COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED (*Plaintiff*) ..... APPELLANT;

AND

SIEGEL DISTRIBUTING COMPANY LIMITED ET AL. (*Defendants*) ..... RESPONDENTS.

1957

*Dec. 9
Dec. 19

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeals—Right of appeal—Amount in dispute—Effect of pleadings—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 82.

*PRESENT: Kerwin C.J. and Rand, Cartwright, Fauteux and Abbott JJ.

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C.A.P.A.C. v. SIEGEL DIST. CO. LTD. et al.

The mere fact that the plaintiff in an action in the Exchequer Court for infringement of copyright claims more than $500 in damages is not sufficient to give a right of appeal to the Supreme Court. Such a pleading does not of itself establish that "the actual amount in controversy" in the appeal exceeds $500 within the meaning of s. 82 of the *Exchequer Court Act*. *McNea and McNea v. The Township of Saltfleet*, [1955] S.C.R. 827, applied.

MOTION by the respondents to quash an appeal from a judgment of the Exchequer Court of Canada[1]. Appeal quashed.

The action was for infringement of copyright through the use of a reproducing machine in a tea-room in Toronto. The defendant company furnished and serviced the reproducing equipment and the individual defendants were the proprietors of the tea-room in question.

The plaintiff claimed declarations, injunctions and "the sum of $525.00 damages, or such further sum as this Court may see fit to allow". The trial judge dismissed the action with costs, and the plaintiff appealed.

In support of the motion to quash, the respondents filed an affidavit, parts of which are summarized in the reasons for judgment. The appellant filed an affidavit of W. S. Low, General Manager of the appellant company, containing the following paragraphs:

2. The Plaintiff claims in this action the sum of $525 damages. No evidence was tendered at the trial in respect of the quantum of damages for the reason that in more than 120 actions for damages for infringement of copyright brought by the Appellant in the Exchequer Court of Canada, a minority of which have come to trial, damages have not been assessed at trial or on motion for judgment, but have been the subject of a reference to the Registrar or Deputy Registrar of the said Court.

3. The Defendants in this action have continuously since the filing of the statement of claim infringed the Appellant's copyrights by continuing to perform in public music the sole right to perform which in public in Canada is the property of the Appellant, and the Defendant Company is engaged in activities similar to those carried on at the premises in question in this action in numerous locations in the City of Toronto and elsewhere, and at such locations has in a similar manner continued to infringe the Appellant's copyrights.

* * *

6. The Appellant, as a result of observations made by its staff and applications for licence made to it, believes that devices similar to those in question in this appeal are used for public performance of music the sole right to perform which in public in Canada is the property of the

[1] (1957), 16 Fox Pat. C. 194, 27 C.P.R. 141.

Appellant by persons in Canada who would be liable to the Appellant for fees, according to the scale approved by the Copyright Appeal Board, in sums aggregating more than $125,000 per year.

Paragraph 4 of the affidavit gave particulars of an action brought by the appellant against other defendants where "punitive damages" of $1,200 were awarded in respect of "infringements much less numerous than" those established in this action.

G. W. Ford, Q.C., for the defendants (respondents), applicants.

M. B. K. Gordon, Q.C., for the plaintiff (appellant), *contra.*

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is a motion by the defendants to quash for want of jurisdiction an appeal lodged by the plaintiff against the judgment of the Exchequer Court[1] dismissing its action. The application is supported by the affidavit of Carlton F. McInnis showing the course of the trial and stating that the evidence offered by the plaintiff indicated that from March 11, 1955 to May 3, 1956, there were ten instances of recordings being played in the Superior Tea Room of the four musical works referred to in the statement of claim. The deponent believes that as between the plaintiff and the defendants the value of the amount in dispute is far less than $500.

An examination of the transcript of the proceedings before the Exchequer Court shows that on the argument before Mr. Justice Cameron counsel for the plaintiff drew the Court's attention to the fact that the statement of claim asked for $525 damages, "or such further sum as this Court may see fit to allow", and later said:

> . . . we are asking for $525 damages, which award would give the Defendants the right to go, as a matter of course, to the Supreme Court of Canada, . . . [this] is a fair and very modest request. We have no evidence to show how much of a profit was made out of this installation.

In *McNea and McNea v. The Township of Saltfleet*[2], we said:

> Very often the allegations of fact set forth in a statement of claim and the amount claimed may be sufficient to show that the amount or value of the matter in controversy in an appeal exceeds $2,000 within the meaning of s. 36 of the *Supreme Court Act*.

[1] (1957), 16 Fox Pat. C. 194. 27 C.P.R. 141. [2] [1955] S.C.R. 827.

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Kerwin C.J.

It was there decided that, in the circumstances of that case as they were explained, the amount of damages asked for in the statement of claim could not be said to be any indication that the amount or value of the matter in controversy exceeded the stated sum.

Similarly in the present case, and notwithstanding the affidavit of Mr. Low, it cannot be said that the mere claim by the plaintiff for $525 damages, or a larger sum, is sufficient to show that the actual amount in controversy in the appeal exceeds $500 within the meaning of s. 82 of the *Exchequer Court Act*, R.S.C. 1952, c. 98. No opinion is expressed as to the damages that might be allowed if the plaintiff had succeeded.

The motion is, therefore, granted with costs.

Appeal quashed.

Solicitors for the plaintiff, appellant (respondent on the motion): Manning, Mortimer, Mundell & Bruce, Toronto.

Solicitors for the defendants, respondents (applicants): Rogers & Rowland, Toronto.