Federal Court Cour fédérale

Date: 20210629

Docket: T-288-15

Citation: 2021 FC 681

Ottawa, Ontario, June 29, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MASTER TECH INC.

Plaintiff

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Defendant

JUDGMENT AND REASONS

[1] This is an appeal of the April 21, 2021 Order of Prothonotary Tabib dismissing the Plaintiff's motion to reconsider or set aside her September 8, 2020 Order, dismissing this action for delay.

[2] In 2015, the Plaintiff commenced an action against the Defendant for damages in relation to the seizure of machinery that it sought to export to Iran.

[3] The Plaintiff's president and sole shareholder, Mr. Fariborz Mirzaee Tavana, brought a motion, on April 9, 2015, under Rule 120 of the *Federal Courts Rules* for an order allowing him to represent the corporate Plaintiff. The motion was granted on May 11, 2015 by Prothonotary Tabib, who was Case Management Judge, but was later revoked by her Order dated July 25, 2016:

> The Court is concerned that Mr. Tavana, who was granted leave to represent the Plaintiff by order dated May 11, 2015, may have ceased to seek – or to follow – legal advice from the solicitor who was assisting him in the beginning. The order of May 11, 2015 was premised on Mr. Tavana's undertaking to continue to seek and secure legal assistance as necessary, and it provided that on the Court's motion, the leave granted could be reviewed or withdrawn. Given the recent conduct of the Plaintiff, the Court wishes to review the authorization given to Mr. Tavana to represent the Plaintiff. This review will take the form of a requirement by Mr. Tavana to reapply for leave to represent the company, by serving and filing a motion record to that effect, no later than August 29, 2016.

[4] On October 7, 2016, the Plaintiff appointed its first solicitor of record. That solicitor eventually brought a successful motion under Rule 125 to be removed as the Plaintiff's solicitor of record. Five more solicitors of record were appointed and subsequently removed or replaced as the Plaintiff's solicitor of record.

[5] On December 12, 2019, Prothonotary Tabib issued an Interim Notice of Status Review in this action. It was subsequently suspended for 45 days in order to allow the Plaintiff time to serve and file a proposed schedule of steps to be taken to move this action forward, but on the condition that it be filed by the Plaintiff's solicitor of record. No such solicitor was appointed by the Plaintiff.

[6] On September 8, 2020, Prothonotary Tabib issued an Order dismissing this action for delay.

[7] On September 18, 2020, the Defendant was served with a Notice of Motion based on Rule 397 of the *Federal Courts Rules*, from Mr. Tavana seeking a reconsideration of the decision dismissing the action. It was not accepted by the Court for filing because Mr. Tavana did not have authority to act on behalf of the Plaintiff.

[8] On March 29, 2021, Mr. Tavana brought a similar motion to reconsider the September 8, 2020 Order. He also sought an extension of time to file that motion, and leave to represent the Plaintiff. He submitted that he had authority to represent the Plaintiff because the corporate Plaintiff had been dissolved and all of its interests had been transmitted to him.

[9] Prothonotary Tabib dismissed his motion, stating "his attempt to revive an action that was dismissed and to re-argue a motion that was determined constituted an abuse of process." She also found that there was no justification for the delay in bringing the motion:

> Mr. Tavana appears to rely on his inability to pursue the Plaintiff's claims personally until the dissolution of the Plaintiff's corporation as a justification for his delay. However, Mr. Tavana has not explained why he delayed dissolving the Plaintiff corporation, especially since, as he asserts, the conditions for that dissolution had existed since 2016.

[10] The Prothonotary further found that Mr. Tavana's reliance on Rules 397(1)(b) and 399(2)(a) was without merit because: (1) Rule 397(1)(b) does not apply to a party's failure to bring the Court's attention to facts that it was or should have been aware of with diligence, and

(2) the facts about the dissolution of the corporate Plaintiff were not facts that arose or were discovered subsequent to the decision as is required under Rule 399(2)(a).

[11] Discretionary decisions of a Prothonotary are reviewed on the standard articulated by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. *Housen* outlined that findings and inferences of fact are reviewed on the standard of palpable and overriding error, and questions of law or of mixed fact and law with an extricable legal principle at issue are reviewed on the standard of correctness.

[12] There are serious deficiencies and concerns with the material filed and submissions made by Mr. Tavana.

[13] First, as the Defendant notes, in the memorandum filed in this appeal Mr. Tavana "has brought various allegations against several non-parties." The majority of his submissions focus on the assertion that a number of government agencies, including the Canadian Security Intelligence Service, the Canadian Nuclear Safety Commission, and Global Affairs Canada, violated the rights described in sections 8 and 24 of the *Charter of Rights and Freedoms*. This was not before the Prothonotary and, in any event, were not relevant to the issue before her or before this Court on appeal.

[14] Second, in addition to these new issues, Mr. Tavana's affidavit on this motion includes roughly 19 exhibits that were not before the Prothonotary. This appeal is to be decided on the basis of what was before the Prothonotary when making the Order appealed from. This has long

been the view of the Court, and is well-expressed by Justice Kane in *David Suzuki Foundation v Canada (Minister of Health)*, 2018 FC 379 at paragraphs 36 and 37:

> The general principle remains that an appeal of a Prothonotary's Order is to be decided on the basis of what was before the Prothonotary (*James River* at para 32). Only in “exceptional” circumstances, may new evidence be admitted (*Carten* at para 23).
>
> The approach identified in *Carten* and *Graham*, both of which addressed whether new evidence should be admitted on an Appeal of a Prothonotary’s decision regarding a motion to strike a statement of claim, is most applicable to the circumstances. New evidence may be admissible, “exceptionally” where: it could not have been made available earlier; it will serve the interests of justice; it will assist the Court; and, it will not seriously prejudice the other side. (*Graham* at para 10; *Carten* at para 23; *Shaw v Canada*, 2010 FC 577 at para 9, [2010] FCJ No 684 (QL)).

[15] Mr. Tavana offers no explanation why there are exceptional circumstances here that would support the admission of these new issues or facts. Moreover, the four circumstances referenced by Justice Kane supporting new evidence is conjunctive, and there is nothing to suggest that it could not have been made available earlier.

[16] Mr. Tavana fails to grapple with the merits of the appeal before the Court. He fails to address in any meaningful way why Rules 397, 399(2) and 51 are applicable and established. Instead, he notes that those involved in the seizure process have misled the Court, fabricated documents, unlawfully seized goods, and that this evidence has led the Plaintiff’s solicitors to “run away.” This is baseless speculation and not supported by any evidence.

[17] I agree with the Defendant’s characterization at paragraph 35 of its memorandum regarding the bulk of Mr. Tavana’s submissions:

> In this appeal Mr. Tavana is attempting re-argue and go behind the Order dismissing the plaintiff's action for delay. Mr. Tavana's new arguments and documents and his irrelevant and unfounded allegations of fraud are a further growth of the abuse of process that the motion under appeal began as. Mr. Tavana's unconstrained submissions and evidence are not just an attempt to re-litigate the question of whether the corporate plaintiff's action should be dismissed for delay. Mr. Tavana in this motion invites the court to consider what he feels are substantive issues in an action that has been dismissed. As such Mr. Tavana is heaping an abuse of process on top of an abuse of process. This abuse must end.

[18] This appeal is without merit and must be dismissed, with costs fixed at $2,500.00, to be paid by Mr. Tavana personally.

JUDGMENT IN T-288-15

THIS COURT'S JUDGMENT is that this appeal is dismissed, with costs to the Defendant fixed at $2,500.00, payable personally by Mr. Fariborz Mirzaee Tavana, who brought this appeal.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-288-15
STYLE OF CAUSE:	MASTER TECH INC v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	JUNE 24, 2021
JUDGMENT AND REASONS:	ZINN J.
DATED:	JUNE 29, 2021

APPEARANCES:

Fariborz Tavana	FOR THE PLAINTIFF
Shain Widdifield	FOR THE DEFENDANT

SOLICITORS OF RECORD:

- Nil -	SELF-REPRESENTED PLAINTIFF
Attorney General of Canada Department of Justice Ontario Regional Office Toronto, Ontario	FOR THE DEFENDANT