

FEDERAL COURT OF APPEAL

BETWEEN:

IZABELA POPOVA

Appellant
(Moving Party)

and

THE EMPIRE LIFE INSURANCE
COMPANY, AND MAUREEN WHEELER,
MANAGER OF THE GROUP LIFE
AND DISABILITY CLAIMS

Respondents
(Respondents)

REPLY WRITTEN REPRESENTATIONS OF THE APPELLANT

[Reply under Rule 369(3)]

1. These are the Reply Written Representations filed in response to the Written Representations of the Respondents by their legal representative which in turn were filed in response to the Appellant's Written Representations for an Order

- a) setting aside or varying the Order of Mr. Justice André Scott (the "**learned judge**") of the Federal Court of Appeal dated February 19, 2015 (the "**Order**");
- b) If the Order is set aside, *de novo* review of the Appellant's motion record, dated January 31, 2014, (the "**Motion**") together with the

Respondents' motion record to the Appellant's motion and the Appellant's reply to the Respondents' motion record;

- c) that Mr. Justice André Scott to recuse himself from participating in the proceedings in court file numbers A-197-14 and A-198-14;
- d) Alternatively, requesting Mr. Justice André Scott to not participate in matters with regard to the proceedings in court file numbers A-197-14 and A-198-14;
- e) staying the Order dated February 19, 2015 until the final determination of this Appellant's motion and the Motion dated January 31, 2014;
- f) granting the Appellant her costs of this motion, if the motion is opposed by the Respondents, or such further and other relief as this Honourable Court may deem just.

I. THE FACTS

2. The Appellant relies upon the Court file, the facts set out in the Affidavit of Dimitre Popov affirmed March 2, 2015, the Appellant's Written Representations on this motion, and the facts set out by the Appellant in this Reply Written Representations filed in response to the Written Representations of the Respondents dated March 9, 2015.

II. REPLY SUBMISSIONS

A. Content of Appeal Book

3. In reply, the Appellant respectively submits the following.

4. First, it is clear, it is respectively submitted, that the responsibility for not reaching an agreement between the two parties on the content of the appeal book lies with the Respondents. Consequently, the Appellant was forced in the circumstances to file a Motion to the Court under Rule 343(3) of the *Federal Courts Rules* to determine the content of the appeal book. This fact has been demonstrated by the Appellant in her Motion Record of January 31, 2014, and is also demonstrated in this Motion.

5. In the Order dated June 27, 2014, The Honourable Mr. Justice Webb commanded (AMR, dated March 2, 2015, Tab 2, Para 8, and Exhibit “A”):

Quoting:

“NOW THEREFORE THIS COURT ORDERS THAT:

[...]

4. one appeal book shall be prepared containing the material that relates to the two appeals, one copy of this appeal book shall be served and five copies thereof **shall be filed as provided in Rule 345** of the *Federal Courts Rules*;

[Emphasis added]

6. Rule 345 of the *Federal Courts Rules* states:

Quoting:

“Appeal book

345. (1) An appellant shall serve and file the appeal book within 30 days after the day on which a copy of **an agreement under subsection 343(1) is filed** or an order under subsection 343(3) is obtained.”

[Emphasis added]

Federal Courts Rules, SOR/98-106, s. 345(1)

7. Subsection 343(1) of the *Federal Courts Rules* states:

Quoting:

“Agreement re appeal book

343. (1) **Within 30 days** after the filing of a notice of appeal, **the parties shall agree in writing** as to the documents, exhibits and transcripts to be included in the appeal book and shall file a copy of that agreement.”

[Emphasis added]

Federal Courts Rules, SOR/98-106, s. 343(1)

8. The Respondents’ lawyers were well aware, and at no time did they dispute, that the 30 day limitation period within which they had to reach an agreement with the Appellant started on the date following the dated of the Order (June 27) rendered by The Honourable Mr. Justice Webb – that date falls on June 28.

June 2014

M	T	W	T	F	S	S
				27	28	29
30						

July 2014

M	T	W	T	F	S	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	18	18	19	20
21	22	23	24	25	26	27
<u>28</u>	29	30	31			

No. of days:	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>
Date:	28	29	30	1	2	3	4
No. of days:	<u>8</u>	<u>9</u>	<u>10</u>	<u>11</u>	<u>12</u>	<u>13</u>	<u>14</u>
Date:	5	6	7	8	9	10	11
No. of days:	<u>15</u>	<u>16</u>	<u>17</u>	<u>18</u>	<u>19</u>	<u>20</u>	<u>21</u>
Date:	12	13	14	15	16	17	18
No. of days:	<u>22</u>	<u>23</u>	<u>24</u>	<u>25</u>	<u>26</u>	<u>27</u>	<u>28</u>
Date:	19	20	24	22	23	24	25
No. of days:	<u>29</u>	<u>30</u>	<u>31*</u>				
	26	27	28				

* Because the 30th day fell on Sunday, Monday, July 28, 2014 was the last date for the Appellant to file with the Court a written agreement with the Respondents as to the content of the appeal book.

B. Conduct of the Respondents’ Counsel Cory Young

9. It is clear – it is respectively submitted – that the Respondents’ lawyer Mr. Young **knew that July 28, 2014 was the last date** for the Appellant to file with the Court a written agreement with the Respondents as to the content of the appeal book.

**Affidavit of Dimitre Popov, dated January 2, 2015
AMR, Tab 2, Para 8**

**Affidavit of Dimitre Popov, dated March 2, 2015
AMR, Tab 2, Para 8**

**Written Representations of the Appellant, AMR,
dated March 2, 2015, Tab 3, Para 6, 25,**

**Appellant’s Letter, dated July 24, 2014,
Served on the Respondents**

**Appellant’s Letter, dated July 30, 2014,
Served on the Respondents and filed with the Court**

10. Despite the fact that Mr. Young knew that July 28, 2014 was the time deadline of the 30-day time frame for the Appellant to file the two parties' agreement on the content of the appeal book,

- a) Mr. Cory Young sent a letter to the Appellant, Ms. Popova, in a manner where common sense dictates that on the balance of probability, it was unlikely that his letter could reach the intended recipient in time;
- b) Mr. Young did not send a copy of the letter to the person handling the entire legal work on behalf of Ms. Popova (although he knew or has reason to know that it would cause unnecessary delay in the Appellant's response);
- c) Mr. Young objected in his letter to the Appellant "the inclusion of case law" in the appeal book – an objection that had never been raised and brought to the Appellant's attention before, which, of course, requires additional time for further discussion;

**Reply Submissions of the Appellant's Motion Record,
dated February 11, 2015, Para 5**

**Affidavit of Dimitre Popov, dated January 2, 2015
AMR, dated December 31, 2014, Tab 2, Para 10**

- d) Mr. Young provided, for the first time, the Respondents' list of proposed content to be included in the appeal book – a list that requires

further exchange of correspondence between the parties and thus, of course, more time for discussion;

- e) **Mr. Young must have been well aware that he was too late when he sent his letter to the Appellant on July 28, 2014 – precisely 4 (four) hours and 43 (forty three) minutes prior to the expiration of the 30-day limitation, making it impossible for the Appellant to (i) respond in time, (ii) resolve issues stemming from Mr. Cory Young’s letter, and (iii) file subsequently the list of agreement with the Court as contemplated by Rule 343(1) of the *Federal Courts Rules* .**

**Affidavit of Dimitre Popov, dated January 2, 2015
AMR dated December 31, 2014, Tab 2, Para 10**

**Written Representations of the Appellant, AMR,
dated March 2, 2015, Tab 3, Para 25**

**Reply Submissions of the Appellant’s Motion Record,
dated February 11, 2015, Para 5**

**Affidavit of Dimitre Popov, Tab 2 at paras 10, 12, 13
AMR dated February 11, 2015**

**Written Representations of the Appellant, AMR,
dated March 2, 2015, Tab 3, Para 27**

11. Statements made by Mr. Cory Young in his affidavits are refuted and contradicted by clearly demonstrated facts. In his affidavit dated March 9, 2014, he states: “*the Respondents believe that an agreement as to the contents of the Appeal Book could and should have been made based on a list first proposed by the Respondents on July 28, 2014.*” Clearly, this statement is not only inconsistent with the facts in the record but is also misleading and deceptive. As it has been established

above and in the Appellant's Motion Records of December 31, 2014 and March 2, 2015, an agreement was impossible to make due to the fact that Mr. Cory Young was too late when he first sent the Respondents' first proposed list of content for the appeal book on July 28, 2014 (a date he has confirmed several times and is also on his letter). Moreover, Mr. Young was also alerted in the Appellant's letter sent by facsimile transmission to him on July 24th with an attachment of the Appellant's list of proposed content that July 28, was the last date for the Appellant to file the parties' agreement.

***Supra*, Paras 8, 9, 10**

**Reply Written Representations of the Appellant,
dated February 11, 2015, Para 5**

12. The statement of Mr. Cory Young in his affidavit of January 16, 2014 that "*The Appellant has delayed this appeal process by requesting the inclusion of case law...*" – a statement later referenced by the Respondents' lawyer Mr. Cavanaugh in his Written Representations of January 16, 2015 to support his assertions – is disproved by established facts and is therefore misleading and deceptive.

***Supra*, Para 10(c) and 10(e)**

**Reply Written Representations of the Appellant,
dated February 11, 2015, Para 5**

**Written Representations of the Appellant, AMR,
dated December 31, 2014, Tab 3, Para 24**

**Affidavit of Cory Young, Responding Motion Record,
dated January 19, 2014, Tab 1, Para 35**

**Responding Motion Record, dated January 19, 2015,
Respondents Written Representations, Tab 2, Paras 2 and 6**

13. Mr. Cory Young's statement in his affidavit of January 19, 2015 that they "*have attempted at all material times to proceed with this Application and Appeal on an expeditious basis*" does not accord with their actions.

**Affidavit of Cory Young, Responding Motion Record,
dated January 19, 2014, Tab 1, Para 32**

**Letter of the Appellant, dated July 30, 2014,
Filed with the Court**

14. On July 11, 2014, at noon, the Appellant's representative sent by facsimile transmission a letter proposing the content of the appeal book to be within the documents filed with the Court. Despite the Appellant's request to be informed "as soon as practicable" of the Respondents' position concerning the content of the appeal book, it took them 7 days to reply with one sentence in a letter date July 18, 2014 reading, "At your earliest convenience, we ask that you please provide a list of what you propose to be included in the Appeal Book."

**Letter of the Appellant, dated July 11, 2014,
Letter of the Respondents, dated July 18, 2014,
Responding Motion Record (RMR), Affidavit of Cory Young,
dated January 19, 2014, Tab 1, Paras 4, 5, Exhibits "C" & "B"**

15. Further, if the Respondents' legal representatives "*have attempted at all material times to proceed with this Application and Appeal on an expeditious basis,*" they should not have opposed to the Appellant's motion to the trial Court for an order granting the Appellant's father Dimitre Popov permission to act on behalf of and as a representative of the Applicant in these proceedings. The Respondents' legal representatives should not have opposed, if anything, due to the fact that the Respondents already had professional legal representatives and forcing the Appellant,

who has no professional legal knowledge, training, experience and ability to be self-represented is nothing but knowingly placing her in additional legal disadvantage and adverse position which, of course, is contrary to the principles of due process, procedural equality and fairness. The Respondents opposition to the Appellant's representation of her father is cause for the filing of 5 motion records with the Court and this appeal currently before the Federal Court of Appeal – all consuming more than 13 months in legal battle and resources of the courts.

Responding Motion Record, dated February 10, 2014

16. As it has been already noted in the Appellant's Motion Records, after the Respondents prevented the Appellant from filing the Rule 343(1) written agreement, the latter was forced in the circumstance created by Mr. Cory Young, to seek direction from the Court. Consequently, The Honourable Mr. Justice Wyman Webb made an Order commanding the Appellant to (a) file the agreement as to the content of the appeal book as contemplated by Rule 343(1) of the Rules; or (b) serve and file a motion to request that this Court determine the content of the appeal book as contemplated by Rule 343(3) of the Rules on or before November 28, 2014.

***Supra*, Para 10(c) and 10(e)**

**Reply Written Representations of the Appellant,
dated February 11, 2015, Para 5**

**Written Representations of the Appellant, AMR,
dated December 31, 2014, Tab 3, Para 24**

**Order of Mr. Justice Wyman Webb dated October 23, 2014,
AMR, Affidavit of Dimitre Popov, dated Jan. 2, 2015, Tab 2, Para 14**

17. As it has also been previously noted in the Appellant’s Motion Records, properly filed with the Court, the Respondents’ lawyer’s irrational demands (i.e., for “a draft of the Appeal Book” in order for them to provide their consent) prevented again the Appellant from carrying out her obligation under Rule 343(1) of the *Federal Courts Rules*. Clearly, the Respondents’ lawyer Mr. Young had no rational basis to demand from the Appellant “a draft of the Appeal Book.”

**Written Representations of the Appellant, AMR,
dated December 31, 2014, Tab 3, Paras 23, 24, 25**

18. Due to the irrational demands of Mr. Young, the Appellant was again forced – under the circumstances created by him – to seek another direction from the Court (after it was agreed by the Registry of the Court that seeking direction, instead of filing a motion, would be appropriate under the given conditions). Consequently, the Court issued another Order (*per* Justice Scott) commanding the Appellant to “serve and file a motion to request that this Court determine the content of the appeal book as contemplated by Rule 343(3) of the Rules.”

**Affidavit of Dimitre Popov, dated January 2, 2015,
AMR, Tab 2, Para 16**

Order of Mr. Justice Scott dated December 18, 2014

**AMR, dated January 31, 2014, Tab 3,
Paras 16, 18 & 19 of the Appellant’s Written Representations**

**Affidavit of Cory Young, Responding Motion Record
dated January 19, 2014, Tab 1, Para 29**

19. In our view, it is respectfully submitted that, many of the statements of the lawyer for the Respondents Mr. Cory Young made in his affidavits of January 16,

2015 and March 9, 2015 are incorrect, misrepresented the facts, and misleading. We believe that these affidavits Mr. Young have heavily influenced Mr. Justice Scott to make an Order in favour of the party represented by Mr. Young.

20. For the reasons set out in this Appellant's motion record, we believe that the Order of Mr. Justice Scott, dated February 19, 2015, should be set aside or varied under Rule 399(2).

21. Rule 399(2) of the *Federal Courts Rules* provides:

On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud.

Federal Courts Rules, SOR/98-106, s. 399(2)

22. Legal definition of "fraud:"

fraud, n.

1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.

- *Black's Law Dictionary, Seventh Edition, 1999*

actual fraud

A concealment or false representain through a statement or conduct that injures another who relies on it in acting. – Also termed *fraud in fact; positive fraud; moral fraud.*

- *Black's Law Dictionary, Seventh Edition, 1999*

fraud

A false representation of a matter of fact—whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed—that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury.

- *West's Encyclopedia of American Law, edition 2.*
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23. In denying the Appellant's Motion dated December 31, 2014, it is respectfully submitted that in our view The Honourable Mr. Justice Scott erred by exercising his discretion in circumstances where there was no evidence before him which could properly support the findings and decision made on the Motion, and that the evidence which were properly adduced before him should have caused him to exercise discretion by granting the Appellant's Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 13, 2015

/signature/

Dimitre Popov

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Izabela Popova

Appellant/Applicant