

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of) Appeal No. 06-0017
)
SITKIN ISLAND, INC., AND) DECISION
NORTHERN ORION, INC.,)
Appellants) January 31, 2007
_____)

STATEMENT OF THE CASE

On October 6, 2006, Robert D. Steinberg, Trustee in the Chapter 7 bankruptcy cases filed by Sitkin Island, Inc., and Northern Orion, Inc., filed this timely appeal of Initial Administrative Determinations (IADs) issued to the corporations on August 7, 2006, by the NMFS Restricted Access Management (RAM) program.¹ The identically worded IADs denied the corporations' annual applications for Individual Fishing Quota (IFQ) for the 2006/2007 Bering Sea crab fisheries under the Crab Rationalization Program because the applications were not submitted by the August 1, 2006, deadline provided in regulation. Under the United States Bankruptcy Code, any interests the Appellants may have in crab IFQ became assets of the Debtors' Bankruptcy Cases.² The Trustee has a fiduciary duty to maximize the value of the debtors' assets and is empowered to pursue claims and appeals regarding such assets. Therefore, Mr. Steinberg has a right to appeal the IADs on behalf of the corporations, which have interests that are directly and adversely affected by the IADs, as required under 50 C.F.R. §679.43(b).

ISSUE

Shall the applications of Sitkin Island, Inc., and Northern Orion, Inc., be deemed timely filed?

ANALYSIS

Under 50 C.F.R. §680.4(f)(1), holders of crab quota share must apply annually for an Individual Fishing Quota (IFQ) permit for the upcoming crab fishing year. The regulation is straightforward and unambiguous:

(1) A complete application must be received by NMFS no later than August 1 of the crab fishing year for which a person is applying to receive IFQ or IPQ. If a complete application is not received by NMFS by this date, that person will not

¹The Sitkin Island case (No. 06-12690-SJS) and the Northern Orion case (No. 06-12683-KAO) were filed on August 11, 2006, in the United States Bankruptcy Court for the Western District of Washington.

²11 U.S.C. §101 et. seq.

receive IFQ or IPQ for that crab fishing year.

The record in this appeal shows that Mark F. Maring is the principal and sole shareholder of both Sitkin Island, Inc., and Northern Orion, Inc.³ The record also shows that the annual IFQ applications for both corporations were filed by Mr. Steinberg on October 12, 2006, approximately two and one-half months after the August 1 deadline.⁴ Because the bankruptcy cases were not filed and the Trustee was not appointed until August 11, 2006, the person responsible for filing the IFQ applications by the deadline was Mr. Maring. Thus, in this appeal, I must first determine whether Mr. Maring's failure to file the applications on time is legally excusable, and then decide whether the corporations' filings should be deemed timely as a matter of law.

The Appellants assert that the failure to meet the filing deadline is legally excusable under the doctrine of equitable tolling. In our decision in *David E. Thompson* we recognized that the doctrine of equitable tolling could excuse a late filing of an annual application for crab IFQ if the appropriate facts were proven.⁵ The widely recognized doctrine of equitable tolling permits an administrative agency, under limited circumstances, to toll the running of a federal application period while an applicant is suffering from a disability or incompetency that prevents the person from complying with the application deadline requirements.

In our decision in *John T. Coyne*,⁶ we stated that to obtain relief under this doctrine, an appellant must show three things: (1) extraordinary circumstances beyond the applicant's control prevented the applicant from filing in a timely manner; (2) the applicant was diligent in submitting an application after learning of the filing deadline and after the disability to filing was removed; and (3) implementation of the IFQ program would not have been harmed or frustrated if the application had been processed by the Division when it was submitted.⁷

The first question is whether Mr. Maring's circumstances support the tolling of the application period in this case. Courts have used a variety of formulations to describe the nature of the circumstances that trigger equitable tolling. Usually the courts require extraordinary circumstances beyond the applicant's control that prevented the applicant from filing in a timely manner. These include circumstances such as mental incompetence, chronic alcoholism, minority, war, acts of God, misconduct by an opposing party, and the failure of a government

³*Declaration of Robert D. Steinberg* at 2 (Oct. 12, 2006).

⁴Appellants' Exhibits E and F.

⁵Appeal No. 06-0012 at 2-3 (Nov. 20, 2006).

⁶Decision on Reconsideration, Appeal No. 94-0012 at 13 (May 24, 1996).

⁷*Id.* at 13-14.

agency to provide statutorily required individual notice.⁸ This office has granted relief under the equitable tolling doctrine in cases involving drug addiction, clinical depression, and a mental state resulting from extreme personal tragedies.⁹ As the Appellants rightly point out, there is no exhaustive list of what constitutes “extraordinary circumstances;” rather, this must be determined on a case-by-case basis.¹⁰ What all of these types of circumstances have in common is that they cause the applicant, for all or part of the application period, to be physically, mentally, emotionally, or legally unable to apply, or to be ignorant of the right or requirements of application and, thereby, effectively unable to apply.

The Appellants acknowledge that the duty to file the IFQ applications for 2006/2007 rested with Mr. Maring and that he did not meet that obligation.¹¹ They have offered no affidavit or statement from Mr. Maring explaining why he did not file the applications. Mr. Steinberg states in his declaration that he questioned Mr. Maring under oath at two meetings of creditors in the Bankruptcy Cases (“341 Meetings”).¹² He states that Mr. Maring testified that he placed the corporations and himself in bankruptcy because of a longstanding and very acrimonious dispute with a former business partner/investor, which resulted in Mr. Maring filing a lawsuit in federal court in February 2005.¹³ According to Mr. Steinberg, Mr. Maring testified that the lawsuit had drained him and his companies of virtually all their financial resources; that it had diverted his attention from his business interests; and that he had been unable to fish, maintain the vessels, or otherwise focus on his businesses.¹⁴

At the same time, Mr. Steinberg points out that the ongoing lawsuit and anticipated bankruptcies deprived Mr. Maring of any personal incentive to maintain his and his companies’ interests in the 2006/2007 IFQ permits, and that obtaining the permits would not personally benefit Mr.

⁸*See, e.g., Scott v. United States*, 847 F. Supp. 1499 (D. Hawaii 1993), in which the court found that an applicant's chronic alcoholism constituted a mental incompetency that supported tolling of a one-year period for filing a claim for a tax refund.

⁹*John T. Coyne*, Decision on Reconsideration, Appeal No. 94-0012 (May 24, 1996); *Estate of Marvin C. Kinberg*, Appeal No. 95-0035 (Aug. 1, 1997); *Christopher O. Moore*, Appeal No. 95-0044 (Sep. 5, 1997).

¹⁰Second Supplement to Appeal at 2 (Jan. 24, 2007).

¹¹First Supplement to Appeal at 3 (Oct. 13, 2006).

¹²*Declaration of Robert D. Steinberg*, at 2-3, ¶5 (Oct. 12, 2006). “341 Meetings” are meetings of creditors required under the Bankruptcy Code, 11 U.S.C. §341. The trustee must convene and preside at such meetings.

¹³*Id.* at 3, ¶6.

¹⁴*Id.*

Maring.¹⁵ Although it is clear to me that Mr. Steinberg makes these points in order to show that the equities favor issuing the IFQ permits to the Appellants, his statements also can reasonably be read as inadvertently suggesting that Mr. Maring neglected to file the applications because he had nothing to gain by doing so, and did not care what harm might result to his creditors. Mr. Steinberg also states that Mr. Maring did not mention until September 29, 2006, that he had failed to file the IFQ applications. While Mr. Steinberg obviously offers this information to demonstrate his own diligence in filing the applications on October 12, 2006, it also supports the notion that perhaps Mr. Maring intentionally or knowingly missed the application deadline out of a lack of concern for his creditors' interests. Appellants even acknowledge that Mr. Maring, at worst, may have had a motive to harm his creditors, including the former business partner whom he had sued.¹⁶ It is difficult, if not impossible, for me to ascertain Mr. Maring's intentions or the effect of his circumstances without questioning him directly.¹⁷

In the three cases in which this office has deemed applications timely filed under the equitable tolling doctrine, we held extensive factual hearings.¹⁸ In each of those cases, the individual responsible for missing the application filing deadline testified and provided several witnesses to support their claim that extraordinary circumstances prevented them from applying on time. The Appellants have not offered such evidence in this appeal. The evidence in this record is mixed. While it is apparent from the evidence that Mr. Maring has suffered devastating financial setbacks, it is not clear whether these in fact prevented him from filing the applications. The evidence before me allows the possibility that Mr. Maring may have knowingly failed to file the applications out of a lack of concern about protecting these assets, or even out of an intent to harm his creditors.

I do not rule out the possibility that an applicant's financial circumstances could constitute the "extraordinary circumstances" needed to support a claim under the equitable tolling doctrine. I find only that the Appellants have not met their burden to prove by a preponderance of the evidence the first element of the equitable tolling claim – that Mr. Maring was prevented by circumstances beyond his control from filing the 2006/2007 IFQ applications by the August 1,

¹⁵*Id.*

¹⁶Second Supplement of Appeal at 5 (Jan. 24, 2007).

¹⁷The Trustee withdrew his initial request for a hearing "because there do not appear to be any disputed factual issues in the Appeal and in light of the time sensitive nature of the 2006/2007 IFQs. . . . but remains ready to appear if the hearing officer finds it necessary or helpful." First Supplement to the Appeal at 2 (Oct. 13, 2006). The withdrawal of the hearing request was made before Appellants submitted briefing on the doctrine of equitable tolling argument. I have issued this Decision without a hearing in order to meet Appellants' requested date of January 31, 2007. Appellants are free to renew their hearing request in a Motion for Reconsideration.

¹⁸See note 9 *supra*.

2006, deadline.

As to the other two elements of the equitable tolling claim, it does appear from the evidence that Mr. Steinberg acted diligently in filing the applications, once he learned that Mr. Maring had not done so. It also appears that implementation of the Crab Rationalization Program would not have been harmed or frustrated if the application had been processed by RAM when it was submitted, since RAM reportedly has calculated and set aside the 2006/2007 IFQ in order to be able to perform in the event the Appellants succeeded in this appeal.¹⁹ But because the first element of the equitable tolling claim has not been met, I conclude as a matter of law that the Appellants' applications should not be deemed timely filed.

FINDING OF FACT

The Appellants have not met their burden to prove by a preponderance of the evidence that Mr. Maring was prevented by circumstances beyond his control from filing the 2006/2007 IFQ applications by the August 1, 2006, deadline.

CONCLUSION OF LAW

The Appellants' applications should not be deemed timely filed.

DISPOSITION

The IADs that are the subject of this appeal are **AFFIRMED**. This Decision takes effect on March 2, 2007, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. §679.43(o).

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska Time, on February 12, 2007, the tenth day after this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officers, and must be accompanied by a written statement in support of the motion.

Edward H. Hein
Chief Appeals Officer

¹⁹*Declaration of Robert D. Steinberg* at 6, ¶12 (Oct. 12, 2006).