**CITATION:** Canadian Imperial Bank of Commerce v. Rajshree Prasad et al., 2010 ONSC 320
**COURT FILE NO.:** CV-08-4409-SR
Brampton
**DATE:** 20100112



**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

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|---|---|---|
| **B E T W E E N:** | ) | |
| | ) | |
| CANADIAN IMPERIAL BANK OF COMMERCE | ) | David Byers and Simon Bieber for the Plaintiff |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| **- and -** | ) | |
| | ) | |
| | ) | |
| RAJSHREE PRASAD aka RAJSHREE JANET PRASAD aka JANET PRASAD | ) | Ms. Prasad self-represented |
| | ) | |
| Defendant | ) | |

**DECISION**

**D.L. CORBETT J.**

[1] This is a routine credit card collections action concerning an alleged debt of $16,258.47. Ms. Prasad, who is self-represented, delivered a statement of defence in which she baldly denied the bank's allegations but did not raise a triable issue (her primary defence seems to be that she should not have to pay because the Bank created the money it lent her "out of thin air"). Ms. Prasad did, however, concede that she was the cardholder, that she charged purchases to the card, and that she received periodic statements of account from the Bank.

[2] The Bank moved for summary judgment. In support, it adduced evidence of Ms. Prasad's application for the credit card, the current cardholder agreement, and monthly statements on the account from November 27, 2006 to January 27, 2008.

[3] Ms. Prasad did not file any evidence on the motion.

[4] The motions judge, on his own initiative, raised two issues at the motion for summary judgment. He questioned the sufficiency of the bank's proof of the original credit card agreement (that is, the terms and conditions at the time the credit card was granted to Ms. Prasad). And he questioned whether the Bank had proved that it gave timely notice to Ms. Prasad of periodic changes to the interest rate charged on unpaid balances owing on the card. Apart from the blanket denial in the statement of defence, Ms. Prasad had not raised these issues.

[5] The Bank took the position that it did not need evidence on these issues because the issues had not been raised by Ms. Prasad. The motions judge disagreed and dismissed the motion, with reasons to follow.

[6] During the period that reasons were under reserve, the Bank asked to be permitted to provide evidence addressing the points raised by the motions judge at the hearing of the motion. This request was denied. When the motions judge released his reasons, he explained that he was dismissing the motion for summary judgment because the Bank had not provided the necessary evidence:

> [The Bank's evidence] omits the following evidence that I would have needed in order to decide the issues in the action without cross-examination:
>
> - the Cardholder Agreement that was in effect when Ms. Prasad applied for her card and whose terms she is alleged to have agreed to in her application
>
> - the Disclosure Statement referred to in the cardholder Agreement, which sets out the initial interest rate to be charged;
>
> - the monthly statements containing the charges that are the subject of the Bank's claim including, in the present case, those that account for how the opening balance of $2,641.96 (shown on the first statement that the Bank attached to its affidavit) originated; and
>
> - the letters or other means by which the Bank notified Ms. Prasad of changes in the interest rate from that specified in its original Disclosure Statement.[1]

[7] The learned motions court judge then went considerably further. He did not just find that the Bank had failed to prove its case on the motion. He also found that the Bank had failed to give proper notice of interest rate changes in violation of s.12(3) of the *Financial Consumer Agency of Canada Designated*

[1] *Reasons*, para. 10.

*Violations Regulations*.[2] And, in paragraph 1 of his reasons, the learned motions court judge characterized his decision as follows: "I dismissed the claim with reasons to follow". This led to confusion as to whether the action had been dismissed (an issue not before the motions court judge), or just the Bank's motion for summary judgment.[3]

[8] The Bank determined that it would seek variation of the motion judge's decision by way of motion to adduce fresh evidence. Quite properly, it asked the learned motions judge to hear this motion. The motions judge declined to hear that motion.

**The Test for Leave to Appeal**

[9] Rule 62.02(4)(b) of the Rules of Civil Procedure provides that leave to appeal to the Divisional Court shall not be granted unless (i) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question; and (ii) the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted,

**Good Reasons To Doubt Correctness of the Order**

[10] I am satisfied there are good reasons to doubt the correctness of the order of the motions judge:

(a) Ours is an adversarial system of justice. The parties frame the issues. It is not for the court to tease out issues that have not been raised by the parties, except, perhaps, where the court is concerned that it lacks jurisdiction or that the order it is being asked to make is illegal (i.e. cannot be reconciled with binding authority), unconstitutional, unfairly affects a person not before the court, is an abuse of process;

(b) The court has a role in assisting unrepresented litigants and this may include pointing out issues to them that they may wish to address. It does not go so far as providing them legal counsel, whether by giving them advice directly, or by raising issues on their behalf when there is no basis on the record to do so;

[2] S.O.R./2002-101 (the "*Regulations*").
[3] Paragraph 38 says that the motion was dismissed. The order, taken out after the motion for leave to appeal, dismisses the motion but not the action.

(c) Where an issue arises that has not been addressed in evidence by the parties, the court should give both sides a reasonable opportunity to adduce evidence in respect to the issue. The opportunity to adduce evidence is one aspect of the right to be heard. Here, the Bank had no prior notice of the issues raised by the motions judge, and no opportunity to adduce evidence in respect to them. There is good reason to find a denial of natural justice as a consequence;

(d) The Rules of Civil Procedure do not permit a party to rest on her pleadings on a motion for summary judgment. She must "lead trumps or lose". This requirement is not peculiar to actions under the simplified rules. The learned motions court judge expressly relied upon the blanket denials in Ms. Prasad's statement of defence as a basis for doubting the Bank's evidence.[4] This appears to fly directly in the face of the Rules and clear appellate authority.

(e) The absence of evidence to prove a fact, "A", can lead a court to infer that a different fact, "not A", is true. However such an inference cannot be drawn unless the parties have advance notice and an opportunity to adduce evidence in respect to the issue. Here, the issue of the bank's compliance with the Regulations was not an issue before the court. Moreover, the jurisdiction to enforce the Regulations rests with the Commissioner of the Financial Consumer Agency of Canada. Contravention of a consumer provision of the *Regulations* is an offense, and can carry with it a maximum penalty of $200,000 for a financial institution such as the Bank.[5] This finding by the motions court judge is *obiter dicta*, in that it was not necessary to his decision. But it was more than that. It was a finding of regulatory misconduct by the Bank in an interlocutory decision that is not easily appealed, and in which the procedural requirements of natural justice were not afforded to the Bank.

**Matters of Importance**

[11] "Matters of importance", within the meaning of R.62.02(4)(b) must be matters of importance to the development of the law, and not just to the parties.

[4] *Reasons*, paras. 6 and 7.
[5] As noted by the learned motions court judge: see *Regulations*, s.2(a) and *Financial Consumer Agency of Canada Act*, S.C. 2001, c.9, ss. 19 and 22(1).

[12] I am satisfied the proposed appeal raises several matters of sufficient importance to justify granting leave to appeal. The decision of the motions judge is binding authority in the Small Claims Court and before the Master. A great many credit card collections cases are brought in those courts. Effective January 1, 2010, the jurisdiction of the Small Claims Court was increased to $25,000, and so it can be expected that even more of this collections work will be done in that court.

[13] The reliance of the motions judge on the blanket denials in the defendant's pleading is a radical departure from the general practice on motions for summary judgment. It could lead to significant difficulties in motions practice before the Master.

[14] Second, the approach taken to this motion is not consistent with the general approach taken on debt collection cases of this kind. The goal of civil litigation, as embodied in R.1.04(1), is to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. It is clear that Ms. Prasad held and used a credit card. The principal amount claimed was not contested, and yet the court did not grant partial summary judgment. It is clear (and frankly notorious) that interest is charged on unpaid credit card balances. If the calculation of the interest is in serious question, the proper approach is to grant judgment for the uncontested portion of the claim, without prejudice to a further motion respecting any controversial issue. Where this happens, often the creditor does not pursue additional relief since it is unable to collect the amount of the partial judgment anyway. Where there does not appear to be any defence to the claim, as appears to have been the case here, such a motion should take no more than a few minutes of time in regular motions court. The manner in which this has been handled, the case would proceed to a trial.

[15] This second point has costs consequences in terms of judicial resources and for the parties. In this case, the credit card agreement provides that the debtor is responsible for the Bank's reasonable and actually incurred collection costs, including legal expenses. On a strict application of this term, if the Bank prevails, the defendant will be responsible for the Bank's costs for the motion, for the motion for leave to appeal, for the appeal, and then for any further steps necessary to obtain judgment. The motions court does no favour to a debtor by prolonging this process where there is no defence. Sending the case to a trial would lead to potential costs awards far exceeding the amount in issue.

[16] The motions court judge's decision also carries with it consequences for the general costs of credit. 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.

[17] Leave to appeal is granted. Costs of the motion for leave to appeal are reserved to the panel deciding the appeal. I have ordered this appeal expedited to the March sittings of the Divisional Court in Brampton. That sittings is already overbooked. In the event that there is insufficient time for all matters to proceed during those sittings, I direct that a copy of this endorsement be brought to the attention of the Chairman of the panel so that he or she will be aware of this court's view that it is important this matter proceed without delay. Any motion to adduce fresh evidence at the appeal shall be brought before the panel hearing the appeal.

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D.L. CORBETT J.

**Released:** January 12, 2010

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**B E T W E E N:**

CANADIAN IMPERIAL BANK OF COMMERCE

Plaintiff

**- and –**

RAJSHREE PRASAD

Defendant

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**DECISION**

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D.L. CORBETT J.

**Released:** January 12, 2010