Federal Court  Cour fédérale

Date: 20121128

Docket: T-2061-11

Citation: 2012 FC 1387

Ottawa, Ontario, November 28, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

VLASTA STUBICAR

Applicant

and

DEPUTY PRIME MINISTER AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] Vlasta Stubicar (the applicant) appeals, pursuant to section 51 and 369 of the *Federal Courts Rules*, SOR/98-106 (the Rules), an Order rendered by Madam Prothonotary Aronovitch dated October 22, 2012, which dismissed the applicant's motion to attend re-examination pursuant to Rule 97.

[2] More particularly, in her Order dated October 22, 2012, Madam Prothonotary Aronovitch dismissed the applicant's motion under Rule 97 seeking the affiant's (Ms Rapley) re-attendance for

further cross-examination on the basis that it was "without merit and would only serve to unnecessarily delay a proceeding already hobbled by procedural issues".

[3] The issue raised in the present case is whether the Prothonotary erred by dismissing the applicant's motion for re-examination.

[4] The test setting out the standard of review for discretionary orders of prothonotaries was outlined by the Federal Court of Appeal in *Canada v Aqua-Gem Investments Ltd.*, (FCA) [1993] 2 FC 425, 149 NR 273. This test was subsequently affirmed by the Supreme Court of Canada in *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450 and was then reformulated by the Federal Court of Appeal in *Merck & Co v Apotex Inc*, 2003 FCA 488 at para 19, [2004] 2 FCR 459:

> [19] … Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
>
> a) the questions raised in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[5] In the circumstances, the Protohonotary's decision to dismiss the applicant's motion under Rule 97 to require the affiant's re-attendance for further cross-examination is a discretionary decision that is not vital to the final issue of this case. It follows that the Prothonotary's decision should only be disturbed in the event the Court was to find that the Prothonorary's Order is clearly wrong in the sense that her exercise of discretion was based upon a wrong principle of law or upon a misapprehension of the facts.

[6] The Court recalls that the applicant brought an application for judicial review pursuant to s 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, on December 20, 2011. This application seeks an order for *mandamus* to direct the respondent to consider and render a decision regarding a record correction request made to the Canada Border Services Agency (CBSA) Access to Information and Privacy (ATIP) Division pursuant to the section 12(2) of the *Privacy Act*, RSC, 1985, c P-21.

[7] On May 22, 2012, the applicant served the respondent with a Direction to attend a cross-examination on Ms Rapley's affidavits. The Direction to attend stated that Ms Rapley was to bring and produce the following documents:

1) Written Notice / Confirmation in virtue of which you were promoted from Team Leader to "Acting Manager" in the CBSA ATIP Division;

2) The current organizational chart for the CBSA ATIP Division (effective May 16, 2012);

3) The entirety of the records held by the CBSA ATIP Division in relation to the Applicant's record correction requests that you affirmed having "personally reviewed";

4) The Activity Screen Printouts for, respectively, CBSA files P-2009-02921; P-2011-03955; PI-2011-03955;

5) All the documents contained in the CBSA file P-2010-02064/ID relating to the Applicant's access to personal information request made on September 20, 2010 that you affirmed having "personally reviewed";

6) The Activity Screen Printout for CBSA file P-2010-02064/ID

(Applicant's Motion Record, Exhibit A, Affidavit of Vlasta Stubicar)

[8] The record demonstrates that Ms Rapley attended the cross-examination on May 24, 2012, but she did not bring the documents listed above at (1) – confirmation of her promotion and (2) – the organizational chart for the CBSA ATIP Division. On August 24, 2012, the applicant filed a

motion to compel re-attendance of Ms Rapley (Rule 97) in order to further cross-examine her with respect to her failure to bring the documents listed above at (1) and (2). The applicant alleges that those documents should have been produced. The respondent disagrees.

[9] In her Order dated October 22, 2012, Madam Prothonotary Aronovitch stated that the documents "that were not brought by Ms Rapley with her to her cross-examination are not relevant to issues raised in the underlying proceeding and need not be produced" and referred to her Order dated September 14, 2012, in Court File No. T-1436-11, at paras 10, 11, 12. The Prothonotary was not satisfied that there was merit in having Ms Rapley re-attend cross-examination and also found that the applicant's argument was "technical and without merit". In this regard, and as a general rule, the Court recalls that "parties cannot expect that the summary process mandated for applications will permit them to test every detail of every statement made in affidavits or in cross-examinations against any and all documents that may be in the opposing party's possession" (see *Simpson Strong Tie Co v Peak Innovations Inc* , 2009 FC 392 at para 24, 344 FTR 217)

[10] Although the applicant seeks to compel re-attendance of Ms Rapley, the Court notes that Ms Rapley did not refuse to answer questions pertaining to her position during the cross-examination (Respondent's Motion Record, Cross-examination of Tara Rapley on May 24, 2012, Exhibit G to Affidavit of Jude Pattenden, Tab G). The Prothonotary stated in her Order, dated October 22, 2012, that Ms Rapley's answers in cross-examination on the issues of documents (1) and (2) were "a sufficient basis on which Ms Rapley's credibility could be impugned". Indeed, the record contains information to that effect (Respondent's Motion Record, Tab G). Further, the Court

is of the view that the relevance of documents (1) and (2), given the issues raised in the present case, is questionable and there is no evidence that the applicant was prejudiced.

[11] Finally, the Court notes that the applicant previously made submissions before Madam Prothonotary Aronovitch on Ms Rapley's credibility (Rule 318) in Court File No. T-1436-11.

[12] For all of these reasons, the Court is satisfied that the Prothonotary identified the applicable principles of law in the present case and did not err in applying these principles to the facts before her. The Court, therefore, finds that the Prothonotary's Order, dated October 22, 2012, ought not to be disturbed since it is not clearly wrong in the sense that the exercise of her discretion was based upon a wrong principle or misapprehension of the facts. It follows that the Court's intervention is not warranted and the appeal will be dismissed.

ORDER

THIS COURT ORDERS that

1. The appeal of the Prothonotary's Order dated October 22, 2012 is dismissed;

2. The whole with costs payable in favour of the respondent. Costs in the form of a $500.00 lump sum are payable to the respondent within fifteen (15) days of the date of this Order.

"Richard Boivin"

Judge