

CANADA / JUDGMENT

Trevor Nicholas Construction Co. Ltd. v. Canada (Public Works)

2006 FC 687

COURT
Federal CourtDECIDED
2 June 2006

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Trevor Nicholas Construction Co. Ltd. v. Canada (Public Works) Court (s) Database Federal Court Decisions Date 2006-06-02 Neutral citation 2006 FC 687 File numbers T-1049-95 Decision Content Date: 20060602 Docket: T-1049-95 Citation: 2006 FC 687 Ottawa, Ontario, June 2, 2006 PRESENT: The Honourable Mr. Justice Phelan BETWEEN: TREVOR NICHOLAS CONSTRUCTION CO. LIMITED Plaintiff and HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER FOR PUBLIC WORKS CANADA Defendant REASONS FOR ORDER AND ORDER

- [1] The Plaintiff has appealed an Order of Prothonotary Lafrenière in which the Plaintiff was ordered to post security for costs in the amount of \$4,000.00 up to the hearing of a summary judgment motion and an additional \$3,000.00 in the event the summary judgment motion is dismissed.
- [2] The Plaintiff has been represented by its sole director, John Susin, who, with possibly the aid of others, have been financing the corporation's litigation.
- [3] Canada v. Aqua-Gem Investments Ltd. (C.A.), [1993] 2 F.C. 425; [1993] F.C.J. No. 103 (QL) holds that discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or (b) they raise questions vital to the final issue of the case.
- [4] Prothonotary Lafrenière's decision is a discretionary one. The issue of security for costs does not itself raise a question vital to the final issues of the case. The finding as to impecuniosity deals with the issue of whether an order for costs would effectively end the litigation.
- [5] The prothonotary properly considered the law; that Rule 416 sets out the criteria for security for costs and places the burden of proof on the party seeking the order. There is no issue here that the Defendant established the necessary criteria under the Rule. The Plaintiff has three cost orders totalling \$14,239.54 in favour of the Defendant which remain unpaid.

- [6] The prothonotary then properly considered the law under Rule 417; that the onus shifted to the Plaintiff to establish that a security order should be refused on the grounds that the Plaintiff is impecunious and that the case has some merit.
- [7] The prothonotary, for purposes of the motion, accepted that the case had merit. The Plaintiff should not have interpreted this as anything other than the fact that the prothonotary believed that the motion could be decided on the issue of impecuniosity without having to engage in a debate about the merits of the case.
- [8] In deciding that the Plaintiff had not established impecuniosity, Prothonotary Lafrenière was not satisfied with the nature and quality of the evidence concerning the corporation's financial condition. He had serious questions about the state of the financial records, the intermingling of the director's and the company's funds and the manner in which funds were disbursed. He also dismissed the contention that the Defendant had delayed in bringing the security for costs motion. In the end he refused to exercise his discretion in the Plaintiff's favour.
- [9] It is my conclusion that Prothonotary Lafrenière did not misapprehend the facts. The Plaintiff is arguing that the interpretation and conclusions from those facts are wrong. I cannot find any error but, more importantly, those interpretations and conclusions were within Prothonotary Lafrenière's discretion.
- [10] I further conclude that this is a matter properly within the prothonotary's jurisdiction and there is no reason for this Court to interfere.
- [11] Therefore, this appeal will be dismissed with costs in favour of the Defendant in the amount of \$600.00. ORDER IT IS ORDERED THAT the appeal will be dismissed with costs in favour of the Defendant in the amount of \$600.00. "Michael L. Phelan" Judge FEDERAL COURT NAME OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-1049-95 STYLE OF CAUSE: TREVOR NICHOLAS CONSTRUCTION CO. LIMITED and HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER FOR PUBLIC WORKS CANADA PLACE OF HEARING: Toronto, Ontario DATE OF HEARING: May 29, 2006 REASONS FOR ORDER AND ORDER: Phelan J. DATED: June 2, 2006 APPEARANCES: Mr. John Susin FOR THE PLAINTIFF Ms. Tamara Sugunasiri FOR THE DEFENDANT SOLICITORS OF RECORD: SELF REPRESENTED Niagara Falls, Ontario FOR THE PLAINTIFF JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario FOR THE DEFENDANT

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