

Docket: 2006-915(IT)G

BETWEEN:

LINO MASTROMONACO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on October 16, 2008 at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

For the Appellant: The Appellant himself
Counsel for the Respondent: Ryan Hall

ORDER

The application is allowed and the judgment dismissing the appeal is set aside.

The Respondent is awarded costs in the motion in the amount of \$1,000 payable in any event of the cause.

Signed at Ottawa, Canada, this 16th day of October 2008.

“V.A. Miller”

V.A. Miller, J.

Citation: 2008TCC571
Date: 20081016
Docket: 2006-915(IT)G

BETWEEN:

LINO MASTROMONACO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

V.A. Miller, J.

[1] This is a motion to set aside the Judgment dated May 16, 2008 issued by Justice Lamarre Proulx in which she dismissed the Appellant's appeal for his 1999 taxation year. The appeal was dismissed as no one appeared on behalf of the Appellant at a show cause hearing held at Ottawa on May 13, 2008.

[2] The Appellant represented himself at the hearing of this motion and during all stages of his appeal.

[3] By letter dated May 24, 2008 the Appellant explained that it was not until May 16, 2008 that he received the Order which set down the show cause hearing. He also noted in the letter of May 24 that the Order had been sent to his former address and that he had provided a change of address to both the Tax Court of Canada (the "Court") and the Department of Justice.

[4] The Appellant filed an affidavit dated July 30, 2008 with his Notice of Motion for this hearing. In his affidavit the Appellant stated that he believed that he did notify both counsel for the Respondent and the Court of his change of address as early as October, 2006 or at the latest February 27, 2007. In support of his belief the Appellant attached the List of Documents which he had sent to the Respondent on February 27, 2007 and which bore his new address.

[5] The Respondent opposed the application to set aside the Judgment on the basis that the Appellant has not shown that he did all things necessary to prosecute his appeal. In particular he did not produce a document to prove that he had notified the Court of his change in address as is contemplated by paragraph 38(1)(d) of the *Tax Court of Canada Rules (General Procedure)*.

[6] The Appellant was cross-examined on his affidavit and he again stated that he had notified the Court and the Respondent of his change of address but he had failed to keep a copy of the notification.

[7] On review of this file I have found that the parties have exchanged their Lists of Documents and they have held discoveries. There is a question whether undertakings given by the Appellant have been fully satisfied.

[8] Based on the record before me, I have concluded that the Appellant was mistaken in his belief that he notified the Court of his change of address. However, based on that same record I am of the opinion that the Appellant has proceeded with his appeal in a diligent manner.

[9] The Appellant should not be deprived of his right to proceed with his appeal and he should have his appeal decided on its merits.

[10] The principles to be considered by the Court to set aside a default judgment were discussed by Chief Justice Bowman, as he then was in *Farrow v. R.*, 2003 TCC 885 at paragraph 17:

The circumstances under which a Court will exercise its discretion to set aside a judgment regularly signed are pretty well settled. The application should be made as soon as possible after the judgment comes to the knowledge of the defendant, but mere delay will not bar the application, unless an irreparable injury will be done to the plaintiff or the delay has been wilful. *Tomlinson v. Kiddo* (1914) 7 WWR 93, 29 WLR 325, 7 Sask LR 132; *Mills v. Harris & Craske* (1915) 8 WWR 428, 8 Sask LR 114. The application should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits. *Chitty's Forms*, 13th ed., p. 83.

[11] The application was brought without delay. The Judgment dismissing his appeal was signed on May 16, 2008 and it was sent on May 20, 2008. The Appellant sent his request to reinstate his appeal on May 24, 2008.

[12] Finally I am satisfied that the Notice of Appeal and the Reply to Notice of Appeal disclose that there is a justifiable issue.

[13] The application is allowed and the judgment dismissing the appeal is set aside.

[14] The Respondent is awarded costs in the motion in the amount of \$1,000 payable in any event of the cause.

Signed at Ottawa, Canada, this 16th day of October 2008.

“V.A. Miller”

V.A. Miller, J.

CITATION: 2008TCC571

COURT FILE NO.: 2006-915(IT)G

STYLE OF CAUSE: LINO MASTROMONACO AND THE QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 16, 2008

REASONS FOR ORDER BY: The Honourable Justice Valerie Miller

DATE OF ORDER: October 16, 2008

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Ryan Hall

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada