COURT OF APPEAL FOR ONTARIO

CITATION: 2275518 Ontario Inc. v. The Toronto-Dominion Bank, 2024 ONCA 343
DATE: 20240506
DOCKET: COA-23-CV-0276

Fairburn A.C.J.O., Simmons J.A. and Daley J. (*ad hoc*)

BETWEEN

The Toronto-Dominion Bank

Plaintiff (Respondent)

and

2275518 Ontario Inc., 1135578 Ontario Inc., 1344228 Ontario Inc., and Grace Diena

Defendants (Appellants)

Eli Karp and Ian Literovich, for the appellants

Mark J. van Zandvoort and Joshua Suttner, for the respondent

Heard: March 7, 2024

On appeal from the judgment of Justice Robert Centa of the Superior Court of Justice, dated February 13, 2023.

Daley J. (*ad hoc*):

Introduction

[1] This appeal arises from a motion for summary judgment brought by the respondent bank ("TD Bank"). The motion judge granted judgment in favour of TD Bank against the appellants 2275518 Ontario Inc. (the "Borrower"), the corporate

guarantors 1135578 Ontario Inc. and 1344228 Ontario Inc., and the personal guarantor Grace Diena (with the corporate guarantors, collectively, the "Guarantors").

[2] It is common ground that TD Bank granted a loan to the Borrower, supported by continuing, absolute and unconditional guarantees provided by the Guarantors. It is further undisputed that the loan has not been repaid and that, under its terms, it is in default.

[3] In defending the action by the bank, the Guarantors alleged that their lawyer, Jerome Stanleigh, who had also been retained by TD Bank, failed to register the bank's security with respect to the loan in a first priority position. The Guarantors asserted that the first priority position registration of the security was a condition for the guarantees being executed, and accordingly, given Stanleigh's error, TD Bank was estopped from enforcing the guarantees.

[4] The appellants commenced a third party claim against Stanleigh, seeking indemnity from him for any losses they sustain arising from his negligence in failing to follow their instructions to register TD Bank's security interest in a first priority position.

[5] TD Bank brought a motion for summary judgment on the loan against the Borrower and Guarantors. Prior to the hearing of that motion, a case management judge made several case management orders with respect to the conduct of the

motion, seeking to advance the third party claim in tandem with the main action. Despite these orders, the appellants took no steps to move the third party claim forward.

[6] Just before the originally scheduled date for TD Bank's summary judgment motion, the appellants brought a motion seeking leave to amend their statement of defence to allege that Stanleigh, in his capacity as the solicitor and agent for TD Bank, had misrepresented to them that the bank's security interest would be registered in a first priority position, and that the loan should be rescinded as a result. The summary judgment motion proceeded based on the proposed amended statement of defence.

[7] TD Bank's summary judgment motion came before the motion judge in December 2022. He had concerns based on the record before him that there was at least one genuine issue requiring a trial and concluded that he could not fairly determine the motion without resort to the enhanced powers under r. 20.04(2.1) or (2.2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, (the "Rules"). He also concluded that it would be in the interests of justice for him to hear oral evidence in a "mini-trial" to determine if a fair and just determination of the issues was possible without a trial.

[8] In his December 2022 procedural order, the motion judge directed that, pursuant to r. 20.04(2.2), on the return of the motion, the appellants present the

oral evidence of Grace Diena and her husband, Daniel Diena (a principal of the Borrower and the corporate Guarantors), and that TD Bank call Stanleigh. The motion hearing therefore continued over two additional days in January 2023, during which time the three witnesses testified. Their evidence was completed in less than three hours.

[9] In his decision on the summary judgment motion, the motion judge thoroughly outlined his reasons for concluding that it was necessary and proper to exercise the enhanced powers under r. 20.04(2.1) and (2.2). He also found, for several reasons, that the appellants' defence of misrepresentation did not raise a genuine issue requiring a trial.

[10] The motion judge did not accept that Stanleigh made any false representations to the appellants on behalf of TD Bank, or that, during discussions of the guarantees, the appellants had instructed him to register TD Bank's security in a first priority position. He also concluded that if Stanleigh said anything to the guarantors about TD Bank's security position, which he did not find, Stanleigh would have said nothing more than that "he <u>would</u> be registering the TD loan in first position" (emphasis in the original). Several authorities made it clear that this type of statement could not give rise to an actionable misrepresentation, as it is a statement of future intent or expectation.

[11] The motion judge also found that the appellants' other defences[1] did not raise a genuine issue requiring a trial and that they were not entitled to relief from forfeiture. Finally, he rejected their submission that the third party claim was a barrier to summary judgment.

Issues on Appeal

[12] The appellants raise several grounds of appeal. Namely, they allege that the motion judge erred:

(a) by ordering oral evidence from a non-party, Stanleigh, in violation of r. 20.04(2.2);

(b) in the alternative, in making findings of fact and credibility relating to the appellants' third party claim against Stanleigh, thereby creating a risk of inconsistent findings of fact and effectively granting partial summary judgment;

(c) in the further alternative, by granting summary judgment in the main action prior to the determination of the third party claim, thereby prejudicing the appellants' interests.

[1] The appellants claimed that s. 4(o) of the guarantee concerning the continuing, absolute and unconditional nature of the guarantee was sufficiently unusual that it should have been brought to their attention. They also argued post-guarantee variation of risk premised largely on their claim of misrepresentation.

[13] For the reasons that follow, I am not persuaded that the motion judge made any error. I would therefore dismiss the appeal.

Evidentiary Record

(1) The loan and guarantees

[14] In 2016, the Borrower entered into two loan agreements: one with TD Bank and another private loan with the lenders CFE Financial Inc. and RJ E Investments Inc. (“CFE/RJE”). These loans related to the refinancing of other debt owed by the Borrower.

[15] As a condition of the TD Bank loan, the Guarantors provided continuing, absolute and unconditional guarantees in support of the loan.

[16] The Borrower and the Guarantors retained Stanleigh as a solicitor to represent them in the refinancing transactions. TD Bank also retained Stanleigh to see to the preparation and registration of the required loan security documents.

[17] On the closing of the TD Bank loan transaction, the Borrower received $997,665.78.

[18] As a term of the TD Bank loan, the bank’s security interest, including its rights with respect to the Guarantors, was to be registered in a first priority position. However, ultimately, the security interest with respect to the CFE/RJE loan was registered in priority to the TD Bank loan. This error in the registration sequence was not disclosed until the Borrower was placed in receivership in December 2019,

which was an event of default under the TD Bank loan. Following the discharge of the receiver, TD Bank commenced this action against the appellants.

[19] During the receivership proceedings, TD Bank received one payment against its loan, which reduced the debt to $886,271.22. No further payments were made by the appellants.

(2) The action and the third party claim

[20] As the pleadings in the action set out the procedural context for the summary judgment motion, they must be considered on this appeal.

[21] The action was commenced with a simple statement of claim from TD Bank seeking payment of the loan amount from the Borrower and the Guarantors due to the breach of the loan contract.

[22] As I have said, just before the original hearing date of TD Bank's summary judgment motion, the appellants brought a motion seeking leave to amend their statement of defence.

[23] In their amended and operative statement of defence, the appellants alleged that, given Stanleigh's negligence as TD Bank's solicitor in failing to ensure that the bank's security interest was registered in first priority, as well as his misrepresentations to them regarding the security registration, the loan should be rescinded.

[24] In their third party claim against Stanleigh, the appellants allege that they instructed him to register the bank's security in a first priority position. Similarly, in her affidavit filed in response to the summary judgment motion, Grace Diena swore that Stanleigh acted contrary to her instructions by failing to register the bank's security interest in first position. However, as noted by the motion judge, in her evidence at the mini-trial, Grace Diena denied any recollection of giving Stanleigh any instructions, let alone instructions regarding the registration of TD Bank's security interest.

[25] Notably, although the appellants allege that they instructed Stanleigh to register TD Bank's security in a first priority position, it is not alleged in the third party claim that Stanleigh made any negligent misrepresentations to the appellants. The claim is framed as a simple solicitor's negligence action arising from Stanleigh's failure to register TD Bank's security in a first priority position.

(3) The case management orders

[26] The case management orders leading up to the hearing of the summary judgment motion add important context to the appellants' grounds of appeal. I will briefly outline the terms of those orders.

[27] Black J. was the assigned case management judge ("CMJ"). His endorsements relating to the bringing of the summary judgment motion include the following terms and reasons:

January 14, 2022 – despite the appellants' position that summary judgment was inappropriate, the CMJ concluded that the matter could properly proceed by way of summary judgment. He scheduled a full day for the hearing on October 25, 2022, provided directions with respect to discoveries and documentary disclosure and directed the parties to return on January 25, 2022 to finalize the schedule for same.

January 25, 2022 – with all counsel in attendance, including counsel for the third party, Stanleigh, the CMJ made 15 case management orders. These included setting timelines for the exchange of affidavits of documents and discoveries in the third party proceeding and for the delivery of materials with respect to TD Bank's summary judgment motion as well as a summary judgment motion to be brought by the appellants in the third party proceeding, which was to be heard together with or immediately after TD Bank's summary judgment motion. The CMJ also set timelines for r. 39 examinations and any cross-examinations on affidavits in both the main action and the third party claim.

May 20, 2022 – the CMJ amended the schedule and timelines as a result of the appellants' delay in complying with the orders made on January 25, 2022. The appellants were ordered to peremptorily comply with the amended timetables.

August 11, 2022 – the CMJ noted that counsel for TD Bank requested a case management conference to address concerns relating to the appellants' failure to comply with peremptory orders. The CMJ directed that Stanleigh's r. 39.03 examination proceed during the week of September 6, 2022, that TD Bank had the right to participate in that examination and that a further case conference be held on September 20, 2022 to assess the overall progress in relation to TD Bank's summary judgment motion.

September 20, 2022 – the CMJ ordered costs against the appellants in light of their "somewhat lackadaisical approach" in proceeding with Stanleigh's r. 39.03 examination, which led to the late discovery of the loss of Stanleigh's file.

[28] Despite the CMJ's case management orders, the appellants chose not to proceed with a summary judgment motion for the third party proceeding. Instead, they simply let TD Bank's summary judgment motion proceed as scheduled.

Discussion

[29] In framing this appeal, I note that the appellants do not challenge any of the motion judge's factual findings.

[30] Rather, the appellants assert errors in the motion judge's use of the enhanced powers provided for in r. 20.04(2.2).

[31] Thus, the applicable standard of review is that established in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 81-84. In summary, the Supreme Court concluded that absent an error of law or palpable and overriding error of fact or mixed fact and law, the exercise of powers under r. 20.04(2.1) attracts deference and a determination that there is no genuine issue for trial should not be disturbed on appeal. Further, a decision that it is in the "interest of justice" to exercise the enhanced powers is a question of mixed fact and law which attracts deference. Finally, a decision to exercise the enhanced powers under the rule is discretionary and, as such, should not be disturbed unless the motion judge misdirected themself or came to a decision that is so clearly wrong that it resulted in an injustice.

[32] Having considered the parties' arguments and the record, I have concluded that the motion judge did not err in law or make any palpable and overriding errors that would warrant appellate intervention.

(1) The motion judge did not err by permitting a non-party to give oral evidence at the mini-trial

[33] The appellants first argue that the motion judge erred by ordering that Stanleigh, a non-party, testify during the mini-trial proceeding in violation of r. 20.04(2.2). The appellants submit that a motion judge's jurisdiction to order oral evidence on a mini-trial is limited to ordering evidence from only the parties themselves. They say that a mini-trial is not intended to be a trial that includes a parade of witnesses testifying about multiple issues.

[34] The appellants' submission must be rejected. Rule 20.04(2.2) reads as follows:

> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. [Emphasis added.][2]

[35] Rules 1.04(1) and (1.1) provide important guidance concerning the proper interpretation of the *Rules*:

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[2] The full text of r. 20.04 is included in Appendix 'A'.

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[36] Further, I note that the principles of statutory interpretation apply equally to regulations, such as the *Rules of Civil Procedure*, subject to the proviso that they must also be read in the context of the enabling statute: *Ayr Farmers Mutual Insurance Company v. Wright*, 2016 ONCA 789, 134 O.R. (3d) 427, at para. 27. The modern approach to statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting from Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87. See also *Ayr Farmers*, at para. 26.

[37] As can be seen from the text of r. 20.04(2.2), it contains no limitation such as the one advanced by the appellants, restricting the jurisdiction of the court to order evidence on a mini-trial from non-parties. On its face, the rule states that oral evidence can be "presented" by one or more parties. It does not state that evidence can only be given by parties.

[38] Significantly, an interpretation permitting the court to order that a party may present oral evidence from a non-party is entirely consistent with the direction of the Supreme Court in *Hyrniak*, at paras. 63 and 66, where it stated that a motion judge should invoke their power to resolve disputes when it allows the judge to reach a fair and just adjudication on the merits in a manner proportional to what is at stake in the litigation. Although the court stated that "this is more likely to be the case when the oral evidence required is limited" it also said "there will be cases where extensive oral evidence can be heard … avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure": at para. 63. The clear purpose of r. 20.04(2.2), as shown by the authoritative caselaw interpreting it, is to permit a motion judge to order the parties to present oral evidence from appropriate sources where it is likely to allow the judge to reach a fair and just adjudication on the merits in a proportionate manner.

[39] Considering the text, context and purpose of r. 20.04(2.2), I see no basis for interpreting it in the restrictive manner advanced by the appellants. I would dismiss the first ground of appeal.

(2) The motion judge did not err by making findings of fact and credibility relating to the appellants' third party claim against Stanleigh

[40] The second ground of appeal is that, even if it was within the motion judge's jurisdiction, the enhanced fact-finding process should not have been implemented, as it was contrary to the interest of justice for Stanleigh to testify in the mini-trial while the third party proceeding against him remained outstanding.

[41] Specifically, the appellants argued that the motion judge erred by making findings relevant to and potentially dispositive of the issues in the third party negligence claim against Stanleigh in circumstances where the motion judge did not have all of the relevant evidence in front of him and where doing so created a risk of inconsistent findings of fact. Counsel emphasized that this court has repeatedly warned about the dangers of granting partial summary judgment because it creates a risk of inconsistent findings of fact.

[42] Here, the appellants say that, contrary to the warnings of this court, the motion judge made findings of fact concerning whether the Dienas gave instructions to Stanleigh, an issue that also arises in the third party proceeding. The motion judge thereby created a risk of inconsistent findings of fact, and, in effect, granted partial summary judgment.

[43] I would not give effect to this ground of appeal.

[44] As observed by the motion judge, the summary judgment process is tailor-made to enforce liquidated claims by creditors against debtors and guarantors. Unless there is a genuine issue for trial, the court should be reluctant to delay a creditor's access to this summary procedure, which enables the creditor to enforce its legitimate contractual claims against debtors and guarantors.

[45] The motion judge noted that, in this case, the appellants have made a claim against their lawyer asserting that he did not meet the standard of care. However, he concluded that the appellants' negligence claim had nothing to do with TD Bank's action against the appellants on the loan and guarantees. The allegedly negligent actions of Stanleigh do not raise a genuine issue requiring a trial in relation to TD Bank's claim against the appellants. The appellants' third party claim in negligence against Stanleigh can continue among those parties even if summary judgment is granted.

[46] The motion judge also noted that TD Bank's summary judgment motion disposes of the entirety of its claim against the appellants and that the third party claim is a separate legal proceeding. Accordingly, the test for granting partial summary judgment does not apply.

[47] I see no error in these conclusions. While I acknowledge that the motion judge rejected the Dienas' assertions in their affidavits that they gave Stanleigh instructions to register TD Bank's security in a first priority position, I reject the appellants' arguments that this finding gives rise to a realistic risk of inconsistent findings or that it somehow prejudices the appellants.

[48] In his submissions to this court, counsel for the appellants focused his arguments in this respect on the motion judge's acceptance of Stanleigh's evidence that he would not have discussed priorities with the Dienas. Counsel asserted that the motion judge assessed Mr. Stanleigh's evidence without the benefit of a full record. He submitted that evidence concerning the quantum of the Dienas' loss that may have been caused by Stanleigh, which would only be brought forward in the third party proceeding, could affect a trier of fact's assessment of Stanleigh's evidence.

[49] I would not accept these submissions for several reasons.

[50] First, in making his findings about whether the Dienas gave instructions to Stanleigh about the priority position of TD Bank's security, the motion judge found that the Dienas were not credible or reliable witnesses. For example, they had filed virtually identical affidavits that contained obviously incorrect and misleading information that was contradicted in part by the attached exhibits. Statements in their affidavits about their instructions to Stanleigh or advice they alleged he had

given were also contradicted or undermined by their oral evidence in the mini-trial, during which they either could not recall such instructions or advice or provided inconsistent evidence about the advice and when it was given.

[51] Viewed in the context of the Dienas' own evidence, the suggestion that the motion judge's finding concerning their evidence on this point creates a risk of inconsistent findings is fanciful. It assumes that their evidence will somehow be different in the third party proceeding. Even if it were realistic that they could provide a credible explanation for giving fundamentally different evidence in the third party proceeding, which I conclude it is not, they were required to put their best foot forward on TD Bank's motion for summary judgment.

[52] Second, counsel for the appellants candidly acknowledged in oral argument that he did not make submissions to the motion judge that the quantum of loss for which Stanleigh could be found liable, which could only be determined in the third party proceeding, could affect the assessment of Stanleigh's credibility. It is not open to the appellants to now claim that this consideration should have affected the motion judge's determination of whether he should exercise the expanded powers in rr. 20.04(2.1) and (2.2). Moreover, and in any event, I fail to see how a determination that Stanleigh was potentially liable for, for example, $1,000,000 as opposed to $500,000, would realistically be likely to affect the assessment of his credibility.

[53] Third, the issue in the third party negligence claim relating to negligence (as opposed to causation and losses) will turn on whether Stanleigh met the standard of care. As noted above, it was a term of the TD Bank loan that its security be registered in a first priority position. The appellants have not explained how, in light of that term, the issue of whether they discussed priorities with Stanleigh will impact their claim that he failed to meet the standard of care.

(3) The motion judge did not err by granting summary judgment in the main action prior to the determination of the third party claim

[54] Turning to the appellants' next argument, I conclude that the motion judge correctly directed himself on whether it was in the interest of justice to grant summary judgment after a mini-trial. He properly considered the evidentiary record and the nature, size and complexity of the action. He provided careful and thorough reasons for proceeding with a mini-trial. All the witnesses who testified had sworn affidavits and been cross-examined or examined pursuant to r. 39.03. Therefore, proceeding with that evidentiary record, supplemented by further oral testimony, was entirely efficient and proportionate.

[55] Furthermore, as the appellants had not instituted a counterclaim or made a claim for set-off against TD Bank, and given the absence of any allegations of misrepresentations in the third party proceeding, the summary judgment motion was properly heard by way of mini-trial. The issues at stake, framed by the

pleadings in the main action, were fully capable of being determined by the motion judge on the fulsome record, as he ordered.

[56] Finally, as outlined above, the appellants were provided with every opportunity by the case management judge to have the third party action joined with the main action, so that the outcome of both proceedings could be determined at the same time.

[57] On appeal, counsel for the appellants submitted that it was not possible for the appellants to proceed with their third party claim by way of summary judgment motion. He asserted that the case management judge's schedule was too tight, and that, in any event, solicitor's negligence claims do not ordinarily proceed by way of summary judgment.

[58] However, having failed or chosen not to join the third party claim with the summary judgment motion, it is not open to the appellants at this time to raise any argument of prejudice. Had they chosen to participate, they could have sought necessary accommodations in the schedule or demonstrated that the procedure was somehow unfair or prejudicial to their interests if in fact that were the case.

Disposition

[59] For these reasons, I would dismiss the appeal.

[60] As agreed by counsel in the event the appeal was dismissed, I would award costs to the respondent fixed in accordance with the terms of the guarantees on a solicitor and own client basis in the all-inclusive sum of $69,901.24.

Released: May 6, 2024 “J.M.F.”

“Daley J (*ad hoc*)”
“I agree. Fairburn A.C.J.O.”
“I agree. Janet Simmons J.A.”

Appendix ‘A’

Disposition of Motion

General

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13 (3).

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount. R.R.O. 1990, Reg. 194, r. 20.04 (3); O. Reg. 438/08, s. 13 (4).

Only Genuine Issue is Question of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to an associate judge, it shall be adjourned to be heard by a judge. R.R.O. 1990, Reg. 194, r. 20.04 (4); O. Reg. 438/08, s. 13 (4); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts. R.R.O. 1990, Reg. 194, r. 20.04 (5).