Federal Court  Cour fédérale

Date: 20151019

Docket: T-761-14

Citation: 2015 FC 1183

Ottawa, Ontario, October 19, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

NOAHS ARK FOUNDATION
AND ITIG TRUST
AND NATHAN JOEL PEACHEY
SECRETARY

Applicants

and

HER MAJESTY THE QUEEN (CROWN)
MINISTRY OF THE ATTORNEY GENERAL
ROYAL CANADIAN MOUNTED POLICE
JESUS BERRIOS, JOSE BERRIOS,
AND RICHARD BERRIOS

Respondents

ORDER AND REASONS

I. Introduction

[1] The Applicant, Mr. Nathan Joel Peachey (Mr. Peachey), in his alleged capacity as Secretary for the Applicants Noahs Ark Foundation (Noahs Ark) and ITIG Trust (ITIG), seeks

an order to set aside the Order of Prothonotary Kevin Aalto, dated April 30, 2014, pursuant to Rule 399 of the *Federal Court Rules*, SOR/98-106 (the Rules). He also seeks an order pursuant to Rule 385 of the Rules to compel the presiding case management judge "to move the case along on its merits."

[1] The Respondents, Her Majesty the Queen (Crown), the Ministry of the Attorney General, and the Royal Canadian Mounted Police (collectively, the Crown Respondents), oppose the Applicants' motion and request the dismissal of it as well as of the Applicants' underlying judicial review application.

[2] For the reasons that follow, this motion is dismissed.

II. Background

[3] On November 18, 2012, Respondents Jesus Berrios, Richard Berrios, and Jose Berrios were subjected to a secondary vehicle search by Border Service Officers (Officers) at the Detroit-Windsor border in which Officers discovered the equivalent of $7, 367, 922.45 Canadian dollars in Iraqi Dinars.

[4] Since Jesus Berrios failed to report the currency when asked if he was in the possession of cash, currency, or monetary instruments equal to or greater than $10, 000.00 Canadian dollars, the Canada Border Services Agency (CBSA) seized the currency as forfeit as it suspected the currency to be proceeds of crime pursuant to sections 12(1), 18(1), and 18(2) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (the Act).

[5] On December 4, 2013, CBSA's Recourse Directorate received a letter entitled "72 Hour Notice-Notice of Demand" from ITIG. The letter was signed by a "General L.W.R." who stated the following:

> I am the owner of ITIG TRUST. It has come to my respective attention that the Financial Group for whom I represent, is currently missing an allotment of IRAQI DINAR […] which I control through ITIG TRUST. I have initiated an Investigation for Fraud, and my people have located it inside the borders of Canada where it has been detained by the CBSA, since the 18th of November 2012, whilst being transported through the Windsor, Canada, Port of Entry CBSA, by Jesus Berrios, who was then acting Secretary for Noahs Ark Foundation.

[6] On February 24, 2014, the Minister of Public Safety and Emergency Preparedness (the Minister) confirmed CBSA's finding that section 12(1) of the Act was contravened and decided that the currency would remain forfeited to the Crown pursuant to section 29 of the Act. Criminal charges were laid against Jesus, Jose, and Richard Berrios with respect to the seized currency, which are still pending.

[7] Mr. Peachey was not involved in any of the above-mentioned events, including the Ministerial Review of February 24, 2014. I note in this respect, that the December 4, 2013 letter signed by General L.W.R. does not mention Mr. Peachey at all and that, furthermore, the General, in another paragraph of the letter, requested that CBSA "immediately release" and return the Iraqi Dinars to him and not Mr. Peachey.

[8] In March 2014, Mr. Peachey contacted CBSA's Recourse Directorate for the first time to request that the currency be returned to him. In a letter dated March 12, 2014, Mr. Peachey sets out three proposed options with CBSA to resolve the matter. These options were formulated as

follows: (1) "I choose to sit down at an appointed meeting and "SHED LIGHT" on this subject matter and settle this between us like Gentlemen;" (2) "We will take all the investigation findings that we have and file criminal charges, return of currency and triple-times plus punitive damages for theft of property;" or (3) "Classified." Attached to the letter is a document signed on behalf of ITIG on November 13, 2012 purporting to appoint Mr. Peachey as Secretary of ITIG. I note that General L.W.R.'s letter of December 4, 2013 indicates that Jesus Berrios was Secretary of ITIG at the time of the seizure in November 2012.

[9] Despite his non-involvement in the matter since the initial seizure took place, Mr. Peachey applied for judicial review of the Minister's decision in a Notice of Application dated March 25, 2014, alleging that he was the lawful owner of the currency through his entities Noahs Ark and ITIG.

[10] On April 2, 2014, the Applicants filed a motion pursuant to Rule 120 of the Rules asking the Court to grant leave for Mr. Peachey to represent Noahs Ark and ITIG for the purposes of the judicial review proceedings. Rule 120 states that a "corporation, partnership or unincorporated association shall be represented by a solicitor in all proceedings, unless the Court in special circumstances grants leave to it to be represented by an officer, partner or member, as the case may be." The motion was heard on April 15, 2014 and subsequently dismissed by Prothonotary Aalto on April 30, 2014.

[11] Prothonotary Aalto found that the Applicants did not demonstrate any special circumstances warranting an exception to the general rule found in Rule 120; namely that a

corporation be represented by counsel. Instead, Prothonotary Aalto found that the evidence before him demonstrated factors militating toward the requirement of retaining counsel. Prothonotary Aalto found that the Applicants appeared to have the financial resources to retain counsel, that the complexity of the matter requires the expertise of a lawyer, and that the proposed representative, Mr. Peachey, will be a central witness.

[12] With respect to the legal status of Noahs Ark and ITIG, Prothonotary Aalto found that it was unclear what these entities were since Mr. Peachey submitted self-authored documents to demonstrate that "Noahs Ark Foundation and the ITIG Trust were charted by my signature through Jericho Outreach as private corporation soles and for all intents and purposes of this judicial process shall be treated as a sole proprietor." Since the Applicants did not demonstrate any special circumstances, Prothonotary Aalto ordered them to appoint a solicitor to represent them within 30 days of the date of his Order. He also ordered that the Applicants' judicial review application proceed as a specially managed proceeding.

[13] The Applicants were ordered to pay forthwith costs in a fixed amount of $300 inclusive of HST. These costs have still not been paid.

[14] Nearly nine months elapsed without further advancement on the merits of the Applicants' application for judicial review. In this context, the Court issued a Notice of Status Review on February 10, 2015. Subsequently, the parties attended a Case Management Conference with Prothonotary Martha Milczynski on April 27, 2015. Prothonotary Milczynski, who has been

appointed to case-manage the present matter, ordered the Applicants to retain counsel by May 27, 2015, failing which the judicial review application would go back into Status Review.

[15] Instead of retaining counsel, Mr. Peachey served and filed a motion record on May 29, 2015 to have Prothotonary Aalto's Order set aside pursuant to Rule 399 of the Rules.

III. Issue

[16] There is one issue to be determined in this case and it is whether the Order of Prothonotary Aalto, dated April 30, 2014, should be set aside pursuant to Rule 399.

IV. Analysis

[17] Rule 399 of the Rules allows the Court to set aside or vary an order in very limited circumstances, namely, where an order is made in the absence of another party, where a matter arose or was discovered subsequent to the making of the order, or where the order was obtained by fraud. In my view and for the reasons that follow, none of the above-mentioned criteria are met in this case.

[18] Mr. Peachey submits that a new matter has arisen in this case, which is that Rule 112(1), as opposed to Rule 120, applies to the issue of legal representation of ITIG and Noahs Ark. Rule 112(1) provides, *inter alia*, that a proceeding may be brought by the trustees, executors or administrators of a trust without joining the beneficiaries of the trust.

[19] Apart from the fact that Rule 112(1) appears irrelevant to the issue that was before Prothonotary Aalto as it is unrelated to the Rules dealing with the representation of parties, this argument must fail since Rule 399 is not meant to vary or set aside judgments of this Court when the parties are not well-versed in the law or applicable Rules and as a result fail to raise an argument before the Court. In the context of a motion under Rule 397, Justice Denis Pelletier defined the term "matter" as "an element of the relief sought as opposed to an argument raised before the court" *(Haque v Canada (Minister of Citizenship and Immigration),* 188 FTR 154, 98 ACWS (3d) 1081, at para 5). This definition was retained by Justice Judith Snider in *Procter & Gamble Pharmaceuticals Canada Inc v Canada (Minister of Health),* 2003 FC 91, 238 FTR 215, [*Procter & Gamble*] for new matters arising in the context of Rule 399 applications. Thus, the case law is clear that ignorance of the law or failure to raise an argument that could otherwise properly have been brought before the Court is not a valid reason for setting aside an order of this Court under Rule 399 (*Procter & Gamble*, at para 19; *Desouky v Canada (Minister of Citizenship and Immigration),* 176 FTR 302, 92 ACWS (3d) 674, at para 17; *Guzman v Canada (Minister of Citizenship and Immigration)* [2000] 1 FC 286, 174 FTR 43, at para 40).

[20] Secondly, Mr. Peachey contends that Prothonotary Aalto's Order was obtained by fraud as this Court's Prothonotaries have no authority to issue an "injunction" and , therefore, to compel a party to a proceeding to retain counsel. This argument is devoid of any merit. As counsel for the Crown Respondents correctly points out, Prothonotaries have a broad discretion to hear, and make any necessary orders relating to, any motion under the Rules, except those expressly excluded from their jurisdiction by Rule 50. This broad jurisdiction comprises all matters that arise prior to trial or the assignment of a hearing date (*Pearson v Canada*, 2008 FC

62 (Proth), [2008] 4 FCR 373, at para 12), including ordering that a party must retain counsel pursuant to Rule 120. A Rule 120 motion is simply not a motion for an "injunction" within the ordinary meaning of that very specific type of recourse and remedy. It is therefore not covered by the exceptions listed in Rule 50. Otherwise, any order made by a Prothonotary, to the extent, for example, it requires that something be done procedurally, would have to be considered an "injunction". This cannot possibly have been the intention of those who drafted the Rules.

[21] Mr. Peachey further contends that Prothonotary Aalto's Order is part of a criminal conspiracy perpetrated against him by the Crown Respondents and the "judicial machinery" of the Court. He claims to be a "live first-hand witness to Respondents "*sinister actions*" of prohibiting and intervening any way possible, preventing Applicant from further proceedings with this Application." At paragraph 19 of his written submissions dated May 19, 2015, Mr. Peachey states the following:

> Moreover there is "***highly suspicious***" activity, that the judicial machinery of this Court may be tainted with fraud in this Case; cognizant with respondents as in "***conspiring together to obstruct justice***" because since Prothonotary Aalto's order, Applicant is now duly harassed, detained and refused entrance by the Respondents when it attempts to enter through the Canada Border; prohibiting it from soliciting a Canadian solicitor or file case-matters in Federal Court.

[22] These are obviously very serious allegations but there is not an *iota* of evidence to support them. According to CBSA reports, Mr. Peachey was denied entry into Canada on February 19, 2015 as he refused to answer fully and truthfully the questions posed to him by Officers regarding his trip to Canada on that date. There is no evidence that he was detained or searched and no evidence of any other border incident involving Mr. Peachey. His claim that he

is the subject of a conspiracy by the Crown Respondents and the "judicial machinery" of the Court is wholly unsubstantiated, frivolous, devoid of any merit and contemptuous.

[23] Finally, Mr. Peachey claims that he was caught by surprise at the hearing before Prothonotary Aalto on April 15, 2015 as it is apparently only then that he was given the Crown Respondents' responding material. I am satisfied that Mr. Peachey was given ample time to review and prepare objections in response to the Crown Respondents' arguments before presenting his submissions before Prothonotary Aalto. Prothonotary Aalto granted Mr. Peachey a recess of approximately 30 to 45 minutes to review the Crown Respondents' arguments. When the hearing resumed, Mr. Peachey did not ask the Court for more time in order to prepare himself, which suggests that he was ready to meet the issues raised by the Crown Respondents. Therefore, I conclude that fairness is not an issue since the Applicant was given a reasonable and fair opportunity to respond to the issue of whether the Applicants required representation by counsel pursuant to Rule 120 of the Rules (*Minister of National Revenue v Optical Recording Corp,* [1987] FCJ No 405, 79 NR 23, at para 12).

[24] There are therefore no reasons to interfere, on the basis of Rule 399, with Prothonotary Aalto's Order that the Applicants retain counsel.

[25] Even if I was sitting on appeal of Prothonotary Aalto's Order, I would see no reason to interfere with it either. It is trite law that discretionary orders of Prothonotaries ought not to be disturbed on appeal before a judge of the Court unless they raise questions vital to the final issue of the case or they are clearly wrong in the sense that the exercise of discretion by the

Prothonotary was based upon a wrong principle or a misapprehension of the facts (*R v Aqua-Gem Investments Ltd*. [1993] 2 FC 425, 61 FTR 44; *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27, [2003] 1 SCR 450; *Merck & Co. Inc. v Apotex Inc.*, 2003 FCA 488, 246 FTR 319). Here, I find that no error was made when Prothonotary Aalto found that the Applicants did not present any special circumstances demonstrating that they ought to be represented by someone other than a solicitor. Those special circumstances are normally (i) that the moving party cannot afford counsel, (ii) that the issues are not complex and can be handled expeditiously, and (iii) that the representative will not be a key witness (*El Mocambo Rocks Inc v Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2012 FCA 98, at para 3; *Alpha Marathon Technologies Inc v Dual Spiral Systems Inc*, 2005 FC 1582, at para 3).

[26] Having considered the evidence on record and the submissions of the parties, I am satisfied that Prothonotary Aalto's Order was not based upon a wrong principle or a misapprehension of the facts, quite the contrary.

[27] I further note that it is unclear from the evidence whether Mr. Peachey is Secretary of any of the other Applicants in this case since documents provided by CBSA, one of which is in part reproduced above, indicates that Jesus Berrios is or has been the Secretary of Noahs Ark and that General L.W.R. and not Mr. Peachey is the sole owner of ITIG. Mr. Peachey also failed to demonstrate that Noahs Ark and ITIG are sole proprietors nor that they do not have the funds to retain counsel. I also recognize that Mr. Peachey's Rule 120 motion to represent the Applicants alleges that Mr. Peachey is a "Judge and private international common-law lawyer", yet, during

the hearing he admitted to Prothonotary Aalto that he does not have an accreditation from a recognized law school and has not been appointed by any recognized government as a judge.

[28] Given the dismissal of the Applicants' Rule 399 motion, I will not order the case-management judge, as requested by Mr. Peachey, "to move the case along on its merits," assuming I had the authority to do so. Instead, I will vary Prothonotary Milczynski's case-management order of April 27, 2015 so that it reads that the Applicants are to retain counsel by November 19, 2015; failing which their judicial review application will go back into Status Review.

[29] As for the Crown Respondents' request that the Applicants' application for judicial review be dismissed for excessive delay in moving the matter along, or, in the alternative, that they be granted security for costs pursuant to Rule 416(1)(f) of the Rules, they should be brought before the case management judge, on separate motions, if, and when, necessary.

[30] Costs on the present motion, in the amount of $500 inclusive of HST, are awarded to the Crown Respondents and payable forthwith.

ORDER

THIS COURT ORDERS that:

1. The Applicants' motion pursuant to Rule 399 of the *Federal Court Rules*, seeking to set aside the Order of Prothonotary Alto, dated April 30, 2014, is dismissed;

2. Prothonotary Milczynski's case-management order, dated April 27, 2015, is varied so that it reads that the Applicants are to retain counsel by November 19, 2015, failing which their judicial review application will go back into Status Review;

3. Costs in the amount of $500 inclusive of HST, are awarded to the Crown Respondents and payable forthwith.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-761-14
STYLE OF CAUSE:	NOAHS ARK FOUNDATION, AND ITIG TRUST, AND NATHAN JOEL PEACHEY SECRETARY v HER MAJESTY THE QUEEN (CROWN), MINISTRY OF THE ATTORNEY GENERAL, ROYAL CANADIAN MOUNTED POLICE, JESUS BERRIOS, JOSE BERRIOS, AND RICHARD BERRIOS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 30, 2015
ORDER AND REASONS:	LEBLANC J.
DATED:	OCTOBER 19, 2015

APPEARANCES:

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Mr Derick Edwards	FOR THE RESPONDENTS

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