

CANADA / JUDGMENT

Thirion v. Lessard

2024 FC 275

COURT
Federal CourtDECIDED
20 February 2024

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Thirion v. Lessard Court (s) Database Federal Court Decisions Date 2024-02-20 Neutral citation 2024 FC 275 File numbers T-1515-15 Decision Content Date: 20240220 Docket: T-1515-15 Citation: 2024 FC 275 [ENGLISH TRANSLATION] Ottawa, Ontario, February 20, 2024 PRESENT: Mr. Justice Sébastien Grammond BETWEEN: PHILIPPE THIRION Plaintiff and LOUIS LESSARD MARYSE BREAU LT CANADA BORDER SERVICES AGENCY HIS MAJESTY THE KING Defendants
JUDGMENT AND REASONS

- [1] At the outset of the trial, the plaintiff requested an adjournment, which was refused. He then did not present any evidence. Since the burden of proof is his, it follows that the action must be dismissed. I. Background
- [2] The plaintiff, Philippe Thirion, is a French citizen who stayed in Canada between 2004 and 2006 and between 2012 and 2016. He was issued exclusion orders. While awaiting his removal, he was detained, but then released on conditions pursuant to the Immigration and Refugee Protection Act, SC 2001, c 27. He also had several criminal charges against him. Several times, he was detained by police and then released while awaiting a trial.
- [3] In 2015, Mr. Thirion initiated this action for damages. In substance, he alleges that the Canada Border Services Agency officers exercised various forms of harassment and abuse of power towards him.
- [4] The procedural history of this action was very long. It is not necessary to provide a detailed description. Mr. Thirion was represented by three lawyers in succession.
- [5] On January 5, 2023, Associate Judge Benoît M. Duchesne ordered Mr. Thirion to post security for costs. On February 21, 2023, Chief Justice Paul S. Crampton scheduled the trial for February 29, 2024, for ten days. On March 22, 2023, Associate Chief Justice Jocelyne Gagné dismissed Mr. Thirion's appeal against the decision by Associate Judge Duchesne: Thirion v Lessard, 2023 FC 822.

- [6] In July 2023, counsel representing Mr. Thirion at the time, Rocco Galati, informed him that he would stop representing him. In December 2023, the defendants presented a motion to dismiss the action, on the ground that Mr. Thirion had not posted the amount required as security for costs. In January 2024, Mr. Thirion posted the amount and asked the Court for an extension of the time to post this security. I allowed this request and dismissed the defendants' motion to dismiss the action: *Thirion v Lessard*, 2024 FC 89.
- [7] A trial management conference was held on January 30, 2024. Mr. Thirion participated personally. At that time, he did not indicate that he intended to request an adjournment of the trial. He stated that he was not in physical possession of his file, that Mr. Galati had kept it. To compensate for this situation, I asked the defendants to provide him with copies of the exhibits in the statement. Mr. Thirion also received the defendants' exhibits.
- [8] On February 13, 2024, Mr. Thirion presented a request to adjourn the trial, based on the fact he did not have in his possession the file given to Mr. Galati and that his computer was not working. I heard the parties on February 14, 2024. I dismissed the request for adjournment for the reasons provided in writing. In short, I noted that Mr. Thirion had received all the evidence relied on in the statement of claim and in the defence and that he had not explained which documents were missing. I also noted that an adjournment would cause prejudice to the defendants and would waste the Court's resources.
- [9] In the afternoon of February 14, Mr. De Sua sent a letter to the Registrar, in which he stated that he had been hired by Mr. Thirion that day. He indicated that he would appear at the trial in order to request an adjournment because Mr. Thirion had had trouble finding counsel and the file was still in his former counsel's possession. Mr. De Sua did not file a notice pursuant to rule 124 of the Federal Courts Rules, SOR/98-106, but I am willing to consider that he represents Mr. Thirion.
- [10] On February 19, at the outset of the trial, Mr. De Sua informed the Court that his client had just sent him a medical note dated the previous evening indicating that he was not able to attend the trial. Mr. De Sua filed a new request for adjournment, based solely on this ground. For the reasons given orally at the hearing, I dismissed the request. In short, I remarked that the medical note seemed to be based solely on what Mr. Thirion had stated to the physician and that the physician had no specific diagnosis. I also recalled that Mr. Thirion was able to present his claims without any apparent difficulty during the trial management conference on January 30 and at the request for adjournment on February 14. Because of these circumstances, I granted little credibility to the medical note.
- [11] After rendering this decision, I briefly adjourned the hearing to allow Mr. De Sua to communicate with his client. When the hearing resumed, Mr. De Sua stated that he was unable to contact his client, that he had no instructions and that it was impossible for him to continue. I then asked the parties to make their submissions about how to proceed. The defendants submitted that I had no choice but to dismiss the action since the plaintiff was not presenting any evidence. Mr. De Sua submitted that I should review the evidence that

was already on the record. II. Analysis

[12] Article 2803 of the Civil Code of Québec establishes a fundamental principle that governs evidence in civil matters:

2803. A person seeking to assert a right shall prove the facts on which his claim is based.

2803. Celui qui veut faire valoir un droit doit prouver les faits qui soutiennent sa prétention.

[13] However, in a trial, evidence must be given at the hearing, by witnesses. This was noted by the Federal Court of Appeal in *Boily v Canada*, 2017 FCA 180 at paragraph 64, [2018] 2 FCR 546: “there can be no dispute that the usual manner in which evidence is given at trial is by way of viva voce examination of witnesses who shall be subject to cross-examination.” This is also what rule 282 indicates: 282 (1) Unless the Court orders otherwise, witnesses at trial shall be examined orally and in open court. 282 (1) Sauf ordonnance contraire de la Cour, les témoins à l’instruction sont interrogés oralement, en séance publique.

(2) All witnesses shall testify under oath.

(2) Les témoins déposent sous serment.

[14] As a result, the plaintiff’s failure to present evidence during the trial necessarily leads to the dismissal of the action. See, for example, *Sawridge Band v Canada*, 2009 FCA 123. This is also implicit in rule 284: 284 (1) Where on the day of a trial, a party who intends to call witnesses does not produce them or justify their absence, the Court may declare the party’s proof closed. 284 (1) Si, le jour de l’instruction, la partie qui entend produire des témoins ne les produit pas et ne justifie pas leur absence, la Cour peut déclarer close la preuve de cette partie. . . . [...]

[15] At the hearing, Mr. De Sua submitted that the Court should nonetheless consider the evidence that was already on the record, whether it be affidavits or other evidence. He added that the allegations in the pleadings should be taken as truthful unless the Court indicates that testimonial evidence is necessary. These claims reflect a misconception of the role of pleadings and the manner in which evidence is to be presented at a trial. A pleading is not evidence: *Khodeir v Canada (Attorney General)*, 2022 FC 44 at paragraph 10. Moreover, in an action, the pleadings are not accompanied by affidavits that attest to the truth of the allegations. The allegations in the pleadings must be proven at trial. As I indicated above, failure to present evidence necessarily leads to the dismissal of the action. In short, these claims are simply a roundabout manner of presenting a new request for adjournment. III. Conclusion

[16] For these reasons, Mr. Thirion’s action is dismissed.

[17] The usual rule is that the losing party pays the costs of the successful party: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paragraph 20, [2003] 3 SCR 371. I see no reason to deviate from this general principle. On the contrary, Mr. Thirion’s flippant attitude during the conduct of the hearing in the past few weeks has

caused considerable prejudice to the defendants, which fully justifies awarding costs. JUDGMENT in T-1515-15 THIS COURT'S JUDGMENT is as follows: The action is dismissed. Costs are awarded against the plaintiff. "Sébastien Grammond" Judge Certified true translation Elizabeth Tan FEDERAL COURT SOLICITORS OF RECORD DoCKET: T-1515-15 STYLE OF CAUSE: PHILIPPE THIRION v LOUIS LESSARD, MARYSE BREault, CANADA BORDER SERVICES AGENCY, HIS MAJESTY THE KING PLACE OF HEARING: BY VIDEOCONFERENCE DATE OF HEARING: FEBRUARY 19, 2024 JUDGMENT AND REASONS: GRAMMOND J. DATED: FEBRUARY 20, 2024 APPEARANCES: Gianni F. De Sua FOR THE PLAINTIFF Marjolaine Breton Chantal Chatmajian FOR THE DEFENDANTS SOLICITORS OF RECORD: Astell Caza De Sua Lawyers Montréal, Quebec FOR THE PLAINTIFF Attorney General of Canada Ottawa, Ontario FOR THE DEFENDANTS

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