Docket: 2013-2117(IT)G

BETWEEN:

MICHAEL J. GRANOFSKY,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on May 30, 2016 at Montreal, Quebec.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Applicant:	François Asselin
Counsel for the Respondent:	Claude Lamoureux

ORDER

Upon motion made by counsel for the Applicant seeking an order declaring invalid the purported settlement agreement reached between the Applicant and the Respondent and for an order declaring the reassessments invalid; and

Upon motion made by counsel for the Respondent seeking an order enforcing the settlement agreement; and

Upon reading the affidavits filed and hearing the oral submissions made by and for the parties; and

The motion of the Applicant is dismissed. The motion of the Respondent is allowed; therefore the appeal is quashed, with costs, for the reasons set out in the attached Reasons for Order.

Signed at Ottawa, Canada, this 17th day of August 2016.

"Johanne D'Auray"

D'Auray J.

Citation: 2016 TCC 181
Date: 20160817
Docket: 2013-2117(IT)G

BETWEEN:

MICHAEL J. GRANOFSKY,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Auray J.

Overview

[1] The Applicant has brought a motion to have set aside and declared invalid an out-of-court settlement agreement allegedly reached between the parties under subsection 169(3) of the *Income Tax Act*[1] (the "*Act*").

[2] The Applicant alleges that the counsel who had been previously acting on his behalf in this matter, Ms. Julie Tremblay, and counsel for the Respondent, Ms. Cristina Ham, incorrectly informed this Court on September 3, 2015 that his appeal had been settled, as the Applicant did not give a mandate to his counsel to settle and that he did not sign personally the out-of-court settlement.

[3] The Respondent has brought a motion to enforce the settlement allegedly reached under subsection 169(3) of the *Act*. The Respondent's position is that Ms. Tremblay was mandated to act for the Applicant in this matter and that she was authorized by him to settle his appeal.

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[1] RSC 1985, c 1 (5th Supp).

Facts

[4] The Applicant was reassessed by the Minister of National Revenue (the "Minister") on October 8, 2010 with respect to his 2005, 2006, 2007 and 2008 taxation years. The Applicant was reassessed for not reporting in his income a total amount of $3,128,324.[2] The Applicant objected to these reassessments, which were confirmed, with respect to 2005, 2006 and 2007, by the Minister on March 13, 2013. The Applicant then appealed the reassessments to this Court by way of a Notice of Appeal filed on June 5, 2013.[3]

[5] Ms. Tremblay, who was the counsel of record in this appeal, testified that she acted for the Applicant with respect to his tax appeal until shortly after he instructed her to put a stop to the discontinuance and denied that he had ever given her a mandate to settle the appeal. At that time, she advised the Applicant that she could no longer act for him.

[6] Ms. Tremblay stated that, after completing the written discovery process, she met the Applicant in July 2015. The Applicant's accountant was also in attendance at that meeting. At that time, the Applicant's objective was to settle or to postpone the hearing of the appeal. Ms. Tremblay testified that it was important for the Applicant that the pressure of the collection of any potential tax debt owing by him be removed. Following a discussion, the Applicant agreed with Ms. Tremblay's proposal to settle his appeal.

[7] Accordingly, Ms. Tremblay forwarded an offer of settlement to Ms. Ham, who was acting for the Respondent. Ms. Ham did not accept the offer made by Ms. Tremblay, but made a counter-offer in August 2015.

[8] Ms. Tremblay brought the counter-offer to the Applicant. He, on the advice of Ms. Tremblay, decided to proceed to trial. Ms. Tremblay explained that the counter-offer did not meet her expectations regarding what constituted an

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[2] See paragraph 3 of the Reply to the Amended Notice of Appeal, dated September 30, 2013.

[3] The Applicant filed an Amended Notice of Appeal on August 21, 2013 with the consent of the Respondent. The Respondent filed her Reply to the Amended Notice of Appeal on September 30, 2013.

acceptable offer. Since the trial was scheduled to be heard on September 8, 2015,[4] Ms. Tremblay started to prepare for the trial.

[9] At the end of August 2015, Ms. Tremblay met with the Applicant and his accountant for the purpose of preparing for trial. She testified that, at that meeting, the Applicant advised her that he wanted to discontinue his appeal.[5] Ms. Tremblay suggested to him that she could try to get a better settlement offer than that already offered by the Respondent. Ms. Tremblay felt that the Applicant would be better off by settling than by discontinuing his appeal.

[10] Ms. Tremblay testified that, with the authorization of the Applicant, she then made another offer of settlement to Ms. Ham. In order to obtain a better settlement, she raised new arguments. Although Ms. Ham declined the offer, she did make another counter-offer.

[11] Ms. Tremblay stated that before accepting Ms. Ham's counter-offer, she called the Applicant and apprised him of the revisions to his reassessment that were set out in that counter-offer by the Respondent. In Ms. Tremblay's view, the Applicant had mandated her to accept the offer since he told her to "go ahead" with the settlement during the phone call. She then advised him that she would send him the details of the counter-offer by e-mail.

[12] Ms. Tremblay sent the Applicant the following e-mail dated September 3, 2015 at 11:26 a.m.:

> [Subject: Out of Court Settlement with the CRA]
>
> Dear Mr. Granofsky,
>
> As discussed and as you have mandated me, an out of court settlement was negotiated with Revenue Canada. As per the Settlement, the "additional revenue" [*sic*] will be reduced by the following amounts:
>
> [Ms. Tremblay lists the amounts by which the Applicant's income will be reduced for the 2005, 2006, 2007 and 2008 taxations years.]

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4 See Order of Nadine Labrecque, Judicial Administrator, dated December 8, 2014, for the exact date. There was some confusion on the part of Ms. Tremblay, in her testimony, as to the exact date.

5 Pages 22 and 23 of the transcript of the hearing held on May 30, 2016 ("Transcript").

> The Settlement is signed without any admission as to our submissions.
>
> Please confirm by email that you accept the above-mentioned settlement and that I can sign the document.
>
> Best regards,
>
> Julie Tremblay, avocate
>
> Starnino Mostovac
>
> [My emphasis.]

[13] On the same day, at 11:42 p.m., the Applicant responded by e-mail to Ms. Tremblay, writing: "accepted ok".[6]

[14] After Ms. Ham was advised that the Applicant had accepted the settlement, it was decided that Ms. Ham would draft an out-of-court settlement.

[15] The out-of-court settlement document was signed on September 3, 2015, by Ms. Tremblay on behalf of the Applicant and Ms. Ham on behalf of the Respondent.

[16] In the same document, the Applicant undertook to provide a duly signed Notice of Discontinuance to counsel for the Respondent. Such Notice of Discontinuance was signed on September 9, 2015 by Ms. Tremblay on behalf of the Applicant. According to the terms of the out-of-court settlement, the Notice of Discontinuance was to be "held in trust" by the Respondent's counsel until the Minister would issue under subsection 169(3) of the *Act* reassessments reflecting the settlement reached by the parties.

[17] The reassessments pursuant to subsection 169(3) of the *Act* were issued at the beginning of November 2015. Ms. Tremblay testified that, upon receipt of the reassessments, she verified that they accurately reflected the terms of the out-of-court settlement. Subsequently, on November 10, 2015, she contacted the

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[6] Both e-mails can be found at page 12 of the documents annexed to the affidavit of Michael J. Granofsky dated December 22, 2015 ("Granofsky Affidavit"). They were also entered into evidence by the Respondent as Exhibit R-1.

Applicant by e-mail, informing him that the reassessments accurately reflected the out-of-court settlement and stating that she would file the Notice of Discontinuance with this Court the following day unless advised to do otherwise.

[18] On November 11, 2015, the Applicant replied, instructing Ms. Tremblay to not proceed any further for now, as he needed "some time to reflect", and indicating that he would "attempt to get in touch as soon as possible". Ms. Tremblay replied, stating that she would not proceed any further for the time being, but said that the Notice of Discontinuance was being held by the CRA and would need to be filed by the end of the week. She also represented to the Applicant that the reassessments reflected the settlement "that was agreed upon by you."[7]

[19] On November 25, 2015, Ms. Tremblay wrote to the Applicant by e-mail, providing information that he had requested, namely, the statement of account detailing how much was being claimed by the CRA and Revenu Québec. She then indicated her understanding that "your intention is to file for bankruptcy or to ask your syndic to negotiate an agreement with the tax authorities. Therefore, we negotiate an out of court settlement, for which you agreed with, to facilitate the negotiation with the tax authorities." She went on to state that, as the reassessments were in line with the settlement, "the notice of discontinuance will be filed."[8]

[20] The Applicant sent an e-mail in reply to Ms. Tremblay on December 1, 2015, stating that Ms. Tremblay could not file the Notice of Discontinuance since he had never given her a mandate to settle and that he still wanted his day in court. At that point, Ms. Tremblay advised the Applicant to retain new counsel since she could no longer continue to act on his behalf.

[21] Ms. Tremblay confirmed that she had never forwarded to the Applicant a copy of the document "out-of-court settlement" signed by herself and the Respondent's counsel.[9]

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7 Granofsky Affidavit documents pages 7-9.
8 Granofsky Affidavit documents pages 4-6.
9 See page 27 of the Transcript.

[22] Counsel for the Applicant at the hearing advised the Court that his client had lapses of memory and therefore might not be a reliable witness. In that regard, he tendered as evidence a letter from a Dr. David Goltzman.[10]

[23] The Applicant used as evidence the Granofsky Affidavit filed with his Notice of Motion. The Respondent did not cross-examine the Applicant on his affidavit.

[24] The Granofsky Affidavit states that the Applicant had met with Ms. Tremblay, about three years prior to his signing the Affidavit, to obtain her help in solving his tax problems, mostly by having all of the new assessments against him vacated. The Applicant states in his affidavit that in the autumn of 2015 he had become "physically and financially weak under the heavy collection efforts of the tax agencies". He further states that he explained to Ms. Tremblay that he would be facing bankruptcy if she was not successful in removing on an interim basis the financial pressures caused by the collection activities of the CRA. The Affidavit states that Ms. Tremblay would seek negotiated relief.[11]

[25] Furthermore, the Granofsky Affidavit states that the Applicant received an e-mail from Ms. Tremblay around September 3, 2015, in which "she mentioned she negotiated something to slightly lower the amounts owed and I told her I agreed". The Affidavit states that there was no meeting between Ms. Tremblay and the Applicant then or later, that the Applicant never signed any document and that he did not receive any official letter from Ms. Tremblay. The Affidavit states that the Applicant thought that Ms. Tremblay "had removed pressure from the collection departments so I could avoid bankruptcy on an interim basis".[12]

Questions in issue

[26] The issues in this appeal are as follows:

a. Did Ms. Tremblay have a mandate to settle the appeal of the Applicant?

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10 Letter from David Goltzman, MD, dated May 27, 2016, marked as Exhibit A-1.

11 Paragraphs 6 and 11-13 of the Granofsky Affidavit.

12 Paragraphs 14-16 of the Granofsky Affidavit.

b. Does a consent in writing to settle signed by the counsel of a taxpayer constitutes a valid consent under subsection 169(3) of the *Act*?

Positions of the parties

Applicant

[27] Counsel for the Applicant submitted that there was a misunderstanding between the Applicant and Ms. Tremblay. The Applicant did not want Ms. Tremblay to settle his appeal.

[28] Furthermore, counsel for the Applicant argued that the Respondent had not met the burden of proof incumbent on her to demonstrate that the Applicant had consented in writing, as required under subsection 169(3) of the *Act*.

[29] The Applicant's position is that, under subsection 169(3) of the *Act*, it is the taxpayer personally who has to consent in writing in order for the settlement and the reassessments to be valid. The Applicant argues that since he did not personally consent in writing, the reassessments are not valid.

[30] In addition, the Applicant submits that the out-of-court settlement signed by Ms. Ham and Ms. Tremblay was not validly entered into according to its own terms, since it was not signed by him. Counsel for the Applicant argued that under clause 3 of the out-of-court settlement, the only person authorized to sign was the Applicant. Clause 3 states:

> Upon signing this agreement Michael J. Granofsky shall provide to the Minister of National Revenue's counsel a duly signed Notice of Discontinuance.

[31] In addition, counsel for the Applicant states that under private contract law, an ambiguous clause has to be interpreted against the interests of the party who drafted the contract (in this case, the Respondent).[13] In counsel's view, clause 3 is ambiguous as it is not clear if Ms. Tremblay could sign such a contract on behalf of the Applicant.

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[13] While this was not explicitly stated at the hearing, I assume that counsel for the Applicant is referring to the principles of contractual interpretation arising out of article 1432 of the *Civil Code of Québec*, SQ 1991, c 64 ("CCQ").

[32] The Applicant submits that any doubt as to the meaning of clause 3 gives rise to an interpretive presumption against the interests of the Respondent. In other words, I have to give to the out-of-court settlement contract an interpretation that favours the Applicant since contracts are to be interpreted against the person who stipulated the provisions of the contract, namely, the Respondent in this case. The Applicant argues that under clause 3 of the out-of-court settlement contract, the Applicant had to sign personally such contract.

Respondent

[33] The Respondent is of the view that the testimony of Ms. Tremblay is uncontradicted, that it shows that she had a written mandate to settle, and that she settled the appeal in accordance with her mandate.

[34] In addition, the Respondent argues that the Applicant was able to sign on behalf of the Applicant as she was his mandatary at the time she signed.

Analysis

[35] I am of the view that Ms. Tremblay was given a mandate to settle. Her mandate is reflected in the e-mail sent to the Applicant on September 3, 2015, in which she asked him to confirm that he was in agreement with the settlement terms and that she could sign the document. The Applicant's reply in writing to Ms. Tremblay's e-mail that he "accepted ok" was clear.

[36] In addition, I accept Ms. Tremblay's testimony that the Applicant had communicated to her a desire to simply discontinue his appeal relatively close to the date on which she signed the out-of-court settlement. She clearly testified that, when she met the Applicant for the purpose of working on trial preparation, he initially instructed her to file a notice of discontinuance. It was Ms. Tremblay who advised him that he would be better off to reach a settlement rather than abandon his appeal. At that point, he told her to go ahead and to do what she could.[14]

[37] In light of these uncontradicted facts, it is difficult for the Applicant to state that he did not give Ms. Tremblay a mandate to settle his case and that he only

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[14] See page 23 of the Transcript.

wanted her to find a way to remove the pressure of collection actions being taken by the CRA.

[38] In addition, if the Applicant thought that his appeal was not settled, I do not understand why he did not get in touch with Ms. Tremblay since he knew that his appeal was to be heard on September 8, 2015. The applicant was advised by Ms. Tremblay, on November 10, 2015 that the Notice of Discontinuance had to be filed. It is only on December 1st, 2015, after receiving documents from CRA, including the statement of account, that he advised Ms. Tremblay that he wanted to proceed before the Court.

[39] As properly conceded by counsel for the Applicant, his position on the interpretation of subsection 169(3) of the *Act* turns to a great degree on whether the decision I rendered in *Softsim Technologies*[15] and the decision of Justice Bocock in *Davies*[16] are correct in their interpretation of the requirements of subsection 169(3) of the *Act*.

[40] Subsection 169(3) of the *Act* reads as follows:

> 169(3) Disposition of appeal on consent. Notwithstanding section 152, for the purpose of disposing of an appeal made under a provision of this Act, the Minister may at any time, with the consent in writing of the taxpayer, reassess tax, interest, penalties or other amounts payable under this Act by the taxpayer.

[41] It is clear that Ms. Tremblay was the counsel of record for the Applicant within the meaning of section 31 of the *Tax Court of Canada Rules (General Procedure)*.[17]

[42] As outlined above, Ms. Tremblay was mandated to sign the out-of-court settlement on behalf of her client. Ms. Tremblay, as the mandatary of the Applicant and pursuant to his authorization to settle, was entitled to sign the settlement document. Lawyers are expected to act on behalf of their client within the mandate given by the client. Ms. Tremblay, as mandatary of the Applicant, acted within her mandate when she signed the out-of-court settlement. In my view, when a party is

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15 *Softsim Technologies Inc v The Queen*, 2012 TCC 181, at paras 70-82 ("Softsim Technologies").

16 *Davies v The Queen*, 2016 TCC 104 (on appeal to the Federal Court of Appeal).

17 SOR/90-688a.

represented by counsel, such counsel, for the purpose of settling an appeal, may consent in writing on behalf of the taxpayer in order for the Minister to issue a reassessment.

[43] Although clause 3 of the settlement agreement says that "[u]pon signing this agreement Michael J. Granofsky shall provide to the Minister of National Revenue's counsel a duly signed Notice of Discontinuance", that does not prevent the mandatary from binding her mandator. As I stated earlier in my reasons with respect to subsection 169(3) of the *Act*, as mandatary and counsel of record for the Applicant, Ms. Tremblay acted within her mandate when she signed the settlement document on his behalf. The argument that the terms of the contract either clearly favour the Applicant's position or raise a doubt as to the interpretation of the contract could only succeed if the law surrounding mandates in Quebec civil law were ignored.[18] In my view, there is no doubt that the terms of the contract do not raise a doubt as to whether the Applicant's mandatary was entitled to sign the out-of-court settlement on his behalf so long as she did so in fulfilment of her mandate. Therefore, the out-of-court settlement was validly entered into by the Applicant.

[44] In any event, it could be said that the Applicant's consent to settle was given by him in writing when he reply to Ms. Tremblay by e-mail dated September 3, 2015, at 11:26 a.m. by telling her that he accepted to settle. Subsection 169(3) of the *Act* does not require an out-of-court settlement signed by both parties. Subsection 169(3) of the *Act* states: "The Minister may at any time reassess, with the consent in writing of the taxpayer." The procedure under 169(3) is different from a Consent to Judgment pursuant to section 170 of the *Tax Court of Canada Rules (General Procedure)* where both parties have to consent in writing.

[45] Furthermore, I note that it was not alleged at any time during the hearing that the Applicant did not have the mental capacity to give the mandate to settle. Although the Granofsky Affidavit raises allegations of the Applicant's poor health in the autumn of 2015, those allegations taken at face value are still insufficient to show that the Applicant lacked mental capacity as of September 3, 2015.

[46] In light of the above, I will dismiss the Applicant's motion and allow the Respondent's motion, thereby enforcing the settlement reached in this matter.

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[18] See articles 2130-2185 of the CCQ.

Given the evidence and the arguments before me, the reassessments seem to have been validly issued pursuant to subsection 169(3) of the *Act*.

[47] My order will be the same as issued by Justice Bowie of this Court in *1390758 Ontario*,[19] in which he stated that:

> "[h]ad the Minister not already reassessed the appellant in accordance with the Minutes of Settlement, I would have allowed the appeals and referred the reassessments that are under appeal back to the Minister for reconsideration and reassessment in accordance with the Minutes of Settlement. As he has already made those reassessments the proper remedy is an order quashing the appeals."

[48] Since the reassessments were made by the Minister, the appeal is accordingly quashed. The Respondent is entitled to her costs.

Signed at Ottawa, Canada, this 17th day of August 2016.

"Johanne D'Auray"

D'Auray J.

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[19] *1390758 Ontario Corp v The Queen*, 2010 TCC 572, at para 43 ("1390758 Ontario").

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COURT FILE NO.:	2013-2117(IT)G
STYLE OF CAUSE:	MICHAEL J. GRANOFSKY v THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	May 30, 2016
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF ORDER:	August 17, 2016

APPEARANCES:

Counsel for the Applicant:	François Asselin
Counsel for the Respondent:	Claude Lamoureux

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