

COURT OF APPEAL FOR ONTARIO

CITATION: Almrei v. Canada (Attorney General), 2012 ONCA 779

DATE: 20121115

DOCKET: C53707

Winkler C.J.O., LaForme J.A. and Cunningham A.C.J.S.C.J. (*ad hoc*)

BETWEEN

Hassan Almrei

Plaintiff (Appellant)

and

The Attorney General of Canada

Defendant (Respondent)

David Baker and Lorne Waldman, for the appellant

Paul J. Evraire and Marianne Zoric, for the respondent

Heard: September 11, 2012

On appeal from the order of Justice Sidney N. Lederman of the Superior Court of Justice dated April 15, 2011.

ENDORSEMENT

[1] While this decision was under consideration, this court was advised that subsequent to the hearing of this appeal on September 11, 2012, the Registrar of the Superior Court of Justice notified the parties that Mr. Almrei's underlying action was dismissed for delay under rule 48.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Without considering or deciding whether the appeal may be moot as a result, these are our reasons with respect to this appeal.

[2] The appellant brought an action for damages arising out of the conduct of state actors in relation to two security certificates issued against him under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. In a review of the second of these certificates, Mosley J. of the Federal Court had found the certificate to be unreasonable and quashed it. In the course of his lengthy public reasons, reported at 2009 FC 1263, [2011] 1 F.C.R. 163, Mosley J. made numerous findings of facts.

[3] The appellant moved for partial summary judgment before Lederman J. of the Superior Court of Justice on the basis of issue estoppel. He sought to invoke issue estoppel in order to have the factual findings made by Mosley J. in the security certificate proceeding bind the parties in the civil action. He argued that these findings satisfy all or most of the elements of the causes of action. In the alternative, the appellant requested an order under rule 20.05(1), also based on the application of issue estoppel, specifying those material facts not in dispute and defining the issues to be tried.

[4] Lederman J. dismissed the motion for summary judgment on the basis that the test for issue estoppel was not met. With respect to the relief under rule 20.05(1), Lederman J. found that it was premature to consider directions pursuant to that provision given that the action was only at the pleadings stage and no evidence other than the findings of Mosley J. was put before the court. This appeal was brought from the order dismissing the appellant's motion for partial summary judgment against the respondent.

[5] The respondent brought a motion to quash this appeal on the basis that the order below was not final and that, therefore, this court did not have jurisdiction to hear the appeal. The respondent argued that it was still open to the appellant to prove his case by calling evidence at his trial.

[6] A panel of this court dismissed the motion to quash on December 13, 2011: *Almrei v. Attorney General of Canada*, 2011 ONCA 779. The panel noted, at para. 1, that a decision dismissing a motion for full or partial summary judgment will be interlocutory in many circumstances because the merits of the claim remain to be tried. However, the panel held, at para. 7, that the order in this case is final because: “[t]he decision of the motion judge has arguably deprived the appellant of a substantive right that *could have been entirely determinative of the Attorney General’s liability*” (emphasis added).

[7] In oral argument on September 11, 2012, appellant's counsel indicated for the first time that he is only seeking to appeal from the motion judge's conclusion that issue estoppel does not apply. He is no longer taking the position that the findings of fact in the Federal Court proceeding could be entirely determinative of the Attorney General's liability in the present action. He advised the court that he is no longer appealing the correctness of the order dismissing the motion for partial summary judgment.

[8] The panel was concerned that this created a jurisdictional problem, since the result of the order below is no longer in dispute. After some questioning, the court adjourned the appeal in order to consider this problem. At counsel's request, the court allowed the parties to make further written submissions on this point alone, which have now been considered.

[9] In our view, the fact that the appellant is no longer appealing the order dismissing the motion for partial summary judgment under Rule 20, fundamentally alters the nature of the appeal and therefore the jurisdiction of this court to hear the matter. Hence, this panel is now in a different position than was the panel that decided the motion to quash. The appellant's decision to focus solely on the motion judge's findings with respect to the applicability of issue estoppel means, in effect, that he now wishes to appeal only a portion of the reasons.

[10] An appeal lies from an order and not from the reasons of the court below: *Grand River Enterprises v. Burnham* (2005), 10 C.P.C. (6th) 136 (Ont. C.A.), at para. 10. Because the appellant's only ground of appeal is that issue estoppel should apply, he is taking issue with the motion judge's reasons and not his order dismissing the motion for partial and summary judgment.

[11] This decision concerns only this court's appellate jurisdiction and ought not to be taken as having decided the question of whether and how the doctrine of issue estoppel may apply at trial for the purposes of establishing material facts that are not determinative of the respondent's liability.

[12] The appeal is, therefore, quashed for want of jurisdiction. In all the circumstances the respondent is awarded costs in the amount of \$5,000 inclusive of disbursements and GST.

"W. Winkler C.J.O."

"H.S. LaForme J.A."

"J.D. Cunningham A.C.J. S.C.J. (*ad hoc*)"