Federal Court Cour fédérale

Date: 20230609

Docket: T-1515-15

Citation: 2023 FC 822

Ottawa, Ontario, June 9, 2023

PRESENT: Associate Chief Justice Gagné

BETWEEN:

PHILIPPE THIRION

Plaintiff

and

LOUIS LESSARD
MARYSE BREAULT
AGENCE DES SERVICES FRONTALIERS DU CANADA
SA MAJESTÉ LE ROI

Defendants

ORDER AND REASONS

I. OVERVIEW

[1] The Plaintiff has brought a motion, pursuant to Rule 51 of the *Federal Courts Rules*, SOR 98/106, to appeal an order by Associate Judge Benoit M. Duchesne awarding security for costs to the Defendants.

A. *The Plaintiff's Troubled History in Canada*

[2] The Plaintiff is a French citizen who currently lives in a motor home in France, with no fixed address. The least we can say is that he has a troubled history in Canada.

[3] Over the last two decades, he has lived in Canada under various work permits and visitor's visas. In 2006, he acquired a company that soon after defaulted on several payments. The Plaintiff became the subject of a Payment Order under the *Canada Labour Code* and later the company was the subject of a criminal investigation relating to the disappearance of company property. Criminal charges and arrest warrants were issued against the Plaintiff. Around this time, the Plaintiff left the country. By February 2007, Interpol issued a notice against him for his outstanding arrest warrants in Quebec.

[4] On January 17, 2012, the Plaintiff returned to Canada and was questioned by a Canada Border Services Agency [CBSA] Agent, who realized that he was the subject of arrest warrants in the Province of Quebec. The Plaintiff was admitted to Canada in order to face the charges laid against him.

[5] Throughout 2012 and into 2013, the Plaintiff made several appearances before the Court of Quebec; while he was acquitted of some charges, more charges were also laid against him (e.g. fraud, kidnapping, extortion). He was kept in custody for a short period in connection to these charges.

[6] In July 2013, the Plaintiff was released and put into the CBSA's custody. The CBSA issued an exclusion order against the Plaintiff for having been in the country for over 6 months without interruption. The Plaintiff sought judicial review of that decision, without success.

[7] In August 2013, the CBSA requested information concerning the Plaintiff from Interpol. A month later, a response was received indicating that the Plaintiff was wanted in France for numerous fraudulent activities. Further enquiries were made by the CBSA with French authorities, eventually leading - in June 2014 - to the revelation that the Plaintiff had been convicted to serve a 30-month term of imprisonment and was the subject of an arrest warrant in France.

[8] Without entering into further details, more interactions between the Plaintiff, CBSA, and police followed, including periods spent in custody in relation to criminal charges.

[9] Jumping ahead to April 2015, the Plaintiff was transferred into the CBSA's custody and was referred to the Immigration Division for an admissibility hearing.

[10] By November 2015, the Plaintiff was found to be inadmissible in Canada, pursuant to section 41 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and a deportation order was issued against him. He was detained for immigration purposes from September 20 to September 27, 2016, at which time he left Canada.

[11] Shortly before the issuance of the deportation order, the Plaintiff commenced his action against the Defendants. He seeks damages from the CBSA and its agents. These include $100,000 in moral damages; $176,036 in damages for income lost since 2013; $17,722 in legal fees; $1,255,000 in damages at common law for his allegedly unlawful and unconstitutional confinement and detention; and $250,000 in punitive damages.

[12] He is now represented by his fourth lawyer of record.

B. *The Defendant's Motion for Security for Costs*

[13] On December 1st, 2022, the Defendants brought a motion for security for costs, pursuant to Rule 416(1)(a), asking the Plaintiff to post security for an amount equivalent to counsel fees that they expected to incur in connection with the 10-day trial, then scheduled to commence on June 12, 2023 (it has since been postponed to February 19, 2024).

[14] The Plaintiff opposed the motion, arguing that it was without jurisdiction, and that granting it would constitute a denial of access to justice, estopped by conduct, and an abuse of process.

[15] On January 5, 2023, Associate Judge Duchesne granted the Defendants' motion. He ordered the Plaintiff to pay security for costs in the amount of $24,000 within 90 days of the date of the Order.

II. Decision under appeal

[16] In granting the Defendants' motion for security for costs, Associate Judge Duchesne adopted a two-part framework, as set out under Rules 416 and 417. This framework involves first, determining whether the Defendants were *prima facie* entitled to security for costs under any of the factors listed in Rule 416(1); and second, whether the Plaintiff met the conjunctive test found in Rule 417 to overcome any such entitlement.

[17] As for the first part of the framework, Associate Judge Duchesne held that the Defendants met their burden to establish their *prima facie* entitlement for security for costs, pursuant to Rule 416(1)(a), i.e. that security is available because the Plaintiff ordinarily resides outside of Canada.

[18] As for the second part of the framework, Associate Judge Duchesne found that the Plaintiff filed no evidence in response to the Defendants' motion and thus did not meet his burden under Rule 417 to displace the Defendants' entitlement to security for costs. Rule 417 requires a Plaintiff to establish both impecuniosity and the merits of their claim. On impecuniosity, due to a lack of evidence, Associate Judge Duchesne found that it was unknown whether the Plaintiff had assets in Canada, or anywhere, to pay a costs award. Given that the Plaintiff had not met the first part of the conjunctive test in Rule 417, Associate Judge Duchesne found it was not necessary to engage in an analysis of whether the Plaintiff's claim has merit.

[19] The Order also applied Rule 416(3) to prevent the Plaintiff from taking any further steps in the proceeding, other than an appeal of the Order, without paying the security.

[20] Finally, Associate Judge Duchesne rejected the Plaintiff's claim that an order for security for costs, in this case, would amount to an affront to access to justice, along with his arguments relating to estopped by conduct and abuse of process. According to Associate Judge Duchesne, the Plaintiff failed to plead how the legal test for estoppel by conduct was established or how the doctrine of estoppel applied in this case. He also found that the Plaintiff failed to plead what circumstances specifically constituted an abuse of process.

[21] On quantum for security for costs, Associate Judge Duchesne awarded security in the amount of $24,000; the amount of the Defendants' counsel fee for the duration of trial, as calculated in accordance with Rule 407. The $24,000 figure is likely only a fraction of the costs that the Defendants intend to claim in this action, if they are successful.

III. Standard of Review

[22] An Associate Judge's decision to award security for costs is a discretionary ruling. Rules 416 and 417 provide Associate Judges with the discretion to make an order for security for costs when they deem it appropriate (see for example *Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730 at para 41, citing *Swist v MEG Energy Corp*, 2016 FCA 283 at para 15).

[23] The applicable standard of review for an appeal of a discretionary order of an Associate Judge is palpable and overriding error for questions of fact and questions of mixed fact and law,

and correctness for questions of law and questions of mixed fact and law where there is an extricable legal principle at issue (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 64, 66, citing *Housen v Nikolaisen*, 2002 SCC 33 at paras 17-37).

[24] In other words, on questions of law and questions of mixed fact and law where there are extricable questions of law, there is no deference owed to Associate Judges (*Davis v Royal Canadian Mounted Police*, 2023 FC 280 at paras 40-41; *Lessard-Gauvin* at para 42). On all other questions, especially those relating to the application of facts to law and any inferences of fact, the Court may only interfere if the Associate Judge made a "palpable and overriding error" (see *Housen* at paras 19-24, 26; *Hospira* at paras 27, 64–66, 79; *Davis*, at para 41).

[25] For a court to intervene when the deferential standard applies, the error must be obvious and determinative to the outcome of the case (*Salomon v Matte-Thompson*, 2019 SCC 14 at para 33]. Justice David Stratas describes as follows what "palpable" and "overriding" mean in this context (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157):

> [62] "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
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> [63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.
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> [64] "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not

> "overriding." The judgment of the first-instance court remains in place.

[26] For errors of procedural fairness, the applicable standard is the same as that applicable to errors of law (*Housen*, at paras 8-9; see also *GD Searle & Co v Novopharm Ltd*, 2007 FCA 173 at para 34).

IV. Issues

[27] At issue in this appeal is whether Associate Judge Duchesne made an error of law, exercised his discretion on wrong principles of law or misapprehended the evidence such that there was a palpable and overriding error in his decision to grant the Defendant's motion for security for costs.

V. Analysis

[28] The Plaintiff's first argument is that Associate Judge Duchesne erred in law by stating that once the Rule 416 part of the framework is met, he had no choice but to order security for costs if the second part of the framework, i.e. the one set for in Rule 417, is not met. The Plaintiff argues that both Rules grant this Court a discretionary power to order (Rule 416) or refuse to order (Rule 417) security for costs. Although I agree with the Plaintiff on that front, I disagree that Associate Judge Duchesne would have erred in exercising his discretion on either front.

[29] In light of the evidence before the Court, it was open for Associate Judge Duchesne to grant the motion based on paragraph 416(1)(a) alone (see for example *C. Steven Skies et al v*

Encana Corporation et al, 2018 CanLII 59726 (FC) at para 15; *Sabok Sir v Canada*, 2021 FC 82 at para 4). The Plaintiff is clearly not a Canadian resident and he has failed, in the past, to pay at least two of his three previous lawyers. Chances that he would voluntarily pay a costs order if he were unsuccessful with his action are not very high.

[30] The Plaintiff also argues that Associate Judge Duchesne was bound by the decision of the Federal Court of Appeal in *9038-3746 Quebec Inc v Microsoft Corporation*, 2008 FCA 104 [*Microsoft*], whereby the Court refused to grant a security for costs on the sole basis that it was presented at the 11th hour. I disagree. If this precedent was to be considered binding it would limit the timeframe where a defendant can bring such a motion, imposing a limitation that is not called for in Rule 416.

[31] In the *Microsoft* case, an individual appellant was examined in aid of execution of the first instance judgment and the evidence was that neither he nor the corporate appellant had the assets or ability to satisfy the judgment. Although I agree with Associate Judge Duchesne that there is a lack of evidence on that front in this case, counsel for the Plaintiff repeated several times that his client was not impecunious – he allegedly has assets in the United States that he cannot access at this time.

[32] Also in the case before me, the procedural history of the case, from the moment the action was filed in 2015 to the moment the Defendant's motion was brought, explains why the Defendant decided to bring the motion at the time it was brought. No such special circumstances existed in the *Microsoft* case.

[33] Therefore, I disagree that *Microsoft* was a binding authority in the circumstances of this case.

[34] The Plaintiff's second argument is that Associated Judge Duchesne also failed to address his access to justice argument; it is argued this ignores the binding decision of the Supreme Court of Canada in *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27.

[35] The Plaintiff bases this argument on the following passage of that decision:

> [33] The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action (*Downtown Eastside*, at para. 31). Legality derives from the rule of law: "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law" (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 40).
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> [34] Access to justice, like legality, is "fundamental to the rule of law" (*Trial Lawyers*, at para. 39). As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (*B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 230).
>
> [35] Access to justice means many things, such as knowing one's rights, and how our legal system works; being able to secure legal assistance and access legal remedies; and breaking down barriers that often prevent prospective litigants from ensuring that their legal rights are respected. For the purposes of this appeal, however, access to justice refers broadly to "access to courts" (see, e.g., G. J. Kennedy and L. Sossin, "*Justiciability, Access to Justice and the Development of Constitutional Law in Canada*" (2017), 45 Fed. L. Rev. 707, at p. 710).

[36] As Associate Judge Duchesne rightfully points out, this decision is not relevant to the motion for security for costs because it concerned the issue of public interest standing. The relied upon paragraphs are found under the heading “Legality and Access to Justice in the Law of Public Interest Standing”, whereby the Supreme Court found that in considering whether to grant public interest standing, courts must consider the purposes of legality and access to justice in their analysis. It is somewhat concerning that the Plaintiff would suggest that Associate Judge Duchesne overturned Supreme Court jurisprudence simply because he did not apply its reasons on a totally unrelated issue.

[37] Associate Judge Duchesne explains at paragraph 20 of his reasons why the decision is of no assistance to the Plaintiff. Given this, the Plaintiff’s suggestion that Associate Judge Duchesne ignores the Supreme Court decision, does not apply, and does not pointedly address a binding case is neither accurate nor appropriate. In my view, Associate Judge Duchesne committed no error law in finding that the *Council of Canadians with Disabilities* decision did not apply.

VI. Conclusion

[38] In my view, Associate Judge Duchesne properly considered the evidence before the Court — or the lack thereof; he properly exercised his discretion and did not commit any reviewable error in granting the Defendants’ Motion for Security for costs. Accordingly, the Plaintiff’s appeal is dismissed. Costs in the amount of $500 are granted to the Defendants.

ORDER in T-1515-15

THIS COURT ORDERS that:

1. The Plaintiff's appeal of Associate Judge Duchesne's Order of January 5, 2023, is dismissed;
2. Cost of $500 are granted to the Defendants.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1515-15
STYLE OF CAUSE:	PHILIPPE THIRION v LOUIS LESSARD, MARYSE BREAULT, AGENCE DES SERVICES FRONTALIERS DU CANADA, SA MAJESTÉ LE ROI
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