Federal Court Cour fédérale

Date: 20231222

Docket: T-1055-23

Citation: 2023 FC 1747

Toronto, Ontario, December 22, 2023

PRESENT: Case Management Judge John C. Cotter

BETWEEN:

IFIT INC., THE BIKINI BODY TRAINING COMPANY PTY LTD. AND IFIT SANTÉ & FITNESS INC

Applicants

and

SAFE SWEAT FITNESS LTD.

Respondent

ORDER AND REASONS

[1] The applicants have brought a motion for:

1. An Order compelling the production of financial documents relevant to the issue of an accounting of profits;
2. A subpoena requiring the attendance of either Emre Ozgur or Andrea Kloegman for cross-examination on the financial documents to be produced;
3. Costs of the within motion in the amount of $4,000; and
4. Such further and other relief as to this Honourable Court may seem just.

I. Procedural Context and History

[2] This proceeding was commenced by the issuance of a notice of application on May 18, 2023. The applicants assert various trademark claims against the respondent including common-law passing off and conduct contrary to sections 20, 22(1), 7(b) and 7(c) of the *Trademarks Act*, RSC, 1985, c T-13. The relief sought by the applicants includes damages or alternatively, an accounting of profits.

[3] The parties have served their affidavit evidence under Rules 306 and 307 of the *Federal Courts Rules*, SOR/98-106 ("*Rules*"). Specifically:

- the applicants' evidence was served June 30, 2023; and
- the respondent's evidence was served July 31, 2023.

[4] It is the evidence served by the respondent that is the genesis for this motion. The respondent served two affidavits: one from an individual described as a "front desk receptionist" with the respondent; and the other from an individual described as a trademark searcher with respondent's counsel. To this point, no cross-examinations have been sought or conducted of the respondent's affiants.

[5] The applicants took issue with the nature of the evidence served by the respondent. Applicants' counsel stated the following in a letter to respondent's counsel dated August 2, 2023:

> First, Mr. Penney is an employee of your law firm and not an employee of the Respondent. Ms. Stabler is a part-time receptionist of the Respondent. Neither of these affiants are key players in the matters at issue in the Notice of Application in the above-noted proceeding. As such, our client takes the position that your client is attempting to shield its evidence from effective cross-examination by relying on affidavits of persons who have no personal knowledge

> of the issues. Our client is willing to consent to extend the timeline for your client to provide evidence based on the draft schedule outlined below. Based on a review of your client's website (https://safesweat.com/about-us/our- team/), either Emre Ozgur, Founder + CEO, or Andrea Kloegman, Founder + VP, appear to be appropriate affiants in this proceeding and we expect an affidavit from either of them.
>
> Second, at paragraph 4 of the Notice of Application, our clients make a claim for an accounting of your client's profits. As you are aware, your client is required to provide financial documents relating to this claim. This includes, but is not limited to, the following documents in the power, possession and control of your client from the incorporation of Safe Sweat Fitness Ltd. to present:
>
> > (a) Audited and/or unaudited financial statements, including profit and loss statements, cash flow statements and balance sheets;
> >
> > (b) Journal entries to financial statements;
> >
> > (c) Profit and budget forecasts;
> >
> > (d) Tax returns; and
> >
> > (e) Any other information relevant to how the profits are calculated.
>
> Therefore, our client expects that the above-noted documents be included in the affidavit of either Mr. Ozgur or Ms. Kloegman.

II. Issues

[6] The issues on this motion as framed by the parties are:

1. Should the respondent be ordered to produce financial information relevant to the accounting of profits claim?
2. Should the Court order a subpoena requiring attendance for cross-examination of either Emre Ozgur or Andrea Kloegman?

III. Analysis

[7] This is not a case where the applicants were required to proceed by application. Rather, they had the choice as to whether to assert their claims by way of an action or an application. There

are procedural advantages and disadvantages to each. The applicants chose to proceed by way of application. The applicants are now unhappy with the evidence served by the respondent. Apparently, the applicants need evidence from the respondent in connection with the alternative financial relief sought in their notice of application, namely an accounting of profits.

[8] As stated by Justice Hughes in *Canadian Private Copying Collective v Fuzion Technology Corp.*, 2005 FC 1557, a case under the *Copyright Act*, RSC, 1985, c C-42, in which the applicant was seeking recovery of sums allegedly due under a tariff certified by the Copyright Board, and where the applicant had the option of proceeding by way of action or application:

> [5] … An application allows the party instituting the proceeding to put in its evidence at the beginning by way of affidavit and requires the Respondent to do likewise. Neither party can examine the other for discovery. In theory at least, a trial can be arrived at more quickly and directly than in an action.
>
> [6] The downside of an application is that the party instituting the proceeding must be ready with its evidence at the outset. It cannot depend upon getting further evidence from the other party by way of discovery. The other party may adduce no evidence as very little evidence if it chooses. The initiating party essentially must depend on its evidence alone when it comes to trial.
>
> [Emphasis added.]

A. *Issue 1 – Should the respondent be ordered to produce financial information relevant to the accounting of profits claim?*

[9] The applicants argue that financial documents are relevant to the issue of an accounting of profits. They also argue that all sales information is solely in the knowledge, possession and power of a respondent in an application for trademark infringement passing off. While that may be the case, as stated by Justice Russell in *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 ("*Ottawa Athletic*"):

> [127] The Applicant filed a notice of application rather than a statement of claim, which provides the benefit of a more expeditious proceeding, but it also means more limited opportunities to compel the opposing party to disclose evidence (*see Sierra Club of Canada v Canada (Minister of Finance)*, [1999] FCJ No 306 at para 14, 163 FTR 109 [*Sierra Club*]). Thus, the Applicant "cannot expect to be able to make his case out of the mouth of the respondent": *Merck & Frost Canada Inc v Canada (Minister of National Health and Welfare*), [1994] FCJ No 662 at para 26, 169 NR 342 [*Merck (1994)*]; *Eli Lilly Canada Inc v Apotex Inc*, 2007 FC 455.

[10] The applicants argue that commencing litigation by way of application does not completely deprive a party from compelling production of documents or the answering of questions. While that is also correct, it does not provide an applicant with the type of documentary and oral discovery available in an action. As was stated in *Ottawa Athletic*:

> [128] Neither, however, is an applicant completely deprived of an opportunity to compel the opposing party to disclose documents or answer questions relevant to the issues and the evidence. It is true that a party cannot compel another party to file an affidavit: *Nourhaghighi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1350 at para 20. However, should the responding party choose to introduce evidence by way of affidavits (which it may need to do in order to effectively respond to the application), the Rules provide an opportunity to cross-examine on those affidavits (Rules 83 to 86), and to require affiants to produce certain relevant documents at those examinations (Rules 91 and 94).

[11] In support of their position, the applicants rely on Rule 94(1) and Rule 97 of the *Rules*, which provide as follows:

Production of documents on examination	Production de documents
94 (1) Subject to subsection (2), a person who is to be examined on an oral examination or the party on whose behalf that person is being examined shall produce	94 (1) Sous réserve du paragraphe (2), la personne soumise à un interrogatoire oral ou la partie pour le compte de laquelle la personne est interrogée produisent pour

for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230.	examen à l'interrogatoire les documents et les éléments matériels demandés dans l'assignation à comparaître qui sont en leur possession, sous leur autorité ou sous leur garde, sauf ceux pour lesquels un privilège de non-divulgation a été revendiqué ou pour lesquels une dispense de production a été accordée par la Cour en vertu de la règle 230.
[…]	[…]
Failure to attend or misconduct	Défaut de comparaître ou inconduite
97 Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may	97 Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut :
(a) order the person to attend or re-attend, as the case may be, at his or her own expense;	a) ordonner à cette personne de subir l'interrogatoire ou un nouvel interrogatoire oral, selon le cas, à ses frais;
(b) order the person to answer a question that was improperly objected to and any proper question arising from the answer;	b) ordonner à cette personne de répondre à toute question à l'égard de laquelle une objection a été jugée injustifiée ainsi qu'à toute question légitime découlant de sa réponse;
(c) strike all or part of the person's evidence, including an affidavit made by the person;	c) ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits;

(d) dismiss the proceeding or give judgment by default, as the case may be; or	
(d) dismiss the proceeding or give judgment by default, as the case may be; or	d) ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;
(e) order the person or the party on whose behalf the person is being examined to pay the costs of the examination.	e) ordonner que la personne ou la partie au nom de laquelle la personne est interrogée paie les frais de l'interrogatoire oral.

[12] However, those rules are of no assistance to the applicants on this motion. In this matter the applicants did not seek cross-examination on the respondent's affidavits. The applicants are not seeking through Rule 94(1) to compel an affiant who has financial documents within his or her possession, power or control to produce such documents at a cross-examination. Rather, they seek to invoke this rule to impose a general obligation on the respondent to produce relevant financial documents (assuming such documents exist) that were not included with the respondent's affidavit evidence. This is illustrated in the following passage from the August 2, 2023 letter quoted above that the applicants rely on:

> … our clients make a claim for an accounting of your client's profits. As you are aware, your client is required to provide financial documents relating to this claim. This includes, but is not limited to, the following documents in the power, possession and control of your client from the incorporation of Safe Sweat Fitness Ltd. to present …

[13] Rule 94(1) does not go that far. It is the mechanism to require an affiant being cross-examined to produce relevant documents at the examination that are within his or her possession

or control. It is not the basis of a more general standalone obligation on a party in an application to produce any relevant documents.

[14] Rule 97 is also of no assistance to the applicants, as it does not create a standalone obligation to produce documents. Rather, it is an enforcement mechanism when an obligation otherwise exists and has not been satisfied. As set out in Rule 97, it applies "Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96". None of those circumstances apply in this case. Focusing on the failure to "produce a document", for Rule 97 to be engaged, the document must be one that is "required to be produced". As this is an application and not an action, there is no general requirement on the respondent to produce all relevant documents, including all relevant financial documents. With respect to the respondent's two affidavits, while the applicants could have cross-examined them and, in that context, requested documents (if any) within their possession, power or control, the applicants did not do so. In any event, the applicants' position is that those individuals do not appear to have any such documents within their possession, power or control. The applicants state the following in their written representations (para 29):

> Neither Mr. Penney or Ms. Stabler offer any evidence of material facts at issue between the parties as outlined in the Notice of Application, nor do they appear to have access to said facts or even business records of the Respondent.
>
> [Emphasis added.]

[15] The applicants argue that a formal direction to attend to demand production of documents is not required and that less formal communications between counsel in advance of the examination could have the same effect. However, the issue in this case is not the form of the

demand for production of documents (i.e. letter versus direction to attend), but whether the respondent had any obligation to produce the documents, which it did not.

[16] The applicants also point to Rule 313, which provides as follows:

Requirement to file additional material	Ordonnance de la Cour
313 Where the Court considers that the application records of the parties are incomplete, the Court may order that other material, including any portion of a transcript, be filed.	313 Si la Cour estime que les dossiers des parties sont incomplets, elle peut ordonner le dépôt de documents ou d'éléments matériels supplémentaires, y compris toute partie de la transcription de témoignages qui n'a pas été déposée.

[17] At the hearing of the motion applicants' counsel indicated that they do not rely on Rule 313 as a ground for the relief sought, but rather as being illustrative of the power of the Court to order that the record be supplemented. Rule 313 would not have been engaged in this case as no application records have been filed yet. In any event, Rule 313 does not provide a party with a standalone right to compel additional evidence in order to fill gaps in its case, actual or anticipated, due to an inability of that party to make out an element of its case. Stated differently, if the applicants cannot otherwise compel the evidence they desire, Rule 313 does not provide them with the basis to do so. The inability of the applicants to make out their case does not make the record incomplete; rather it goes to the quality and sufficiency of the applicants' evidence, not whether the application records are complete.

[18] The applicants rely on an order issued July 30, 2021 by the Case Management Judge in T-1184-20, *Blossman Gas, Inc v Alliance Autopropane Inc* ("Blossman Order"). That order does not include any reasons, and no reasons were issued subsequently. The affidavit evidence relied upon by the applicants in the present motion includes as exhibits the Blossman Order and the moving party's motion record in that case. The circumstances in that case were quite different. The affiant in question was the co-president of the respondent, had provided an affidavit, and was going to be cross-examined. The respondent in that case was refusing to produce financial documents and was asserting confidentiality as one of the reasons for not producing them (see the applicants' motion record in the present case, page 514). It was in that context that the affiant was ordered to bring various financial documents to the cross-examination for production and inspection. That result is consistent with Rule 94(1).

B. *Issue 2 – Should the Court order a subpoena requiring attendance for cross-examination of either Emre Ozgur or Andrea Kloegman?*

[19] The applicants rely on the Federal Court of Appeal's decision in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, ("*Tsleil-Waututh Nation*"), which sets out the test for the Court to apply in determining whether to grant leave to issue a subpoena under Rule 41 (in those instances where leave is required). In that case, the Federal Court of Appeal stated:

> [101] Exceptional evidence may be available from witnesses. The standard way and the way that allows judicial reviews to be heard and determined "without delay and in a summary way" (as required by subsection 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules*) is through an affidavit; because of subsection 18.4(1), this will always be the preferred way. The affidavits can be subject to cross-examination and are presented to the Court by including them in the records that are filed with the Court.
>
> [102] Another way to gather exceptional evidence is to cross-examine a deponent in the course of the judicial review proceeding.

> Undertakings can be given that, in some circumstances, where appropriate, exceptional evidence will have to be produced.
>
> [103] In some cases, witnesses may be less than forthcoming. In rare cases, witnesses may be subpoenaed to produce a document or other material on an application for judicial review: Rule 41(1) and Rule 41(4)(*c*).The subpoena power in Rule 41 applies to "proceedings" and Rule 300 shows that applications are "proceedings." This is allowed with leave of the Court where:
>
> - the evidence is necessary;
> - there is no other way of obtaining the evidence;
> - it is clear that an applicant is not engaged in a fishing expedition but, instead, has raised a credible ground for review beyond the applicant's say-so; and
> - a witness is likely to have relevant evidence on the matter.
>
> [104] As well, a judicial review may be treated and proceeded with as an action, thereby allowing for discovery and live witnesses: sections 18.4(2) and 28(2) of the *Federal Courts Act*. However, the situations where this is allowed are most rare: see, *e.g.*, the requirements set out in *Association des crabiers acadiens Inc. v. Canada (A.G.)*, 2009 FCA 357, 402 N.R. 123.

[20] The respondent argued that the test in the *Tsleil-Waututh Nation* case was conjunctive and that each of the four elements needed to be satisfied (see *Dixon v TD Bank Group*, 2020 FC 1054, at para 43). At the hearing of the motion, applicants' counsel indicated agreement with that.

[21] In this case it is the second requirement of the test set out in *Tsleil-Waututh Nation*, namely that "there is no other way of obtaining the evidence", that is determinative. There was another way for the applicants to obtain the evidence they seek (assuming it exists) and that was to proceed by way of action. The applicants chose not to do so. Stated differently, if there is no other way of obtaining the evidence in the current proceeding because it is an application, that is the result of the applicants' choice to proceed by way of application. That should not be a basis for the Court

to grant leave to issue a subpoena. The applicants' choice to proceed by way of application, and then being unhappy with the affidavit evidence the respondent decided to put forward, is not sufficient to make this one of the "rare" cases where leave should be granted.

IV. Conclusion

[22] The applicants in the case had the choice to proceed by action or application. They chose to proceed by way of application. There are certain benefits of proceeding by way of application. However, on an application the respondent is not required to serve any affidavit evidence, and if the respondent does, can decide what affidavit evidence to serve and from whom. If the respondent serves affidavit evidence, the applicant can cross-examine on it, and can avail itself of Rules 91 and 94(1) and require the affiant to produce for inspection at the cross-examination relevant documents that are in that person's possession, power or control. However, a party having chosen to proceed by application does not then have the opportunity to have something approaching action like documentary production obligations imposed on the respondent – in this case, production of all relevant financial documents – simply because it is not happy with the respondent's choice of affiants and the nature of their affidavit evidence. The applicants' motion is dismissed.

V. Costs

[23] Having regard to Rule 400 of the *Rules*, including the factors articulated in subrule (3), costs of this motion are awarded to the respondent, to be paid by the applicants. The factor that is of particular significance in arriving at this conclusion in this case is the result of the motion.

[24] Both sides are agreed that the appropriate quantum is $4,000. Costs of $4,000 are awarded to the respondent, to be paid by the applicants by January 31, 2024.

ORDER in T-1055-23

THIS COURT ORDERS that:

1. The applicants' motion dated and filed November 3, 2023, is dismissed.

2. Cost of the motion are awarded to the respondent and fixed in the amount of $4,000, to be paid by the applicants to the respondent by January 31, 2024.

"John C. Cotter"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1055-23
STYLE OF CAUSE:	IFIT INC., ET AL v SAFE SWEAT FITNESS LTD.
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 19, 2023
ORDER AND REASONS:	CASE MANAGEMENT JUDGE JOHN C. COTTER
DATED:	DECEMBER 22, 2023

APPEARANCES:

Abbas Kassam	FOR THE APPLICANTS
Reagan Seidler	FOR THE RESPONDENT

SOLICITORS OF RECORD:

FASKEN MARTINEAU DUMOULIN LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
SMART & BIGGAR LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT