1964
*Dec. 2, 3
1965
May 17

CARGILL GRAIN COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

FOUNDATION COMPANY OF CANADA LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Actions—Exception of lis pendens—Action in damages for breach of building contract against builder—Subsequent action by builder to preserve privilege and in damages—Cross-demand in second action by first plaintiff—Whether identity of parties, cause and object in cross-demand—Code of Civil Procedure, arts. 173, 215.

The plaintiff instituted in the district of Montreal an action against the defendant and several other construction companies for damages resulting from the failure to complete a building contract within the stipulated date, and invoked in particular against the defendant faulty work on a warehouse built by it. This action was defended by all defendants. After the completion of the work, the defendant instituted in the district of Saguenay an action against the original plaintiff for work done, materials furnished and damages. The original plaintiff filed a cross-demand in the second action for damages arising from the collapse of one of the warehouses built under the contract. The exception of *lis pendens* asking that the cross-demand be struck out was dismissed by the trial judge. This judgment was reversed by the Court of Appeal. The original plaintiff appealed to this Court.

Held: The appeal should be dismissed.

It is clear that *lis pendens* exists only if in both actions the parties, the cause and the object of the action are the same. There is no doubt that in the present case there was identity of parties and of cause. There was also identity of object. The damages claimed in the Montreal action were identical in character to those claimed by the plaintiff in its cross-demand. The mere fact that the amounts claimed might differ did not alter the nature of the object. Under art. 215 of the *Code of Civil Procedure*, additional damages cannot be claimed in a different action, but by incidental demand.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Beaudoin J. Appeal dismissed.

John J. Ahearn, Q.C., for the plaintiff, appellant.

Peter Laing, Q.C., for the defendant, respondent.

* PRESENT: Taschereau C.J. and Fauteux, Judson, Hall and Spence JJ.

[1] [1964] Quebec Q.B. 400.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—I am of the opinion that this appeal fails and that it should be dismissed. A short résumé of the facts is essential for the better understanding of this case.

In 1958, the Cargill Grain Company, Limited, Cross-Plaintiff-Appellant, planned the construction, in Baie Comeau, District of Saguenay, Province of Quebec, of a grain export and storage elevator on the St. Lawrence River, with a capacity in excess of eleven million bushels of grain and high-speed loading and unloading facilities. The appellant entered into a series of separate contracts, each for a different phase of the work.

The Foundation Company of Canada, Limited, submitted bids which were the lowest, and was awarded on or about November 5, 1958, Contract No. 3, on March 17, 1959, Contract No. 4, and on July 23, 1959, Contract No. 14, for the execution of part of the work required.

Cargill Grain was dissatisfied with the work done by Foundation Company and on July 21, 1960, took action in the Superior Court of the District of Montreal against Foundation Company, Cross-Defendant-Respondent in the present case, and Davie Shipbuilding Limited, Cobra Industries Inc., and Hennessy Riedner & Associates Inc., who were all contractors on the Baie Comeau construction, jointly and severally for the sum of $2,451,586.60 damages and further against the Cross-Defendant-Respondent alone for the sum of $170,851.50. The conclusions of the action further asked that the invoiced claims of Cross-Defendant-Respondent against Cross-Plaintiff-Appellant in the amount of $1,096,119.65 be annulled. This action was contested by all defendants, including, of course, Foundation Company.

The Cargill Grain Company alleges that it has sustained damages as a result of the completion of the Baie Comeau facility beyond its scheduled completion date and that

> .... moneys obtained by Cross-Defendant-Respondent as a result of fraud, duress and mistake of fact and law; and payments made to other contractors to correct Cross-Defendant-Respondent's faulty work. In short, Cross-Plaintiff-Appellant claimed in its Montreal action that the facility was completed late and that Cargill was forced to pay excessive sums of money due to Cross-Defendant-Respondent's dishonesty and the necessity to correct certain bad work.

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After the institution of this action in Montreal, construction was completed in Baie Comeau, but during the first loading of grain on August 19, 1960, part of Warehouse No. 1 perished.

On December 20, 1960, the Foundation Company launched an action in the District of Saguenay to preserve its privilege, and claimed against Cargill Grain Company the sum of $964,774.88 for work done, material furnished in execution of its contracts, and damages. After contesting this action on the merits, and some two and one-half years later, in May 1963, the appellant asked leave in the Saguenay action to file a cross-demand, in which it claimed cost of reconstruction of Warehouse No. 1 and damages, totalling $1,986,216.10. The respondent, Foundation Company, met this cross-demand by a Preliminary Exception of *Lis Pendens,* which was dismissed by the Superior Court, but the judgment of the learned trial judge was reversed by the judgment of the Court of Appeal.[1]

The Exception reads as follows:

> WHEREAS by Writ of Summons issued out of the Superior Court for the District of Montreal under No. 511763 of the records of that Court, the Cross-Plaintiff has sued the Cross-Defendant for damages arising out of *inter alia* the alleged improper construction by Cross-Defendant of Warehouse No. 1 at Baie Comeau; and
>
> WHEREAS the said action is still pending between the parties; and
>
> WHEREAS the present Cross-Demand is between the same parties acting in the same qualities, has the same object and is founded on the same cause, as can be seen by a copy of the Writ and Declaration, Particulars and Further Particulars and, more particularly, paragraph 32(4) of the said Declaration, and the Particulars, and Further Particulars thereto, in the Montreal action aforesaid; copies of said Writ and Declaration, Particulars and Further Particulars, being filed herewith as Cross-Defendant's Exhibits CD-1, CD-2, and CD-3 respectively.
>
> THAT Cross-Plaintiff's present Cross-Demand be dismissed with costs.

Under art. 173 of the *Code of Civil Procedure,* the defendant may, in case of *lis pendens,* ask, by a Preliminary Exception, that the action be dismissed. Here, what is asked is not that the action be dismissed, but that the cross-demand in the Murray Bay action be dismissed. It is clear that *lis pendens* exists only if in both cases (Montreal and Murray Bay) the parties, the cause and object of the

[1] [1964] Que. Q.B. 400.

case are the same. If these three conditions exist, the Exception must be allowed and the cross-demand of Cargill Grain claimed in the Murray Bay action must be dismissed.

I have no doubt that in the present case there is identity of parties and of cause. I am also of the opinion that there is identity of object. The damages claimed by the Cargill Company in the Montreal action are identical in character to those claimed by the same company in its cross-demand in the Murray Bay action.

The amount may be different but the object remains the same. The mere fact that the amounts claimed in the two litigations may differ does not alter the nature of the object. *Arsenault v. Monette*[1].

The rules that have to be applied in matters of *lis pendens* are the same that are to be applied in *res judicata* and they have to be applied here. These rules rest on the presumption of r*es judicata* which is a bar to any further litigation on the same matter. This excludes the possibility of contradictory decisions on the same matter. Lacoste, de la chose jugée, n[os] 14, 251; *Langevin v. Raymond*[2].

In the case of *Arsenault v. Monette, supra,* the Court of Appeal said:

> An exception of *lis pendens* should be maintained if it appears that the plaintiff took an action in the Magistrate's Court for damages to his automobile and that he instituted a second action in the Superior Court *claiming a greater amount as damages resulting from the same accident.* The issue whether an exception of *lis pendens* lies is governed by the principles of chose jugée.

Laurent, Droit civil vol. 20, p. 81 says:

> Quand la nouvelle demande est fondée sur *la même cause,* on peut la repousser par l'exception de chose jugée, car elle a été jugée; si l'on admettait une nouvelle action, il pourrait y avoir contrariété de décisions et, par suite, atteinte à l'autorité que la loi attache aux jugements. Dans ce cas, on peut dire que le procès doit avoir une fin, car il a été décidé, et on ne peut pas permettre que cette décision soit remise en question. Celui qui forme une nouvelle demande, fondée sur la même cause, n'a pas le droit de se plaindre si on le repousse par une fin de non-recevoir; il n'éprouve pas un déni de justice, car il a pu soutenir son droit, et il l'a soutenu devant le premier juge.

In the Montreal action, Cargill Grain claims in para. 6 of its statement of claim, *damages* for the *improper construction of Warehouse No.* 1, the foundation and preparation of the ground, causing the failure of the warehouse.

[1] [1951] Que. K.B. 372. [2] (1926), 41 Que. K.B. 412.

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This is an abstract of the particulars furnished by Cargill on January 3, 1962, following the action instituted in Montreal on July 21, 1960.

In defence to the action taken by Foundation Co. in 1963 Cargill made its cross-demand and alleged that the negligence and error of cross-defendant caused the perishing in part of Warehouse No. 1 on August 19, 1960.

The main claim by Cargill in its Montreal action appears to me to be the same as what is claimed in the Murray Bay action by the cross-demand. It should not be forgotten that a cross-demand is equivalent to an action. I have stated before that in such cases art. 173 applies and that the defendant may, in case of *lis pendens*, ask by a preliminary exception that the action be dismissed.

It is also trite law in the Province of Quebec that if additional damages have occurred since the first action was instituted, these additional damages cannot be claimed in a different action, or in a cross-demand in a different action, but by incidental demand by virtue of art. 215 of the *Code of Civil Procedure*. Under that section the plaintiff may, in the course of the suit, make such an incidental demand in order to claim a right accrued since the service of the principal action and connected with the right claimed originally.

On the whole, I concur with the reasons of Mr. Justice Rivard, and I would, therefore, dismiss the appeal with costs throughout.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellants Hyde, Ahern, de Brabant & Nuss, Montreal.

Attorneys for the defendant, respondent: Chisholm, Smith, Davis, Anglin, Laing, Weldon & Courtois, Montreal.