

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130916

Dockets: A-7-12

Citation: 2013 FCA 209

**Present: NOËL J.A.
PELLETIER J.A.
GAUTHIER J.A.**

BETWEEN:

SANOFI-AVENTIS

Appellant

and

APOTEX INC.

Respondent

AND BETWEEN:

**SANOFI-AVENTIS and
BRISTOL-MYERS SQUIBB SANOFI
PHARMACEUTICALS HOLDINGS
PARTNERSHIP**

Appellants

and

**APOTEX INC.
APOTEX PHARMACHEM INC. and**

SIGNA SA de CV

Respondents

=Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 16, 2013.

REASONS FOR ORDER BY:

PELLETIER J.A.

CONCURRED IN BY:

**NOËL J.A.
GAUTHIER J.A.**

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REASONS FOR ORDER

PELLETIER J.A.

[1] Sanofi-Aventis and Bristol Myers Squibb Sanofi Pharmaceuticals Holdings Partnership (Sanofi) bring a motion asking this Court to reconsider its judgment in *Apotex Inc. v. Sanofi-Aventis*, 2013 FCA 187, [2013] F.C.J. No. 857, so as to remove the reference to Signa SA de CV (Signa) and to include Apotex Pharmachem Inc.(Pharmachem) in the portion of the judgment which declares liability for infringement of specific claims of Canadian Patent No. 1,366,777. If Sanofi's motion were granted, the judgment of this Court would read:

The judgement of the Federal Court is set aside. Sanofi-Aventis' action for infringement of the Canadian Patent No. 1,366,777 is allowed and, giving the judgment which the Federal Court ought to have given, it is declared that Apotex Inc. and Apotex Pharmachem Inc. have infringed claims 1, 3, 6, 7, 8, 9, 10, and 11 of that patent and Apotex Inc.'s action seeking a declaration that Canadian Patent No. 1,366,777 is invalid is dismissed. The matter is returned to the Federal Court to deal with the issue of remedies. Sanofi is awarded its costs to be assessed, both in this Court and in the Federal Court.

The claim against Apotex Pharmachem Inc. and ~~Signa Sa de CV~~ is dismissed but without costs.

[2] The motion is brought pursuant to Rule 397 of the *Federal Courts Rules*, SOR/98-106 (the Rules), which is reproduced below:

397. (1) Within 10 days after the making of an order, or within such

397. (1) Dans les 10 jours après qu'une ordonnance a été rendue ou

other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that

(a) the order does not accord with any reasons given for it; or

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.

(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :

a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;

b) une question qui aurait dû être traitée a été oubliée ou omise involontairement

(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

[3] Rule 397(a) has no application in this case because, in its reasons, this Court said :

121. As the Trial Judge made no findings of infringement against Apotex Pharmachem Inc. and Signa SA de CV, I would dismiss Sanofi's claims against them.

[4] As a result, the Court's judgment accords precisely with the reasons given for it.

[5] That leaves the question of whether there was an error, omission or mistake in the preparation of the judgment.

[6] Rule 397 deals with correcting a judgment or order and not the reasons given for the latter: see *Chénier v. Canada (Minister of Veterans Affairs)*, [1991] F.C.J. No 908 (FCA) (QL), *Sawridge Band of Indians v. Canada*, [1987] F.C.J. No. 730 (T.D.)(QL), *Halford v. Seed Hawk Inc.*, 2004 FC

455, [2004] F.C.J. No. 557 (QL) at paragraph 10. This is consistent with the position taken in paragraph 397(a) of the *Rules*, that where there is a conflict between the judgment and the reasons given for it, the reasons prevail. In other words, the judgment is modified, not the reasons.

[7] In this case, this Court came to a conclusion as to the liability of Signa and Pharmachem. In the case of Signa, the parties are agreed that the claim against it was discontinued before trial even though the style of cause was not changed. The trial judge noted the discontinuance in his reasons. As a result, it can be said that this Court's decision dismissing the claim against Signa was the result of an oversight and a correction of the judgment as it concerns Signa is warranted.

[8] That is not the case with Pharmachem. Sanofi says that this Court overlooked the fact that the trial judge made a finding of liability for infringement against Pharmachem but is not able to point to a specific finding. Sanofi says that the finding of liability is implicit in the judge's reasons, arising from the judge's use of Apotex to refer to both Apotex and Pharmachem. In effect, Sanofi is saying that this Court erred in its interpretation of the trial judge's reasons. Whether Sanofi is right about this or not is not the issue, though I believe that it is not. This is neither an oversight (as in the case of Signa) nor an accidental omission, nor is it a clerical error, mistake or omission. Rule 397 does not authorize this Court to revise its understanding of a trial judge's reasons on the basis of argument submitted to it after this Court's judgment has been rendered.

[9] I would therefore allow the motion in part and amend the second paragraph of the judgment issued by the Court to delete the reference to Signa SA de CV so that the paragraph reads:

“Sanofi's claims against Apotex Pharmachem Inc is dismissed but without costs.”

[10] In light of the divided success, each party should bear its own costs.

"J.D. Denis Pelletier"

J.A.

"I agree
Marc Noël J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:
STYLE OF CAUSE:

A-7-12

SANOFI-AVENTIS v. APOTEX
INC. and SANOFI-AVENTIS AND
BRISTOL-MYERS SQUIBB
SANOFI, PHARMACEUTICALS
HOLDINGS PARTNERSHIP v.
APOTEX INC., APOTEX
PHARMACHEM INC. AND,
SIGNA SA de CV

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

PELLETIER J.A.

CONCURRED IN BY:

**NOËL J.A.
GAUTHIER J.A.**

DATED: SEPTEMBER 16, 2013

WRITTEN REPRESENTATIONS BY:

Anthony G. Creber/Marc Richard/Livia Aumand

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