CITATION: Capital One Bank v. Ramirez-Rodriguez, 2017 ONSC 3536
DIVISIONAL COURT FILE NO.: 550/16
DATE: 20170607

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: CANADA ONE BANK (CANADA BRANCH) v. FELIPE RAMIREZ RODRIGU aka FELIPE RAMIREZ-RODRIGUEZ aka FELIPE RAMIREZRODRIGUEZ

BEFORE: NORDHEIMER J.

COUNSEL: *Z. Hakamali & R. Christensen*, for the plaintiff/appellant

A. Dobrogeanu, for the defendant/respondent

HEARD at Toronto: June 7, 2017

E N D O R S E M E N T

[1] The plaintiff appeals from the order of Thomson J. of the Toronto Small Claims Court dated May 6, 2016 in which she dismissed the plaintiff's claim. At the conclusion of the hearing, I granted the appeal and remitted the matter back to the Small Claims Court for trial with reasons to follow. I now provide those reasons.

[2] The plaintiff commenced this action in the Toronto Small Claims Court against the defendant seeking judgment for an unpaid credit card debt. The defendant defended the claim solely on the basis that the claim was barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

[3] On May 6, 2016, Thomson J. dismissed the plaintiff's claim on her own initiative prior to a settlement conference, with no notice to the parties and no opportunity to make submissions. The order reads simply:

> There have been no payments or purchases since February 2014 statement of claim issued in April 2016 is out of time and is dismissed.

[4] The *Rules of the Small Claims Court* do permit the court to dismiss a claim on its own initiative but there are specific steps that it must follow before doing so. Specifically, r. 12.02 states, in part:

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> (3) The court may, on its own initiative, make the order referred to in paragraph 1 of subrule (2) staying or dismissing an action, if the action appears on its face to be inflammatory, a waste of time, a nuisance or an abuse of the court's process.
>
> (4) Unless the court orders otherwise, an order under subrule (3) shall be made on the basis of written submissions in accordance with the following procedures:
>
> 1. The court shall direct the clerk to send notice by mail to the plaintiff that the court is considering making the order.
>
> 2. The plaintiff may, within 20 days after receiving the notice, file with the court a written submission, no more than four pages in length, responding to the notice.
>
> 3. If the plaintiff does not file a written submission that complies with paragraph 2, the court may make the order without any further notice to the plaintiff or to any other party.
>
> 4. If the plaintiff files a written submission that complies with paragraph 2, the court may direct the clerk to send a copy of the submission by mail to any other party.
>
> 5. A party who receives a copy of the plaintiff's submission may, within 10 days after receiving the copy, file with the court a written submission, no more than four pages in length, responding to the plaintiff's submission, and shall send a copy of the responding submission by mail to the plaintiff, and, on the request of any other party, to that party.

[5] There was no order made by Thomson J. dispensing with the requirement for written submissions nor any reasons given why that requirement would be dispensed with in this particular case. Further, it is not apparent on the face of the pleadings that the claim is "inflammatory, a waste of time, a nuisance or an abuse of the court's process". Indeed, there would appear to be a live issue as to when the limitation period begins to run respecting a credit card debt in light of decisions such as *407 ETR Concession Co. v. Day* (2016), 133 O.R. (3d) 762 (C.A.).

[6] Rule 12.02 is a similar type of rule to r. 2.1 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 that permits this court to strike out a claim on its own initiative. However, r. 2.1 has similar notice requirements to those in r. 12.02 of the *Rules of the Small Claims Court*. The reason for notice is fundamental. The right to be heard before a person's rights are determined is one of the most basic tenets of our legal system. If those rights are going to be dispensed with, there needs to be valid and articulated reasons for doing so.

[7] Further, in exercising the authority under these rules, the Court of Appeal has made it clear that they should only be used where it is plain and obvious that the claim is abusive. For example, in *Scaduto v. Law Society of Upper Canada*, [2015] O.J. No. 5692 (C.A.), the court said, at para. 8:

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> Under this line of authority, the court has recognized that the rule should be interpreted and applied robustly so that a motion judge can effectively exercise his or her gatekeeping function to weed out litigation that is clearly frivolous, vexatious, or an abuse of process. However, the use of the rule should be limited to the clearest of cases where the abusive nature of the proceeding is apparent on the face of the pleading and there is a basis in the pleadings to support the resort to the attenuated process.

[8] Unfortunately this is not the first that that this judge has proceeded in such a fashion: *Kipiniak v. Dubiel*, [2011] O.J. No. 572 (Div. Ct.). The result is increased costs to the parties and considerable delay in having the claim properly determined. It also unnecessarily involves the time of this court.

[9] In an effort to bring this matter to a conclusion, I would have proceeded to deal with the limitations issue on its merits but the plaintiff says that it intends to lead evidence on that issue. I cannot deny the plaintiff the right to do so if it feels that such evidence is necessary. Regrettably, that means that the matter must be returned to the Small Claims Court for a proper hearing. However, both parties agree that the mandatory settlement conference is not required for this matter given the nature of the issue. Further, the plaintiff has agreed not to seek any costs of the trial even if it is successful. The plaintiff also did not seek costs of this appeal.

[10] It is for these reasons that I allowed the appeal and remitted the matter back to the Small Claims Court for trial. The mandatory settlement conference provided for in r. 13.01 is dispensed with under r. 2.02. There will be no costs of this appeal and there will be no costs awarded to the plaintiff at the trial if the plaintiff is successful.

NORDHEIMER J.

DATE: June 7, 2017

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