Federal Court  Cour fédérale

Date: 20100616

Docket: T-349-10

Citation: 2010 FC 656

Ottawa, Ontario, June 16, 2010

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

HOWARD KORNBLUM

Plaintiff

and

MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT and MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendants

REASONS FOR ORDER AND ORDER

[1] The plaintiff, Howard Kornblum, a self represented litigant, by motion in writing filed on April 26, 2010, appeals the Order of Prothonotary Lafrenière dated April 21, 2010, striking out the plaintiff's statement of claim without leave to amend (the first appeal).

[2] The plaintiff, also by motion in writing filed on April 29, 2010, appeals the Order of Prothonotary Lafrenière dated April 21, 2010, dismissing a motion by the plaintiff seeking an order

for default judgment pursuant to Rule 210(1) of the *Federal Courts Rules*, SOR/2004-283, s. 2, (the second appeal).

[3] Both appeals are brought pursuant to Rule 51 of the *Federal Courts Rules.*

Facts

[4] The plaintiff was born in the United States of America. He claims Canadian citizenship by operation of law because his mother was a naturalized Canadian.

[5] The relevant facts on the two appeals are set out in the defendants' written submissions on the first appeal at paragraphs 4 to 13, which I reproduce below:

> 4. In November 2009, Mr. Kornblum submitted his Citizenship Application to the CIC [Citizenship and Immigration Canada] Processing Centre (the "Processing Centre") in Sydney, Nova Scotia.
>
> 5. On January 5, 2010, Mr. Kornblum's Citizenship Application was assigned to a CIC officer (the "Officer") for processing after CIC had requested and received his mother's birth certificate.
>
> 6. On January 18, 2010, the Officer sent a letter (the "January 18th Letter") to Mr. Kornblum at the address that he had provided in the Application, requesting additional information so that she could continue processing the Application. In the January 18th Letter, the Officer explained that in order to approve the Application, she had to determine whether his mother was a Canadian citizen when he was born. In order to acquire automatic citizenship on January 1, 1947, when Canada's first citizenship legislation came into effect, his mother had to be a British subject. Therefore, she required some information from Mr. Kornblum about when his mother left Canada to reside in the United States.
>
> 7. The Officer re-sent the January 18th Letter to Mr. Kornblum on several occasions and to different addresses that she found for him. However, CIC

and the Officer did not receive any response to the January 18th Letter before April 8, 2010.

8. On March 10, 2010, Mr. Kornblum filed the Statement of Claim. In the Statement of Claim, Mr. Kornblum claimed, among other things:

    (a) A declaration that the Minister of Citizenship and Immigration's inaction on his Citizenship Application is discriminatory and violates section 15 of the *Charter* [*Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c.11 (the *Charter*)];

    (b) A determination as to whether he is a Canadian citizen;

    (c) An Order of Mandamus compelling the Minister of Human Resources and Skills Development and Service Canada to re-process his SIN Card Application within three days or, in the alternative, an Order of Mandamus compelling the Minister of Citizenship and Immigration to provide his Certificate of Citizenship within ten days and Service Canada to re-process his SIN Card Application within three days; and

    (d) $100,000 in general and special damages for loss of income, future loss of income, lack of access to medical services, loss of enjoyment of life and emotional distress.

9. In support of his claimed relief, Mr. Kornblum pleaded that:

    (a) On November 9, 2009, he mailed his Citizenship Application to CIC and an URGENT processing request;

    (b) At CIC's request, he submitted his deceased mother's Manitoba birth certificate and CIC acknowledged receipt of his mother's birth certificate on January 4, 2010;

    (c) He "Knows of no other meaningful response" from CIC to his Citizenship Application since January 2010.

10. On April 9, 2010, the defendants filed a motion for an Order striking out the Statement of Claim without leave to amend.

11. On April 14, 2010, Mr. Kornblum filed a motion for "[an] Order pursuant to Federal Courts Rule 210.1 for Default Judgment."

12. On April 19, 2010, the Prothonotary heard both the defendants' motion for an Order striking out the Statement of Claim and Mr. Kornblum's motion for default judgment.

13. On April 21, 2010, the Prothonotary issued Orders striking out the Statement of Claim and dismissing Mr. Kornblum's motion for default judgment.

[6] On April 22, 2010, CIC sent the applicant his Citizenship Certificate, which he received May 5, 2010.

[7] The plaintiff also pleads the following facts in his statement of claim, which are not mentioned in the defendants' submissions:

1. He entered Canada legally.

2. No Canada Post correspondence was ever received by the plaintiff from CIC.

3. His mother's birth certificate was received by CIC on November 26, 2009. CIC acknowledged receipt on January 4, 2010.

4. As of February 19, 2010, 14 weeks had elapsed since he had made his Proof of Citizenship Application with CIC, without receiving this Proof of Citizenship.

Standard of review

[8] As the Federal Court of Appeal observed in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, at paras. 18-19, discretionary orders of prothonotaries ought not to be disturbed on appeal unless the questions raised in the motion are vital to the final issue of the case, or the orders are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts. In such cases, a reviewing court should apply a *de novo* standard of review.

The first appeal

[9] The first order under appeal, striking the plaintiff's statement of claim, is dispositive of the action**.** I will therefore proceed to consider this appeal on a *de novo* basis.

[10] The defendants moved for an order striking out the plaintiff's statement of claim, pursuant to Rule 221 of the *Federal Courts Rules*, on basis that the statement of claim did not disclose a reasonable cause of action, was frivolous and vexatious, and that it was an abuse of process. The defendants argued the statement of claim did not set out the facts necessary to establish a cause of action. They further argued that the mere fact that the plaintiff's application for a Citizenship Certificate had not been finalized did not give rise to a cause of action, especially since CIC had been waiting to receive information from the plaintiff to continue processing the application.

[11] In his statement of claim, the plaintiff claimed the following:

> (a) A declaration that The Minister of Citizenship and Immigration's inaction on plaintiff's Application for a Citizenship Certificate (proof of citizenship) Under Section 3 is discriminatory and violates s. 15 of the *Charter* related to equal benefit of the law and is not demonstrably justifiable.
>
> (b) Plaintiff respectfully seeks a declaratory judgment answering the question:
>
> Is the Plaintiff a Citizen of Canada?
>
> (c) If the Federal Trial Court answer is Yes, an Order Mandamus to compel The Minister of Human Resources and Skills Development and Service Canada to re-process his application for a Social Insurance Number (SIN) and issue the number and card within three days so that plaintiff might pursue the gaining of a livelihood.
>
> (d) In the alternative, an Order Mandamus to compel the Minister of Citizenship and Immigration to provide his Certificate of Citizenship within ten days and Service Canada to re-process his Application for a SIN within three days, or explain malfeasance.

(e) An order requiring Citizenship and Immigration (CIC) to forward the two certified birth certificates (plaintiff born Chicago, Illinois and Manitoba parental sent to (CIC)) to the Federal Court for plaintiff testimony and admission based upon Citizenship Regulations, 1993, SOR/93-246 s. 27 or via a Motion to Produce if required.

(f) Costs including in any event of the cause.

(g) General and special damages in the amount of $100,000 based upon: past loss of income; future loss of income; lack of access to medical services; loss of enjoyment of life; emotional distress.

(h) Such further and other relief as the Court deems just.

[12] The plaintiff argues that the delay in processing his Citizenship Certificate has been unreasonable when considering the following criteria: the delay has been longer than the nature of the process required; the applicant is not responsible for the delay, and; the authority in question has not provided satisfactory justification. He claims that the inaction of the Minister of Citizenship in processing his application for a citizenship certificate is discriminatory and violates his rights under section 15 of the *Canadian Charter of Rights and* Freedoms, Part 1 of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, (the Charter). He also claims the inaction of both the Ministers have infringed his right "to pursue the gaining of a livelihood in any province," as protected by paragraph 6(2)*(a)* of the Charter. The plaintiff seeks a declaration from the Court that he is a citizen of Canada, an order of *mandamus* compelling the Minister of Human Resources and Skills Development and Service Canada to re-process his application for a Social Insurance Number (SIN) and issue the number and card within three days. Alternatively, he seeks an order of *mandamus* to compel the Minister of Citizenship and Immigration to provide his Certificate of Citizenship within ten days and Service Canada to re-process his application for a SIN

within three days. The plaintiff seeks other relief including general and special damages in the amount of $100,000.

[13] The Prothonotary ordered the statement of claim struck out on the defendants' motion because he found that on a plain reading, the statement of claim did not set out the facts necessary to establish any cause of action known at law. The mere fact that Mr. Kornblum's citizenship application had not been finalized by the time the statement of claim was issued did not give rise to a cause of action in negligence or breach of statutory duty. Moreover, no facts were pled to support a claim of violation of any Charter right.

[14] Rule 221(1) sets out the various grounds upon which the Court can strike a pleading, including that the pleading discloses no reasonable cause of action (Rule 221(1)*(a)*). A motion to strike a pleading on the ground that it discloses no reasonable cause of action will be allowed if it is "plain and obvious" or "beyond reasonable doubt" that the claim cannot succeed, assuming the facts alleged in the statement of claim are true (*Hunt v. Carey*, [1990] 2 S.C.R. 959 at 980).

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[15] Following a generous read of the statement of claim, allowing for inadequacies due to drafting deficiencies, I find that the statement of claim discloses no reasonable cause of action. I come to this determination for the reasons set out below.

[16] The central allegation advanced by the plaintiff is that the federal government unreasonably delayed the processing of his Citizenship Application. Delay in processing the plaintiff's application

does not in and of itself give rise to a cause of action. The plaintiff did not plead negligence, bad faith or misfeasance on behalf of the CIC or its officers. The statement of claim does not set any facts that could give rise to a claim in negligence by CIC or its officers in processing the plaintiff's citizenship application. Further, the statement of claim does not set out facts that could establish a private law duty of care between CIC and the plaintiff, a breach of that duty or damages resulting from any breach. (*Khalil v. Canada,* 2007 FC 923; affirmed *Khalil v. Her Majesty the Queen,* 2009FCA 66.) Nor did the plaintiff plead the pertinent provision of *the Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

[17] In cases where administrative delay is alleged, the appropriate remedy is an application for judicial review and a request for an order of *mandamus*. It this instance, even if the plaintiff had proceeded by way of judicial review, the facts pleaded would clearly not warrant the granting of such an extraordinary remedy. In the circumstances, the facts pleaded do not indicated that CIC delayed unreasonably the processing of the plaintiff's application.

[18] With regard to the plaintiff's claim for declaratory relief under section 15 of the Charter, the statement of claim does not disclose facts that would establish that the plaintiff's section 15 rights have been violated or even engaged. No facts are pleaded to show how the alleged inaction by CIC or its officers has resulted in differential treatment or discrimination on the basis of any of the enumerated or analogous grounds.

[19] Similarly, no facts are pleaded to show how the plaintiff's right "to pursue the gaining of a livelihood in any province" has been violated under section 6(2)*(b)* of the Charter.

[20] In the result, the plaintiff's first appeal is dismissed with costs which, in the exercise of my discretion, I set at $750.00.

[21] I now turn to the second appeal.

The second appeal

[22] The second appeal concerns the Order of Prothonotary Lafrenière dated April 21, 2010, dismissing a motion by the plaintiff seeking an order for default judgment pursuant to Rule 210(1) of the *Federal Courts Rules*.

[23] As stated above, the approach to be followed for appeals of decisions of prothonotaries is set out by the Court of Appeal in *Merck & Co.*, at paras. 18-19. With respect to the prescribed approach, it is not what is sought but what was ordered that must be "vital to the final issue of the case" in order to warrant *de novo* review (*Peter G. White Management Ltd. v. Canada*, 2007 FC 686, at para. 2). Had the motion for default judgment been granted, the decision of the Prothonotary would be vital to the final issue of the case because judgment would then have been obtained. However, here the motion was dismissed; the Order under appeal is not determinative of a vital issue. I will therefore consider whether the Prothonotary's order is clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts.

[24] In dismissing the motion, the Prothonotary found the motion to be clearly improper. The defendants had brought an earlier motion on April 9, 2010 pursuant to Rule 221 for an order that the statement of claim be struck without leave to amend, or alternatively, an extension of time to serve and file a statement of defence. Before the Court had an opportunity to deal with the defendants' motion, the plaintiff filed his motion for default judgment. The Prothonotary found that the defendants' rights on the pending motion to strike could not be prejudiced by the plaintiff's subsequent notice of motion for default judgment.

[25] The Prothonotary also found that since the plaintiff alleged breaches of constitutional rights and statutory duty, the correct defendant was Her Majesty the Queen and not the two Ministers. Finally, the Prothonotary held that the plaintiff's motion would not have succeeded in any event since the plaintiff failed to provide the minimum notice period of 14 days as required by section 25 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

[26] The Prothonotary dismissed the plaintiff's motion finding it to be ill-conceived, unnecessary and an abuse of process.

[27] On appeal, the plaintiff raises a number of issues in his written submissions. He accuses the Prothonotary of improperly calendaring his motion and ignoring his objection to an oral hearing. The plaintiff takes issue with the Prothonotary's understanding of a moving party's rights upon the

filing of motions. He alleges that the Prothonotary was "overriding the Courts Rules." There is no evidence on the record to support any of these allegations.

[28] I have reviewed and considered the plaintiff's submissions. I find there to be no merit to the arguments raised by the plaintiff. Indeed I find that the plaintiff has failed to raise in his submissions any basis upon which the Court's intervention would be warranted.

[29] In considering the plaintiff's motion, the Prothonotary applied the following principle articulated in *Bruce v. John Northway & Son Ltd.* [1962] O.W.N. 150, at 151:

> After service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court.

He held that the defendant's rights as a moving party could not be defeated by a subsequent step taken by the plaintiff; consequently the rights of the defendants could not be prejudiced by anything done after their notice of motion was served. In the result he found the plaintiff's notice of motion improper.

[30] The defendants did not file a statement of defence because they brought a motion to strike the plaintiff's statement of claim and in the alternative, if their motion to strike was dismissed, the defendants sought an extension of time to serve and file their statement of defence. Where a motion to strike is brought pursuant to paragraphs (*b*) to (*f*) of Rule 221, it is appropriate for the party bringing that motion to do so before filing further pleadings. As stated by Justice Hugessen in *Dene Tsaa First Nation v. Canada,* 2001 FCT 820, at paragraph 3:

> In my view, the great weight of the case law in this Court is to the effect that a motion which is based on the paragraphs of Rule 221 other than paragraph (*a*) must be brought before the defendant has pleaded over, or if brought after that time the plea itself must have contained a reservation with regard to the impugned paragraphs. …

In this case, the defendants relied on paragraphs (*a*), (*c*) and (*f*) of Rule 221 for their motion to strike. In my view, it was therefore appropriate for the defendants to bring their motion to strike prior to serving and filing their statement of defence.

[31] I am satisfied that the Prothonotary identified the applicable principles of law in the circumstances and did not err in applying these principles to the facts that were before him. I find that the Prothonotary's order is not clearly wrong in the sense that his exercise of discretion was based upon a wrong principle or a misapprehension of the facts. It follows that the appeal will be dismissed. The defendants will be awarded costs on the second appeal which, in the exercise of my discretion, I set at $750.00.

ORDER

THIS COURT ORDERS that:

1. The appeal of the Order of Prothonotary Lafrenière dated April 21, 2010, striking out the plaintiff's Statement of Claim without leave to amend, is dismissed with costs set in the amount of $750.00, and;

2. The appeal of the Order of Prothonotary Lafrenière dated April 21, 2010, dismissing a motion by the plaintiff seeking an order for default judgment pursuant to Rule 210(1) of the *Federal Courts Rules*, is dismissed with costs set in the amount of $750.00.

"Edmond P. Blanchard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-349-10
STYLE OF CAUSE:	HOWARD KORNBLUM v. MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT et al.

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA, PURSUANT TO RULE 369

REASONS FOR ORDER AND ORDER:	BLANCHARD J.
DATED:	June 16, 2010

WRITTEN REPRESENTATIONS BY:

Mr. Howard Kornblum	FOR THE PLAINTIFF (self-represented)
Mr. Keith Reimer Vancouver, B.C.	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

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