Federal Court  Cour fédérale

Date: 20220527

Docket: T-1686-21

Citation: 2022 FC 776

Toronto, Ontario, May 27, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

CHRISTOPHER JOHNSON

Plaintiff

and

CANADIAN TENNIS ASSOCIATION,
MILOS RAONIC,
GENIE BOUCHARD,
DENIS SHAPOVALOV,
AND
FELIX AUGER-ALIASSIME

Defendants

ORDER AND REASONS

[1] This is an appeal (Appeal) pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], against the Prothonotary's April 5, 2022 Order (the Decision), in which she granted the Plaintiff a 90-day extension to serve his Statement of Claim on the Defendant, Genie Bouchard, and dismissed his motion for substitutional service. Having considered the Plaintiff's

motion record for this Appeal, the written submissions of the other Defendants to the action, and the relevant portions of the Plaintiff's unfiled letter in reply, as well as the materials filed before the Prothonotary in the original motion for substitutional service, I find that the Plaintiff has not demonstrated an error warranting the Court's intervention. I will accordingly dismiss his motion, with costs to the other Defendants, for the reasons that follow.

I. Background

[2] The action underlying this Appeal concerns allegations by the Plaintiff of copyright infringement and unauthorized use of his portfolio of original photographic works. In his Statement of Claim, the Plaintiff seeks a variety of declaratory and injunctive relief, in addition to compensatory and punitive damages against the Canadian Tennis Association (Tennis Canada), Milos Raonic, Denis Shapovalov, Felix Auger-Aliassime and Genie Bouchard (collectively, the Defendants). The Plaintiff is self-represented.

[3] On February 23, 2022, Associate Chief Justice Gagné dismissed the Plaintiff's *ex parte* motion seeking default judgment against Genie Bouchard (Ms. Bouchard), finding that it had not been established that Ms. Bouchard was served with the Statement of Claim, pursuant to Rule 128 of the *Rules*. The motion for default judgment had been sought by the Plaintiff on the basis that Ms. Bouchard, unlike the other Defendants, had not filed a Statement of Defense or replied directly through lawyers.

[4] In a motion in writing dated March 21, 2022, the Applicant requested an order from the Court which would (i) extend the time for him to serve the statement of claim on Ms. Bouchard;

(ii) extend the time for the Plaintiff to file an Affidavit of Service pursuant to Rule 8 of the *Rules*; and (iii) grant him substitutional service of the Statement of Claim on Ms. Bouchard by depositing it at the Registry Office in Calgary.

[5] In her Decision, the Prothonotary began by citing the twin purposes of service, namely, the right of a party to have proper notice of legal claims against them, as well as the basis upon which to ground the Court's jurisdiction to make an order against a party to a dispute (*Canada v. Spelrem*, [2001] 211 F.T.R. 274 [*Spelrem*]).

[6] The Prothonotary then noted that difficulty in effecting personal service does not automatically entitle a party to substitutional service, and that the Court must first be satisfied that the party seeking an order has taken reasonable steps to effect personal service, that it has not been successful, and that the substitution proposed is an acceptable and reasonable means of bringing the proceeding to the attention of the party (*Clipper Ship Supply Inc v Samatour Shipping Co.*, [1984] FCJ No. 949 (FCTD) [*Clipper*] at para 7).

[7] The Prothonotary observed that the Plaintiff had sought to serve Ms. Bouchard by sending a copy of the Statement of Claim by registered mail to the headquarters of Tennis Canada in Toronto and that the Plaintiff deposed that this was how he had managed to serve the other named Defendants, who all, unlike Ms. Bouchard, subsequently retained counsel and filed Statements of Defence.

[8] The Prothonotary then noted that the Plaintiff's motion detailed a series of messages he sent in an attempt to reach Ms. Bouchard, by means of social media platforms and e-mails to numerous other individuals, but that these communications had purportedly been intended to alert Ms. Bouchard of the approaching deadline for her to file a Statement of Defence. In other words, these communications did not evidence an attempt to effect personal service of the Statement of Claim.

[9] Turning to the Plaintiff's motion for substitutional service, the Prothonotary noted that there was no indication in the Plaintiff's affidavit that he had ever attempted to effect personal service of the Statement of Claim pursuant to the *Rules*. Despite deposing to having conducted an extensive search and being unable to find a home address, the Plaintiff provided no indication of what that search involved, who conducted it, whether he had engaged the services of a process server, or whether he had contemplated other avenues of effecting personal service beyond sending it by registered mail to the Canadian Tennis Association.

[10] The Prothonotary was not prepared to accept or deny the Plaintiff's personal view that famous athletes were inaccessible to being contacted by the general public, particularly in the absence of any evidence of a reasonable attempt to personally serve the Statement of Claim on Ms. Bouchard. As such, the Prothonotary concluded that there was insufficient evidence for the Plaintiff to meet the necessary onus to show that service cannot be practically effected on Ms. Bouchard and dismissed his motion, without costs, for substitutional service, with leave to re-apply if he could demonstrate that he had attempted to effect personal service. The

Prothonotary also granted the Plaintiff an extension of ninety days from the date of the Order to serve the Statement of Claim on Ms. Bouchard and to file proof of service.

II. Written submissions of the parties

[11] The Plaintiff submits that in her Decision, the Prothonotary misapprehended or overlooked important facts which, if properly taken into consideration, would have justified granting his original motion for substituted service. The Plaintiff includes an affidavit in support of this Appeal, with 104 numbered paragraphs. No explanation is provided in support of the admissibility of new evidence on appeal, which were not before the Prothonotary in his original motion, as I will discuss further below.

[12] Relying on the affidavit submitted with his Appeal, the Plaintiff submits that he consulted with lawyers and process servers before deciding to send a demand letter on July 12, 2021 to an agent listed on Ms. Bouchard's social media profiles, as well as to lawyers working for a New York firm who had previously acted for Ms. Bouchard. He further submits that he sent an e-mail requesting consent to electronic service to an e-mail address for Ms. Bouchard listed on her social media profiles.

[13] The Plaintiff also suggests that it would be practically futile to hire a process server for personal service, submitting at paragraph 58 of his Written Representations:

> In reference to the Court's opinion that there is "no indication whether the Plaintiff engaged the services of a process service company or contemplated other avenues to effect personal service on Ms. Bouchard," the Plaintiff submits that he contacted various process servers who agreed with his lawyers that it would be

> costly, nearly impossible, and potentially illegal, to physically approach the Defendent [*sic*] Genie Bouchard, a famous person who lives and works within a bubble of accredited personnel protected by security personnel and armed guards, including police officers.

[14] The Plaintiff goes on to submit at paragraph 60 of his Written Representations:

> Thus, in view of Rule 3 of the *Federal Courts Rules*, the Plaintiff respectfully submits that he should not have to spend 90 more days and hundreds or thousands of dollars on process servers to search in vain for the Defendant in the Caribbean, Australia, Europe or Asia, and somehow penetrate her security perimeter, when in fact the Defendant asks people to engage with her on her social media accounts, where she is actively communicating with people, and via her representatives who are also fielding messages on her behalf.

[15] The Plaintiff further submits that there is a sufficient basis for the Court to conclude that the Statement of Claim has come to the attention of Ms. Bouchard and to reconsider the difficulty of effecting personal service by traditional means on a famous athlete when it is clear she has so far evaded attempts to contact her and will continue to do so unless the Court orders otherwise.

[16] The Plaintiff seeks an Order of this Court which would: grant the Plaintiff an extension to serve the Statement of Claim on Ms. Bouchard and to file an Affidavit of Service; grant permission for substitutional service to be effected; allow Ms. Bouchard an additional 30 days to file a Statement of Defense; and, notably, compel the other Defendants to share a mailing address and contact information for Ms. Bouchard.

[17] In other words, under the auspice of a Rule 51 appeal, the Plaintiff now seeks some of the same relief that he was already granted by the Prothonotary (the extension), some relief that he was denied (substitutional service), and some new relief that was not requested in the first place (an order compelling the other Defendants to share Ms. Bouchard's contact information).

[18] Several of the other Defendants to the action, namely, the Canadian Tennis Association, Denis Shapovalov and Felix Auger-Aliassime (the responding Defendants), contest the new relief sought by the Plaintiff and label the attempt to obtain it as an abuse of process. In support, they argue that the new relief is not properly before the Court in the context of a Rule 51 appeal, particularly since the Plaintiff failed to identify the relief sought and the grounds in support in a Notice of Motion, as required by Rule 359.

[19] Finally, on April 28, 2022, the Plaintiff sent a 19-page letter to the Court for directions, which was not properly filed or accompanied by proof of service on the other Parties, and which purportedly responds to several different court documents related to this action, including the Responding motion record of the Defendant, Canadian Tennis Association.

[20] On May 6, 2022, Prothonotary Ring issued a Direction instructing the Registry to receive the April 28 letter. Prothonotary Ring instructed that the letter would not be filed or treated as a reply to the Defendant's responding motion record because it is not in the form required for such a document and because the Plaintiff failed to tender proof of service on the other Parties. Prothonotary Ring noted that it was "disrespectful of the Court's time for the Plaintiff to tender

an omnibus letter for filing and expect the Court to parse out which portions of the letter are intended to respond to various previously filed documents."

[21] Taking into account that the Plaintiff is self-represented and in the interest of ensuring the just and expeditious resolution of this Appeal, the Court has nonetheless reviewed and considered portions of the letter, namely pages 12 to 14, which respond to the Defendants' responding motion record.

III. Standard of Review and Analysis

[22] A prothonotary's discretionary decision is subject to the appellate standard of review set out in *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 27-28, 65-66, and 79 [*Hospira*]; *Canada (Attorney General) v. Iris Technologies Inc.*, 2021 FCA 244 [*Iris*] at para 33). *Hospira* held that, consistent with the standard set out by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*], questions of fact and questions of mixed fact and law are reviewable on a standard of palpable and overriding error, whereas questions of law will be reviewed on the standard of correctness.

[23] The Plaintiff's Appeal rests on his argument that the Prothonotary's order misapprehended the facts presented in support of his motion. As such, his burden is to show a palpable and overriding error in the Decision. The Federal Court of Appeal has explained that palpable and overriding error is a highly deferential standard of review and that "it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall." (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 61).

[24] After considering all of the submissions in this motion in addition to the evidence that was before the Prothonotary, I cannot agree that any reviewable errors were made. Indeed, the Plaintiff barely addresses the Decision in his extensive and repetitive submissions, contenting himself to simply re-argue his original motion, and in some instances, the underlying merits of his action, instead of concentrating on the error supposedly committed by the Prothonotary, which would justify granting the appeal. No authorities are provided to justify the new relief he seeks.

[25] As noted above, the Prothonotary found that there was no indication in the Plaintiff's affidavit that he had ever attempted to effect personal service of the Statement of Claim pursuant to the *Rules*.

[26] Rule 127 makes it clear that originating documents, in this case a Statement of Claim, must be served personally. Rule 128 details the means of achieving personal service on an individual. Rule 146 provides for how service of a document is proven.

[27] In my view, the Prothonotary was correct to point out that the Plaintiff failed to comply with the formalities of the *Rules* regarding personal service and indeed, did not provide any evidence of attempting to effect personal service in compliance with Rule 128.

[28] Electronic service, provided for in Rule 141 is an alternative to the usual means of effecting personal service, but only where consent is obtained and notice of consent is served and filed with the Court, or alternatively, where the Court is satisfied that the document has come to

the notice of the intended recipient (Rule 147 of the *Rules*). In the absence of any indication that consent to electronic service was obtained, that the Statement of Claim itself was even properly communicated and received by Ms. Bouchard, or that Ms. Bouchard has actually been avoiding service, the Prothonotary was not required to treat the Applicant's e-mail as evidence of an attempt to effect personal service or as sufficient justification to warrant an Order for substitutional service.

[29] The Plaintiff also relies on the evidence of his communications to lawyers in New York whom he claims acted on behalf of Ms. Bouchard in the past. It is true that service of a document can be effected by the acceptance of service by the party's solicitor, pursuant to Rule 134. However, as the Prothonotary rightly noted, the communications attached as exhibits to the Plaintiff's original motion consisted mostly of reminders to file a Statement of Defence. These reminders were sent to social media accounts, and other individuals associated with Ms. Bouchard in addition to her former New York based counsel. They do not evidence that the Plaintiff ever sent the Statement of Claim to the lawyers in the first place and the e-mails in question actually appear to treat the service of originating documents as a *fait accompli*.

[30] As for the Plaintiff's new affidavit, in which he deposes to having consulted with lawyers and process servers, and determining together that it would be costly, nearly impossible and possibly illegal to serve Ms. Bouchard with a Statement of Claim, there are several problems.

[31] First, admitting the Applicant's new affidavit would run against the principle that an Appeal of a Prothonotary's Order is to be decided on the basis of what was before the

Prothonotary and that it is only in exceptional cases that new evidence should be admitted on appeal (*David Suzuki Foundation v. Canada (Health)*, 2018 FC 379 at paras 36-38 [*Suzuki*]). Exceptional reasons include where the new evidence (i) could not have been made available earlier, (ii) will serve the interests of justice, (iii) will assist the Court, and (iv) will not seriously prejudice the other side. No reason or authority has been provided for why this evidence was unavailable to the Plaintiff at the time of his original motion per criterion (i), or on what basis the Court should accept it now, under criteria (ii)-(iv).

[32] Second, it is not clear to me how his newly-raised "consultations" with counsel and process-servers, which again were never put before the Prothonotary, assists the Plaintiff in discharging his burden of showing that the Prothonotary made a palpable and overriding error of fact. First, the Prothonotary could not have known the Plaintiff consulted process servers without him placing that fact before her, as he has only done after the fact in this appeal. Second, the Plaintiff has not shown how this new evidence could have impacted the outcome of her Decision (*Suzuki* at para 38).

[33] More importantly, and setting aside the unexplained assertion of why a process server attempting to effect legal service of originating legal documents could somehow be illegal, the fact that the Plaintiff ultimately decided not to retain a process server only reinforces the Prothonotary's conclusion that the Applicant did not make reasonable efforts to attempt personal service. In that sense, the new evidence is useful only in terms of assisting the Court in disposing of this appeal.

[34] I am in complete agreement with the Prothonotary that the Applicant needed to show reasonable attempts to effect personal service, pursuant to Rule 128, before an Order granting substitutional service is justified, as supported by the jurisprudence (*Spelrem* at paras 5-6; *Clipper* at para 7). That is a basic principle of the *Rules*, and unless they are amended, initiating an action requires personal service according to the options provided in Rule 128. The Prothonotary concluded that the motion failed to establish a satisfactory attempt at personal service. She noted at paragraph 3 of her Decision:

> The difficulty with the Plaintiff's position on this motion for substitutional service is that at no point in his affidavit, does he indicate that he made any attempt to effect personal service as required by the Rules. Rather, at paragraph 34 of his affidavit, he deposes that "an extensive search could not find any 'home address' for the Defendant Genie Bouchard." There is no indication what that search involved nor who conducted the search. There is no indication whether the Plaintiff engaged the services of a process service company or contemplated other avenues to effect personal service on Ms. Bouchard apart from serving Tennis Canada. Instead, he notes at paragraph 36 of his affidavit that "Tennis Canada officials, players and lawyers have not provided home addresses or contact details for Ms. Bouchard or other Tennis Canada players to receive service directly."
>
> [Emphasis added.]

[35] To date, and despite the other methods the Plaintiff has employed to no avail, I am not persuaded that he has demonstrated a palpable and overriding error committed by the Prothonotary in the Order under Appeal.

[36] Neither am I persuaded, absent clear evidence of reasonable attempts to effect personal service, such as by soliciting the services of a process server and providing evidence of that

person's attempt to achieve personal service, that the Statement of Claim can be considered to have come to the attention of Ms. Bouchard.

[37] First, I note that at present, there is no evidence in any of the voluminous materials submitted, that would allow me to conclude that such an attempt has been made, successful or otherwise. Again, the various activities that the Plaintiff deposes to having attempted to effect electronic service, namely, through Ms. Bouchard's social media (Snapchat and Twitter) handles and the three email addresses listed on her "verified" social media accounts, do not constitute personal service under Rule 128, unless the Defendant consents to such electronic service under Rule 141 (or where the Court is satisfied that document has come to the notice of the intended recipient, or would have come to her attention but for her avoidance of service.)

[38] I further note that the Plaintiff has deposed to these efforts at electronic delivery of his Statement of Claim in both the Affidavit in support of this Appeal, as well as the Affidavit in support of the underlying motion before the Prothonotary. However, he has not furnished proof of these attempts. The Plaintiff did include, however, Canada Post receipts proving delivery of the five packages he sent to Tennis Canada, which were duly signed for and received.

[39] Indeed, there is no doubt that personal service took place on Tennis Canada, as well as on the three other named Defendants through this delivery, because the three other individual Defendants (Messrs. Raonic, Auger-Alliasime, and Shapovalov) each provided Statements of Defence in response. However, this does not necessarily mean that by extension, as the Plaintiff argues, they have come to the attention of Ms. Bouchard or that she has evaded service.

[40] In short, the Plaintiff in this Appeal has recycled precisely the same argument as he argued before the Prothonotary, namely that Ms. Bouchard remains in close contact with Tennis Canada and the three defendants, and thus that she, too, must be well aware of the litigation, either through them or her representatives. The Plaintiff complains that he cannot breach security at tennis tournaments to personally serve this document on her. To this, the Prothonotary held at paragraph 4:

> The Plaintiff appears to be of the view that athletes, like Ms. Bouchard who travel extensively cannot be personally served with documents. That view is confirmed in his evidence where he concludes that "famous athletes cannot be contacted in person at hotels or tournaments because they are isolated inside a bubble of security personnel protecting athletes, tour officials and other VIPs from contact with the general public." While this may ultimately prove to be the case, at this point, it does not rise above mere conjecture because the Plaintiff has made no attempt to personally serve the Defendant Genie Bouchard with the Statement of Claim. He cannot rely on his personal views about the impossibility of service where he has made no reasonable effort to attempt personal service.
>
> [Emphasis added.]

[41] I do not find that the Prothonotary made any reviewable error in her findings. Given the lack of evidence of reasonable efforts that the Plaintiff had undertaken to serve Ms. Bouchard personally, the Prothonotary was correct to state that a party seeking an Order for substitutional service must demonstrate that (i) they have taken reasonable steps to effect personal service; (ii) that it has not been successful; and, (iii) that the substitution proposed is an acceptable and reasonable means of bringing the proceeding to the attention of the party. As Justice Dubé held in *Clipper* at para 7):

> The provision in Rule 310(1) [now Rule 136] for substitutional service is an exception to the general requirement for personal service. There is no automatic right to substitutional service

> whenever there is some difficulty in effecting personal service. The applicant must show to the Court that he has taken reasonable steps to effect personal service and that he has not been successful. He must also show that the substitution is an acceptable and reasonable one, bearing in mind that the object of the order for substitutional service is to bring notice of the proceedings to the attention of the defendant.

[42] The Plaintiff did not discharge his burden of making reasonable attempts to effect personal service, and, as a result, the Prothonotary did not err in reaching this conclusion.

[43] Finally, turning to the new relief sought by the Plaintiff, namely that the responding Defendants be compelled to share personal contact information for Ms. Bouchard, I agree with the responding Defendants that this relief is not properly before the Court on appeal. Having never requested this relief in his initial motion, having not provided any Notice of Application that it would be sought and having not cited a single legal authority to justify the legal basis for this Court's ability to grant it, it is not open to the Plaintiff to attempt to shoehorn new relief into an appeal of an Order refusing his request for substitutional service.

[44] Taking into account that the Plaintiff is self-represented and unfamiliar with Court process, I will not go so far as to label the attempt to obtain this relief in the way he did as an abuse of process, as counsel for the Defendant Tennis Canada has alleged. It is, however, certainly inappropriate, and the present action is becoming increasingly populated with instances of the Plaintiff attempting to obtain relief or file documents without properly placing parties on notice or acting in compliance with the *Rules*.

[45] There are now plenty of examples to show that while self-represented parties may benefit from some flexibility from the Court in the name of access to justice, this is not equivalent to exempting them from the *Rules*, with which they must still comply (*Brauer v. Canada*, 2021 FCA 198 at para 8; *Fitzpatrick v. Codiac Regional RCMP Force, District 12*, 2019 FC 1040 at para 19).

[46] The Plaintiff, in the further pursuit of his action, is heavily encouraged to consult the Federal Court's website, which contains a significant amount of information to self-represented parties on how to comply with Court procedures, including the explanation of what Registry Officers can and cannot do for the parties (see *Ladouceur v. Banque de Montréal*, 2022 FC 440 at paras 31-32). He is also encouraged to exercise diligence in the form and substance of his future filings with this Court and to ensure they are in compliance with the *Rules*.

[47] The Prothonotary provided the Plaintiff with an extension of 90 days to serve his Statement of Claim on Ms. Bouchard and file proof of service. The Plaintiff will have the same opportunity to effect personal service from the date of this ruling. If, however, that does not prove possible in that it cannot be accomplished by orderly personal service through a professional such as a process server, this ruling will not prejudice the Plaintiff returning to the Court with sufficient evidence demonstrating that eventuality despite due diligence, appropriate investigations and reasonable attempts. Finally, while I realize that this imposes an increased cost on the Plaintiff, ultimately the cost of hiring a professional for the purpose of effecting service will be recoverable if the Applicant is successful in his action.

IV. Costs

[48] The Defendants seek costs payable forthwith for this appeal. Taking all the circumstances into account, including the fact that the Plaintiff is self-represented and that by inappropriately seeking new relief against the other Defendants, he gave them no choice but to make representations in an appeal that would not otherwise have involved them, I will order costs totalling $250 payable by the Plaintiff to the Defendants.

V. Conclusion

[49] The Prothonotary correctly set out the law, and made no reviewable error in her appreciation of the facts or the law. The appeal is accordingly dismissed with costs.

ORDER in file T-1686-21

THIS COURT ORDERS that:

1. The appeal is dismissed.

2. The Plaintiff shall pay costs to the Defendants in the total amount of $250.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1686-21
STYLE OF CAUSE:	CHRISTOPHER JOHNSON v CANADIAN TENNIS ASSOCIATION, MILOS RAONIC, GENIE BOUCHARD, DENIS SHAPOVALOV,AND FELIX AUGER-ALIASSIME

MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	DINER J.
DATED:	MAY 27, 2022

APPEARANCES:

Christopher Johnson	ON HIS OWN BEHALF
Blake P. Hafso	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

None	FOR THE PLAINTIFF
McLennan Ross LLP Barristers and Solicitors Calgary, Alberta	FOR THE DEFENDANTS