Date: 20090318

Docket: A-352-08

Citation: 2009 FCA 92

CORAM: **EVANS J.A.**
RYER J.A.
TRUDEL J.A.

BETWEEN:

ROCHELLE L. MOSS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Winnipeg, Manitoba, on March 18, 2009.

Judgment delivered from the Bench at Winnipeg, Manitoba, on March 18, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Winnipeg, Manitoba, on March 18, 2009)

RYER J.A.

[1] This is an appeal from a decision of Campbell J. (the "trial judge") of the Federal Court (2008 FC 768) dated June 19, 2008, dismissing an action for damages claimed by Rochelle L. Moss (the "appellant") against Her Majesty the Queen (the "respondent"). The appellant's claim alleges that conduct of the Minister of National Revenue (the "Minister") in relation to the collection of income taxes payable by her, pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA"), prevented her from organizing her affairs in a tax advantageous manner and as a result, she incurred an income tax liability that she would not have otherwise incurred.

Background

[2] In January of 1997, the appellant was assessed a tax liability approximating $302,000. On February 5, 1997, the Minister obtained an order (the "Jeopardy Order"), pursuant to subsection 225.2(2) of the ITA, authorizing the Minister to take any of the collection actions described in paragraphs 225.1(1)(a) to (g) of the ITA with respect to the income tax that was assessed against the appellant prior to the completion of the appeals process. The validity of the Jeopardy Order has been unsuccessfully challenged by the appellant.

[3] Based upon the Jeopardy Order, the Minister issued written requirements pursuant to subsection 224(1) of the ITA (the "Requirements") to three insurance companies, requiring them to pay to the Minister monies owing by them to the appellant. The Minister also instructed the sheriff to seize any property of the appellant held by those companies pursuant to writs of *fieri facias.*

[4] The insurance companies had contractual arrangements ("insurance policies") with the appellant under which funds were payable to her. Nonetheless, they declined to make any payments to the Minister pursuant to the Requirements and took the position that the insurance policies were exempt from seizure. After soliciting opinions from the Minister, the insurance companies determined that they would not permit the appellant to withdraw any amounts owing to her under the insurance policies until the exemption from seizure issue was settled.

[5] In her statement of claim, the appellant alleges that the Minister caused the insurance companies to "freeze" her insurance policies, which prevented her from restructuring them in such a

way that all of the income generated by them would have been immune from income tax. Accordingly, she claims that the actions of the Minister caused damage to her in that the income from her insurance policies was taxable when it need not have been.

[6] The appellant unsuccessfully contested the assessments of tax on the income generated by the insurance policies in the Tax Court of Canada (*Moss v. Canada*, 2005 TCC 139). There, the appellant argued that to the extent that the assessments related to income earned on her insurance policies that was "forced upon the appellant by virtue of CCRA's improper actions" (see paragraph 5 of the reasons in that decision), those assessments should be reversed.

[7] The Tax Court Judge rejected that argument, stating that any allegations of improper conduct on the part of the Minister in collection matters were required to be made in the Federal Court. In upholding that decision, Sharlow J.A., in *Moss v. Canada*, 2006 FCA 150, stated at paragraph 5:

> If unlawful or improper collection actions occur, and are proved, it may be possible to obtain a remedy by commencing appropriate proceedings in the Federal Court …

[8] Thus, the appellant seeks a remedy in the statement of claim that she filed in the Federal Court.

The Decision of the Federal Court

[9] The trial judge dismissed the appellant's claim on the basis that she failed to prove that her income tax liability was caused by any action of the Minister. The main findings of the trial judge are succinctly summarized at paragraph 7 of his reasons, where he stated:

> … I find that: it is Ms. Moss' conduct that caused the jeopardy order to be issued; as stated, no wrong was committed by the Minister in applying for the order; and no wrong was committed by the Minister in attaching the insurance policies.

[10] The trial judge also found that the Minister's attempt to seize the insurance policies was unsuccessful and the Minister never obtained control over those policies. He further concluded that the insurance policies had been "frozen" by actions taken by the insurance companies, and not by any action on the part of the Minister.

Discussion

[11] The findings upon which the trial judge based his decision to dismiss the appellant's claim are questions of fact and factual inferences or questions of mixed fact and law that contain no readily extricable questions of law. In appellate review, this Court is not permitted to interfere with such findings unless it is demonstrated that in making such findings, the trial judge made a palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[12] In our view, the appellant has demonstrated no such error on the part of the trial judge. Based on the evidence that was before him, it was open to him to make the findings referred to above. Recognizing the high level of deference that is owed by an appellate court in relation to

findings of a factual nature and of mixed fact and law that contain no readily extricable question of law, we are not prepared to interfere with any of the findings of the trial judge upon which he based his decision to dismiss the appellant's claim.

[13] The appellant argues that the trial judge erred in failing to consider her allegation that the Minister acted in bad faith in relation to the collection actions that were taken. This argument is without merit because there was no allegation of bad faith on the part of the Minister in the appellant's statement of claim. As such, whether the Minister acted in bad faith was not an issue that was before the trial judge.

[14] In addition, the appellant contends that the trial judge failed to consider whether it was "fair, equitable and reasonable" for the Minister to have caused the appellant to become subject to additional income taxes. This contention was covered by the trial judge's finding that the Minister's actions did not cause the additional income taxes that were assessed against the appellant. That finding – one that we have declined to overturn – made it unnecessary for him to consider whether the Minister's actions were, or were not, "fair, equitable and reasonable".

[15] In her factum, the appellant requests this Court to reverse the assessments pursuant to which she was rendered liable to tax on the income generated by the insurance policies. This request cannot be granted as the validity of those very assessments was upheld by this Court in the decision of Sharlow J.A. that is referred to in paragraph 7 of these reasons.

Disposition

[16] For the foregoing reasons, and despite the appellant's best efforts before us, we are unpersuaded that we should interfere with the decision of the trial judge and, accordingly, the appeal will be dismissed with costs.

"C. Michael Ryer"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-352-08
(APPEAL FROM A JUDGMENT OF MR. JUSTICE CAMPBELL OF THE FEDERAL COURT (2008 FC 768) DATED JUNE 19, 2008)	
STYLE OF CAUSE:	ROCHELLE L. MOSS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MARCH 18, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(EVANS, RYER and TRUDEL JJ.A.)
DELIVERED FROM THE BENCH BY:	RYER J.A.

APPEARANCES:

Rochelle Moss	SELF-REPRESENTED APPELLANT
Julien Bédard	FOR THE RESPONDENT

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