Court of King's Bench of Alberta

Citation: Bank of Montreal v Luciano, 2024 ABKB 314

Date: 20240528
Docket: 2301 01153
Registry: Calgary

2024 ABKB 314 (CanLII)

Between:

Bank of Montreal

Plaintiff/Respondent

- and -

Katelyn Luciano

Defendant/Applicant

Corrected judgment: A corrigendum was issued on May 31, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] Katelyn Luciano (**Luciano**) applies (**Application**) for leave of the Court to file and serve a notice of appeal in respect of a November 13, 2023 order (**BMO Judgment**) of Applications Judge Mattis (**Judge**) granting judgment in favour of Bank of Montreal (**BMO**) in the amount of $25,083.54 (plus costs in the amount of $6,000) and a declaration that Luciano's actions were fraudulent. Luciano specifically seeks to appeal the BMO Judgment's fraud declaration.

[2] The Application raises the question of if and when Luciano was served with the BMO Judgment to determine when her appeal period, under rule 6.14(2) of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*), began to run and, if her appeal period expired, whether the Court should exercise its discretion to allow a late-filed appeal.

[3] For the reasons set out below, the Court declares that service of the BMO Judgment was effected on November 17, 2023 and declines to permit Luciano to file a late notice of appeal in respect of the BMO Judgment. The Application is dismissed.

II. Background

[4] In October 2022, Luciano attended Airdrie House of Cars Inc (**AHOC**) to purchase a used vehicle (**Vehicle**). She required financing and signed paperwork for the purchase, including a Conditional Sales Contract and an Application for Credit.

[5] The Application for Credit indicated that Luciano's gross monthly income was $4,800. Both the Application for Credit and the Sales Contract included terms by which Luciano acknowledged, agreed and/or represented that the information in the Application for Credit was true. The Conditional Sales Contract included an acknowledgment that BMO and AHOC each relied on the information in the Application for Credit. BMO advanced Luciano $49,871.45 in exchange for the assignment of the Conditional Sales Contract to BMO and the purchase closed.

[6] Luciano defaulted on the payments and, in November 2022, left the Vehicle with AHOC. BMO investigated and confirmed that Luciano was on maternity leave and that her monthly income before that was approximately $2,200, not $4,800. AHOC paid BMO $27,000 in exchange for BMO discharging security against the Vehicle.

[7] On January 26, 2023, BMO commenced this action seeking judgment against Luciano for $23,653.93 plus interest and costs, for breach of the Conditional Sales Contract and for fraudulent misrepresentations made in the Application for Credit.

[8] Luciano retained counsel and, on March 31, 2023, filed her statement of defence. The essence of her defence was that she provided information to AHOC, AHOC filled out the Application for Credit and Conditional Sales Contract incorrectly, AHOC represented to her they were completed correctly, AHOC induced her to sign the documents, and that AHOC was responsible for any BMO losses. She also pleaded contributory negligence and section 53 of the *Law of Property Act*, RSA 2000 c L-7.

[9] On July 26, 2023, Luciano filed a third party claim against AHOC. On August 16, 2023, AHOC filed its third party statement of defence. AHOC denied liability, pleaded that it relied on Luciano's representations, denied any negligence, denied making any misrepresentations to her, and denied that Luciano was induced by AHOC to sign the documents.

[10] On September 8, 2023, BMO applied for summary judgment against Luciano seeking judgment and a declaration of fraud. On September 26, 2023, AHOC applied to summarily dismiss Luciano's third party claim. The applications were scheduled for November 10, 2023.

[11] On October 24, 2023, Luciano's counsel filed a notice of withdrawal of lawyer of record and served it on BMO and AHOC. The notice of withdrawal provided Luciano's last known address, which was a municipal address in Airdrie. It did not include an email address.

[12] On November 10, 2023, the BMO and AHOC applications proceeded. Luciano was self-represented. She had not filed any affidavit in response to the applications. Luciano indicated to

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the Judge that she was trying to just negotiate something and explained that she did not believe there was a fraud because AHOC had prepared the paperwork she signed and had led her to believe that her monthly income could include both her income and her boyfriend's income.

[13] The Judge explained to Luciano that she had not filed evidence and the Judge could not rely on her oral submissions as evidence. She also explained that BMO's request for a declaration of fraud had implications including that a judgment would survive bankruptcy. The Judge asked Luciano if she wanted an adjournment to have the opportunity to file evidence and Luciano declined indicating "I am at the point – it has been going on for a long time, I want to move on with my life, so I kinda want to get this done and over with."

[14] The Judge granted the BMO Judgment. She also granted an order dismissing Luciano's third party claim against AHOC (**AHOC Judgment**), with $4,150 in costs to AHOC. AHOC's counsel emailed Luciano a copy of the AHOC Judgment and, on November 15, 2023, Luciano confirm she had received it.

[15] On November 17, 2023, BMO's counsel emailed the BMO Judgment to Luciano, stating, "please see attached for service upon you the Order for Judgement". Luciano responded, stating: "thanks ... do you know if there was any costs for the fraud part?". In her March 1, 2024 affidavit, Luciano deposed that the BMO Judgment was served on her on November 17, 2023.

[16] On December 4, 2023, Luciano filed an assignment into bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*). MNP Ltd was appointed trustee.

[17] In mid-February 2024, Luciano retained her current counsel and, on March 7, 2024, Luciano filed this Application. The Application only seeks permission to file a late notice of appeal in respect of the BMO Judgment (not the AHOC Judgment). The Application came before me in morning chambers on April 23, 2024. I heard submissions of the parties and reserved my decision. After my review of the file, on April 24, 2024 I requested supplemental submissions from the parties which were provided.

III. Issues

[18] The issues on this Application are:

(a) Was the BMO Judgment served on Luciano and, if so, when?

(b) If Luciano's appeal period has expired, should the Court exercise its discretion to permit Luciano to file a late notice of appeal?

IV. Analysis

A. Was the BMO Judgment Served on Luciano?

[19] As indicated, on October 24, 2023, Luciano's counsel filed and served a Notice of Withdrawal of Lawyer of Record that provided Luciano's last known address.

[20] Rule 2.29(3) provides:

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> (3) The address of the party stated in the notice of withdrawal is the party's address for service after the lawyer of record withdraws unless another address for service is provided or the Court otherwise orders.

[21] If no other address for service is provided, and there is no order otherwise, rule 2.29(3) effectively operates to provide the address for service as provided under rule 11.15: ***Richardson v Schafer***, 2023 ABKB 727 at para 72; ***Fink v Trakware Systems Inc***, 2014 ABQB 512 at paras 12-14.

[22] BMO did not serve the BMO Judgment at the address stated in the notice of withdrawal, but instead emailed it to her. One of the issues I requested the parties to address in supplemental submissions was what effect, if any, that had on the Application.

[23] Rule 11.20 governs service of documents in Alberta, other than commencement documents:

> 11.20 Unless the Court otherwise orders or these rules or an enactment otherwise provides, every document, other than a commencement document, that is to be served in Alberta may only be served by
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> (a) a method of service described in Division 2 for service of a commencement document,
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> (b) a method of service described in rule 11.21,
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> (c) recorded mail under rule 11.22, or
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> (d) a method of service agreed to under rule 11.3.

[24] Rule 11.20 provides that non-commencement documents may be served the same way as commencement documents under Division 2, but also provides additional methods of service.

[25] BMO could not serve the BMO Judgment pursuant to rule 11.21 (electronic method) because Luciano did not specifically provide "an address to which information or data in respect of an action may be transmitted".

[26] However, one of the ways that service of commencement documents (and therefore also non-commencement documents under rule 11.20(a)) may be effected on self-represented litigants is if the self-represented litigant "accepts service of the document in writing": rule 11.18(1); ***Powell Estate (Re)***, 2023 ABCA 311 at para 11; ***Toronto Dominion Bank v Halliday***, 2022 ABKB 764 at para 12 [***Halliday***]. Service of a document may be proved to have been effected by an acknowledgment or acceptance of service in writing by the person served: rule 11.30(1)(b). If a self-represented litigant specifically acknowledges service in writing it is not necessary to obtain an order validating service: ***Powell Estate*** at para 16; ***Halliday*** at para 12(a).

[27] Interpreting the rules together, there are two components to effect service in this manner on a self-represented litigant: (1) a written response from the self-represented party being served that (2) constitutes "acknowledgment or acceptance" of service. The assessment of these components is a question of fact having regard to all of the circumstances.

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[28] With respect to the writing requirement, electronic transmissions, including in the form of email, text messages, social media communications or a handwritten note may be sufficient if it is proven, on a balance of probabilities, that the communication was authored by the person being served: ***Halliday*** at para 12(a).

[29] With respect to the "acknowledgment" or "acceptance" of service, this must be considered in the context of the meaning of "service". Service is a specialized form of notice encompassing the conveying of knowledge or information with the intention to affect legal rights: ***Zahmol Properties Ltd v Calgary (City)***, 2012 ABCA 89 at paras 14-16; ***Sandhu v MEG Place LP Investment Corporation***, 2012 ABCA 266 at para 18; ***R v Sharifi-Jamali***, 2022 ABCA 114 at para 8. The purpose of service is to give a party notice: ***Post v Kellogg Brown & Root (Canada) Company***, 2005 ABCA 390 at paras 5-6; at paras 11-12. Service is a question of fact: did the person being served actually get a copy of the document?: ***Thompson v Procrane Inc (Sterling Crane)***, 2016 ABCA 71 at para 12 .

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[30] As per ***Sandhu*** at para 19:

> [19] Service is a quintessentially practical consideration. The only point of service is that the defendant must get notice of the claim against it. Service is not some sort of magical or formalistic ritual that has to be followed. While civil procedure recognizes certain forms of service, unconventional forms of service that actually bring the legal process to the attention of the person being served are still effective. For example, assume that personal service is required, but when the process server arrives the defendant is not there. His wife agrees, however, to provide the documents to her husband when he returns. The next day the husband sends an e-mail, the contents of which make it clear that his wife did follow through, and that he is aware that he has been sued and served. This is effective service, even though it is unconventional.

[31] Accordingly, there are no formalistic or magical words that a self-represented person must use to be found to have accepted or acknowledged service. For example, the recipient does not need to use specific words of acceptance or acknowledgement. The crux of the question is whether the self-represented person has responded in writing that they received the document.

[32] Therefore, if the evidence illustrates, on the balance of probabilities, that the self-represented person has, in writing, positively acknowledged, confirmed, accepted or verified that they actually received the document, this will usually be sufficient to establish service under rule 11.18(1) and, therefore, rule 11.20(a).

[33] There may be unique circumstances where a written response from a self-represented litigant will be insufficient on its own to establish service, for example if the response indicates that the attached document was received but could not actually be opened, or perhaps if the recipient expressly states that they do not accept or acknowledge service in this manner (in which case an order validating service may be required). As noted, each case will depend on its facts.

[34] In this case, Luciano acknowledged receipt of the BMO Judgment on November 17, 2023 when she responded with a thank you and then asked a question about it. Further, after she retained counsel, she swore an affidavit acknowledging that she was served on November 17, 2023.

Further, the Application seeking leave to file a notice of appeal in respect of the BMO Judgment was predicated upon Luciano having been served with the BMO Judgment and the expiry of her appeal period.

[35] In all the circumstances, I find Luciano was served with the BMO Judgment on November 17, 2023. Rule 6.14(2) provides that a notice of appeal in Form 28 must be filed and served within 10 days after the judgment or order is entered and served. Therefore, the appeal period expired on November 27, 2023: *Interpretation Act*, RSA 2000 c I-8, section 22(7).

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B. If Necessary, Should the Court Exercise its Discretion to Permit Luciano to file the Notice of Appeal?

[36] The 10 day period to file and serve a notice of appeal in rule 6.14(2) may be extended pursuant to rule 13.5 and the court's discretion: ***Vizor v 383501 Alberta Ltd (Val Brig Equipment Sales)***, 2022 ABQB 5 at para 82.

[37] The applicant seeking an extension bears a heavy burden: ***Kuzik v Hagel***, 2021 ABCA 241 at para 24; ***Alberta Health Services v Wang***, 2017 ABCA 198 at para 11; ***Travis v D& J Overhead Door Ltd***, 2016 ABCA 319 at paras 5 and 16; ***Vizor*** at para 87.

[38] Alberta courts have a long history of using the test from ***Cairns v Cairns***, 1931 CanLII 471 (AB CA) in deciding whether to exercise the discretion to extend time to file an appeal: ***Vizor*** at para 83; ***Pardy v West***, 2008 ABQB 566 at paras 17-19; ***Cho v Phimsarath***, 2003 ABQB 235 at para 19.

[39] Although the ***Cairns*** factors can be described in different ways by different judges and may have evolved over time (see, for example, the discussion in ***Travis*** at paras 48-128), the core factors that guide courts in exercising its discretion to extend the time to appeal in Alberta are:

(a) a *bona fide* intention to appeal while the right to appeal existed;

(b) an explanation for the failure to appeal in time that serves to excuse or justify the lateness;

(c) an absence of serious prejudice such that it would not be unjust to disturb the judgment;

(d) the applicant must not have taken the benefits of the judgment under appeal; and

(e) a reasonable chance of success on the appeal, which might better be described as a reasonably arguable appeal.

(see, for example: ***Rock River Developments Ltd v Village of Nampa***, 2024 ABCA 42 at para 9; ***Behrisch v Behrisch***, 2024 ABCA 101 at para 12; ***Macdonald v King***, 2021 ABCA 258 at para 4; ***Lofstrom v Radke***, 2017 ABCA 211 at para 3).

[40] The ***Cairns*** factors are not determinative, do not set rigid requirements, and do not override the court's general and unfettered discretion to extend time in appropriate circumstances: ***Bank of Montreal v McLennan***, 2023 ABCA 235 at para 12; ***Macdonald*** at para 4; ***Lofstrom*** at para 3;

Rock River at para 9; ***Vizor*** at para 93. The overriding question is whether the interests of justice are served by granting the extension: ***Behrisch*** at para 12; ***Wandler v Crandall***, 2017 ABCA 115 at para 14.

[41] I consider the factors in this case below.

1. Did Luciano Have a *Bona Fide* Intention to Appeal While the Right to Appeal Existed?

[42] Luciano, in her affidavit, only stated that it was "arguable" she had an intention to appeal but attempted to do so through the unconventional means of filing for bankruptcy. I reject that notion. Filing an assignment into bankruptcy is not an appeal, so intention to file bankruptcy is not an intention to file an appeal. The relevant intended appeal in this context is the "notice of appeal in Form 28" – that is, engaging the formal process to appeal an application judge's decision under the rules.

[43] There is no evidence Luciano had a *bona fide* intention to appeal while the appeal right existed. In fact, her actions show she had an altogether different intention based on an ill-conceived strategy of accepting the BMO Judgment but attempting to use bankruptcy to eliminate it or some of its effects on her. I agree with counsel for BMO that an assignment into bankruptcy based in part on the BMO Judgment is the opposite of an intention to appeal – it is an acceptance of the BMO Judgment (or, least, part of it).

2. Did Luciano Have an Explanation for the Failure to Appeal in Time that Serves to Excuse or Justify the Lateness?

[44] Luciano did not file the Application until March 7, 2024, more than three months after being served. This is longer than the 2 month period the rules anticipate as a reasonable time for the *return* of the appeal under rule 6.14(2), let alone the *commencement* of the appeal. While the 2 month period often cannot be achieved due to the need to schedule special applications or other reasons, Luciano's delay to start the process is considered significant.

[45] It is often described that the explanation for lateness must constitute some "very special circumstances" in order to excuse or justify the lateness: ***Heath-Engel v Alberta (Human Rights Commission)***, 2024 ABCA 138 at para 7; ***Travis*** at para 8; ***Kuzik*** at para 6; ***Rai v Alberta (Labour Relations Board)***, 2019 ABCA 497 at para 17.

[46] The fact Luciano was self-represented is relevant, including in considering an explanation for the failure to appeal on time. However, that fact alone is insufficient to explain why a person fails to appeal in time, or to make an explanation a "very special circumstance". The bottom line is that self-represented litigants are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case and to comply with the *Rules*: ***Abou Shaaban v Baljak***, 2024 ABKB 28 at para 66. There is not a separate, more lenient, set of procedural rules for self-represented parties: ***Abou Shaaban*** at para 66; ***Gjergji v Hyatt Mitsubishi***, 2017 ABQB 500 at para 32; ***Lofstrom v Radke***, 2020 ABQB 122 at para 93.

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[47] In the context of rule 6.14(2), this was described by Justice Friesen (as she then was) in the context of rule 6.14(2), in ***Vizor*** at paras 85-86, citing ***Blomer v Workers Compensation Board***, 2020 ABCA 334:

> [85] The fact that the party in question is self-represented is a relevant consideration which may factor into the Court's assessment with respect to the specific factors described in ***Cairns***, as well as its general assessment of whether it is an appropriate situation in which to exercise its discretion to extend time to appeal.
>
> [86] While it is possible that in some circumstances, a party's self-represented status may explain a failure to appeal in time, our Court of Appeal has been very clear in stating that
>
>> ... there are not separate statutory regimes for persons who are represented by counsel and persons who are not. The Canadian Judicial Council has proclaimed that "[s]elf-represented persons are expected to familiarize themselves with relevant legal practices and procedures pertaining to their case". Nor are there two sets of court rules – one for persons who are represented by counsel and persons who are not. Rule 1.1(2) of the *Alberta Rules of Court* states that "[t]hese rules … govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer".
>>
>> ([***Blomer***] at para 64)

[48] A generous way to potentially characterize Luciano's explanation for failing to appeal in time is that she made an uninformed mistake, and that she should have sought to appeal before (or instead of) filing for bankruptcy. However, I am not satisfied that she has actually established on a balance of probabilities that her failure to appeal was a mistake. In any event, confusion, mistakes or misunderstanding of a pertinent rule or procedure may not constitute a special circumstance that reasonably explains a delay in filing, particularly in the absence of due diligence: ***Heath-Engel*** at para 10; ***Schulte v Alberta (Appeals Commission for Workers' Compensation Board)***, 2015 ABCA 148 at para 14; ***Adderley v 1400467 Alberta Ltd***, 2014 ABCA 291 at paras 10-12; ***Real Life Homes & Investments Ltd v Wert Homes and Investments***, 2012 ABCA 3 at para 8. However, this is not an absolute rule either: ***Macdonald*** at para 7. For example, where a party intends to appeal, then files the wrong application under a technical rule, and then the appeal period expires, this may be considered: ***AE v Alberta (Child Welfare)***, 2019 ABCA 435 at para 8; ***Gezehegn v Alberta (Appeals Commission of the Workers' Compensation Board)***, 2020 ABCA 48 at para 3.

[49] Luciano asserts that she had no knowledge that a fraud claim would presumptively survive bankruptcy. However, this is exactly what the Judge explained to her when she offered Luciano the opportunity to adjourn BMO's application to file evidence.

[50] Based on the evidence, it appears Luciano decided to proceed with bankruptcy based on the recommendation of her father. There is no evidence what his training is, but it does not appear

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he has legal training. Notwithstanding the seriousness of that choice to her, there is no evidence Luciano conducted the due diligence expected of self-represented litigants, that is, to familiarize herself with the relevant legal practices and procedures pertaining to her case and to comply with the *Rules*. There is no evidence she was unable to do that during the relevant period. It appears she simply did not do so and decided to embark upon her own strategy to relieve herself of the burden of the BMO Judgment.

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[51] Luciano has failed to establish a persuasive explanation justifying her failure to file an appeal on time.

3. Is There an Absence of Serious Prejudice Such that it Would Not be Unjust to Disturb the BMO Judgment?

[52] The relevant question in an application to extend is whether the delay in filing an appeal, rather than the existence of the appeal, will seriously prejudice the respondent or other parties: ***2003945 Alberta Ltd v 1951584 Ontario Inc***, 2018 ABCA 48 at para 37; ***Murphy v Haworth***, 2016 ABCA 219 at para 14; ***Macdonald*** at para 8.

[53] The time limits for appealing are kept short, in order to promote finality in litigation, and because the successful party is entitled to the fruits of the judgment under appeal: ***Macdonald*** at para 8. It has been noted that the test for extending time for appeal is premised on the importance of the finality of judgments, keeping litigation speedy, and public certainty of time periods: ***Bank of Montreal v McLennan*** at para 11.

[54] The longer the delay, the greater the potential for serious prejudice. Short delays of a matter of days or a couple weeks are less likely to engage prejudice: ***Macdonald*** at 8. However, the expectation of finality deserves greater judicial protection with the passage of time and lengthy delays are much more likely to involve serious prejudice: ***Travis*** at para 30; ***Holden v Holden***, 2022 ABCA 341 at para 53.

[55] The potential for serious prejudice to BMO in this case was not materially explored in argument. If there is a lost opportunity to have the BMO Judgment survive Luciano's bankruptcy, it appears that would be caused, if at all, by the appeal and not the delay. It is conceivable that the delay occasioned to the bankruptcy process which might be caused by an appeal, could cause prejudice. However, the current status of the Luciano bankruptcy is not fully before me and I make no findings in that regard.

[56] As noted, the over 3-month delay is lengthy.

[57] On balance, without more information, I find there is an absence of serious prejudice to BMO if a late appeal is permitted.

4. Did Luciano take the Benefit of the Judgment Under Appeal?

[58] As noted, on December 4, 2023 Luciano filed an assignment into bankruptcy under section 49 of the *BIA*. To do so, Luciano provided a sworn statement in the prescribed form showing her property and the names and address of all of her creditors: *BIA*, section 49(2). Her assignment into bankruptcy constituted an act of bankruptcy and immediately gave rise to a stay of proceedings

preventing her creditors from having a remedy against her or her property: *BIA*, section 69.3; ***Yehya v Thomas***, 2019 ABCA 164.

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[59] As part of her assignment into bankruptcy, Luciano signed a Form 79 indicating unsecured liabilities including those from the BMO Judgment and the AHOC Judgment. While they were a very significant component of her liabilities (together with student loans), they were not her only liabilities, and she has not asserted she would have or could have assigned herself into bankruptcy without the judgments against her in this action. In fact, she deposed that "if the fraud declaration in relation to BMO's judgment is not revoked, my bankruptcy filing will have been pointless". The reality is that, in reliance (at least in part) on the BMO Judgment, Luciano obtained a special statutory status under the *BIA* and, in doing so, obtained a stay of proceedings against BMO, AHOC and her other creditors together with the possibility of compromise of some of her unsecured liabilities.

[60] I find Luciano took the benefit of the BMO Judgment by using it to file an assignment into bankruptcy. It is only after realizing that this strategy may have been pointless that she sought to appeal.

5. Does Luciano's Appeal Have a Reasonable Chance of Success?

[61] The reasonable chance of success standard on an application for an extension of time is a low bar, requiring an applicant to demonstrate the appeal is arguable (requiring only that it has "some merit" and is not hopeless or frivolous, not that it is a certainty or even likely victory), bearing in mind the applicable standard of review: ***Esfahani v Samimi***, 2023 ABCA 220 at para 19; ***Andres v Andres***, 2023 ABCA 42 at para 28; ***Gezehegn*** at para 7; ***Balisky v Balisky***, 2019 ABCA 404 at para 26.

[62] The standard of review for the proposed appeal is correctness and would likely involve a *de novo* hearing because Luciano could likely file relevant and material evidence that was not before the Judge: ***Kadco Construction Inc v Sterling Bridge Mortgage Corp***, 2021 ABCA 52 at para 11; ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30; rule 6.14(3).

[63] Luciano seeks to appeal the Judge's fraud declaration.

[64] Civil fraud or fraudulent misrepresentation requires (a) a false representation by the defendant; (b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (c) the false representation caused the plaintiff to act; and (d) the plaintiff's actions resulted in a loss: ***Bruno Appliance and Furniture Inc v Hryniak***, 2014 SCC 8 at para 21; ***Toronto Dominion Bank v Wilde***, 2022 ABCA 128 at paras 38-39; ***Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd***, 2017 ABCA 378 at para 21.

[65] Luciano's affidavit describes the circumstances in which she executed the documentation that led to BMO advancing her money to purchase the Vehicle as including the following. Luciano and her boyfriend attended AHOC with two four-year-old children. They were there for hours. They were asked numerous questions by AHOC about their financial situation and answered truthfully. They were expressly advised by AHOC that "we could rely on our joint income" in the paperwork "notwithstanding that I would be the sole applicant for credit". AHOC prepared the

documentation for her to review and sign. Luciano believed at the time the paperwork she signed was accurate based on her dealings with AHOC, but now acknowledges that the documentation misdescribed her monthly income and that, in hindsight, she should have reviewed the paperwork more thoroughly.

[66] If the appeal is allowed to proceed, key issues on appeal would be whether Luciano's conduct was reckless and whether the matter is appropriate for summary determination.

[67] The proper approach to summary dispositions in Alberta has been confirmed by the Court of Appeal in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47. Credibility can leave genuine issues for trial which are "not amenable to" or "impossible to resolve" in a summary adjudication: ***Weir Jones*** at paras 35, 38; ***Condominium Corp No 0321365 v Cuthbert***, 2016 ABCA 46 at para 28; ***Nafie v Badaway***, 2015 ABCA 36 at para 106; ***Barter v Barter***, 1996 ABCA 248 at para 8; ***Walker v Walker***, 2001 ABCA 106 at paras 3-5. Courts are particularly careful in granting summary judgment based on fraud where credibility is at issue: ***Precision Drilling*** at paras 26-27.

[68] Luciano's evidence, and its conflict with other evidence about how the paperwork was prepared and what was said in that process, has established that her proposed appeal of the summary determination of the declaration of fraud would have a reasonable chance of success. She has a reasonably arguable proposed appeal.

6. Conclusion re Extending Time to Appeal

[69] If AHOC's conduct as set out in Luciano's affidavits were ultimately found to be true, it would be of serious concern to the Court and, as noted, would give rise to a reasonably arguable appeal. AHOC denies Luciano's evidence and I need not and make no findings resolving that evidentiary conflict. However, Luciano's evidence and strength of the potential appeal, together with the lack of serious prejudice, are factors in support of granting leave to file a late appeal.

[70] However, Luciano's lengthy delay and overall conduct in this litigation process does not support leave to file a late appeal. Luciano seeks to have her steps to file for a voluntary assignment into bankruptcy effectively ignored after those steps prove unsuccessful, and to have a second chance to try a different strategy months later. That is not how litigation normally works. Had Luciano exercised reasonable due diligence, including seeking appropriate advice from available resources (including potentially from available *pro bono* legal services), she likely would have engaged in a different strategy than she did. However, she did not do that, and she made a strategic decision to choose bankruptcy instead of an appeal.

[71] In all the circumstances, notwithstanding some factors ~~her~~ Luciano's favour, it would not be appropriate, or in the interests of justice, to create or endorse a more lenient regime for Luciano than other litigants because she is self-represented. Like all litigants, self-represented parties are entitled to make litigation strategy decisions and, also, to experience the consequences of those decisions even if they don't have the desired result.

[72] On balance, I decline Luciano permission to file a late appeal of the BMO Judgment.

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V. Conclusion

[73] The Application is dismissed.

[74] I have considered general costs principles, including as I recently summarized them in ***Abou Shaaban v Baljak***, 2024 ABKB 125 at paras 11-20. I find that BMO is entitled to costs of the Application in the amount of $675 based on Column 1 of Schedule C, plus disbursements and GST. I have considered whether to award costs for the supplemental written submissions and have decided it is not appropriate in these circumstances.

[75] In my view, it is not fair or appropriate to award costs to AHOC because, even though its interests may have been engaged in the Application, it was not a respondent in the Application, its submissions did not materially add to the Court's deliberations, and it failed to file its affidavit of service of the AHOC Judgment which partly caused the Court's request for supplemental submissions. Further, the interests of justice do not warrant Luciano paying two sets of costs of the Application and it is more appropriate that BMO should be entitled to its costs given that it is the respondent and was not involved in the preparation of the paperwork at issue in the action. AHOC is not awarded any costs of the Application.

Heard on the 23rd day of April 2024; supplemental written submissions received on May 3rd and May 16th, 2024.
Dated at the City of Calgary, Alberta this 28th day of May, 2024.

M.A. Marion
J.C.K.B.A.

Appearances:

Matthew Prieur
for Katelyn Luciano

Anthony J. Di Lello
for Bank of Montreal

Brendan Hill
For Airdrie House of Cars Inc.

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Corrigendum of the Reasons for Decision
of
The Honourable Justice M.A. Marion

Typographical errors corrected at paragraphs 14, 71 and 75.

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