

Date: 20090625

Docket: T-64-08

Citation: 2009 FC 666

Ottawa, Ontario, June 25, 2009

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

HENRY NEUGEBAUER

Applicant

and

ANNA M. LABIENIEC

Respondent

REASONS FOR ORDER AND ORDER

[1] This case involves an application to expunge a Certificate of Registration of Copyright (Registration No. 1,039,825) registered at the Canadian Intellectual Property Office on July 12, 2006, in connection with a literary work in the Polish language entitled *Gesi puch* (the Book). The Registration at issue identifies both the Applicant and the Respondent as the owners and authors of

the Book. The application is brought pursuant to subsection 57(4) of the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act).

THE PARTIES

[2] The Applicant, Henry Neugebauer, was born in Poland in 1926 and has lived in Canada since the 1950s. He is a Holocaust survivor and was 13 years old when the Germans occupied Poland in 1939. The Book is based on his life story, particularly his experiences during the Holocaust. The Applicant has no writing experience and is not familiar with matters such as computer layouts, cover design and the process of printing and publishing a book. The Applicant says that he is fluent in English and Polish.

[3] The Respondent, Anna M. Labieniec, is a writer and journalist who has lived and worked in Canada for twelve years. She speaks and works in Polish and is fluent only in that language. Accordingly, the Respondent was assisted by a translator at the hearing of this application. In addition to her claim to have jointly authored the Book, the Respondent has written and published six books, four as general editor, one as a joint author, and one as an author. She also claims to have authored several hundred interviews as well as reports in print and for radio and television.

[4] The Respondent was briefly represented during a motion to adjourn these proceedings, but was self-represented during the hearing on the merits. Unfortunately, as a result of her decision to represent herself, her record was not complete. For example, although in her affidavit of

December 23, 2008 she described thirty pages of transcription which she alleged she prepared, she was not permitted to introduce them during the hearing because they had not been exhibited to her affidavit. As well, I have disregarded evidence she provided during her submissions which was not included in her affidavits.

THE FACTS

[5] The Applicant says that a document entitled “Confirmation of Oral Agreement” dated September 1, 2005 (the First Agreement) reflected the intention of the parties to create a book with the Applicant as the author and the Respondent as the editor. The Applicant further submits that the parties are bound by the terms respecting “authorship” in the First Agreement because the Respondent failed to demonstrate a modification of that agreement or a material change in the parties’ intentions.

[6] The Respondent denies that the First Agreement related to a Book. She says that it provided that she would prepare an edited transcription of the Applicant’s tape-recorded recollections of his Holocaust experiences. The recordings were in Polish and the transcription was also to be in that language.

[7] The Respondent says that a separate oral contract was made dealing with the writing of the Book as joint authors (the Second Agreement) and that the Applicant’s conduct supports their joint authorship of the Book.

[8] For the reasons below, I have concluded that the Respondent is credible and that there was a Second Agreement under which she and the Applicant agreed to jointly author the Book.

The First Agreement

[9] The parties did not know one another prior to their discussions about the First Agreement. Based on a favourable recommendation, the Applicant contacted the Respondent in August 2005.

[10] On September 1, 2005, the parties signed the First Agreement. It was a one page personal service contract which had been drafted in English by the Respondent's husband, J. Bogdan Pasziewicz. Mr. Pasziewicz explained the terms of the First Agreement to the parties in Polish before they signed it. It identifies the Applicant as author and the Respondent as editor. Her duties were to "[t]ransfer from tape recording to written media (Polish)" and "[e]dit and shape the materials to literary form".

[11] The First Agreement makes no mention of a book, but rather refers to the work as an "edition" or "memoires". The word "Memoires" appears over the Applicant's name on the top left corner of the page and again under the heading "miscellaneous" as follows: "Author gives the rights [*sic*] to the editor to use parts of memoires in her future works". The word "edition" appears twice under the heading "miscellaneous" as follows: "Edition shall remain the property of the Author" and "Author shall have final approval over edition".

[12] Mr. Pasziewicz's affidavit said that he explained to the parties that "[t]he material is called Memoirs" and that:

The result of transferring the recordings onto paper, the printed version of it (edition) belongs to the author of the tapes. Such author has the right to ask for a correction of the printed version in cases when he would not like to reveal some secrets from his life in print. He gives Anna Labieniec the right to use parts of his history in her journalistic work, without separate permission. The last clause was the main concern for Mr. Neugebauer.

[13] The Respondent asserts that the content of the tape recordings was "a chaotic accumulation of non-sequitur information about the Applicant's life" with no chronology. She also said that the language was difficult to understand. Given her difficulty with the materials provided, the Respondent requested interviews with the Applicant in order to complete her transcription of the Applicant's tapes. She also undertook some independent research to fill in gaps in the material. In the end, she provided the Applicant with thirty pages of material.

[14] I have concluded that the First Agreement was a limited contract for the transcription and editing and shaping of the material on the Applicant's tapes into an organized written form in Polish. Because the First Agreement provides for a fee of only \$2,000.00, two months for the completion of the work, and makes no provision regarding copyright or royalties, I have accepted the Respondent's evidence that it did not deal with a book.

The Second Agreement

[15] The Respondent asserts that the Applicant was satisfied with the thirty page transcription under the First Agreement but stated that he also dreamt of writing a book. The Respondent says that the Applicant wanted her to write a book of approximately 240 pages based on his life. He was to be the main character. At this point, the parties orally made the Second Agreement providing that they would be joint authors of the Book. The Second Agreement also provided that the Applicant would pay for the first printed edition and thus receive the whole income from that edition, but that profits from future editions and any translations would be divided between the parties.

The Book

[16] The Book was first published in Toronto on May 5, 2006. It is 224 pages in length and has a paper jacket. The front of the jacket prominently displays the names of both parties, with the Applicant's name above and in slightly larger type than the Respondent's. The publishing information on the second page of the Book shows copyrights for both individuals. The inside front flap of the jacket includes the Applicant's photo and provides information about his background. It also notes that "[h]e told his story to [the Respondent], Polish author and journalist who live in Canada". The Respondent translated the first sentence on the back of the jacket as follows:

“Gesi puch” (“Goos Down”) [*sic*] of Henry Neugebauer and Anna Labieniec is a story based on true events, seen through the eyes of teenager, history of the Holocaust in Sosnowiec.

[17] The Applicant acknowledges that the Respondent wrote every word in the Book. I have accepted the Respondent's submission that she took the Applicant's disjointed information and created a narrative. I have rejected the Applicant's submission that the Respondent merely edited and organized his narrative. I have also concluded that the Respondent included original material in the Book about events which were not actually based on the Applicant's recollections. She created this material to expand his story to make the Book.

[18] The Applicant says that, at the time the Book was printed by a printer arranged by the Respondent, he was unaware that any reference was being made to the Respondent as either an author or copyright owner. The Applicant states that before the printing he was shown some items on Mr. Paszkiewicz's computer, but that he could not see anything as he was not wearing his glasses. He also states that he was not given paper material to review, despite having asked for it. He asserts: that everything was rushed and unorganized at the printing house; that he was only given a few pages to look at; that he was not given sufficient time to review the cover of the book; and that no one pointed out to him "the small passages about copyright, rights being attributed to the Sooni Project and other such details that are in the printed version of *Gesi Puch*".

[19] The Applicant also says that when he saw the layout of the Book, he thought he was sufficiently represented as the author by such things as his name being larger on the cover, his forward introducing the Book, his picture and biography on the front flap of the jacket cover, and "the fact that *Gesi Puch* is the autobiography of [his] life".

[20] On the other hand, the Respondent says that the Applicant liked the design of the Book and approved of her name on the cover as joint author. Further, although she didn't agree, he wanted her to have her photograph on the back flap of the cover. The Respondent and Marek Kornas, the owner and operator of Nova Printing, both deposed that the Applicant participated in all decisions and approved all consecutive stages of the work throughout the printing process which took three weeks. They say that, during that period, the Applicant took the jacket and the text of the work home and never objected to any aspect of the material. They also say in late April 2006, the Applicant attended at the printing shop and carefully examined the Book and the cover and approved the content of both.

[21] Based on the above submissions, I have rejected the Applicant's claims that he was unaware of the copyright and authorship information in the Book before it was printed.

Publication of the Book

[22] The Applicant submits that the conduct of the parties after a work is published should not be treated as evidence of their intentions. However, in *Drapeau c. Girard*, [2003] R.J.Q. 2539 at para. 9, the Quebec Court of Appeal held that parties post-publication behaviour was relevant to issues of authorship and joint authorship. Accordingly, I will examine that behaviour.

[23] The first promotional event for the Book took place in Toronto on May 5, 2006 at the Artus bookstore. According to Teresa Budzillo, the owner and manager of Artus, the event was planned in

a meeting involving herself, the Applicant and the Respondent, wherein the Applicant “introduced himself as a co-author of the book *Gesi puch* written by Anna Labieniec”. Ms. Budzillo and the Respondent said that the public reading on May 5, 2006 was attended by writers and journalists as well as readers and the Applicant’s close family members.

[24] Ms. Budzillo described the event, in part, as follows:

Anna Labieniec talked about the process of writing the book, and about the difficulties which she had to overcome in order to convey in words the way of thinking of the man raised in different from Christian culture, and express the character’s traumatic experience in the face of extermination. [...] During the reading, Mr. Neugebauer repeatedly thanked Anna Labieniec for writing a beautiful book about him and his lot. He presented her with a bouquet of roses. Ms. Labieniec and Mr. Neugebauer jointly signed the books for the readers.

[25] Marek Kusiba, a writer and journalist who attended the event, said that the parties were both asked for autographs by several purchasers. However, the Applicant asserts that the parties signed the Book not as joint authors, but as author and editor and says that they co-signed at the Toronto book launch only because the Respondent had many friends in attendance. However, because they also signed the Book together in Poland, I have not accepted this explanation.

[26] The Applicant gave the Respondent an autographed copy of the Book. The Respondent translated the autograph from Polish into English as follows: “For Ms. Ania for writing beautiful book with thanks. Henry Neugebauer.” The Applicant does not contest the translation, rather he asserts that he meant to express his gratitude for her editorial assistance. The Applicant’s counsel said that the Applicant meant to thank the Respondent for editing the Book, and that the Court

should not put too much weight on his choice of words. However, I have taken his words at face value and am comfortable that, if she had been an editor, his note of thanks would have reflected that fact. In reaching this conclusion, I am mindful that the Applicant was aware of the distinction between an author and an editor when he signed the First Agreement.

[27] I have found the evidence about the promotional reading at Studio 102 in Lodz, Poland on May 26, 2006 to be particularly useful. The Respondent provides a translation of the portion of the reading that was videotaped and the Applicant does not contest the Respondent's translation. The Respondent clearly described herself as an author of the Book without objection from the Applicant.

[28] Based on all the evidence, including photographs of the Respondent autographing the Book with the Applicant in Toronto and Poland, I have determined that the parties signed together on at least two occasions. In light of this conduct at the promotional events and particularly Ms. Budzillo's evidence that he identified himself as "co-author" with the Respondent, I also reject the Applicant's submission that these signings were not as co-authors. Accordingly, I find that the parties held themselves out as joint authors during the promotion of the Book.

Events Leading up to This Proceeding

[29] The Applicant testified that on his return from Europe, his daughter (now deceased) alerted him to her belief that the Respondent was claiming joint authorship in the Book. He was apparently

surprised and enraged and took corrective action, including publishing a newspaper advertisement identifying himself as the Book's sole author.

[30] Ms. Budzillo says that in late June 2006, she discovered that the Applicant had replaced the promotional posters in her store which bore the names of both parties with ones that bore only his name. She took them down and requested a meeting with the Applicant. She also says that the Respondent informed her that the Applicant's lawyer had written to her accusing her of unlawfully presenting herself as co-author of the Book and threatening litigation. Ms. Budzillo says that, in their meeting, the Applicant gave her no reason for his conduct. She informed him that she considered his behaviour scandalous and ungrateful and she refused to sell the Book. She returned the unsold copies to the Applicant.

[31] The Respondent says that the Applicant's story about discovering her claim to joint authorship from his daughter is untrue. She says that his conduct is explained by the fact that she had the contacts needed to arrange the promotional tour in Poland and, once it was over, the Applicant had no further need of her. She also says he was motivated to deny her joint authorship by the prospect that he would have to pay her if the Book was republished or translated.

[32] The Respondent registered the Book with the Canadian Intellectual Property Office on July 12, 2006. The registration identified the Respondent and the Applicant as owners and authors of the Book.

[33] In October 2007, the Applicant submitted an independent Application for Registration of Copyright in the Book to the Canadian Intellectual Property Office, which was registered on November 2, 2007. This registration identifies the Applicant as the sole owner and author of the Book.

ISSUES

[34] Against this background, the following questions require consideration:

1. Did the Respondent's contribution to the Book constitute "authorship" under the Act?
2. Did the parties' respective contributions to the Book constitute "joint authorship"?

Issue 1 - Authorship

[35] The parties disagree about the Respondent's creative contribution to the Book. While the Applicant asserts that the Respondent did not contribute to the creative or intellectual process of writing the Book, characterizing her contribution as merely editorial, the Respondent asserts that the intellectual and creative process of writing the Book was all her own.

[36] The Applicant correctly notes that although the word "author" is not defined in the Act, cases have indicated that it conveys a sense of creativity and ingenuity. The Applicant further cites the New Brunswick Court of Appeal's decision in *New Brunswick Telephone Company* in this regard. It states:

The word author must “not be equated to a mere scribe or amanuensis.” Nor can a person who shared or gives to another person be considered an author. Rather, it is the individual who “expressed the ideas in an original or novel form” that is considered the author.

New Brunswick Telephone Company, Limited v. John Maryon International Limited [1982] N.B.J. No. 387, [1982] 141 D.L.R. (3d) 193 at 244 (N.B.C.A.).

[37] I have concluded that, in this case, the Respondent contributed sufficient originality and expression to claim authorship of the Book and have rejected the Applicant’s submission that the Book is simply the Respondent’s transcription of the Applicant’s narrative with minor improvements to flow, editing of vocabulary and crafting. In my view, the Applicant did not provide the Respondent with sufficient personal recollections to allow her to write a book. This is why her affidavit describes over a dozen scenes based on her imagination and research in order to fill out the Book. The Respondent takes issue with only one of her claims and says he told her about drinking whale oil.

[38] Canadian cases have consistently maintained that copyright law does not protect ideas, concepts and facts, but rather the expression of these ideas, concepts and facts in an original form. The Applicant maintains that all the Respondent’s created events are “loosely base on my life and or [sic] the lives of those like me who endured the Holocaust”. I find this to be an admission that these events were not simply the Respondent’s edited transcription of a narrative authored by the Applicant.

[39] In *Gould Estate v. Stoddart Publishing Co.* (1996), 30 O.R. (3d) 520 (Gen. Div.), aff'd (1998), 80 C.P.R. (3d) 161 (Ont. C.A.). Glenn Gould, who was the subject of the literary work, contributed substantially to the content of the work in the form of statements given in interviews. However, the author was held to be the person who conducted interviews and performed the creative task of assembling his statements into a literary work. Accordingly, *Gould* states that people do not have copyright in a work simply because they are its subjects or respond to questions in interviews. Following *Gould*, *Hager v. ECW Press Ltd.*, [1999] 2 F.C. 287, 85 C.P.R. (3d) 289, at para. 24, noted that:

Under Anglo-Canadian law, insofar as private interviews are concerned, it is the person who reduces the oral statements to a fixed form that acquires copyright therein. That individual is considered to be the originator of the work.

Issue 2: Joint Authorship

[40] The Applicant also contests the Respondent's factual and legal entitlement to joint authorship.

[41] Section 2 of the Act defines "work of joint authorship" as follows:

"work of joint authorship"
«*oeuvre créée en collaboration*»

«*oeuvre créée en collaboration*»
"*work of joint authorship*"

"work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;

«*oeuvre créée en collaboration*» Oeuvre exécutée par la collaboration de deux ou plusieurs auteurs, et dans laquelle la part créée par l'un n'est pas distincte de celle créée par l'autre ou les autres.

[42] Thus, the statutory definition involves two precise requirements: there must be collaboration and the contributions must not be distinct.

[43] I have concluded that, under the Second Agreement, there was collaboration which contributed towards a unitary whole and that the parties intended that their contributions be joined in furtherance of a common design. I have accepted the Respondent's evidence that the Applicant agreed that they would be joint authors of the Book. I am persuaded that the Respondent is a joint author by the evidence of the bookstore owner who asserted that the Applicant introduced himself to her as the "co-author" of the Book written by the Respondent and by the Applicant's post-publication conduct.

[44] I have reached this conclusion under both the conventional test for joint authorship as well as the expanded test introduced by the British Columbia Supreme Court its decision *Neudorf v. Nettwerk Productions Ltd.* (1999), 3 C.P.R. (4th) 129 (B.C.S.C.) at para. 24 (*Neudorf*). *Neudorf* followed American law, which imposes a requirement that collaborators intend to regard each other as joint authors, instead of the Canadian and British precedents, which impose no such requirement.

[45] *Levy v. Rutley* (1871) 6 L.R. 976 (CP) 1870-71 523 [*Levy v. Rutley*] continues to be cited as the leading authority on the constituent elements of joint authorship under English and Canadian law. For example, Normand Tamaro, *The 2009 Annotated Copyright Act* (Toronto: Carswell, 2008),

at pp. 189-191, cites this judgment as establishing the following three important elements concerning work of joint authorship:

First, the existence of a work of joint authorship is established by the facts and by the law, and is not based on the parties' intentions.

[...]

Second, the contributions of each of the parties need not be equal, though each must be substantial.

[...]

Third, even if one contribution may be qualitatively and quantitatively inferior to the other, there must be a joint labour in carrying out a common design.

[my emphasis]

[46] In contrast to the joint authorship element of “contribution”, which has been considered in numerous Canadian cases, Mr. Justice Cohen said in *Neudorf* at para. 68 that “[t]here is a dearth of Canadian law on the meaning of the word “collaboration” in the definition of joint authorship in s. 2 of the Act.”

[47] After describing some of the Canadian and English authorities, Mr. Justice Cohen concluded at para. 71 that:

Neither *Fox, Stuart v. Barrett* nor *Godfrey v. Lees* expanded upon the test for joint authorship beyond the scope of its introduction into the common law by *Levy v. Rutley*. However, in my opinion, the authorities, at the very least, have settled that to satisfy the test for joint authorship a putative joint author must establish that he has made a contribution of significant original expression to the work at the time of its creation, and that he has done so pursuant to a common design (or, in other words, some form of shared intent).

[my emphasis]

[48] In introducing the requirement for shared intention, Justice Cohen drew on American legislation and precedents.

[49] Section 101 of the U.S. *Copyrights Act* of 1976, 17 U.S.C., the legislative definition of a “joint work” in force in the U.S. at the time *Neudorf* was decided, provided as follows:

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

[50] Justice Cohen also relied on *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (*Childress*), which he treated as the leading American authority interpreting the American statutory definition of “joint work”. It established the following three-prong test:

- 1) each of the collaborators intended the other to be a joint author of the work;
- 2) each author’s work was independently copyrightable; and
- 3) each author intended that his work be merged into inseparable or interdependent parts of the whole.

[51] Although the *Neudorf* test has been used at the trial level in Quebec, Ontario and Nova Scotia (see *Drapeau c. Carbone 14*, [2000] J.Q. no 1171 (QCCS) (Locus Para. 55); *Saxon c. Communications Mont-Royal inc.*, [2000] J.Q. no 5634 (QCCS) (Locus Para. 75); *Dolmage v. Erskine* (2003), 23 C.P.R. (4th) 495 (ONSupCtJus) (Locus Para. 45); and *Wall v. Horn Abbot Ltd.*, 2007 NSSC 197 (Locus Paras. 498-506), it has not, in my view, been applied at the appellate level. In particular, I have not accepted the Applicant’s submission that it was relied on by the Quebec

Court of Appeal in *Drapeau c. Girard*, [2003] J.Q. no 13044, 127 A.C.W.S. (3d) 533. As I read that decision, the Court relied on the conventional test for joint authorship found in *Levy v. Rutley*.

[52] Given this background, I have decided not to follow *Neudorf*'s articulation of the appropriate test for joint authorship under s. 2 of the Act. However, as previously mentioned, even if I had followed *Neudorf*, my conclusion on the issue of joint authorship would have been the same.

CONCLUSION

[53] The application to expunge the Registration of Copyright No. 1,039,825 will be dismissed.

ORDER

UPON hearing the submission of both counsel for the Applicant and the self-represented Respondent in Toronto on Thursday, January 22, 2009;

AND UPON being satisfied, for the reasons given above, that the Certificate of Registration of Copyright (Registration No. 1,039,825) dated July 12, 2006, properly describes both parties as owners and authors of the literary work entitled *Gesi puch*;

AND UPON being satisfied that, because the Respondent is a self-represented litigant, she is entitled to be reimbursed as follows: (i) for her time on a modest scale; (ii) her reasonable

disbursements; and (iii) party and party costs associated with the work of any counsel retained to assist with this application;

NOW THEREFORE THIS COURT ORDERS that:

1. This application to expunge the Certificate of Registration of Copyright (Registration No. 1,039,825) dated July 12, 2006, in connection with the literary work entitled *Gesi puch* is dismissed.
2. The Respondent shall have her costs, in the amount of \$3,000.00 for her time plus reasonable disbursements and party and party costs associated with any counsel retained to assist with this application.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-64-08

STYLE OF CAUSE: HENRY NEUGEBAUER v. ANNA M. LABIENIEC

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 26, 2008

**REASONS FOR ORDER
AND ORDER BY:** SIMPSON J.

DATED: June 25, 2009

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