Federal Court Cour fédérale

Date: 20100825

Docket: T-1003-10

Citation: 2010 FC 844

Ottawa, Ontario, August 25, 2010

PRESENT: The Honourable Mr. Justice Mandamin

SIMPLIFIED ACTION

ACTION *IN REM* AGAINST THE SV "ACOR"
AND *IN PERSONAM* AGAINST THE OWNERS OF THE SV "ACOR"

BETWEEN:

CAMPBELL RIVER HARBOUR AUTHORITY

Plaintiff
(Respondent)

and

THE OWNERS AND ALL OTHERS INTERESTED
IN THE SV "ACOR", THE SV "ACOR",
CAPT. E.G. DA COSTA DUARTE
aka EMANUEL DUARTE

Defendants
(Applicant)

REASONS FOR ORDER AND ORDER

[1] This is a motion to set aside the July 13, 2010 Order of Justice Tremblay-Lamer who granted an interlocutory injunction requiring the Applicant to remove his sailing vessel from the premises of the Respondent.

[2] The Applicant, Captain E. G. da Costa, is the owner of the sailing vessel, the ACOR. The Respondent is the Campbell River Harbour Authority which is responsible for management of the facilities at the Campbell River Harbour. The Respondent had commenced an action, T-1003-10, against the Applicant and brought forward a motion that resulted in the Order at issue.

[3] The Applicant is unrepresented. Although he received notice, he did not appear before Justice Tremblay-Lamer to contest the Respondent's application for an injunctive order against him. The Applicant is now seeking to revisit the July 13, 2010 Order.

[4] I am dismissing this application for three reasons: the Applicant's motion should have gone back before the judge who made the Order, the Applicant has neither Rule 397 nor 399 available to him, and, more importantly, the Applicant has failed to provide evidence relevant to the Order that he seeks to have set aside.

Background

[5] The Respondent had previously brought a motion for an injunction under Rule 373 of the *Federal Court Rules*, SOR/98-106 requiring the Applicant to remove his sailing vessel, the ACOR, from its facilities in the Campbell River Harbour. The Applicant was served and was aware of the injunction application but neither responded nor attended court when the application was heard.

[6] Justice Tremblay-Lamer granted an interlocutory injunction requiring the Applicant to remove the ACOR from the Respondent's premises.

[7] The Applicant applies for the reconsideration of Justice Tremblay-Lamer's Order as well as other remedies. I am confining this Order to the application for reconsideration.

Legislation

[8] The *Federal Courts Rules*, SOR/98-106 provide two ways to revisit a recently made court order, reconsideration under Rule 397 or variance under Rule 399.

397. (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	397. (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :
(a) the order does not accord with any reasons given for it; or	a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;
(b) a matter that should have been dealt with has been overlooked or accidentally omitted.	b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.
(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.	(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la
…	

399. (1) On motion, the Court may set aside or vary an order that was made

(a) ex parte; or

(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,

if the party against whom the order is made discloses a prima facie case why the order should not have been made.

Setting aside or variance

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud.

Effect of order

(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

Cour.

…

Annulation sur preuve prima facie

399. (1) La Cour peut, sur requête, annuler ou modifier l’une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve prima facie démontrant pourquoi elle n’aurait pas dû être rendue :

a) toute ordonnance rendue sur requête ex parte;

b) toute ordonnance rendue en l’absence d’une partie qui n’a pas comparu par suite d’un événement fortuit ou d’une erreur ou à cause d’un avis insuffisant de l’instance.

Annulation

(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l’un ou l’autre des cas suivants :

a) des faits nouveaux sont survenus ou ont été découverts après que l’ordonnance a été rendue;

b) l’ordonnance a été obtenue par fraude.

Effet de l’ordonnance

(3) Sauf ordonnance contraire de la Cour, l’annulation ou la

modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

Analysis

Which judge can hear the motion?

[9] The jurisprudence indicates that a recent order may only be revisited under Rules 397 or 399 of the *Federal Court Rules,* if brought before the judge that made the order.

> Any judge having made an Order has exhausted his authority to deal with the application on its merits. He may not thereafter reconsider the matter so disposed of except within the very narrow exceptions provided by Rules 397 and 399. Apart from those the judge has no authority to vary his Order. No other judge, except one sitting on an appeal from the original judgment, has authority to vary an Order. If it were otherwise there would be no certainty in the law's application, and no end to litigation. *Grant v. Canada (Minister of Citizenship & Immigration)*, 2001 FCT 1343

[10] There seems to be some exceptions where motions can be heard by a judge other than the judge who made the original order. For example, although usually *ex parte* Anton Piller orders should be "reviewed, varied, or rescinded by the judge to makes it" *Indian Manufacturing Ltd. V. Lo,* [1997] 131 F.T.R. 319 (C.A.) paragraph 8, some exceptional circumstances do provide room for judges to review another judge's *ex parte* order, such as in *Proctor & Gamble Inc. v. John Doe,* [1996] 138 F.T.R. 250 (T.D.), where Justice Teitelbaum concluded that he did have the authority to do so because the previous judge had expressly given his "leave" that another Judge could review the order. This principle, however, applies to *ex parte* orders under Rule 399(1)(a).

The present order is not an *ex parte* order, nor does the order contain any provision that would indicate that Justice Tremblay-Lamer has given her “leave”.

[11] It would therefore appear that jurisprudence dictates that the Application should have gone to the judge who gave the order, that is, Justice Tremblay-Lamer, and not to me.

[12] Although the Application should ordinarily go back before the judge who gave the order, I will review Rules 397 and 399 in the context of this application and further give my reasons for dismissing this application.

Application of Rule 397

[13] Rule 397 provides for reconsideration of an order in a limited set of circumstances.

Rule 397(1)(a)

[14] Rule 397(1)(a) provides for reconsideration on the basis that “the order does not accord with any reasons given for it.” A review of the reasons given in the impugned Order discloses that the order to remove the sailing vessel, the ACOR, is in accord with the reasons given. The Applicant failed to provide proof of liability insurance for his sailing vessel. When the Respondent demanded the Applicant remove his vessel, the Applicant refused.

[15] Justice Tremblay-Lamer’s Order was issued in part on the premise that the lack of liability insurance coverage for the ACOR poses a hazard to other users of the Respondent’s harbour, for

which there would be no compensation by damages. I consider the Order to be in accordance with the reasons given.

Rule 397(1)(b)

[16] Rule 397(1)(b) only refers to "a matter that should have been dealt with has been overlooked or accidentally omitted." The case law affirms that the overlooking or accidental omission must be by the Court, not by a party as noted in *Khroud v Canada (M.C.I.)*, 2002 FCT 1157 para.12 where it states "the failure of a party to include available material does not give rise to jurisdiction to reconsider a decision finally disposing of the matter."

[17] The failure of the Applicant to attend court and give evidence does not come within the exception provided by Rule 397(1)(b).

Rule 397(2)

[18] Similarly, Rule 397(2) requires a clerical mistake, error or omission. The failure of the Applicant to appear in Court does not constitute a clerical mistake or error.

Application of Rule 399

[19] Rule 399(1)(a) only applies to *ex parte* applications which does not apply here since the Applicant was given notice to the application for an injunction.

Rule 399(1)(b)

[20] Rule 399(1)(b) expressly allows the Court to set aside or vary an order made "in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding."

[21] In both of the tax cases *Malowitz v. Canada (Minister of National Revenue)*, [1991] T.C.J. No. 338 and *Hinz v. Canada (M.N.R.),* 2003 TCC 727, the Court set aside the previously issued orders due to the party counsels' error and illness, respectively. The Court reasoned in *Malowitz* that the Applicant was not personally to blame for the failure to appear and that setting aside the judgement would not be prejudicial to the other party, whereas not doing so might adversely affect the Applicant's rights. These decisions appear to be rooted in the idea that a party should not be "deprived of rights by reason of an error of counsel where the consequences may be rectified without injustice to the other side" *Phui v. Canada (M.C.I)*, 2002 FCT 791 para. 3.

[22] However, in the present case, the Applicant is representing himself; it is not due to an error of counsel that he was unable to appear in court. He had notice. He gave his excuses for not attending in his submissions, but not in evidence. His failure to appear was not due to an accident or mistake or by reason of insufficient notice of the proceeding.

No Relevant Evidence

[23] Even if the Motion did not have to be heard by the Judge who made the original Order and the Applicant had either Rule 397 or 399 available to him, the Applicant did not provide any relevant evidence for his motion.

[24] The Applicant seeks to persuade the Court that the issue should be reconsidered and invites a review *de novo* of the application already considered by Justice Tremblay-Lamer, in effect an appeal of her determination on its merits.

[25] The Applicant, in his submissions, has declared he has insurance for his sailing vessel, the ACOR. Yet, he does not provide any evidence by way of affidavit or business records demonstrating that he has liability insurance for the ACOR.

[26] On the insufficient evidence the Applicant provides in this motion, the Applicant would not be successful even if his application had been before the original Judge who issued the Order.

Conclusion

[27] In result, the Applicant has failed to proceed in the manner provided by the *Rules of Court* and dictated by jurisprudence.

[28] In addition his application is fundamentally flawed in that he fails to produce any evidence that is relevant to the reason Justice Tremblay-Lamer issued her Order.

[29] The Applicant's motion for reconsideration does not succeed.

ORDER

THIS COURT ORDERS:

1. This motion to reconsider is dismissed.

2. Costs are awarded to the Respondent in the amount of $500.00.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1003-10
STYLE OF CAUSE:	CAMPBELL RIVER HARBOUR AUTHORITY and S/V "ACOR" ET AL.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	AUGUST 9, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN, J.
DATED:	AUGUST 25, 2010

APPEARANCES:

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