Federal Court  Cour fédérale

Date: 20230619

Docket: T-217-22

Citation: 2023 FC 863

Ottawa, Ontario, June 19, 2023

PRESENT: The Honourable Justice Fuhrer

SIMPLIFIED ACTION

BETWEEN:

R. MAXINE COLLINS

Plaintiff/Moving Party

and

THE ATTORNEY GENERAL OF CANADA

Defendant/Responding Party

ORDER AND REASONS

I. Overview

[1] The Plaintiff, R. Maxine Collins, brings this motion in writing filed on May 1, 2023 pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [*FCR* or *Rules*], to set aside the April 21, 2023 Order of Associate Judge Molgat [April Order] dismissing the motion of the

Defendant, the Attorney General of Canada [AGC], to strike the Statement of Claim or to require the Plaintiff to remove the AGC as a defendant, pursuant to the *FCR* Rule 221 [Rule 221 Motion].

[2] The Plaintiff also seeks the disposition of the AGC's Rule 221 Motion, as well as disposition of the Plaintiff's earlier motion filed on April 19, 2022 pursuant to the *FCR* Rule 210 for default judgment [Rule 210 Motion].

[3] On April 27, 2022, the Court issued a direction of Associate Judge Tabib (then Prothonotary Tabib) indicating that the time for the AGC to respond to the Rule 210 Motion would start to run from the date of the determination of the Rule 221 Motion. That time started to run following the issuance of the April Order on April 21, 2023. The AGC served and filed his responding motion record on May 1, 2023.

[4] Although the Plaintiff takes issue with the AGC's characterization of her May 1, 2023 motion as a Rule 51 motion, I note that the Plaintiff describes it in her supporting affidavit as "my motion under Rule 51 of the *Federal Courts Rules*." Further, before the Court can consider the Rule 221 Motion afresh, the Plaintiff first must succeed on her motion under Rule 51. Accordingly, to avoid confusion with the other relevant motions, the Court will refer to the Plaintiff's May 1, 2023 motion as the "Rule 51 Motion."

[5] Pursuant to Rules 3 and 385(1) (the latter to be read along side Rules 53 and 55), and noting the broad powers reposed in me as a case management judge in this matter, I have

considered the Rule 210 Motion and Rule 51 Motion together, including all the parties' motion material, submissions and related correspondence: *Mazhero v Fox*, 2014 FCA 219 at paras 2-6. For the reasons that follow, I dismiss these motions. I thus determine that it is unnecessary to consider the Plaintiff's request to dispose of the Defendant's Rule 221 Motion.

[6] I deal with each of the Plaintiff's two motions in turn below, starting with the Rule 210 Motion. In light of my dismissal of both of the motions, and contrary to the Plaintiff's submissions, the order in which I dispose of them is inconsequential in the current circumstances.

II. Analysis

A. *Rule 210 Motion*

[7] I find that the Plaintiff's motion must be dismissed because the Plaintiff has failed to file any supporting evidence, apart from an affidavit of service: *FCR* Rule 210(3); *Monsanto Canada Inc. v Verdegem*, 2013 FC 50 [*Monsanto*] at para 2.

[8] On a motion for default judgment under the *FCR* Rule 210, the allegations contained in a statement of claim are considered denied: *Trimble Solutions Corporation v Quantum Dynamics Inc.*, 2021 FC 63 [*Trimble*] at para 35. Further, there is no issue in the motion before me that the AGC has been served with the Plaintiff's Statement of Claim and that the AGC has not filed a Statement of Defence within the period stipulated in the *FCR* Rule 204.

[9] Because an order granting default judgment is discretionary, it is the "plaintiff's burden …to establish its case on a balance of probabilities, based on sufficiently clear, convincing, and cogent evidence": *Trimble*, above at paras 36-37. The Plaintiff here, however, has not filed any evidence that would permit the Court to find on a balance of probabilities that the Plaintiff has established her claim: *Trimble*, at para 35.

[10] As the Plaintiff admitted in written representations submitted on her Rule 51 Motion, the Rule 210 Motion "is deficient as not including affidavit evidence with respect to the claim," and submits that the Rule 210 Motion be dismissed without prejudice to a further motion supported by proper affidavit evidence, citing *Monsanto*, above at para 7.

[11] In the circumstances, I determine the Plaintiff's Rule 210 Motion must be dismissed without prejudice to a further motion with proper supporting affidavit evidence.

[12] I add that this is not a proceeding where the AGC has shown no interest in the matter. Rather, it is one where the AGC chose to avail himself of procedural steps open to him (i.e. the Rule 221 Motion), albeit one day late and without a request for an extension of time under Rule 8, short of serving and filing a Statement of Defence.

B. *Rule 51 Motion*

[13] As I understand it, the Plaintiff essentially asserts that Associate Judge Molgat, in rendering her April Order, did so erroneously on the basis of the *FCR* Rule 298(2)(b), instead of Rule 210, contrary to Rule 47(2). I disagree. As explained below, I find that Associate Judge

Molgat made neither any palpable or overriding error nor any (extricable) error of law warranting the Court's interference.

[14] Further, I am not persuaded that the AGC's response to the Rule 51 Motion reads as a motion by the AGC or is an attempt to rewrite the Plaintiff's motion. The overarching issue for the Court to consider on any motion under the *FCR* Rule 51 is whether the associate judge made a reviewable error.

[15] The standard of review applicable to a Rule 51 motion appealing a decision of an associate judge (formerly titled "prothonotary") is the appellate standard described by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at paras 7-36: *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 63-65, 79 and 83. (I note that on September 23, 2022, the term "associate judge" replaced "prothonotary," including their plurals and any applicable supernumerary status, pursuant to section 371 of the *Budget Implementation Act, 2022, No. 1*, SC 2022, c 10.)

[16] The Federal Court of Appeal recently summarized the *Housen* standard as follows: "questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions **where there is an extricable question of law**, are subject to the standard of correctness" [emphasis added]: *Worldspan Marine Inc. v Sargeant III*, 2021 FCA 130 at para 48; see also *Canada (Attorney General) v Iris Technologies Inc.*, 2021 FCA 244 at para 33.

[17] The “palpable and overriding error” standard of review is highly deferential. Further, palpable means an obvious error, while an overriding error is one that affects the decision-maker’s conclusion: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64; see also *NCS Multistage Inc. v Kobold Corporation*, 2021 FC 1395 at paras 32-33.

[18] I note that the *Rules* do not operate necessarily in a vacuum or in silos and, depending on the circumstances, certain Rules may be read together or operate in tandem.

[19] As the Supreme Court guides, “[a] court interpreting a statutory provision does so by applying the ‘modern principle’ of statutory interpretation, that is, that the words of a statute must be read ‘in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament’” [citations omitted]: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 117. This applies to regulatory provisions as well, such as the *Rules*. Further, Rule 3 provides that the *Rules* must be interpreted and applied (by the Court) to “secure the just, most expeditious and least expensive outcome of every proceeding.” In addition, the principle of proportionality was included in a recent amendment to Rule 3.

[20] The Plaintiff argues that the *FCR* Rule 298 was not before Associate Judge Molgat on the Rule 221 Motion and, therefore, the Associate Judge’s consideration of this Rule was contrary to the *FCR* Rule 47(2). I disagree. I also do not accept the Plaintiff’s argument that AGC’s written representations, although brief, do not respond to the Plaintiff’s Rule 51 Motion. The AGC

submits, and I agree, that the Plaintiff has failed to demonstrate that Associate Judge Molgat's reference to the *FCR* Rule 298(3)(a) was an error of fact or law and has not submitted evidence pointing to an error that warrants judicial review.

[21] Contrary to the Plaintiff's submission that the April Order does not reference Rule 221 anywhere, I note that the first paragraph of the April Order specifically indicates that the AGC brought his Rule 221 Motion in writing "for an Order pursuant to Rule 221(1)(a), (c) and (f) of the *Rules*." Further, I find that, in stating that "Rule 298(2) permits **such a motion** to be brought 'within the time set out in rule 204 for the service and filing of a statement of defence'" [emphasis added], Associate Judge Molgat was reading the *FCR* Rules 221, 298 (impliedly the *FCR* Rule 298(2)(b)) and 204 together, and that she committed no reviewable error in doing so, nor in referring to the *FCR* Rule 298(3)(a) in the ultimate disposition.

[22] In my view, the words "such a motion" referenced in the first paragraph of the April Order mean the Rule 221 Motion. In addition, this proceeding is a simplified action. As such, and bearing in mind the modern principle of statutory interpretation, in my view Rule 221, which applies to actions generally, must be read together with any applicable *Rules* that apply to simplified actions, such as Rule 298. This is evident in the latter Rule itself which references Rule 204 that also applies to actions generally.

[23] Read in its ordinary and grammatical sense, Rule 298 imposes a limitation on simplified actions regarding the bringing of motions before or after the pre-trial conference. Specifically,

they must be made returnable at a pre-trial conference conducted in accordance with Rules 258 to 267, which Rules also apply to actions generally.

[24] There are exceptions to this limitation which include a motion to strike a statement of claim (298(2)(b)) and a motion for default judgment (298(3)(c)). The *FCR* Rules 298(2)(b) and 298(3)(c) do not specifically mention Rules 221 and 210 respectively. Nonetheless, when read in the context of, and harmoniously with, the entire *Rules*, there is no question in my mind that the former Rules implicate or involve the latter Rules, hence the permitted Rule 221 Motion and Rule 210 Motion brought outside a pre-trial conference that has not been held yet in this simplified action.

[25] Whether the Plaintiff understood how the *Rules* operate and are interpreted by the Court, I find that the Plaintiff benefitted from the operation of the *FCR* Rules 298(3)(c) and 210, in the sense of being permitted under the *Rules* to bring her motion for default judgment in the context of a simplified action outside the pre-trial conference.

[26] Further, and more to the point, the Plaintiff herself referred to Rules 204 and 298(2) in paragraph 4 of the notice of motion for her Rule 210 Motion. That the AGC omitted a reference to the *FCR* Rule 298(2)(b) in ground (c) of the notice of motion for his Rule 221 Motion does not mean, in my view, that it was not relevant or not applicable. In other words, there was nothing improper about the Associate Judge taking the *FCR* Rule 298(2)(b) into account and I thus find that she did not err in doing so.

[27] Similarly, I determine that it was neither improper nor a reviewable error for Associate Judge Molgat to refer to the *FCR* Rule 298(3)(a) in her April Order. I note the Associate Judge ultimately dismissed the Rule 221 Motion "without prejudice to the Defendant's right to bring a motion for an Order under Rule 298(3)(a) of the *Rules* and to strike the Statement of Claim at a later date." I find that Associate Judge Molgat simply acknowledged another possible avenue open to the AGC to pursue under the *Rules*, if he chooses, given that the one he chose initially was out of time and made without a request for an extension of time under Rule 8. Contrary to the Plaintiff's submission, I am not persuaded, however, the Associate Judge instructed the AGC to file a new motion under the *FCR* Rule 298(3)(a).

[28] Although I could end my analysis here, there are several submissions the Plaintiff has made that I will address, noting that it is unnecessary for the Court to address all of the Plaintiff's submissions. The Court's silence on any argument or position, however, should not be taken as acceptance of it.

[29] In her reply submissions, the Plaintiff complains that the AGC included a copy of the Statement of Claim in his motion record on the basis that it is "material that was not before the [Associate Judge]," citing *Shaw v Canada*, 2010 FC 577 at para 8, and *Papequash v Brass*, 2018 FC 325 at para 10. I find no merit to this complaint. The Statement of Claim is the originating pleading in this proceeding and is not new evidence. On a plain reading of these decisions and others of this Court, such as, *Canjura v Canada (Attorney General)*, 2021 FC 1022 at para 12, what is improper material on a Rule 51 motion is new evidence that was not before the prothonotary or associate judge.

[30] I also find the Plaintiff's reply submission that the AGC is not required to prove information already on file (pursuant to Rule 353(2)(c)), not only contradictory to the above complaint but also misplaced. The *FCR* Rule 365(2)(b) is sufficiently broad in my view to permit the AGC to include the Statement of Claim in his responding motion record. The latter Rule is another example, in my view, of a Rule that, in the circumstances here, must be read in tandem with another Rule, i.e. Rule 369. Further, the *FCR* Rule 365(2)(b) is an answer to the Plaintiff's complaint that the April 27, 2022 direction of Associate Judge Tabib was not included in the Defendant's motion record. I note that the direction was contained in the Plaintiff's motion record; in other words, the AGC's motion record properly contains "**other material** to be used by the respondent on the motion that is **not included in the moving party's motion record**" [emphasis added].

[31] Contrary to the Plaintiff's reply submission, parties desiring that a proceeding be case managed or proceed as specially managed proceeding are permitted to, and do, move for or request case management. There was nothing improper about the AGC's counsel requesting case management in this matter, regardless of whether the other party is self-represented or represented by counsel.

[32] Further, the Plaintiff's submissions regarding the May 9, 2023 Order of the Chief Justice that the proceeding shall continue as a specially managed proceeding could be viewed as an impermissible collateral on the order: *Wilson v The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594 at pages 599-600; *Strickland v Canada (Attorney General)*, 2013 FC 475 at para 43.

If the Plaintiff disagreed with the order, she could have appealed it or moved for reconsideration under Rule 397.

III. Conclusion

[33] For the above reasons, the Plaintiff's Rule 210 Motion and Rule 51 Motion are dismissed. Further, it is unnecessary in the circumstances to dispose of the AGC's Rule 221 Motion afresh.

IV. Costs

[34] The AGC has requested costs in respect of these motions. Relying on my discretion pursuant to Rule 400, I award the AGC the lump sum amount of $500 for both motions (i.e. 2 x $250) payable by the Plaintiff.

[35] The Court appreciates, and sympathizes with, the position in which self-represented litigants such as the Plaintiff find themselves trying to navigate the Court's procedural requirements. Nonetheless, the jurisprudence does not favour ~~t~~their lack of legal training or understanding of the *Rules*: *MacDonald v Canada (Attorney General)*, 2017 FC 2 at paras 30 and 32, citing *Cotirta v Missinnipi Airways*, 2012 FC 1262 at para 13, affirmed 2013 FCA 280. In my view, the outcome of the Rule 210 Motion and the Rule 51 Motion was a direct result of the Plaintiff's incomplete understanding of the applicable *Rules*, hence the award of costs in the circumstances.

ORDER in T-217-22

THIS COURT ORDERS that:

1. The Plaintiff's motion in writing for default judgment pursuant to Rule 210 of the *Federal Courts Rules* is dismissed.
2. The Plaintiff's motion in writing to set aside the April 21, 2023 Order of Associate Judge Molgat pursuant to Rule 51 of the *Federal Courts Rules* is dismissed.
3. The Plaintiff shall pay costs in the amount of five hundred dollars ($500.00) to the Attorney General of Canada.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-217-22
STYLE OF CAUSE:	R. MAXINE COLLINS v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	FUHRER J.
DATED:	JUNE 19, 2023

APPEARANCES:

R. Maxine Collins	FOR THE PLAINTIFF (ON THEIR OWN BEHALF)
Narin Sideq	FOR THE DEFENDANT

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