

Date: 20081022

Docket: 08-A-52

Citation: 2008 FCA 318

Present: PELLETIER J.A.

BETWEEN:

KEVIN McKINNEY

Applicant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 22, 2008.

REASONS FOR ORDER BY:

PELLETIER J.A.

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REASONS FOR ORDER

PELLETIER J.A.

[1] This is a motion to extend the time for bringing an appeal from a decision of the Tax Court of Canada, as well as a motion to consolidate the hearing of the pending appeal of an interlocutory order made in the course of the same proceedings before the Tax Court.

[2] The affidavit of Timothy Clarke, one of the applicant's counsel establishes that the final judgment of the Tax Court in this matter was mailed to him on May 23, 2008, and that the 30 day period for appealing the judgment expired on June 23, 2008. It appears that the applicant had a family crisis on June 20, 2008 as a result of which counsel was not able to contact him to obtain instructions until June 24, 2008.

[3] The judgment under appeal is one in which the applicant succeeded in part before the Tax Court in that, even though his appeal was dismissed, the Tax Court returned the Assessment to the Minister for reconsideration and reassessment on the basis that the applicant should be credited with a further sum of \$43, 503.77.

[4] While the affidavit of Mr. Clarke indicates that a copy of the judgment under appeal is attached as Exhibit B to his affidavit, Exhibit B is a copy of the interlocutory order which is already under appeal. As a result, the Court has no idea of the nature of the judgment under appeal and the grounds for the appeal, and thus is unable to form any idea as to the potential merit of the appeal.

[5] The factors to be considered in deciding whether to extend the period for filing a notice of appeal are set out in *Pharmascience Inc. v. Canada (Minister of Health)*, 2003 FCA 333, [2004] 2 F.C.R. 349, at paragraph 6, where the following appears:

6. In deciding whether or not to grant an extension of time to commence an appeal, the basic test is whether the interests of justice favour granting the extension. The factors to be considered are conveniently summarized in *Karon Resources Inc. v. Canada* (1993), 71 F.T.R. 232, 1994] 1 C.T.C. 307 (F.C.T.D.): (1) whether there is an arguable case on appeal, (2) whether there are special circumstances that justify the delay in commencing the appeal, (3) whether there was a continuing intention to appeal, (4) whether the delay has been excessive, and (5) whether the respondent will be prejudiced if the extension of time is granted. The weight to be given to each of these factors will vary with the circumstances.

[6] In this case, the applicant has not established that there is an arguable case on appeal. There are special circumstances that partially justify the delay in commencing the appeal. I say "partially justify" because the unfortunate event which disrupted the applicant's life occurred late, very late, in

the appeal period. Those who leave these decisions to the last minute run the risk of unforeseen events interfering with their plans. That said, I am prepared to credit the applicant with this factor.

[7] In his affidavit, Mr. Clarke deposes that the applicant had a continuing intention to appeal, "but [that he] had been considering the relative cost and benefits of appealing the judgment before instructing counsel." It is obvious from this that the applicant did not, in fact, have a continuing intention to appeal. He was in the process of considering his options, a not unreasonable position since the judgment appealed from did credit him with \$43,507.77. Unfortunately, his consideration of this question was overtaken by other events. The applicant has been prompt in seeking relief from the failure to file his appeal within the appeal period. Finally, the Crown consents to the granting of an extension of time, which suggests that it does not claim that it would be prejudiced by the granting of an extension of time.

[8] These factors are not to be applied mechanically or arithmetically. The fact that the applicant satisfies three of the five factors is not determinative, just as the consent of the Crown is not determinative. The Court is being asked to authorize the late filing of an appeal when it has no idea of the nature or the merits of the proposed appeal. This omission is very difficult to overcome, particularly when the taxpayer himself is undecided whether to pursue his appeal. In the end result, I conclude that the time for filing a notice of appeal should not be extended. In the circumstances, I do not have to deal with the request that the appeals be consolidated.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: 08-A-52

STYLE OF CAUSE: *KEVIN McKINNEY and HER
MAJETY THE QUEEN*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: PELLETIER J.A.

DATED: October 22, 2008

WRITTEN REPRESENTATIONS BY:

Michael Welters FOR THE APPLICANT

Johanna Russell FOR THE RESPONDENT

SOLICITORS OF RECORD:

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