmil is not in the process of being retained by the Defendants and was not in the process of being retained at the

time Mr. Moniz wrote to Court on February 28, 2024. As had been the case with Me Kaufman's letter, the information being conveyed by Mr. Moniz was not true at the time.

[24] There is no manner of discerning when the Defendants may wish to participate in a dispute resolution conference other than by attempting to divine when a new solicitor with the stated requisite knowledge may in fact be retained by them.

[25] The Defendants were required to inform the Plaintiff by February 28, 2024, whether and when they would participate in a dispute resolution conference. The Defendants were required to inform the Plaintiff with certainty as to intent and availability. They did not do so.

[26] The information provided to the Plaintiff's solicitor and its falsity leads me to conclude that the Defendants had not complied with paragraph 1 of the Court's February 7, 2024, Order by February 28, 2024. M^{e} Kaufman's email to the Plaintiff's solicitors suggesting that M^{e} Ashenmil "will be" taking over the Defendants' representation was untrue on February 28, 2024, and it remains untrue now. Mr. Moniz' correspondence that sets out the Defendants' conditional desire to participate in a settlement conference was also a misrepresentation. Given that M^{e} Ashenmil has clearly stated that he is not retained and will not accept a retainer from the Defendants, the Defendants' stated intention to participate in a dispute resolution conference that was conditional on his retainer cannot be construed as the statement of an intention to participate in a dispute resolution conference within the meaning of paragraph 1 of the February 7, 2024, Order. Saying otherwise would be to accept a misrepresentation as satisfactory compliance with an Order. It is not.

[27] The Defendants' conduct is consistent with their previous conduct in this proceeding. In a situation where they had to take a firm position and commit, the Defendants misrepresented facts, failed to inform the Plaintiff of their intention adequately and reliably as had been required, and responded with a confused mess of misrepresentations that answers neither whether nor when they may voluntarily take part in a dispute resolution conference.

[28] As had been provided by the Court's February 7, 2024, Order, the Defendants' Statement of Defence is struck, with retroactive effect to the date of the breach, February 29, 2024, due to the Defendants' failure to comply with the Court's February 7, 2024, Order.

THIS COURT ORDERS that:

1. As the Defendants have failed to comply with paragraph 1 of this Court's Order of February 7, 2024, the Defendants' Statement of Defence is struck, with retroactive effect to February 29, 2024.

"Benoit M. Duchesne"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1517-21
STYLE OF CAUSE:	THE BAY LIMITED PARTNERSHIP v ZELLERS INC., ZELLERS CANADA INC., ZELLERS HOLDINGS INC., ZELLERS CONVENIENCE STORE INC., ZELLERS RESTAURANT INC., MARIA ALMERINDA MONIZ SOUSA, MANUEL MONIZ, ROBERT MONIZ, CARLOS MONIZ, ZELLERS PLAZA INC.
PLACE OF HEARING:	OTTAWA, ONTARIO **IN WRITING**
DATE OF HEARING:	MARCH 6, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	ASSOCIATE JUDGE B.M. DUCHESNE
DATED:	MARCH 6, 2024

SOLICITORS OF RECORD:

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