

Federal Court



Cour fédérale

Date: 20141020

Docket: T-514-10

Ottawa, Ontario, October 20, 2014

PRESENT: Case Management Judge Mireille Tabib

BETWEEN:

HIS HIGHNESS PRINCE KARIM AGA KHAN

Plaintiff

and

**NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE
AND DOE CO. AND ALL OTHER PERSONS
OR ENTITIES UNKNOWN TO THE
PLAINTIFF WHO ARE REPRODUCING,
PUBLISHING, PROMOTING AND/OR
AUTHORIZING THE REPRODUCTION AND
PROMOTION OF THE INFRINGING
MATERIALS**

Defendants

ORDER

UPON the Plaintiff's motions for answers to outstanding and deferred questions, for a further and better affidavit of documents and for re-attendance on examination for discovery.

CONSIDERING the Plaintiff's motion records for the motions, the responding motion record of the Defendants for both motions and having heard counsel's oral submissions.

CONSIDERING that the Court's task in respect of the matters referred back to it by the Federal Court of Appeal is neither to sit in appeal of the determinations already made by Prothonotary Milczynski, nor to follow or apply the determinations made by Justice Tremblay-Lamer on appeal from Prothonotary Milczynski's order.

CONSIDERING that the Court's task is to consider and determine whether, in light of the further answers and concessions made by the Defendants since Prothonotary Milczynski's decision, and of any further developments, evidence or argument presented by the parties, the questions set out in paragraphs 4, 5, 6, 7 and 10 of the prothonotary's order remain relevant and/or are now "sufficiently answered".

CONSIDERING that the Plaintiff is, in principle, entitled to seek production of documents and obtain answers to questions that are relevant to any unadmitted issue of fact in this proceeding.

CONSIDERING that the Court may, in its discretion, relieve a party from an obligation to produce a relevant document or to provide an answer to a relevant question or decline to order a party to produce a document or provide an answer.

CONSIDERING that the Court's discretion to refuse relief or relieve a party from a discovery obligation may be exercised, *inter alia*, where the request is excessive or abusive, where the request has already been answered or satisfied, or where the Court is of the view that the expense or inconvenience of information providing it is not proportional to the amounts at issue in the litigation, and/or the relevance or probative value of the information or documents sought.

CONSIDERING that the Court is satisfied that all five questions at issue, and the additional questions that had been earlier deferred and on which the Plaintiff is now moving are relevant to establishing the number of books printed and the revenues derived from these books, either directly or through a train of enquiry.

CONSIDERING that, although the Defendants have asserted that only 5,500 books were printed, the Plaintiff has not admitted or accepted that assertion, such that the number of books printed remains a question in dispute.

CONSIDERING that the Plaintiff's allegation, in its Statement of Claim, that the Defendants promote the Book for sale on their respective websites for \$50.00 CAD does not constitute an admission by the Plaintiff that the actual sale price for all books sold was \$50.00.

CONSIDERING that the revenues derived from the books accordingly remain a matter in dispute.

CONSIDERING that while there is evidence to support the Defendants' assertion that the printer identified by the Defendants only printed 5,500 copies, and that the books were sold for \$50.00 per unit plus shipping costs, I find, based on the entire record before me, that there is some contradictory evidence of both facts.

CONSIDERING that the evidence that would be supportive of the Defendants' assertion as to the number of books printed and the sale price is comprised of very few documents;

CONSIDERING that a very large number of documents would likely have existed to corroborate the few documents that have been produced, but that corroborative documents have

not been produced, either because of the Defendants' objections or because the Defendants have disposed of them.

CONSIDERING, that such evidence as there is to support the Defendants' assertion as to the number of copies printed and the price paid is not so overwhelming and compelling that it precludes the possibility or reasonable likelihood that more books were printed or that the revenues exceeded \$50.00 per book.

CONSIDERING that I am satisfied that there is a reasonable likelihood that the information and documents sought by the Plaintiff could assist in determining whether more books were printed and/or whether the revenues derived by the Defendants from the books exceeded \$50.00 per book.

CONSIDERING that the Defendants' assertion that the amount at stake in this litigation is only \$65,000.00 proceeds from the assumption only 5,500 books were printed and sold at a maximum of \$50.00 per book, AND from the assumption that the Defendants did pay for the costs of printing the books and that these costs can properly be deducted from the revenues.

CONSIDERING that the Defendants themselves have admitted that they did not directly pay the printing costs, but that those costs were paid, value for like value, by the recipients of the books, an assertion that is not supported by any documents so far.

CONSIDERING that, if more than 5,500 books were printed, if more revenues were derived than \$50.00 per book or if the Defendants did not pay the printing costs, then the amount that is a stake in this litigation could conceivably be much greater than the \$65,000.00 asserted by the Defendants.

CONSIDERING, in light of all the above, of the amounts at issue, of the relevance or probative value of the information sought, and of the expense or inconvenience of providing the information, that the Court is not satisfied that the answers that have been provided by the Defendants are sufficient or proportional to relieve them from their discovery obligations.

CONSIDERING that the Court does not believe the Defendants' assertion that their refusal and objection to answer questions is motivated solely by their desire to maintain the confidentiality of the names of the purchasers of the book.

CONSIDERING that the Plaintiff has expressed particular interest in the identity of individuals or corporations who are said to have purchased over 100 books each.

CONSIDERING that such persons are likely to have acted as distributors or resellers of the books, with low expectations of confidentiality, but that the Defendants specifically resist providing their names.

CONSIDERING that there is no evidence that any of the purchasers of the book have any expectation of confidentiality with respect to their identity or have raised any concern in that regard.

CONSIDERING that the Defendants have themselves made public the name of certain supporters and purchasers of the book.

CONSIDERING that there is no evidence that the Plaintiff or its counsel have breached the implied undertaking rule, published the names of purchasers of books or harassed any purchasers of books.

CONSIDERING that the Defendants could have, but did not advance a motion for a confidentiality order.

CONSIDERING that the costs and efforts deployed by the Defendants in opposing the Plaintiff's request for information since the hearing before Justice Tremblay-Lamer is at odds with their argument that the information sought by the Plaintiff is irrelevant and unnecessary in light of the amounts at stake.

CONSIDERING that the Plaintiff has conceded at the hearing that the question set out in item 4 of the Prothonotary's order has been answered by the Defendant Tajdin's statement that he does not have unredacted invoices from the shipping company, subject follow-up discovery.

CONSIDERING that the Plaintiff has, at the hearing, selected the 10 names it wishes to have produced in respect of item 5 of the Prothonotary's order (Exhibit 2; tab 8 of the Tajdin transcript).

CONSIDERING that the affidavit of Mr. Tajdin dated September 4, 2014 provides an answer to additional question no. 40 of the Tajdin refusal chart – to the effect that he does not know where the laptop is.

CONSIDERING that I am not satisfied that the affidavit of Mr. Tajdin provides a full answer to item 41 of the Tajdin refusal chart.

CONSIDERING that the Plaintiff is substantially successful on this motion and that there is no reason why it should not recover its costs.

THIS COURT ORDERS that:

1. The Defendant Nagib Tajdin shall provide the following documents and information to the Plaintiff:
 - a) An unredacted copy of the PayPal document appearing at pages 298 and 299 of the Plaintiff's motion record on this motion.
 - b) The name of the purchasers of books corresponding to the following entries of the spreadsheet at pages 329 and 330 of the Plaintiff's motion record:

At page 329:

Date	Destination	Qty Books	Price
15/02/2010	USA	116	
27/01/2010	Canada	100	162.79
27/01/2010	Canada	200	332.93
22/02/2010	Canada	400	534.71
22/02/2010	Canada	200	282.71
15/02/2010	USA	100	256.7

At page 330:

Date	Destination	Qty Books	Price
17/02/2010	Canada	100	141.31

17/02/2010	Canada	300	45.43
2009-10-12	Africa	200	
2009-04-12	Canada	600	

- c) The identification of the bank account where he placed monies received from the sale of the book.
 - d) The identification of the bank account where he deposited his book funds from PayPal.
 - e) The bank records from his personal bank account and personal line of credit for the period from November 2009 to March 2011.
 - f) An electronic copy of his Golden KIZ mailbox.
2. The Defendant Alnaz Jiwa shall provide the following documents and information to the Plaintiff:
- a) The name and address of the book distributors known to him.
 - b) The identity of the person from whom he received the 24 boxes of books that he distributed.
 - c) The names and addresses of all those who received a free copy of the book from him.
 - d) The name of every person to whom he can recall distributing a book.

3. Both Defendants shall serve on the Plaintiff a further and better affidavit of documents.
4. Both Defendants shall re-attend examinations for discovery to answer under oath in respect of any document produced or information provided since the last examination on discovery and in respect of the further and better affidavit of documents.
5. The parties shall, no later than 5 days from the date of this order, provide counsel's mutual dates of availability to participate in a case management telephone conference to set a schedule for the further steps to be taken in this proceeding.
6. Costs of these motions shall be paid by the Defendants to the Plaintiff.

"Mireille Tabib"

Case Management Judge