CITATION: Royal Bank of Canada v. 14068653 Canada Inc. 2024 ONSC 3190
COURT FILE NO.: CV-23-00002484-0000
DATE: 2024-06-04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Royal Bank of Canada, Plaintiff

AND:

14068653 Canada Inc. o/a Ibrahim Truck and Trailer Repair and Shiza Shaukat, Defendants

BEFORE: Justice Kurz

COUNSEL: Hyland Muirhead, for the Plaintiff

No one appeared for the Defendants

HEARD: May 29, 2024

ENDORSEMENT

[1] This is a motion for judgment on an action that should have been brought in the small claims court.

[2] The Plaintiff seeks judgment for $9,761.84 plus punitive damages. Of that amount, $8,517.99 represents the balance of an unpaid credit card and $1,243.85 represents the balance on an unpaid bank overdraft. The Plaintiff seeks to first to characterize those amounts as damages in fraud and only in the alternative, damages for the unpaid credit card and overdraft.

[3] What the Plaintiff relies on to bring this claim for less than $10,000 presumably brings this matter into the monetary jurisdiction of this court is a prayer for relief in the statement of claim for further punitive damages of $30,000. As set out below, nothing before me justified such a punitive damages claim. The Plaintiff seeks only the unpaid credit card amount and the $1,243.85 unpaid overdraft, which it characterized as damages in fraud.

[4] The Plaintiff is clearly entitled to the sums of $8,517.99 on an unpaid credit card and $1,243.85 on the unpaid overdraft based upon the provisions of Rule 19.04. It can obtain that amount without reference to a claim in fraud. I am willing to grant judgment on those amounts.

[5] I point out that on July 1, 2024, a party will not be able to issue an action in this court for an amount within the jurisdiction of the small claims court without leave: *Courts of Justice Act*, R.S.O. 1990, ch. C.43, s. 23.1, as amended by S.O. 2023, c. 12, Sched. 3, s. 1.

[6] Since the Plaintiff is entitled under Rule 19.04(a) to obtain default judgment from the Registrar of this court for any claim to liquidated damages, such as the unpaid line of credit and credit card, that is not the point of this motion. Rather, this action and this motion is really about a finding and declaration of fraud so that any judgment survives bankruptcy.

[7] However, there is no evidence or indication that the individual defendant is contemplated bankruptcy let alone assigned himself into that state.

[8] The Plaintiff asserts that the facts, as admitted through the Defendants' noting default in defending this action, prove its allegations of fraud. However, on the materials before me, I am not convinced that the funds in question were acquired with fraudulent intent. In saying that, I point out the following.

[9] First, the deemed admissions that arise with the noting of default under Rule 19.05 reflect admitted facts, not conclusions of law. The Rule reads as follows:

> **19.05** (1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed.
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> (2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages.

(3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action or order that the action proceed to trial and that oral evidence be presented.

(4) Where an action proceeds to trial, a motion for judgment on the statement of claim against a defendant noted in default may be made at the trial.

[10] However, under r. 19.06: "[a] plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment." As Favreau J., as she then was, describes it in *Canada Mortgage and Housing Corp. v. CMC Medical Centre Inc.*, 2017 ONSC 7551, at para. 14, this rule "requires the judge to inquire into whether the deemed factual admissions resulting from the default support a judgment on liability as well as damages."

[11] In support of that statement, Favreau J. cited the decision of Himel J. in *Fuda v. Conn*, [2009] O.J. 188 (S.C.J.), who wrote at para 16:

> [A]lhough the Rules provide the consequences for noting in default, the court has the jurisdiction and the duty to be satisfied on the civil standard of proof that the plaintiff is able to prove the claim and damages. If the court finds the evidence to be lacking in credibility or lacking "an air of reality", the court can refuse to grant judgment or grant partial judgment regardless of fault.

[12] In *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, D.M. Brown J., as he then was, stated at para. 14 that the court considering a motion for judgment must engage in the following enquiry:

(i) What deemed admissions of fact flow from the facts pleaded in the Statement of Claim?

(ii) Do those deemed admissions of fact entitle the plaintiffs, as a matter of law, to judgment on the claim?

(iii) If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitles it to judgment on the pleaded claim?

[13] As I wrote in *Bank of Montreal v Mathivannan*, 2021 ONSC 2538 ("*Mathivannan*"), at para. 16, after considering the authorities cited above:

> **16** As r.19.06 implicitly demonstrates, while the facts set out in the statement of claim are deemed to have been admitted, the legal consequences of those facts are not. As Corkery J. wrote in *Nikore v. Jarmain Investment Management Inc.*, 2009 CarswellOnt 5258 (S.C.J.), at para. 20:
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> > Under Rule 19.02 a defendant noted in default is deemed to have admitted all allegations of *fact* in the statement of claim. Allegations of law or mixed fact and law do not bind the court as admissions.

[14] Second, while allegations of civil fraud require only proof on a civil balance of probabilities, the trier of fact is entitled to consider the cogency of the evidence and scrutinize it with greater care when serious allegations such as fraud are proffered against a party: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 (S.C.C.), at p. 170, per Laskin C.J.

[15] Further, as McClung J.A. wrote in *Canada (Attorney General) v. Bourassa (Trustee of)*, 2002 ABCA 205, at para. 9:

> Fraud and its proof have their own distinct biosphere. In commercial disputes, allegations of fraud are frequently levelled. But they must be levelled with caution. At common law the claim must be specified and with particulars, or it will be struck: see Canadian Abridgement, vol. R17D, (2d) ed. (Toronto: Carswell, 1991) at Digest 1689 et seq. Regarding evidence of fraud, Kerr on Fraud and Mistake notes that; "fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established."

[16] McClung J.A. concluded on the point at para. 10 that "[h]e who alleges must prove. It is that simple."

[17] Here, the both the statement of claim and the supporting affidavit of the Plaintiff's employee referred to the timing of payments and withdrawals/charges at a time when each of the line of credit and credit card were at their limit. They do so in order to draw the inference of fraud. Those facts are uncontested in this motion. But while the facts of

the transactions are admitted, the motivations for them are opaque. The simple existence of those transactions, as both deemed and proven, does not, in itself prove fraud in law. I do not see them as badges of fraud and there is no extrinsic evidence of the defendants' motivations.

[18] In sum, nothing before me and certainly not the operation of Rule 19.06 proves fraud.

[19] Further, any request for a *declaration* of fraud (included in the notice of motion but not pleaded in the prayer for relief in the statement of claim) is premature and hypothetical as the individual defendant has not been placed in bankruptcy: *Bank of Montreal v Mathivannan*, at paras. 25 – 31, *Bank of Montreal v Garasymovych*, 2023 ONSC 3630, at paras. 36-40, *National Bank of Canada v. Pahuja*, 2024 ONSC 736 at paras. 34-37.

[20] The Plaintiff counters that allegations of fraud must be proven prior to bankruptcy. It cites the 1961 comment by Smily J. of the Ontario High Court of Justice in *Re Kemper (American British Canadian Catering Service)*, [1961] O.J. No. 380 (O.H.C.) at para. 11:

> **11** Counsel for the creditor intimated he could submit further evidence by other witnesses and suggested that an issue might be directed to try the question. **However, I do not think the Bankruptcy Act contemplates that on an application by the debtor for his discharge an issue might be directed to determine whether he was guilty of fraud. I think there has to be a conviction or a finding by a judgment of the Court in a civil proceeding indicating fraud or fraudulent breach of trust before the bankrupt can be considered to be guilty of fraud or fraudulent breach of trust so as to make clause (k) of s. 130 applicable on the application for the bankrupt's discharge.** Apart from enabling this to be shown, I do not think the Court on such an application should enter upon an inquiry as to whether the bankrupt had been guilty of fraud or fraudulent breach of trust.
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> [Emphasis added]

[21] I do not see that authority having been followed in recent years. Each of the authorities cited in para. 14 above as well as the authorities cited in those cases stands for the opposite proposition.

[22] With regard to the claim for $30,000 in punitive damages, nothing before me shows the entitlement to punitive damages, let along such damages at the level claimed. In fact, counsel made no arguments and offered no authorities in favour of a $30,000 punitive damages claim: particularly by a bank suing for less than $10,000 on an unpaid line of credit and credit card. In light of my findings above, I see no merit to the claim for punitive damages.

[23] As stated above, this matter should not have bene brought in this court. Even the finding of fraud which the Plaintiff sought was as available to the Plaintiff in Small Claims Court as it is in this court. No authorities have been presented to me that a declaration of fraud is necessary for the purposes of 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, should the individual defendant enter bankruptcy.

[24] The Plaintiff is entitled to judgment of $8,517.99 against the individual defendant, Shiza Shaukat, on the unpaid credit card and $1,243.85 against both defendants on the unpaid overdraft. With respect to interest, on the credit card, the Plaintiff claims charges of 25.99% as set out in the statement of claim as the applicable interest rate. It is entitled to interest at that rate from July 8, 2023 to judgment and postjudgment interest at that rate as well. It is entitled to prejudgment interest on the line of credit of its prime rate plus 5% from July 8, 2023 to judgment and postjudgment interest at that rate as well.

[25] Regarding costs, under Rule 57.05(1), if a plaintiff recovers an amount within the monetary jurisdiction of the Small Claims Court, the court may order that the plaintiff shall not recover any costs. That is an appropriate remedy here, where the action should not have been brought in this court. My colleagues and I are seeing far too many cases which could have been brought in the Small Claims Court, with the procedural protections available to self-represented parties that are not available in this court.

Justice Marvin Kurz

Date: June 4, 2024