Federal Court of Appeal | Cour d'appel fédérale

Date: 20171122

Docket: A-434-16
A-435-16

Citation: 2017 FCA 230

CORAM: **RENNIE J.A.**
GLEASON J.A.
LASKIN J.A.

BETWEEN:

ELENA MAXIMOVA

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 21, 2017.

Judgment delivered at Toronto, Ontario on November 22, 2017.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GLEASON J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is a consolidated appeal of two decisions of the Federal Court. Elena Maximova appeals an order of the Federal Court dated November 9, 2016 *per* Justice Southcott dismissing her appeal of an order of Prothonotary Aalto dated October 4, 2016 dismissing her motion for leave to file an additional affidavit under Rule 312 of the *Federal Courts Rules* (A-344-16).

[2] Ms. Maximova also appeals a second order of the Federal Court motions judge dismissing her appeal of an order of the prothonotary dismissing her motion under Rule 75 of the *Federal Courts Rules* for leave to amend her Notice of Application in the underlying application for judicial review of a decision of the Canadian Human Rights Commission (A-435-16).

[3] A copy of these reasons shall be placed on each file.

I. Dismissal of the motion under Rule 312

[4] Since this Court's decision in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 (*Hospira*), it is well-established that the Court may only interfere with a discretionary decision of a prothonotary if the prothonotary made an error of law or a palpable and overriding error regarding a question of fact or mixed fact and law: *Hospira* at paras. 64-65, 79. The same standard of review applies when this Court reviews the motions judge's consideration of the prothonotary's decision: *Hospira* at paras. 83-84.

[5] A palpable and overriding error is one which is obvious and apparent, the effect of which is to vitiate the integrity of the reasons. I am not satisfied that either the motions judge, or the prothonotary, made errors of this nature. I reach this conclusion in respect of both appeals.

[6] The thrust of Ms. Maximova's submission is that the motions judge erred in accepting the prothonotary's conclusion that the information contained in the proposed new affidavit could have formed part of Ms. Maximova's original affidavit.

[7] The motions judge applied the proper test for filing an additional affidavit under Rule 312. In exercising its discretion under Rule 312, the Court may take into account whether the evidence sought to be adduced was available when the party filed its affidavits or if it could have been available with the exercise of due diligence: *Connolly v. Canada (Attorney General)*, 2014 FCA 294 at para. 6, 466 N.R. 44.

[8] As the motions judge noted at paragraph 7 of his reasons, although the prothonotary did not explicitly refer to this test, it is clear he considered the relevant factors in the test and applied them in the present case. Since the evidence Ms. Maximova seeks to introduce "could have formed part of [Ms. Maximova's] original affidavit" and since "[t]here [wa]s nothing to explain why it is being proffered only now" (the prothonotary's order at page 2), he chose not to exercise his discretion in the appellant's favor. There is nothing in the record that suggests either the prothonotary or the judge made an overriding and palpable error in applying the appropriate test to the facts as he found them to be.

II. The motion to amend the Notice of Application

[9] Ms. Maximova challenges the motions judge's decision on the basis that he erred in concluding that detailed reasons are not necessarily required in a prothonotary's order. She also takes issue with the motions judge's conclusion that the requested amendments constitute pleas capable of being struck.

[10] Neither the motions judge nor the prothonotary made errors that justify this Court's interference with the order.

[11] In reviewing the prothonotary's order, the motions judge considered established jurisprudence that detailed reasons are not required in a prothonotary's order: *Apotex Inc. v. Canada (Health)*, 2016 FC 776 at para. 84.

[12] Here, as the motions judge noted, the prothonotary stated that he read Ms. Maximova's motion record, the respondent's written representations, and Ms. Maximova's reply (the Federal Court order at para. 6; the prothonotary's order at page 1). The Court was satisfied that the prothonotary directed his mind to the issues and law. We see no error in that conclusion.

[13] With regards to the first requested amendment, the motions judge identified the governing principle, namely, that if the proposed amendments constitute pleas capable of being struck, they should not be allowed: *Bauer Hockey Corp. v. Sport Maska Inc.*, 2014 FCA 158 at para. 16, 122 C.P.R. (4th) 97.

[14] The amendment to advance a claim for damages against the CHRC was denied because damages are not available as a remedy in judicial review applications: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 26, [2010] 3 S.C.R. 585.

[15] With respect to the second set of requested amendments, being Ms. Maximova's request to include references to the CHRC's website in her Notice of Application, we agree with the motions judge that this amendment (and the related amendments on pages 3 and 4 of the proposed amended Notice of Application, AB, Tab 10, pages 75–76), however characterised, do not constitute a ground of review. Thus, it cannot be said that it is in "the interests of justice"

(*AbbVie Corp. v. Janssen Inc.*, 2014 FCA 242 at para. 3, 131 C.P.R. (4th) 128) to allow an appellant to amend her Notice of Application.

[16] Finally, the amendment to add delay as a ground for judicial review was properly denied. Delay alone will seldom constitute a ground of review; the applicant must show the delay prejudiced her ability to have a fair hearing: *Marsh v. Royal Canadian Mounted Police*, 2006 FC 1466 at para. 27; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 101, [2000] 2 S.C.R. 307. In the present case, it was clear to the motions judge that Ms. Maximova's delay argument had no reasonable prospect of success because she has not stated how the delay prejudiced her ability to have a fair hearing. We see no reviewable error in this conclusion.

[17] The appeals will therefore be dismissed. Costs are, in the usual course, awarded in favour of the successful party on appeal. I would fix costs in the amount of $400.00, but caution the appellant that further interlocutory appeals, if unsuccessful, could result in a higher award.

"Donald J. Rennie"
J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED NOVEMBER 9, 2016 DOCKET NUMBER T-309-16

DOCKET:	A-434-16 A-435-16
STYLE OF CAUSE:	ELENA MAXIMOVA V. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 21, 2017
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	GLEASON J.A. LASKIN J.A.
DATED:	NOVEMBER 22, 2017

APPEARANCES:

Elena Maximova	APPELLANT
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SOLICITORS OF RECORD:

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