

COURT OF APPEAL FOR ONTARIO

CITATION: Flight (Heritage Painters & Services) v. Bank of Nova Scotia, 2024
ONCA 370
DATE: 20240507
DOCKET: M55056 (COA-24-CV-0252)

Gomery J.A. (Motions Judge)

BETWEEN

Brian Wayne Flight c.o.b. as Heritage Painters & Services

Plaintiff (Appellant/Responding Party)

and

The Bank of Nova Scotia

Defendant (Respondent/Moving Party)

and

Julie Leblanc

Third Party (Respondent)

Joe Wahba, for the moving party

Tara Vasdani, for the responding party

Jason Squire, for the third party

Heard: May 6, 2024

ENDORSEMENT

[1] In this appeal, Brian Flight seeks the reinstatement of his action against the Bank of Nova Scotia, which was struck by Koehnen J. under rules 21.01(b), 21.01(3)(b), and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990. Reg. 194. By

way of this motion, the Bank seeks an order under r. 61.06(1)(a) or (b) requiring Mr. Flight to post security for its costs of the appeal.

Background

[2] Mr. Flight operates Heritage Painters & Services as a sole proprietorship. Between 2004 and 2016, he made four assignments in bankruptcy. His last bankruptcy was deemed annulled in February 2021.

[3] Beginning in 2019, Mr. Flight commenced actions alleging that his former spouse and bookkeeper, Julie Leblanc, misappropriated over \$200,000 from his accounts at the Bank using a power of attorney and online access he had given to her, and that she and the Bank are liable for damages he has incurred as a result.

[4] Mr. Flight initially sued Ms. Leblanc in the Ontario Superior Court in London (CV-19-1888, the “London Action”). Mitchell J. dismissed the London Action on a summary judgment motion in February 2022, on the basis that Mr. Flight was, at the time, an undischarged bankrupt who lacked the capacity to begin the action. In his decision, Mitchell J. found, “on the undisputed evidence put forward by the parties”, that Mr. Flight discovered his claims against Ms. Leblanc on January 9, 2018.

[5] The dismissal of the London Action was upheld by this court. Mr. Flight’s application for leave to appeal to the Supreme Court of Canada was also dismissed.

[6] Mr. Flight next sued John Adamson, the trustee in bankruptcy for all four of his assignments in bankruptcy in Toronto Superior Court File CV-19-00002035-0000 (the “Toronto Action”). Mr. Flight alleged that Mr. Adamson ought to have detected Ms. LeBlanc’s misappropriation of funds and, once told about it, should have sued her. On a motion for directions, the court held that Mr. Flight, an undischarged bankrupt at the time, was not required to obtain leave to sue the trustee under s. 215 of the the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. This decision was overturned by this court and the action was remitted back to the Superior Court to determine whether leave should be granted to Mr. Flight to sue the trustee. The Toronto Action has still not been resolved.

[7] In a third proceeding (CV-20-00001435), the trustee in bankruptcy sued Ms. Leblanc on behalf of the sole proprietorship’s creditors (the “Trustee Action”). The allegations were substantially identical to those made in the London Action. After Mr. Flight’s consumer proposal to his debtors was accepted and his bankruptcy was annulled in February 2021, Mr. Flight’s lawyer brought a motion for default judgment in the Trustee Action, without notice to the lawyer acting for Ms. Leblanc or to the lawyer acting for the Trustee. Default judgment was granted but, in June 2023, Mitchell J. held that Mr. Flight could not take steps to enforce the default judgment without leave of the court.

[8] On May 1st, 2024, Rady J. dismissed Mr. Flight's motion to enforce the default judgment obtained in the Trustee Action. She found that the Action was time-barred and constituted an impermissible collateral attack on Mitchell J.'s finding in the London Action that Mr. Flight discovered Ms. Leblanc's misappropriation of funds on January 9, 2018. She held that, if she were to be found in error on this point on appeal, the default judgment was obtained improperly and should be set aside.

[9] Finally, in December 2021, Mr. Flight began this action against the Bank, alleging that it was liable for his damages based on conversion, breach of contract, and negligence. The Bank brought a motion to strike the statement of claim and dismiss the action under rr. 21 and 25.

The motion judge's decision

[10] The motion judge summarized his reasons for granting the Bank's motion as follows:

The new claim amounts to a collateral attack on an earlier court order which found that the limitations period for the matters at issue expired on January 9, 2020. The claim at issue here was issued on December 21, 2021. That sort of collateral attack also amounts to an abuse of process.

In addition, quite apart from the earlier court ruling, the claim is time-barred because it complains about conduct which the plaintiff knew occurred more than two years before the statement of claim was issued.

[11] The motion judge rejected Mr. Flight's argument that his claim was based on the Bank's failure to remove Ms. Leblanc's power of attorney from his accounts before January 2020 as opposed to her alleged misappropriation two years earlier. He explained that:

The difficulty with that proposition is that Mr. Flight does not allege that Ms. Leblanc made any further withdrawals from the bank account after [the Bank] told Mr. Flight in 2018 that Ms. Leblanc's power of attorney had been removed. Indeed, the evidence is to the contrary and shows that Mr. Flight's new bookkeeper changed the account password in January 2018 once the alleged fraud had been discovered and that Ms. Leblanc made no further withdrawals from the account after that point. Mr. Flight admitted on cross-examination that he is alleging misuse of his accounts only before 2018.

The statement of claim does not particularize any damage arising from the alleged failure to revoke the power of attorney nor could Mr. Flight's counsel point to any such damage in oral argument.

[12] Furthermore, in cross-examination and undertakings, Mr. Flight confirmed that the damages he was seeking from the bank arose out of the fraud that Mr. Flight discovered in January 2018. Any claim for these damages was therefore time-barred.

[13] The motion judge concluded that Mr. Flight had raised the issue of the power of attorney "simply to avoid the finding of Mitchell J." and that this constituted an impermissible collateral attack. The motion judge found that the other causes of

action alleged in the statement of claim, based on actions that the Bank should have taken after the fraud was discovered, were time-barred:

[T]he Bank told Mr. Flight on February 20, 2019 that it would not provide information to him but would only provide information to the police. Assuming the alleged failure to investigate gave Mr. Flight a cause of action (which was not argued on the motion), then the limitation period on that claim began running on February 20, 2019 and would normally have expired on February 20, 2021. Even if I add an additional 182 days to the limitation period because of the Covid-19 pandemic as provided by the *Emergency Management and Civil Protection Act*, the limitations period would have expired on August 21, 2021. As noted earlier, this claim was not commenced until December 21, 2021.

[14] The motion judge awarded the Bank \$50,000 in substantial indemnity costs on the motion.

Analysis

[15] Rule 61.06(1)(a) empowers a judge of this court to order security for costs “where it appears that there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal”. Even if these criteria are met, security should not be ordered unless it is just to do so in the circumstances, considering the interests of justice; *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at para. 22; *Heidari v. Naghshbandi*, 2020 ONCA 757, 153 O.R. (3d) 756, at para. 6.

[16] I find that the Bank has met the criteria in r. 61.06(1)(a), and that it is just to order Mr. Flight to post security for costs.

[17] First, I find that Mr. Flight's appeal appears to be frivolous and vexatious.

[18] In considering whether an appeal appears to be frivolous and vexatious, the court may consider all relevant factors, including the apparent merits of the appeal, the appellant's motives in appeal, their conduct in the prosecution of the appeal, the public importance (if any) of the litigation, and the need to preserve access to justice: *Schmidt v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (C.A.), at p. 6; *Heidari*, at para. 6. The court must ensure that an order for security for costs "is not used as a litigation tactic to prevent a case from being heard on its merits"; *Yaiguaje*, at para. 23, *Heidari*, at para. 6.

[19] Mr. Flight's appeal appears to have no merit. Mr. Flight attacks the motion judge's findings without explaining in any meaningful way why they are wrong. He contends that, in declining to grant Ms. Leblanc any costs, the motion judge recognized that she "may well have engaged in inappropriate transactions". But the question is not whether or not Mr. Flight can prove that Ms. Leblanc misappropriated funds but rather whether his action against the Bank based on that alleged misappropriation is time-barred.

[20] Mr. Flight argues that his appeal could succeed because the Bank has not abandoned its third-party claim against Ms. Leblanc. The third-party claim does not amount to a concession that the action has any merit.

[21] Second, Mr. Flight acknowledges that he does not have sufficient assets in Ontario to pay the Bank's costs.

[22] Third, taking a step back, I find that it is just to order security for costs in the circumstances of this case. Mr. Flight argues that he is impecunious due to the Bank's own actions and that, in these circumstances, he ought not to be deprived of his day in court. Mr. Flight has however already had many days in court, advancing the same arguments. He has moreover unnecessarily increased the Bank's cost on the appeal by refusing to negotiate settlement of procedural issues.

[23] The Bank also seeks an order for security for costs under r. 61.06(1)(b), which allows a judge of this court to order security for costs where such an order could be made under s. 56.01. Given my conclusions under r. 61.06(1)(a), I need not consider these submissions. Based on the record before me, however, Mr. Flight has not paid the substantial indemnity costs he was ordered by pay to the Bank by the motion judge in any of the Actions, including the \$50,000 in substantial indemnity costs he was ordered to pay by the motion judge.

Disposition

[24] The Bank seeks \$50,000 in security for costs. This is excessive, in my view.

I order that:

1. Mr. Flight shall post \$25,000 as security for costs of the appeal by May 27, 2024.
2. Mr. Flight cannot take any further step in the appeal until the security ordered is posted.
3. If Mr. Flight fails to post the entire amount of the security ordered by May 27, 2024, the Bank may bring an *ex parte* motion to dismiss the appeal, with proof of the Mr. Flight's failure to post the ordered security.

[25] The Bank is entitled to its partial indemnity costs on this motion, which I fix at \$4,000 all-inclusive based on the parties' oral submissions.

“S. Gomery J.A.”