Divisional Court File No. DC-12-463-00

DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

B E T W E E N:

CAPITAL ONE BANK (CANADA BRANCH)

Plaintiff
(Appellant)

-and-

LAURA M. TOOGOOD aka LAURA MARIE TOOGOOD
aka LAURA MARIE DEGENOVA

Defendant
(Respondent)

APPELLANT'S FACTUM

I. STATEMENT OF THE APPEAL

1. This is an appeal by the plaintiff, Capital One Bank (Canada Branch), from the order of Deputy Judge Boris G. Freesman dated August 14, 2012 made at the Newmarket Small Claims Court in Newmarket, Ontario by which the plaintiff's claim was dismissed following an Assessment Hearing held on July 30, 2012

Reasons for Judgment, *Appeal Book and Compendium*, Tab 2.

II. OVERVIEW

2. At issue on this appeal is whether Deputy Judge Freesman erred in (a) ruling that a claim for a credit card debt set out on an invoice and owing pursuant to a written credit card agreement was not a liquidated demand for money, (b) erred in finding no evidence of the contractual rate of interest and ruling that the contractual rate of interest does not apply after breach of the contract, and (c) erred in failing to follow the Small Claims Court Rules and established precedent and grant default judgment against the defendant for the amount claimed.

III. SUMMARY OF FACTS

3. The Plaintiff's Claim was issued February 23, 2011 for $7,101.08 due as of February 9, 2011 along with pre-judgment and post-judgment interest at the rate of 21.7 percent per year and costs, owing by the defendant under a credit card agreement between the parties.

Plaintiff's Claim, Schedule A, Appeal Book and Compendium, Tab 4

4. The defendant was served personally on November 20, 2010.

Notice of Motion and Supporting Affidavit, Exhibit A, Appeal Book and Compendium, Tab 6

5. A request to note the defendant in default and grant default judgment was sent to the court on December 16, 2010 and subsequently on January 7, 2011 but the clerks refused to signed default judgment. The matter was administratively dismissed as abandoned on April 26, 2011.

Notice of Motion and Supporting Affidavit, paragraph 8, Appeal Book and Compendium, Tab 6

6. A motion in writing to set aside the dismissal and grant default judgment and was sent to the court on or about March 14, 2012. In paragraph 11 of the affidavit, the plaintiff waived its claim to the collections expenses as claimed in the Plaintiff's Claim. By his order of April

10, 2012, Deputy Judge Sparks set aside the order of dismissal and ordered that the plaintiff reserve the claim along with a copy of his order.

Notice of Motion and Supporting Affidavit, Appeal Book and Compendium, Tab 6; *Motion Endorsement Record, Appeal Book and Compendium*, Tab 7

7. A request for an Assessment Hearing was sent to the court on May 22, 2012 and was scheduled by the court staff to be heard on July 30, 2012. An additional affidavit, sworn by Samantha Cooze on June 20, 2012, was submitted to the court in support of the plaintiff's position.

Affidavit for Assessment, Appeal Book and Compendium, Tab 8.

8. At the Assessment Hearing Deputy Judge Freesman, endorsed that the plaintiff waived its claim to the collection expenses, and reserved judgment on the remainder of the claim.

Assessment Hearing Endorsement Record, Appeal Book and Compendium, Tab 3; *Transcript, Appeal Book and Compendium,* Tab 5, page number 33, line 23 to page number 34, line 17.

9. In his Reasons for Judgment, dated August 14, 2012 Deputy Judge Freesman dismissed the claim, on the basis that the plaintiff had not adduced evidence that would permit him to "…determine what part of the Claim was for charges actually incurred on the account by the client and what part was for interest or other charges added by the Plaintiff…"

Reasons for Judgment, Appeal Book and Compendium, Tab 2, paragraph 4 of page 17.

10. Upon receipt of receipt of Deputy Judge Freesman's reasons for judgment, the plaintiff's lawyers made additional submissions in writing to the court by way of letter dated September 4, 2012.

Additional Written Submissions to Deputy Judge Freesman, Appeal Book and Compendium, Tab 9.

IV. ISSUES, LAW AND ARGUMENT

Proving the Claim for a Liquidated Demand in Money

11. The Small Claims Court Rules provide that a plaintiff is entitled to default judgment for a debt or liquidated demand in money and interest claimed thereon and that at an assessment hearing the plaintiff is not required to prove liability against a defendant noted in default only the amount of the claim.

> Rule 11.03(5), *Small Claims Court Rules*, O. Reg. 258/98.

12. Deputy Judge Freesman ruled that a claim under a credit card account is not a debt or a liquidated demand in money. He further ruled that proving a claim requires the plaintiff to submit "….sufficient particulars or a detailed accounting that will permit a judge…to qualify it" but found that no such evidence was provided by the plaintiff.

> *Reasons for Judgment, Appeal Book and Compendium*, Tab 2, paragraphs 1 and 4 of page 4.

13. It is trite law to say that a credit card debt is a liquidated debt. Justice Ferguson explained:

> …. the test of a liquidated demand is whether the amount to which amount the plaintiff is entitled (if he is entitled to anything) can be ascertained from the contract itself or by calculation or fixed by a scale of charges agreed upon by the contractor implied by it…
>
> *Cantalia Sod. Co. Ltd. v. Patrick Harrison & Co. Ltd*., 1967 CarswellOnt 176, [1968] 1 O.R. 16, (obtained February 4, 2013), paragraph 3, *Book of Authorities*, Tab 1.

14. The plaintiff submitted the final monthly statement with the outstanding balance and the customer agreement between the parties as part of the Plaintiff's Claim and as exhibits to the affidavit of Samantha Cooze submitted at the Assessment Hearing.

Plaintiff's Claim, Appeal Book and Compendium, Tab 4; *Affidavit for Assessment, Exhibits B and C; Appeal Book and Compendium,* Tab 8.

15. The final monthly statement lists the sum owing by the defendant to the plaintiff. Additionally, the Customer Agreement, attached to the Plaintiff's Claim and sworn as an exhibit to the affidavit for assessment, provides that the cardholder accepts the statement as accurate if they do not inform Capital One of the any alleged errors within 30 days of the statement date (section 16), and provides that the total debt must be paid if the cardholder fails to fulfill any terms of the Agreement (section 12). Consequently, the amount appearing on the final statement is in fact a "sum agreed upon or quantified in advance by the parties themselves …" which is how Deputy Judge Freesman defined a liquidated sum.

Plaintiff's Claim, Appeal Book and Compendium, Tab 4; *Reasons for Judgment, Appeal Book and Compendium,* Tab 2, paragraph 3 of page 4

16. Deputy Judge Freesman also ruled,

> In my opinion, to prove its claim the Plaintiff must adduce *prima facie* evidence showing what charges were incurred and payments made from a point in time when the account stood at a nil balance. […] Alternatively, if a client makes a partial payment without protest after receiving a monthly statement showing the balance that the Plaintiff claims was due on the account on a given date, then that payment may constitute an acknowledgement of the debt as of that date if there is evidence before the Court from which such an inference may be drawn. There is no such evidence before me.

Reasons for Judgment, Appeal Book and Compendium, Tab 2, paragraph 5 of page 4, paragraph 1 of page 5.

17. There was such evidence before His Honour. The affidavit for the Assessment Hearing included statements showing the final payment, which was made subsequent to all charges made on the account by the defendant, through to the final statement on which the plaintiff's claim was based.

Affidavit for Assessment, Appeal Book and Compendium, Tab 8.

Interest

18. Deputy Judge Freesman indicated the plaintiff had provided no evidence of the interest rate at the time the card was opened and no evidence of notice of the change in the interest rate.

> *Reasons for Judgment, Appeal Book and Compendium,* Tab 2, paragraph 6 of page 6; paragraph 2 of page 7.

19. The plaintiff submitted the final statement with the outstanding balance and the customer agreement between the parties, as part of the Plaintiff's Claim and as exhibits to the affidavit submitted at the Assessment Hearing, which set out the rate of interest, where it was stated on the final statement and how it was calculated.

> *Plaintiff's Claim, Appeal Book and Compendium,* Tab 4; *Affidavit for Assessment, Exhibit B and C, Appeal Book and Compendium,* Tab 8, paragraphs 7 and 8.

20. The Divisional Court has ruled, "…unless the terms respecting interest rates in the credit card agreement are vague or unclear or unless the interest rate derived from the written agreement infringes a statutory provision such as the *Interest Act*, effect should be given to the contractual rate for the determination of both pre- and post-judgment interest."

> *Capital One Bank v. Matovska*, 2007 WL 2602217 (Ont. Div. Ct.), 2007 CarswellOnt 5605, [2007] O.J. No. 3368 (obtained February 4, 2013), paragraph 13, *Book of Authorities, Tab* 2.

21. Deputy Judge Freesman concluded, "…in the absence of any evidence or explanation to justify it, the rate of interest claimed offends my sense of justice and good conscience within the meaning of s. 25 of the *Courts of Justice Act*."

> *Reasons for Judgment, Appeal Book and Compendium,* Tab 2, paragraph 5 of page 7.

22. It is well established that notwithstanding section 25 of the *Courts of Justice Act*, the court must still apply the law. A Small Claims Court cannot ignore the law and cannot base its

decision of a belief that the law in unfair.

> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 25; *Sereda v. Consolidated Fire and Casualty Insurance Co.*, 1934 CarswellOnt 37, [1934] O.R. 502, [1934] 3 D.L.R. 504, [1934] O.W.N. 394 (obtained February 4, 2013), paragraph 3, *Book of Authorities*, Tab 3; *O'Shanter Development Corp. v. Separi*, 1996 CarswellOnt 1701 (obtained February 4, 2013), paragraphs 8-9, *Book of Authorities*, Tab 4.

Interest After Termination of the Contract

23. Deputy Judge Freesman concluded that the applicable rate of interest after the agreement was "terminated" should be the rate provided by section 128 to 130 of the *Courts of Justice Act*, stating "[i]f the contract is at an end, then the contractual rate of interest no longer applies from the date of termination forward" and "[a]fter termination of the Agreement there is no agreed upon rate of interest."

> *Reasons for Judgment, Appeal Book and Compendium,* Tab 2, paragraphs 4, 6 and 8 of page 8.

24. Section 8 of the Customer Agreement, attached as an exhibit to the affidavit, provides: "You are still responsible for paying interest at the rate current at the time under this agreement even if: you fail to meet the terms of this Agreement, we obtain a court judgment against you for payment of the debt under this Agreement, we close your account or cancel your card, we demand immediate payment of your total debt."

> *Plaintiff's Claim, Appeal Book and Compendium,* Tab 4; *Affidavit for Assessment,* Exhibit B, *Appeal Book and Compendium,* Tab 8.

25. The Divisional Court, citing the Supreme Court of Canada, has ruled:

> The court gave a detailed analysis of the circumstances under which interest was payable by another right, i.e. a contractual rather than a statutory basis, and canvassed the principles of contract law as it relates to the recovery of expectation damages by a creditor in relation to default under loan arrangements by the debtor. Finding that judgment interest is essentially compensation for the lending of money, the court concluded that absent exceptional circumstances, **the interest rate which**

should govern the loan prior to breach or default would be the appropriate rate to govern the loan after the breach or default and that the application of a lower interest rate would be unjust to the lender. The court concluded this analysis applied equally to pre-judgment interest and post-judgment interest: See paragraphs 49 and 50 on page 400 (emphasis added).

Capital One Bank v. Matovska, supra, paragraph 11, *Book of Authorities*, Tab 2.

Collection Fees

26. Deputy Judge Freesman wrote extensive and detailed reasons on the collection expenses claimed in the Plaintiff's Claim, notwithstanding the fact that the plaintiff had waived its demand for that portion of the claim as indicated in Deputy Judge Freesman's endorsement. Despite having waived it claim for this amount, the plaintiff had full and binding authority to assert it had it so elected.

Assessment Hearing Endorsement Record, Appeal Book and Compendium, Tab 3.

27. The deputy judge should have entertained the submissions from the plaintiff if he wished to address this claim that had been waived by the plaintiff. It is a basic principle of natural law and procedural fairness that one has the right to be heard before a decision affecting their rights or interests is made.

Kipiniak v. Dubiel, 2011 CarswellOnt 766, 2011 ONSC 825, 274 O.A.C. 249, (obtained February 4, 2013), paragraph 13, *Book of Authorities*, Tab 5.

Conclusion

28. The affidavit for assessment provided sufficient evidence to the court to permit it to grant default judgment. Nevertheless, despite Deputy Judge Freesman's conclusion that he "…would have been prepared to grant judgment for the balance due by the client together

with interest either at the contractual rate prior to default by the client or at a reasonable rate, together with reasonable costs within the framework" he dismissed the claim.

> *Reasons for Judgment, Appeal Book and Compendium,* Tab 2, paragraph 3, of page 17.

29. Given that the defendant failed to file a Defence, Deputy Judge Freesman ought not to have required additional proof of a liquidated demand for money beyond the statements provided nor should he have required evidence of the initial interest rate and the changes to it.

30. The court ought to have considered the words of Justice Corbett, who allowed an appeal of an order which had denied a bank's motion for summary judgment. In that case, the motions judge had, on his own initiative, raised the issues of the sufficiency of the bank's proof of the original credit card agreement and whether it had given proper notice of the periodic changes to the interest rate. Justice Corbett stated the following with respect to debt collection cases of this kind:

> It is in everyone's interests that debt enforcement through the courts be time- and cost-efficient, subject to ensuring that all parties have a fair opportunity to raise their issues and present their evidence. If the defendant had raised the issues raised by the motions court judge, then it would have been incumbent on the Bank to respond to them. In that event there would have been no unfairness in the debtor being responsible for the Bank's costs to present this evidence. Here, though, these additional costs will be incurred, not through any conduct of the debtor, but at the insistence of the court. And if the decision of the motions court judge is correct, then the costs to assemble evidence in every credit card collections case will increase, with no apparent improvement in the quality of justice accorded parties in these cases:
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> > *Canadian Imperial Bank of Commerce v. Prasad*, 2010 CarswellOnt 108, 2010 ONSC 320, (obtained February 4, 2013), paragraph 16, *Book of Authorities*, Tab 6.

31. The reasoning of Justice Corbett ought to apply *a fortiori* where the defendant is in default and the plaintiff has submitted the necessary evidence.

V. ORDER SOUGHT

32. The plaintiff respectfully requests an order in the following terms: "The appeal is allowed. The Reasons for Judgment Deputy Judge Freesman of August 14, 2012 are set aside. Judgment is ordered for the plantiff in the amount of $5,536.90 as of February 9, 2011, with pre-judgment and post-judgment interest accruing 21.7 percent, costs of $275 and costs of the appeal of $305."

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Menachem M. Fellig, LSUC No. 54257B
Lawyer for the appellant, Capital One Bank (Canada Branch)

DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

B E T W E E N:

CAPITAL ONE BANK (CANADA BRANCH)

Plaintiff

-and- (Appellant)

LAURA M. TOOGOOD aka LAURA MARIE TOOGOOD
aka LAURA MARIE DEGENOVA

Defendant

(Respondent)

CERTIFICATE

I, Menachem M. Fellig, lawyer for the appellant, certify:

1. An order under subrule 61.09 (2) is not required, and
2. I estimate I will require 0.5 hours for oral argument.

SCHEDULE A

List of Authorities

Capital One Bank v. Matovska, 2007 WL 2602217 (Ont. Div. Ct.), 2007 CarswellOnt 5605, [2007] O.J. No. 3368

Sereda v. Consolidated Fire and Casualty Insurance Co., 1934 CarswellOnt 37, [1934] O.R. 502, [1934] 3 D.L.R. 504, [1934] O.W.N. 394

O'Shanter Development Corp. v. Separi, 1996 CarswellOnt 1701

Kipiniak v. Dubiel, 2011 CarswellOnt 766, 2011 ONSC 825, 274 O.A.C. 249

Canadian Imperial Bank of Commerce v. Prasad, 2010 CarswellOnt 108, 2010 ONSC 320

SCHEDULE B

Text of Relevant Provisions

Small Claims Court Rule 11.03(5)

11.03 (5) On a motion in writing for an assessment of damages or at an assessment hearing, the plaintiff is not required to prove liability against a defendant noted in default, but is required to prove the amount of the claim. O. Reg. 78/06, s. 24.

Courts of Justice Act, s. 25

25. The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience.

Divisional Court File No. DC-12-463-00

DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

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Plaintiff
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-and-

LAURA M. TOOGOOD aka LAURA MARIE TOOGOOD
aka LAURA MARIE DEGENOVA

Defendant
(Respondent)

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Divisional Court File No. DC-12-463-00

CAPITAL ONE BANK (CANADA BRANCH) v. LAURA M. TOOGOOD aka LAURA MARIE TOOGOOD aka LAURA MARIE DEGENOVA

DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

Proceedings commenced at Newmarket

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