Date: 20081218

Docket: 08-A-52

Citation: 2008 FCA 409

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 December 18, 2008.

REASONS FOR ORDER BY: PELLETIER J.A.

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REASONS FOR ORDER

PELLETIER J.A.

[1] This is an application for reconsideration of an order dismissing an application for an extension of time to file a Notice of Appeal from a judgment of the Tax Court of Canada. The basis of the application for reconsideration is that "a matter that should have been dealt with has been overlooked or accidentally omitted": see Rule 397(1)(b). The allegation that a matter was overlooked or accidentally omitted arises from paragraph 4 of the Court's reasons:

> [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 of the potential merit of the appeal.

[2] The applicant notes that the judgment under appeal was attached as Exhibit A to the affidavit of Mr. Clarke, and the Court's failure to take this into account is a "matter which has been overlooked or accidentally omitted."

[3] The Reasons for Judgment do not say that the judgment under appeal is not attached; they say it is not attached as Exhibit B.

[4] What is implicit in the Court's order is that the Reasons for Judgment with respect to the judgment under appeal are not attached as an Exhibit to the Affidavit of Mr. Clarke and thus, "the Court has no idea of the nature of the judgment under appeal and the grounds for appeal, and thus is unable to form any idea of the potential merit of the appeal."

[5] It is clear from paragraph 3 of the Court's reasons that it was aware of the judgment under appeal as it refers to the specific terms of the judgment.

[6] The basis of the refusal to grant the application for an extension of time is found in paragraph 8 of the Court's reasons:

> 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.

[7] The applicant suggests that the Court "overlooked the Final Judgment (which was attached as Exhibit A) and the grounds for appeal set out in paragraphs 22(b) and (c) of the Applicant's

Written Representations (which the Motion to Extend clearly indicates were to be relied upon).":see paragraph 25 of the Applicant's Written Representations.

[8] Paragraph 22 of the Applicant's original submissions does not refer to the proposed grounds of appeal. It refers to the arguable case on appeal. Whether a case is arguable depends, in part, on the grounds of appeal:

> [22] There is an arguable case on appeal because:
>
> (a) The learned trial judge dismissed the application to amend the pleadings without considering the law relating to amendments of pleadings but rather he only considered the law relating to adjournments.
>
> (b) Furthermore, although the learned trial judge ruled that Mr. McKinney "never did anything to prevent the failure to remit…", Mr. McKinney tendered considerable evidence, which, if properly considered would have led to the appeal being allowed on the basis that Mr. McKinney had made out a "due diligence" defense pursuant to ITA ss. 227.1(3).
>
> (c) Alternatively, the learned trial judge erred in ruling that only $43,503 of the $72,015.25 received by the CRA from MKM Manufacturing Ltd.'s trustee in bankruptcy should have been credited against the CRA's claim because those funds were subject to a mortgage executed by MKM and were paid pursuant to its terms because the CRA did not receive those funds as a result of enforcing the mortgage but rather chose to petition MKM into bankruptcy. The $72,015.25 was paid to the CRA in respect of its "property claim" filed under the *Bankruptcy and Insolvency Act* (Canada) in respect of the unremitted payroll deductions but not under the mortgage therefore the funds should have been credited against the payroll deductions and not the mortgage debt. In short, the mortgage was simply irrelevant to the bankruptcy proceedings.

[9] The normal practice when seeking leave for an extension of time to file an appeal is to attach a copy of the proposed Notice of Appeal so that the Court knows the proposed grounds of appeal. From this, the Court can decide whether the proposed grounds are in fact "arguable". Of the three matters raised in paragraph 22, only paragraph (c) may raise an arguable case.

[10] Paragraph (a) deals with the subject matter of the interlocutory appeal while paragraph (b) seeks to set aside a conclusion of mixed fact and law, i.e. the failure to make out the defence of due diligence, on the basis that the Court did not properly evaluate the evidence. It is settled law that a court of appeal is not to simply re-weigh the evidence before the trial judge in order to come to a different conclusion.

[11] In order to assess whether paragraph (c) raises an arguable case, it is necessary to know that:

> (a) the assessment against the applicant is in his capacity as a director of a corporation with respect to payroll deductions made but not remitted by the corporation, MKM Manufacturing Ltd. The trial judge found that the applicant was involved in the day to day operations of the corporation.
>
> (b) as security for the amounts owing to Canada (as represented by the Canada Revenue Agency) and British Columbia (as represented by the Worker's Compensation Board), MKM executed a general security agreement with respect to its personal property in favour of CRA and the WCB.
>
> (c) as further security for the amounts owing to the CRA and the WCB, MKM granted CRA a second mortgage of its real property, which mortgage eventually became a first charge against the property.
>
> (d) as a result of the closure of MKM, the mortgagees foreclosed and attempted to arrange a sale of the property. When the proposed sale collapsed CRA petitioned MKM into bankruptcy.
>
> (e) the trustee in bankruptcy eventually conveyed the real property to a third party in return for approximately $100,000.00 of which $72,015.25, the balance after deduction of the cost of the proceeding, was paid to the CRA for itself and the WCB. The sum of $43,503.77, which the trial judge credited to the account of the applicant, was the CRA's proportionate share of the proceeds, based on the relative size of the claims of the CRA and the WCB.

[12] The arguable case proposed by counsel for the applicant is that the applicant should be entitled to the full benefit of the $72,015.25 paid to the CRA because the funds were not paid to the CRA pursuant to the mortgage arrangement between MKM, the CRA and the WCB. The funds

were paid in respect of the CRA's "property claim" in bankruptcy and not as a result of the mortgage.

[13] Accepting that "arguable case" is a very low threshold, do these facts raise an arguable case?

[14] A secured creditor does not cease to be a secured creditor as a result of seeking a bankruptcy order against its debtor: see subsection 43(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the Act):

43.(2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.	43.(2) Lorsque le créancier requérant est un créancier garanti, il doit, dans sa requête, ou déclarer qu'il consent à abandonner sa garantie au profit des créanciers dans le cas où une ordonnance de faillite est rendue contre le débiteur, ou fournir une estimation de la valeur de sa garantie; dans ce dernier cas, il peut être admis à titre de créancier requérant jusqu'à concurrence du solde de sa créance, déduction faite de la valeur ainsi estimée, comme s'il était un créancier non garanti.

[15] The amount paid to the CRA was characterized by the trial judge as "the final distribution of the proceeds of the sale of MKM's land and buildings by the trustee in bankruptcy." The applicant suggests that the payment was made in respect of CRA's "property claim" filed under the Act. Given the characterization of the payment by the trial judge, it is clear that it was not simply a *pro rata* distribution of the funds in the trustee's hands, nor does the amount – the proceeds of sale less

the cost of the proceedings – lend itself to the conclusion that the payment was for the unsecured portion of the debt owing after realization of the security, as provided in subsection 43(2) above.

[16] Subsections 227(4) and (4.1), which were raised before the trial judge, deal with third parties who, notwithstanding intervening security interests, are deemed to hold amounts in trust for the Crown. They do not deal with the Crown itself holding funds for itself and another public creditor. If the CRA had another "property claim", counsel has not told us what it is.

[17] Paragraph 22 of the applicant's Written Representations does not raise an arguable case. Other than a bald denial, the Court has not been given any reason to question the trial judge's characterization of the payment made to the CRA. If the trial judge's characterization is correct, then the disposition of the applicant's appeal to the Tax Court of Canada is unassailable.

[18] The absence of an arguable case combined with the absence of a continuing intention to appeal are fatal to the request for an extension of time to file a Notice of Appeal. In this application, the applicant takes issue with the Court's conclusion on the question of continuing intention to appeal: see paragraph 47. Two points should be made on this issue. The first is that the evidence that the applicant had a continuing intention to appeal should come from the applicant, not from his counsel. The second is that counsel's affidavit is equivocal. It does not say that the tragic circumstances which intervened in the applicant's life prevented the latter from communicating his instructions to counsel. It says only that counsel "was unable to obtain instructions to file the Notice

of Appeal until Tuesday, June 24, 2008." The obligation of timeliness was the applicant's, not counsel's.

[19] The application for reconsideration will be dismissed with costs.

"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 Majesty the Queen*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	PELLETIER J.A.
DATED:	December 18, 2008

WRITTEN REPRESENTATIONS BY:

Timothy W. Clarke	FOR THE APPELLANT
Johanna Russell	FOR THE RESPONDENT

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