Federal Court of Appeal | Cour d'appel fédérale

Date: 20141009

Dockets: A-147-11
A-186-11

Citation: 2014 FCA 226

Present: STRATAS J.A.

BETWEEN:

FRANCIS MAZHERO

Appellant

and

ANDREW FOX, JACQUES ROBERGE AND NEIL SHARKEY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 9, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] On October 1, 2014, I ruled that all new motions filed in these consolidated appeals must be sent to me to be assessed in my capacity as case management judge: *Mazhero v. Fox*, 2014 FCA 219 at paragraph 15.

[2] The Registry has sent to me two new motions filed by Mr. Mazhero on October 3, 2014.

[3] In the first motion, Mr. Mazhero moves for an order "from Justice Sharlow" setting aside or rescinding her July 9, 2014 Order. In that Order, among other things, Justice Sharlow required Mr. Mazhero to show cause why these consolidated appeals should not be dismissed for delay.

[4] The motion will not be determined by Justice Sharlow. She has retired from the Court. Also, all motions are to be heard by the case management judge. As case management judge, I am to determine this motion.

[5] In this motion, Mr. Mazhero purports to challenge the July 9, 2014 Order under Rule 399(1) on the ground that it was made *ex parte*.

[6] Justice Sharlow made her July 9, 2014 Order on her own motion. In my view, this is not an *ex parte* order within the meaning of Rule 399(1). The Rule targets situations where one party moved to the Court without the other party present and, later, the party affected by the order moves to set it aside on the basis that it was obtained without full and frank disclosure of all relevant information or is otherwise subject to a fatal flaw: see, *e.g.*, *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2005 FCA 28, [2005] 3 F.C.R. 111.

[7] Even if the July 9, 2014 Order were reviewable, I would dismiss the motion on the ground that it is an abuse of process. It is barred by the doctrine against re-litigation. Mr. Mazhero has previously brought motions to revisit the July 9, 2014 Order and these have been dismissed: *Mazhero v. Fox*, 2014 FCA 219 at paragraph 21. One cannot bring later motions raising issues that could have been raised in earlier motions: *Danyluk v. Ainsworth Technologies*

Inc., 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. There are no considerations in favour of relaxing the bar against re-litigation in this case.

[8] The motion is also moot. Justice Sharlow determined the show cause hearing. She allowed the consolidated appeals to proceed. See *Mazhero v. Fox*, 2014 FCA 200 at paragraph 16.

[9] In any event, Mr. Mazhero's motion fails on its merits. The main thrust of Mr. Mazhero's motion is that Justice Sharlow had no power to act on her own motion to require him to show cause why the consolidated appeals should not be dismissed for delay. She did have that power on the basis of a previously-issued notice of status review that has never been dealt with. She also had that power as part of her plenary power to regulate Court proceedings: *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 at paragraphs 33-36.

[10] Mr. Mazhero's second motion has been brought *ex parte*. He seeks an order requiring two of the three respondents and a Registry Officer of this Court to be brought before a judge of the Federal Court to show cause why they should not be held in contempt.

[11] The motion should not have been filed *ex parte*. For that reason, I dismiss the motion.

[12] Even if the affected parties were served, the motion would fail on its merits. The two respondents' contempt is said to arise from their alleged failure to file submissions by the

deadline set by Justice Sharlow in her July 9, 2014 Order. They did not breach the Order. Paragraph 3 of the Order provided that the respondents "may" serve and file responding submissions. They were under no obligation to do so. As I explained in a recent direction, the two respondents in fact tried to file submissions, but their filing was unsuccessful, in part due to an error by the Registry.

[13] As for the Registry Officer, the complaint seems to be that on July 22, 2014 she refused to allow a written submission and affidavit of Mr. Mazhero to be filed. Rather than asking the Registry Officer to get a ruling of a judge under Rule 72, Mr. Mazhero couriered a copy of the written submission directly to Justice Sharlow. That was improper – judges may be addressed only through the Registry or the Judicial Administrator. Having examined the July 22, 2014 material, I see nothing in the Registry Officer's conduct that warrants any criticism whatsoever, let alone a show cause hearing for contempt.

[14] Quite aside from the failure of Mr. Mazhero to serve affected parties and the motion's lack of merit, I also dismiss it as an abuse of process. It is abusive in two respects:

- The two respondents' alleged failure to file submissions in opposition to Mr. Mazhero did not prejudice him in any way. In fact, it made it more likely that Mr. Mazhero would succeed. And he did succeed: in its September 11, 2014 Order, this Court allowed the consolidated appeals to proceed rather than dismissing them for delay. In these circumstances, Mr. Mazhero has nothing to complain about.

- Even though the July 22, 2014 written submission was improperly sent to Justice Sharlow, she accepted it and placed it in the Court file: *Mazhero v. Fox*, 2014 FCA 200 at paragraph 14. Except for the couriering cost – a cost that Mr. Mazhero could have avoided by asserting his rights under Rule 72 – he was not prejudiced in any way.

[15] In my October 1, 2014 ruling, I asked the following questions (2014 FCA 219 at paragraph 25):

> Is the appellant truly interested in appealing the merits of the Federal Court's judgments declaring him a vexatious litigant? Or, instead, is he interested in using the consolidated appeals as a forum to pursue improper collateral purposes?

[16] I conclude that Mr. Mazhero brought the *ex parte* contempt motion only for the collateral purpose of harming two of the respondents and a Registry Officer. He did not bring it to protect his rights concerning these consolidated appeals or to assist him in advancing them to a hearing on the merits.

[17] In my October 1, 2014 ruling, I set out the steps necessary to be completed so that Mr. Mazhero's consolidated appeals will be soon heard on their merits. In particular, I gave him concrete and clear advice on how to determine what should be included in the appeal book. I encouraged him to direct himself to the task of getting the appeals ready for hearing, and that task alone (2014 FCA 219 at paragraph 36):

> If the appellant believes his appeals to be well-founded, he must now work in an orderly, diligent and single-minded way to get them ready for hearing soon so that this Court can consider them fairly on their merits.

[18] In that ruling, I also warned Mr. Mazhero as follows (2014 FCA 219 at paragraphs 34-35):

> Lastly, if the orders I am making today are not obeyed, if a party brings multiple motions seeking relief this Court has no jurisdiction to give, if a party persists in moving to set aside every order without any basis, or if a party brings motions that are frivolous and vexatious, I will take decisive action in accordance with this Court's plenary power to redress an abuse of its processes.
>
> For example, if the appellant engages in that sort of conduct, I shall conclude that the consolidated appeals are nothing more than a tool to pursue improper purposes and I shall dismiss the consolidated appeals summarily as an abuse of process. As mentioned above, I do have concerns in this regard, but I hope I am wrong.

I deliver these warnings one last time.

[19] Just like any other litigant, Mr. Mazhero is free to bring motions – if he has an arguable basis to do so – to protect his rights concerning these consolidated appeals or to assist him in advancing these consolidated appeals to a hearing on the merits.

[20] However, in light of the circumstances described in my October 1, 2014 ruling and in light of these two motions – both of which smack of abuse of process – it is now necessary to make additional orders to prevent further abuse. I have the authority to make such orders: *Mazhero v. Fox*, 2014 FCA 219 at paragraphs 2-6.

[21] If Mr. Mazhero brings a motion or makes any submissions at any time for purposes other than those described in the preceding paragraph, the consolidated appeals shall be immediately and summarily dismissed with costs. To be completely clear, in his written submissions

concerning the contents of the appeal book, due soon, Mr. Mazhero shall not make submissions at any time of any sort on any subjects other than the contents of the appeal book.

[22] My Order of October 1, 2014 remains in full force. If Mr. Mazhero fails to obey it in any way whatsoever, these consolidated appeals shall be immediately and summarily dismissed with costs.

[23] These motions shall be dismissed.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-147-11 AND 186-11
STYLE OF CAUSE:	FRANCIS MAZHERO v. ANDREW FOX, JACQUES ROBERGE AND NEIL SHARKEY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	OCTOBER 9, 2014

WRITTEN REPRESENTATIONS BY:

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