

Federal Court



Cour fédérale

Date: 20090923

Docket: T-1950-08

Citation: 2009 FC 953

Ottawa, Ontario, September 23, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GERRARD GORDON FINLAY

Plaintiff

and

MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS and  
KATHY RUSH, MANAGER,  
ADJUDICATIONS DIVISION

Defendants

**REASONS FOR ORDER AND ORDER**

**O'KEEFE J.**

[1] This is a motion by the defendants for:

1. an order granting the defendant, Minister of Public Safety and Emergency

Preparedness summary judgment dismissing the plaintiff's entire claim with costs;

2. alternatively, an extension of time within which to serve the defendants' affidavit of documents;

3. an order striking Kathy Rush as a defendant in this action; and
4. such further and other relief as the Court deems just.

[2] The plaintiff arrived at Vancouver International Airport from the Philippines on March 27, 2008. On arrival, he had in his possession \$9,850 US, 2,300 New Taiwan dollars, 3,720 Philippine Pesos, 4,200 Thailand Baht and \$20 CDN (the currency).

[3] When the official conversion rate of the Bank of Canada, as published in the Bank of Canada's *Daily Memorandum of Exchange Rates* in effect on March 27, 2008 was applied, the Canadian dollar value of the currency was \$10,044.37.

[4] Customs officials at the airport found that the plaintiff had imported currency equal to a value or exceeding \$10,000 CDN without reporting it, contrary to subsection 12(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the Act).

[5] The currency was seized and returned to the plaintiff pursuant to section 18 of the Act after payment of the penalty of \$2,500 set by section 18 of the *Cross-Border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412.

[6] The plaintiff did not deny that he took the currency into Canada but disputed the conversion rates used by the defendants.

[7] The plaintiff submitted that the conversion rates of financial institutions should have been used to convert the currency rather than the Bank of Canada rates. The plaintiff maintained that had these rates been used, the currency value would not have exceeded the allowable amount.

[8] By a decision dated November 21, 2008, the defendants decided as follows:

After considering all of the circumstances, I have decided, that under the provisions of section 27 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, that there has been a contravention of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* or the Regulations with respect to the currency or monetary instruments which were seized;

Under the provisions of section 29 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, the amount of \$2,500.00 received for the return of the seized currency or monetary instruments shall be held as forfeit.

[9] **Issues**

1. Is Kathy Rush a proper party to this action?
2. Is there a genuine issue for trial, i.e. should summary judgment be granted?

[10] **Issue 1**

Is Kathy Rush a proper party to this action?

Kathy Rush is employed by the Government of Canada as a manager, Adjudications Division, Recourse Directorate with the Canada Border Services Agency.

[11] Subsection 30(1) of the Act states:

30.(1) A person who requests a decision of the Minister under section 27 may, within 90 days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which the person is the plaintiff and the Minister is the defendant.

[12] It is clear from this section that the appropriate defendant in the action is the Minister.

Accordingly, I am of the view that Kathy Rush is not an appropriate defendant in the action and her name is removed or struck as a defendant.

[13] **Issue 2**

Is there a genuine issue for trial, i.e. should summary judgment be granted?

The relevant legislation (subsections 12(1) and 12(3) of the Act and sections 2, 3 and subsection 4(1) of the Regulations) requires every person who imports currency worth \$10,000 or more to report this importation to a customs official.

[14] In the present case, the officer believed on reasonable grounds that subsection 12(1) of the Act was violated when the plaintiff did not report the currency. The officer did not believe that there were reasonable grounds to suspect that the currency was the proceeds of crime or funds for terrorist financing. As a result, the officer returned the currency after receipt of the \$2,500 penalty.

[15] Rules 213(2) and 216(3) of the *Federal Courts Rules* apply to the present motion for summary judgment:

213.(2) A defendant may, after serving and filing a defence and at any time before the time and place for trial are fixed, bring a

motion for summary judgment dismissing all or part of the claim set out in the statement of claim.

216.(3) Where on a motion for summary judgment the Court decides that there is a genuine issue with respect to a claim or defence, the Court may nevertheless grant summary judgment in favour of any party, either on an issue or generally, if the Court is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law.

[16] In *Granville Shipping Co. v. Pegasus Lines Ltd.* [1996] 2 F.C. 853 (T.D.) at paragraph 8, Madam Justice Tremblay-Lamer summarized the case law relating to summary judgment:

1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al*);
2. there is no determinative test (*Feoso Oil Ltd. v. Sarla (The)*) but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie*. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
3. each case should be interpreted in reference to its own contextual framework (*Blyth* and *Feoso*);
4. provincial practice rules (especially Rule 20 of the *Ontario Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194]) can aid in interpretation (*Feoso* and *Collie*);
5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of *the Ontario Rules of Civil Procedure*) (*Patrick*);
6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (*Pallman* and *Sears*);

7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (*Forde* and *Sears*). The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (*Stokes*).

[17] As was stated at the hearing of this motion, there was only one issue raised on this appeal. The issue was stated by the defendants at paragraphs 28 to 32 of the defendants' memorandum of fact and law:

28. The Plaintiff's sole basis for taking issue with the finding that he contravened section 12(1) of the *PCMLTFA* on March 27, 2008 has consistently been that if currency conversion rates other than those employed by Customs Officials were employed, the Canadian Dollar value of the Currency would not meet the reporting threshold of \$10,000.

See Letters dated March 29, 2008, July 31, 2008 and August 21, 2008; Exhibits "C", "E" and "F" to the Rush Affidavit / DMR pp. 11 – 13, 17 – 24 & 25 - 27

29. The sole issue in this action is therefore which currency conversion rates should be employed to determine the Canadian Dollar value of the Currency. If the rates relied on by the Minister are employed, then the Currency exceeded the prescribed amount and a contravention of section 12(1) of the *PCMLTFA* necessarily occurred. If the rates advanced by the Plaintiff are employed, then the Currency did not exceed the prescribed amount and this action must be allowed.

30. The issue of which conversion rates should be employed in determining the Canadian Dollar value of the Currency is not a genuine issue that requires determination at trial. There is no discretion with respect to which rates are employed in determining the value of currency for the purposes of the *PCMLTFA*. The *Regulations* are clear – the Canadian Dollar value of currency is determined based on:

...the official conversion rate of the Bank of Canada as published in the Bank of Canada's *Daily Memorandum of Exchange Rates* that is in effect at the time of importation [...]

*Regulations*, s. 2(1)(a)

31. The official conversion rates for the Bank of Canada as published in the Bank of Canada's *Daily Memorandum of Exchange Rates* for March 27, 2008 are in evidence on this motion. There is no genuine issue with respect to whether they should be applied in determining the Canadian Dollar value of the Currency as the *Regulations* are clear.

Bank of Canada *Daily Memorandum of Exchange Rates*, March 27, 2008, Exhibit "J" to the Rush Affidavit / DMR p. 34

32. The application of the Bank of Canada's rates to the Currency (see paragraph 6 above) shows indisputably that the Currency was of a Canadian Dollar value in excess of \$10,000. There simply is no genuine issue with respect to what rates should apply and whether the Canadian Dollar value of the Currency exceeded the reporting threshold.

[18] There is no issue as to credibility in the present case.

[19] The plaintiff relied on different rates of exchange to convert his foreign currency and by using these rates he was below the \$10,000 amount. However, Regulations 2(1) and 2(2)(a) of the *Cross-Border Currency and Monetary Instruments Reporting Regulations* prescribes the conversion rate as follows:

2.(1) For the purposes of reporting the importation or exportation of currency or monetary instruments of a certain value under subsection 12(1) of the Act, the prescribed amount is \$10,000.

(2) The prescribed amount is in Canadian dollars or its equivalent in a foreign currency, based on

(a) the official conversion rate of the Bank of Canada as published in the Bank of Canada's *Daily Memorandum of Exchange Rates* that is in effect at the time of importation or exportation; or . . .

[20] Further, whether the plaintiff knew that the value of the currency equalled or exceeded the prescribed amount is not relevant. In *Zeid v. Canada (Minister of Public Safety and Emergency*

*Preparedness*, 2008 FC 539 at paragraph 53, Mr. Justice de Montigny stated:

The jurisprudence makes it abundantly clear that a traveller's subjective intention when failing to report is irrelevant. It has been unequivocally held that such intention is not required since the system is one of voluntary reporting and because strict liability attaches to those who fail to report.

[21] Accordingly, I am of the view that there is no issue for trial in this action and an order must issue granting the defendant, Minister of Public Safety and Emergency Preparedness summary judgment dismissing the plaintiff's claim (appeal). There shall be no order as to costs.



**ORDER**

[22] **IT IS ORDERED that:**

1. Kathy Rush is not an appropriate defendant in this action and her name is removed or struck as a defendant.
2. Summary judgment is granted to the defendant Minister of Public Safety and Emergency Preparedness dismissing the plaintiff's claim (appeal) in this action.
3. There shall be no order as to costs.

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"John A. O'Keefe"  
Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1950-08

**STYLE OF CAUSE:** GERRARD GORDON FINLAY

- and -

MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS and  
KATHY RUSH, MANAGER,  
ADJUDICATIONS DIVISION

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** March 23, 2009

**REASONS FOR ORDER  
AND ORDER OF:** O'KEEFE J.

**DATED:** September 23, 2009

**APPEARANCES:**

Gerrard Gordon Finlay	SELF-REPRESENTED FOR THE PLAINTIFF
Liliane Bantourakis	FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

Gerrard Gordon Finlay Vancouver, British Columbia	SELF-REPRESENTED FOR THE PLAINTIFF
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE DEFENDANTS