

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Capital One Bank \(Canada Branch\) v. Wilcox](#) | 2011 CarswellOnt 9507, [2011] O.J. No. 4166, 207 A.C.W.S. (3d) 87 | (Ont. S.C.J., Sep 21, 2011)

2007 CarswellOnt 5605
Ontario Superior Court of Justice (Divisional Court)

Capital One Bank v. Matovska

2007 CarswellOnt 5605, [2007] O.J. No. 3368

CAPITAL ONE BANK v. ZORICA MATOVSKA

CAPITAL ONE BANK v. GAYLE BLACKWELL

CAPITAL ONE BANK v. JANET SEMPLE a.k.a. J. SEMPLE

MacKenzie J.

Judgment: September 4, 2007

Docket: Brampton DC-05-009964-00, DC-05-010277-00, DC-05-010278-00

Proceedings: additional reasons to *Capital One Bank v. Matovska* (2007), 230 O.A.C. 1, 2007 CarswellOnt 5661 (Ont. Div. Ct.)

Counsel: T.R. Christensen for Plaintiff / Appellant

No one for Defendants / Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure --- Default proceedings — Judgment following default — By signing default judgment — Requirement for debt or liquidated demand

Plaintiff sought recovery of debt pursuant to written credit card agreement for outstanding principal, interest and pre-proceeding collection expenses — Although defendants failed to deliver defences and were noted in default, Small Claims Court clerk did not sign default judgment on requisition and matter went to trial on uncontested basis — Trial judges declined to award any amount for interest as stipulated in credit card agreement nor for any pre-proceeding collection expenses of plaintiff pursuant to terms of credit card agreement — Defendants' appeals on basis that trial judges erred in failing to find that pre-proceeding collection expenses claimed by plaintiff were liquidated demand for money were allowed — Pre-proceeding collection expenses claimed in credit card agreement were claim for liquidated demand for money, within meaning of R. 11.10(1) and 11.02(1) of Small Claims Court Rules, and was enforceable as liquidated demand for money by plaintiff against defendants.

Financial institutions --- Loans and discounts — Interest

Plaintiff sought recovery of debt pursuant to written credit card agreement for outstanding principal, interest and pre-proceeding collection expenses — Although defendants failed to deliver defences and were noted in default, Small Claims Court clerk did not sign default judgment on requisition and matter went to trial on uncontested basis — Trial judges declined to award any amount for interest as stipulated in credit card agreement nor for any pre-proceeding collection expenses of plaintiff pursuant to terms of credit card agreement — Defendants' appeals on basis that trial judges erred in failing to make award for pre- and post-judgment interest at rate stipulated in credit card agreement were allowed — Unless terms respecting interest rates in credit card agreement were vague or unclear or unless interest rate derived from written agreement infringed statutory provision such as Interest Act, effect should be given to contractual rate for determination of both pre- and post-judgment interest.

Table of Authorities

Cases considered by *MacKenzie J.*:

Bank of America Canada v. Mutual Trust Co. (2002), 287 N.R. 171, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 159 O.A.C. 1, 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, [2002] 2 S.C.R. 601 (S.C.C.) — considered

Cantalia Sod Co. v. Patrick Harrison & Co. (1967), [1968] 1 O.R. 169, 1967 CarswellOnt 176 (Ont. H.C.) — considered

Holden Day Wilson v. Ashton (1993), 14 O.R. (3d) 306, 104 D.L.R. (4th) 266, 64 O.A.C. 4, 1993 CarswellOnt 1834 (Ont. Div. Ct.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 128 — considered

s. 128(4)(g) — considered

s. 129 — considered

s. 129(5) — referred to

s. 130(1)(a) — referred to

s. 130(1)(b) — referred to

Interest Act, R.S.C. 1985, c. I-15

Generally — referred to

Rules considered:

Small Claims Court Rules, O. Reg. 258/98

R. 11.01(1) — referred to

R. 11.02(1) — referred to

ADDITIONAL REASONS to judgment reported at *Capital One Bank v. Matovska* (2007), 230 O.A.C. 1, 2007 CarswellOnt 5661 (Ont. Div. Ct.), respecting reasons for endorsement.

MacKenzie J.:

1 By my Endorsement dated January 12, 2007, the appeals in each of the above noted-cases were allowed and judgments issued accordingly. The resulting judgments were entered at Brampton on January 18, 2007.

2 In each of these cases, the plaintiff sought recovery of a debt pursuant to a written credit card agreement for outstanding principal, interest and pre-proceeding collection expenses. Although the defendants each failed to deliver defences and were noted in default, the Small Claims Court clerk did not sign default judgment on requisition and the matter went to trial on an uncontested basis. The trial judges declined to award any amount for interest as stipulated in the credit card agreement nor for any pre-proceeding collection expenses of the plaintiff pursuant to terms of the credit card agreement.

3 The appeals were based on alleged error by the trial judges in failing to find that pre-proceeding collection expenses claimed by the plaintiff were a liquidated demand for money and in failing to make an award for pre- and post-judgment interest at the rate stipulated in the credit card agreement.

4 In my view, the pre-proceeding collection expenses claimed in the credit card agreement are a claim for a liquidated

demand for money, within the meaning of the Small Claims Court Rules 11.10(1) and 11.02(1). In *Holden Day Wilson v. Ashton* (1993), 14 O.R. (3d) 306 (Ont. Div. Ct.), this Court held that a solicitor's account, where "the quantum owing on the account can be ascertained from the contract itself or by calculation or fixed by a scale of charges agreed upon in the contract or by it, is a liquidated demand for money in respect of which a plaintiff is entitled to default judgment from the clerk of the Small Claims Court": See also *Cantalia Sod Co. v. Patrick Harrison & Co.* (1967), [1968] 1 O.R. 169 (Ont. H.C.) : 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: page 171.

5 In these actions, the plaintiff has a liability to pay its counsel herein on a contingent basis, being a fixed percentage of the outstanding debt (principal and interest) on account of "debt collection services prior to commencing legal proceedings ... retainer agreement."

6 These pre-proceeding collection expenses can be ascertained by calculation as agreed in the contract between the plaintiff and its counsel. In such event, counsel's claim against the plaintiff in accordance with the retainer agreement for his account for these expenses constitutes a claim for a "liquidated demand" for money, in respect of which plaintiff's counsel would be entitled, in the absence of a defence, to default judgment against his client, the plaintiff.

7 In the credit card agreements, the defendants agreed to pay the plaintiff "any expenses we [the plaintiff] incur to collect your debt". In my view, the claim for pre-proceeding collection expenses charged by the plaintiffs' counsel pursuant to a retainer agreement providing for a fixed percentage of the outstanding indebtedness is a "liquidated demand for money" and by necessary implication, it is enforceable as a liquidated demand for money by the plaintiff against the defendants.

8 I now turn to the failure of the trial courts to award pre-judgment interest and post judgment interest in accordance with the credit card agreements.

9 The *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended, sets out the rules respecting an award of pre-judgment interest (s.128) and post judgment interest (s.129), subject to the overriding discretion of the court to, among other things, disallow interest under either sections 128 and 129 or to allow interest at a rate higher or lower than that provided in either of those sections: See s.130(1)(a) and (b).

10 In *Bank of America Canada v. Mutual Trust Co.* (2002), 211 D.L.R. (4th) 385 (S.C.C.), the Supreme Court of Canada interpreted the above sections of the *Courts of Justice Act*. In particular, reference was made to s.128(4)(g) which provided that "interest shall not be awarded under ss.1 ... where interest is payable by a right other than under this section." Reference was also made to s.129(5) for a similar provision relating to post-judgment interest.

11 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.

12 The question then arises whether there were “exceptional circumstances” within the meaning of the above dicta in the credit card agreements and the circumstances of the defendants as borrowers/debtors.

13 In my view, 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.

Order accordingly.

Citing References (12)

Treatment	Title	Date	Type	Depth
Distinguished in	C 1. Capital One Bank (Canada Branch) v. Wilcox 2011 CarswellOnt 9507 (Ont. S.C.J.) Judicially considered 2 times	Sep. 21, 2011	Cases and Decisions	
Distinguished in	C 2. Loans Till Payday v. Brereton 2010 ONSC 6610 (Ont. Div. Ct.) Judicially considered 5 times	Dec. 01, 2010	Cases and Decisions	
Followed in	H 3. Capital One Bank v. Wright 2013 ONSC 5440 (Ont. Div. Ct.)	Sep. 06, 2013	Cases and Decisions	
Followed in	4. Bank of Montreal v. Dabeka 2007 CarswellOnt 7535 (Ont. S.C.J.)	Nov. 16, 2007	Cases and Decisions	
Considered in	C 5. Citi Cards Canada Inc. v. Ross 2014 ONSC 114 (Ont. S.C.J.) Judicially considered 1 time	Jan. 07, 2014	Cases and Decisions	
Considered in	6. Capital One Bank v. Rivera 2011 CarswellOnt 16055 (Ont. S.C.J.)	Sep. 19, 2011	Cases and Decisions	
Considered in	7. Consumers Choice Home Improvements Corp. v. Marwaha 2008 CarswellOnt 8059 (Ont. S.C.J.)	Dec. 24, 2008	Cases and Decisions	
Referred to in	8. Forest City Fire Protection Ltd. v. 1099516 Ontario Inc. 2015 ONSC 2346 (Ont. S.C.J.)	May 01, 2015	Cases and Decisions	
—	9. Zuker, Ontario Small Claims Court Practice Case Law 128(4), Case Law	2005	Secondary Sources	—
—	10. Zuker, Ontario Small Claims Court Practice Case Law 130(1), Case Law	2005	Secondary Sources	—
—	11. Zuker, Ontario Small Claims Court Practice Case Law RSmCC 7.01(2), Case Law	2006	Secondary Sources	—
—	12. Banking and Finance Law Review (Canada); Bank and Customer: The Five Year Review, 2005-2010	2012	Secondary Sources	—