Federal Court of Appeal | Cour d'appel fédérale

Date: 20140911

Docket: A-364-13

Citation: 2014 FCA 198

Present: SHARLOW J.A.

BETWEEN:

MEDOS SERVICES CORPORATION
MARATHON MEDICAL INC.
ALEXANDER VLASSEROS

Appellants

and

RIDOUT AND MAYBEE LLP

Defendant

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 11, 2014.

REASONS FOR ORDER BY: SHARLOW J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] Medos Services Corporation, Marathon Medical Inc. and Alexander Vlasseros have appealed the judgment of the Federal Court (2013 FC 1006). That judgment upheld the decision of the Registrar of Trade-Marks to expunge a trade-mark for non-use pursuant to section 45 of the *Trade-Marks Act*, R.S.C. 1985, c. T-13. Before me are two interlocutory motions by the appellants. One is a motion under Rule 351 of the *Federal Courts Rules*, SOR/98-106, for leave

to present evidence on appeal. The other is a motion under Rule 343 to have the appeal book prepared by the Administrator.

Preliminary matter

[2] In the Federal Court, Mr. Vlasseros represented himself, as is his right. He also represented the Medos Services Corporation and Marathon Medical Inc. by leave granted by the Federal Court under Rule 120, which reads as follows:

120. A corporation, partnership or unincorporated association shall be represented by a solicitor in all proceedings, unless the Court in special circumstances grants leave to it to be represented by an officer, partner or member, as the case may be.	**120**. Une personne morale, une société de personnes ou une association sans personnalité morale se fait représenter par un avocat dans toute instance, à moins que la Cour, à cause de circonstances particulières, ne l'autorise à se faire représenter par un de ses dirigeants, associés ou membres, selon le cas.

[3] In this Court, Mr. Vlasseros is also representing himself and the two corporate appellants. He has the right to represent himself. He does not have the right to represent the two corporate appellants without first obtaining leave pursuant to Rule 120 from a judge of this Court. The two corporate appellants are now in breach of Rule 120. However, as several steps have been taken in this appeal with no objection from the respondent Ridout Maybee LLP, the order disposing of these two motions will say that compliance with Rule 120 is waived under Rule 55.

Motion to present evidence on appeal

[4] The general rule is that evidence will not be admitted on appeal unless it could not with due diligence have been presented in the court below, it is credible, and it is practically conclusive of the issue to which it is alleged to relate. Whether or not those conditions are met,

the Court retains a residual discretion to permit evidence to be admitted on appeal if the interests of justice require: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10.

[5] A careful review of the affidavit submitted in support of the motion discloses no basis upon which I can reasonably conclude that the documents the appellants wish to present as evidence on appeal meet the test for admitting new evidence on appeal. Specifically, the appellants have failed to establish that they could not, with due diligence, have discovered the documents in time for the Federal Court hearing, or that the documents are credible and practically conclusive of the main issue – which is whether the trade-mark in issue was in use by the appellants during the relevant period. Nor am I persuaded that the interests of justice require that the evidence be presented on appeal.

[6] Accordingly, the motion to present evidence on appeal will be dismissed. The respondent is entitled to its costs on this motion, and the order will so state. The order will also state that the costs on the motion are to be assessed after the disposition of this appeal. That will be included in the order in this case because I have noted that in a previous motion in which costs were awarded to the respondent, steps were taken immediately to obtain a formal assessment.

[7] Generally, it is more efficient for the parties and for the Court if costs on interlocutory motions are dealt with after the disposition of the appeal. That permits all matters of costs to be considered at once, with any offsets taken into account. Of course, a separate assessment on a

costs award on a motion is appropriate if the costs are specifically ordered to be payable forthwith, but that is not the case here.

Motion to have the appeal book prepared by the Administrator

[8] The appellants wish to be relieved of the responsibility for preparing the appeal book because "a) summer vacation holidays have reduced the resources available to the Appellants. b) That the appellants lack the appropriate resources and expertise to do so by himself (themselves) without risking errors and additional delays and prejudice. c) Discussions with Court staff have identified several potential delays and errors which would be prevented if the Appellants' appeal book is completed by the Federal Court Administrator as provided for by the Court rules" (from the affidavit of Mr. Vlasseros filed in support of the motion). The affidavit gives no further particulars or explanation.

[9] The contents of the appeal book, as settled by the order of Justice Webb on March 20, 2014, are as follows:

(a) Notice of Appeal filed November 1, 2013;
(b) Justice Harrington's Reasons for Judgment and Judgment dated October 2, 2013;
(c) Notice of Application filed June 27, 2011;
(d) Affidavit of Alexander Vlasseros dated July 27, 2011 (with exhibits);
(e) Affidavit of Alexander Vlasseros dated June 18, 2012 (with exhibits); and
(f) Affidavit of Christina Gould dated April 18, 2012.

[10] These documents should already be in the appellants' possession (and if not, they are readily obtainable from the Registry). As well, the appeal book must contain a table of contents describing each document (Rule 343(1)(*a*)), a copy of the order of Justice Webb determining the

contents (Rule 343(1)(*h*)), and a certificate signed by Mr. Vlasseros stating that the contents of the appeal book are complete and legible (Rule 343(1)(*i*)). These documents should be relatively simple to prepare. I am not satisfied, based on the limited evidence submitted by the appellants, that they lack the skills required to complete the appeal book.

[11] Further, the bare assertion that the appellants have "reduced" resources is not sufficient to establish that the appellants would suffer undue hardship from the cost of preparing, serving and filing the appeal book.

[12] For these reasons, the motion to have the appeal book prepared by the Administrator will be dismissed without costs, because the respondent consented to the motion.

Ancillary relief – extensions of time

[13] The order disposing of these motions will extend the time for preparing, serving and filing the appeal book.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-364-13
STYLE OF CAUSE:	MEDOS SERVICES CORPORATION MARATHON MEDICAL INC. ALEXANDER VLASSEROS v. RIDOUT AND MAYBEE LLP

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	SHARLOW J.A.
DATED:	SEPTEMBER 11, 2014

WRITTEN REPRESENTATIONS BY:

Alexander Vlasseros	FOR THE APPLICANTS
Dr. Paul Tackaberry Christopher D. Langan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ridout & Maybee LLP Toronto, Ontario	FOR THE RESPONDENT