Federal Court  Cour fédérale

Date: 20160315

Docket: T-1774-15

Citation: 2016 FC 317

Toronto, Ontario, March 15, 2016

PRESENT: Prothonotary Kevin R. Aalto

BETWEEN:

EMAD IBRAHIM AL OMANI, LINA HOUSNE HAMZA NAHAS, AND SULTAN EMAD AL OMANI (A MINOR), LULWA EMAD IBRAHIM AL OMANI (A MINOR), HAYA EMAD IBRAHIM AL OMANI (A MINOR), BY THEIR LITIGATION GUARDIANS, EMAD IBRAHIM AL OMANI AND LINA HOUSNE HAMZA NAHAS

Plaintiffs

and

HER MAJESTY THE QUEEN, THE MINISTER OF FOREIGN AFFAIRS, AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendants

ORDER AND REASONS

[1] This motion was brought by the Defendants as a motion pursuant to Rule 369 of the *Federal Courts Rules*. The motion is for an order to strike the statement of claim in its entirety

without leave to amend on the basis that it discloses no reasonable cause of action; is scandalous, frivolous and vexatious; is devoid of material facts; is defective; and, contains irrelevant and immaterial pleadings. In support of the motion, the Defendants filed a Motion Record together with a two volume book of authorities referring to some 44 cases and legislative provisions. The Plaintiffs filed a lengthy motion record in response and the Defendants then filed Reply Written Representations. Counsel for the Plaintiffs requested in their Written Representations that an oral hearing be held.

[2] The Defendants commenced their argument in their Written Representations with the following statement:

> This Court has confirmed that motions to strike a statement of claim are **typically** disposed of in writing, pursuant to Rule 369 of the *Federal Court Rules* (sic). An oral hearing is not required. [emphasis added].

[3] For this proposition, the Defendants rely upon a decision of the Honourable Mr. Justice Russell Zinn dated April 27, 2015 in Court File No. T-2425-14, *Cabral et al. v MCI et al.*, and in particular paragraphs 21-23 thereof which read as follows:

> [21] The plaintiffs, in response to the Crown's motion, indicated in writing and then in its memorandum that they wished to have the Crown's motion heard orally and not under Rule 369. In their memorandum they submit that Rule 369 is unconstitutional and of no force or effect.
>
> [22] I agree with the defendants that motions such as that brought by the defendants are typically disposed of in writing. Generally, there is no need for an oral hearing and this case is not an exception to the rule.
>
> [23] I also agree with the defendants that the plaintiffs do not point to any jurisprudence in support of its assertion that Rule 369 is unconstitutional, violates section 7 of the Charter, and requires

> the consent of the parties. Absent any foundation, the plaintiffs' suggestion that Rule 369 is unconstitutional is best described using the words of Justice Stratus in Paradis Honey as being "preconceptions, ideological visions or freestanding opinions."

[4] It is to be noted in *Cabral* the plaintiffs were attacking the constitutionality of Rule 369 as offending the rights of the plaintiffs to be heard in Court. Justice Zinn dismissed that argument and on the facts of *Cabral* determined it was not necessary to hold an oral hearing to deal with the substantive aspects of the motion. The motion was dealt with on the basis of the written representations pursuant to Rule 369.

[5] The Defendants in this case, which has similarities to *Cabral*, seek to transform the Rule 369 disposition of *Cabral* into a standard of the Court that motions to strike should, ordinarily be dealt with as Rule 369 motions. In my view, the Defendants are enlarging the implications of Justice Zinn's observations regarding Rule 369 motions. There is nothing in paragraph 22 of Justice Zinn's decision which supports the proposition that "motions to strike a statement of claim are typically disposed of in writing" or that the use of Rule 369 is a standard procedure for motions to strike a statement of claim. On my interpretation of Justice Zinn's comments, all that is being suggested is that if a Rule 369 motion is brought it is typically dealt with in writing subject to the overarching discretion of the Court as to whether or not the Court will hear it as a motion in writing or whether the Court wishes the benefit of an oral hearing. It is also subject to the request of the responding party that it be heard orally. In my view, Rule 369 is not a substitute for oral argument where it is required. Rule 369 provides as follows:

Motions in writing

369 (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

Procédure de requête écrite

369 (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

Request for oral hearing

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

Demande d'audience

(2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

Reply

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

Réponse du requérant

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

Disposition of motion

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

Décision

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

[6] Rule 369(2) requires that a respondent to a Rule 369 motion object to the disposition of the motion in writing. Where a respondent objects to disposition of a motion in writing, the respondent is required to indicate "the reasons why the motion should not be disposed of in writing".

[7] Motions to strike statements of claim are among the most complex of all interlocutory motions heard by the Court. There may be some statements of claim that are so obviously bereft of any chance of success or, alternatively, clearly contain a cause of action that they can reasonably be dealt with by way of a Rule 369 motion. However, in the ordinary course, the complexity of the causes of action and the analysis of the case law as applied to the pleaded facts is what should drive whether oral argument is necessary on a motion pursuant to Rule 369. It is not axiomatic that just because it is brought pursuant to Rule 369 it will be dealt with in writing.

[8] One of the factors to be considered is whether the responding party opposes a hearing by way of Rule 369 and requests an oral hearing. The Court may determine that oral submissions would be of assistance. In *Cabral*, Justice Zinn determined that although the responding party sought an oral hearing, in the circumstances of that case, it was not necessary as the issues could meaningfully be determined without an oral hearing.

[9] However, the position of the responding party is not necessarily determinative of whether an oral hearing is necessary. A responding party may consent to the disposition of the motion in writing but the Court may determine that oral submissions would be of assistance to the Court.

[10] Another factor for consideration is that the complexity of the causes of action frequently requires the assistance of oral advocacy of the parties to understand better the positions of the parties and the nature of the claims sought to be struck. Rule 369 is not a substitute for oral advocacy which can, and often does, play a key role in the outcome of a case. For example, the Honourable Marshall Rothstein (recently retired from the Supreme Court of Canada) has spoken about oral advocacy and on one occasion in a speech entitled "Some Tips on Oral Advocacy" made the following observations:

> First, some preliminary observations: it is safe to assume that Appeal Court judges will have read your factum before the appeal. But the judges won't have spent the time reading it that you did writing it. Unless the case is unusually simple, the judges will only have an impression of each side's case. The judges will come into the courtroom, having had a brief discussion. They will likely have a predisposition toward one side or the other, but only a predisposition. However, the judges want to be sure, if at all possible, that when they leave the courtroom, they know exactly which side will win and the reasons why. So oral argument is very important.
>
> My own experience is this. I hear better than I read. Many of you speak better than you write. There will be subtleties in your factum that don't come across on a reading but that should, if they are significant, come out in oral argument or in answers to questions. Last week I was in Calgary and Edmonton. Of the three cases we heard in Calgary, two are being decided opposite to what our predisposition as a panel was based on the factums. And the other case almost got decided that way too.
>
> So, with all the emphasis on the importance of a factum, don't underestimate the importance of oral argument.
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> [*Oral Advocacy in Courts of Appeal, Advocates' Society Courthouse Series 2001*, Thursday, February 22, 2001, Mr. Justice Marshall Rothstein, Federal Court of Appeal]

[11] Although these observations were made when Justice Rothstein was on the Federal Court of Appeal they are equally applicable to all levels of Courts. The importance of oral advocacy cannot be underestimated as is evident from the extensive literature available on the topic: for example, consult the papers and publications of The Advocates' Society at www.advocates.ca; and, in particular, Ethos, Pathos and Logos, The Best of the Advocates' Society Journal 1982–2004, David E. Spiro and David Stockwood, eds., Irwin Law, 2005; Pratte, G., "On the Teaching and Learning of Advocacy: Some personal and informal remarks", Presented to the Task Force on Advocacy - Policy Forum, Toronto, Ontario, February 17, 2004; Olah, John, *The Art and Science of Advocacy*, Carswell, 1990; Sopinka, John and Gelowitz, Mark, *The Conduct of an Appeal*, 3rd ed. LexisNexis Canada Inc., 2012].

[12] In the *Cabral* case, Justice Zinn observed that the motion to strike could readily be dealt with as a Rule 369 motion without the need for oral argument. The motion was dismissed except for the striking of two paragraphs and one named party. The defendants in that case could not demonstrate the high threshold required to strike the statement of claim.

[13] What differs in this case is that once again as in *Cabral*, a number of causes of action are alleged including public misfeasance, abuse and excess of jurisdiction, abuse of process, negligence, breach of various constitutional obligations. Further, the Plaintiffs argue that this statement of claim is similar to the statement of claim in *Cabral* and has many of the same causes of action.

[14] Turning to the specifics of this case, in seeking to have this motion heard orally, the Plaintiffs object to the constitutionality of Rule 369 without providing substantive arguments regarding why this motion is inappropriate for a Rule 369 disposition. It can be read into the submissions of the Plaintiffs that failure to allow oral argument is prejudicial to the Plaintiffs. I give no views on constitutionality as that was dealt with by Justice Zinn in *Cabral*.

[15] Notably, in the reply submissions of the Defendants they maintain their position that this is a "straight forward" motion which would be most efficiently and expeditiously dealt with in writing and which position is "fully supported by the authoritative jurisprudence of the Federal Court of Appeal and of this Court". They argue that the claim in *Cabral* is substantively different than this one. That argument requires that there be at least some comparison between the statements of claim in *Cabral* and in this case to determine whether or not Justice Zinn has already opined on the causes of action as they relate to facts which are alleged to be somewhat similar in this case. That all requires the assistance of counsel in focused oral argument.

[16] Having considered the totality of the materials before the Court it is my view that this particular motion to strike the statement of claim is not an appropriate candidate for hearing by way of the Rule 369 procedure. In coming to that conclusion, I am not endorsing the Plaintiffs position that Rule 369 is only used where there is consent nor that it is somehow unconstitutional. It is a procedure available in this Court pursuant to the *Federal Courts Rules* to provide, in the appropriate circumstances, a cost effective mechanism to parties to have straightforward interlocutory matters disposed of in an efficient and expeditious manner.

[17] The Defendants are therefore directed to contact the Hearings Coordinator to arrange for a one-half day hearing of this motion in Toronto, in English either before a Prothonotary or a Judge of the Court.

ORDER

THIS COURT ORDERS that:

1. This motion shall be heard in Court at a time and place to be fixed by the Hearings Coordinator of the Federal Court.

2. Costs are reserved to the Judge or Prothonotary hearing the motion.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1774-15
STYLE OF CAUSE:	EMAD IBRAHIM AL OMANI, LINA HOUSNE HAMZA NAHAS, AND SULTAN EMAD AL OMANI (A MINOR), LULWA EMAD IBRAHIM AL OMANI (A MINOR),, HAYA EMAD IBRAHIM AL OMANI, (A MINOR), BY THEIR LITIGATION GUARDIANS, EMAD IBRAHIM AL OMANI AND LINA HOUSNE HAMZA NAHAS V HER MAJESTY THE QUEEN, THE MINISTER OF FOREIGN AFFAIRS, AND THE MINISTER OF CITIZENSHIP, AND IMMIGRATION
ORDER AND REASONS:	AALTO P.
DATED:	MARCH 15, 2016

CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369

WRITTEN REPRESENTATIONS BY:

Rocco Galati	FOR THE PLAINTIFFS
Catherine Vasilaros Susan Gans	FOR THE DEFENDANTS

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