Court of King's Bench of Alberta

Citation: Stuart Financial Corporation v Olympia Trust Company, 2024 ABKB 527

Date: 20240904
Docket: 1101 08126
Registry: Calgary

Between:

Stuart Financial Corporation on behalf of itself and all other members of a class

Plaintiff

- and –

Olympia Trust Company, Olympia Financial Group, Fraser Milner Casgrain LLP, Bishop & McKenzie LLP, Costa Koraal Investment Corp., David Jones, Vinny Aurora, Dave Humeniuk, Vincenzo De Palma and Milton Kiehlbauch

Defendants

Reasons for Decision
of the
Honourable Justice M.H. Hollins

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[1] Mr. Kiehlbauch, the Applicant and a Defendant in Action 1101 08126 (the Fraud Action), seeks to set aside a Default Judgment issued against him on November 19, 2019, in the amount of $2,208,844.

[2] The Fraud Action was commenced against a number of parties in 2011, along with a related action (Action 1101 08125). Mr. Kiehlbauch was noted in default in 2013 but the Default Judgment against him was not entered until 2019 and not served on him, substitutionally, until 2021. At that time, Stuart Financial began to take steps to enforce its judgment, beginning with the registration of a writ against real property registered to Mr. Kiehlbauch.

[3] Mr. Kiehlbauch insists that he was not aware of the existence of the Actions nor the issuance of the Default Judgment against him until July of 2021 when he was notified of the writ proceedings in respect of his house. From that time, Mr. Kiehlbauch has attempted to resist

enforcement of the Default Judgment and has applied, in various ways, to set aside the Default Judgment.

[4] The Respondent, Stuart Financial Corporation, says that there is no jurisdiction to hear this application because it is *res judicata* as a result of Mr. Kiehlbauch's prior court applications.

[5] Because Mr. Kiehlbauch was self-represented for most of his prior applications, in some cases proper procedure was not followed. In other appearances, the presiding Justices simply dealt with other facets of his applications but not with the issue of setting aside the Default Judgment.

[6] As a result, the question before me is whether or not Mr. Kiehlbauch is estopped from bringing a fresh application to set aside the Default Judgment, given that this relief was previously sought but never actually addressed.

[7] For the reasons that follow, I find that neither issue estoppel nor action estoppel apply to this application. Mr. Kiehlbauch should be allowed to present his arguments on setting aside the Default Judgment on the conditions I set out at the conclusion of these Reasons.

Background

[8] The chronology of this litigation is as follows (all references are to the Fraud Actions unless otherwise indicated):

June 9, 2011	Statement of Claim filed.
June 11, 2012	Time extended for service of Statement of Claim.
March 14, 2013	Filing of Affidavit of Service of H. Tarras (sworn June 25, 2012) swearing to personal service of the Statement of Claim on Mr. Kiehlbauch on June 22, 2012.
March 14, 2013	Mr. Kiehlbauch Noted in Default.
November 19, 2019	Order for Default Judgment ($2,208,844) Justice Poelman.
May 26, 2020	Stuart Financial enters November 19, 2020 Order for Judgment.
July 26, 2021	Stuart Financial obtains an Order for Substitutional Service on Mr. Kiehlbauch from (then) Master Prowse, takes initial steps to register writ for Judgment against Mr. Kiehlbauch's property.
August 25, 2021	Mr. Kiehlbauch applies on an *ex parte*, emergency basis, for a stay of enforcement pending a proceeding to set aside the Default Judgment in the related (1101 08125) Action. Justice Eamon issues a Desk Endorsement dated August 26, 2021, dismissing the application based on lack of evidence and the necessity of notice to the Plaintiffs.
November 12, 2021	Mr. Kiehlbauch files an Originating Application in a new proceeding (Action 2101 13812) seeking an injunction to stop Stuart Financial from taking action on their judgment,

	removal of the writ and for the "setting aside of any actions made by Stuart Financial."
December 17, 2021	The application in Action 2101-13812 is heard by Justice Devlin in morning chambers. Rule 9.15 is not raised nor discussed. Justice Devlin makes the (very legitimate) point that he cannot decipher what relief or what grounds are being advanced by Mr. Kiehlbauch, who is self-represented. The Originating Application is dismissed.
June 10, 2022	Mr. Kiehlbauch brings an application in his Mother's Estate proceeding (Action 2201-05625), apparently to remove the writ from his house on the basis of his mother's alleged interest therein. The application was struck by Justice Dario as Mr. Kiehlbauch did not appear. He says he could not call in due to technical difficulties, which difficulties were noted by Justice Dario in Chambers that day.
August 5, 2022	Mr. Kiehlbauch applies to Applications Judge Prowse, now represented by counsel, to stop the sale of his property and also for "an order setting aside the default judgment against Milton Kiehlbauch in Action Nos. 1101-08125 and 1101-08126." Prowse, AJ orders the sale to proceed and the proceeds of sale to be paid into Court.
September 26, 2022	Justice Armstrong grants an Order relating to vacant possession of the home.
October 4, 2022	Justice Marion grants an Order relating to vacant possession of the home.
October 7, 2022	Justice Wilson grants an Order relating to vacant possession of the home.
October 26, 2022	Mr. Kiehlbauch's house is sold.
January 18, 2023	Proceeds are paid into Court ($71,977.80).
March 25, 2024	Mr. Kiehlbauch files this Application to set aside the Default Judgment.

[9] Stuart Financial argues that Mr. Kiehlbauch has had four prior applications to set aside the Default Judgment, before Justices Devlin, Eamon and Dario and Applications Judge Prowse. Stuart Financial acknowledges that the issue of setting aside the Default Judgment was never argued nor decided but says that the law on estoppel includes issues that could or should have been raised at a prior hearing, not just those that were directly addressed.

Is Mr. Kiehlbauch Estopped From Seeking to Set Aside the Default Judgment?

1. Does Estoppel Apply to Issues Not Argued?

[10] There are two types of estoppel, cause of action estoppel and issue estoppel. Cause of action estoppel bars a party from pleading a cause of action which has already been decided in a prior proceeding. Issue estoppel bars a party from raising issues which have already been decided, even if the cause of action is different; *Angle v Minister of National Revenue*, [1975] 2 SCR 248 at p.254.

[11] Issue estoppel has three requirements: (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised.

[12] With respect to the first requirement, historically it was said that the issue decided must be "fundamental to the decision arrived at," not one arising collaterally or incidentally in the earlier proceedings.

[13] However, more recent cases suggest that *res judicata* may also apply to bar the hearing of issues that *could have been* decided in a prior proceeding even if they were not. Stuart Financial relies on that approach to say that Mr. Kiehlbauch should be estopped from bringing this application because his prior applications sought to set aside the Default Judgment.

[14] In *Thai v Kernick*, Justice Poelman of this Court had refused to hear an application by a woman seeking relief concerning the allocation of parking stalls in a condominium complex. He found that the application before him mirrored a prior application by the same woman against seeking essentially the same relief, although she had added some additional claims of improper conduct by particular condo board members.

[15] On appeal from that decision, the Court of Appeal upheld Poelman, J, saying as follows:

> A court may also apply issue estoppel to determinations of fact, law, and mixed fact and law that were essential to earlier conclusions: *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, para 24, [2001] 2 SCR 460. As noted in *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2021 ABCA 153, paras 56–61, [2021] AJ No 616 (QL), litigation can be found to be barred by the finality policy of the administration of justice respecting issues either directly or implicitly raised or that could have been raised: *Henderson v Henderson*(1843), 3 Hare 100, 67 E.R. 313 (Eng VC) at 319; *Raincoast Conservation Foundation v Canada (Attorney General)*,2019 FCA 224, para 24, [2019] FCJ No 1002 (QL).
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> *Thai v Kernick*, 2021 ABCA 236 at para 20.

[16] Although this passage says that issue estoppel may apply to issues that "could have been raised", it also describes such issues as those "essential to earlier conclusions". Furthermore, later in the *Thai* decision, the Court of Appeal says:

> For a bar by finality, the question must have essentially been bound up in what was earlier determined: *574095 Alberta Ltd v Hamilton Brothers Exploration Co*, 2003 ABCA 34, para 52, 320 AR 351, citing *Danyluk*, para 54.
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> *Thai v Kernick* at para 23

[17] Thus, while issue estoppel may operate to bar further arguments even on an issue that was not directly argued or decided earlier, the prior decision must necessarily have involved consideration and adjudication of that issue. In the case at bar, all the applications that dealt with removal of the Stuart Financial writ could have been, and were, decided without any consideration of the validity of the underlying judgment. This is not atypical, that the court would be asked to stay some specific enforcement step(s) while deferring the issue of setting aside the underlying judgment.

[18] There have been subsequent cases under the "cause of action estoppel" umbrella which have expanded the application of *res judicata* to claims or defences that could have been raised but were not. For example, in *ATB v Opsteen*, the Court of Appeal upheld the dismissal of an application to amend a counterclaim on the basis that the granting of the judgment in the claim proper obviated any further counterclaims for breach of contract; *ATB v Opsteen*, saying as follows:

> This branch of estoppel by res judicata applies not only to subsequent claims or defences based on matters specifically decided in the prior action but also to every claim or defence which could properly have been raised in those proceedings. In Henderson v. Henderson (1843), 3 Hare 100, [1843-60] All E.R. Rep. 378, Wigram V.C. said at pp. (All E.R.) 381-82:
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> > The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time [emphasis in the original].
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> This principle was adopted in *Abacus Cities Ltd. (Trustee of) v. Bank of Montreal* (1987), (sub nom. *Re Abacus Cities Ltd.*), 55 Alta. L.R. (2d) 123 [[1988] 1 W.W.R. 78], where this Court quoted with approval (at p. 129) the following passage from *Green v. Weatherill*, [1929] 2 Ch. 213 (after noting that it had been previously accepted in *Maynard v. Maynard*, [1951] S.C.R. 346):
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> > ... the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.
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> *ATB v Opsteen*, 2012 ABCA 153 at para 17

[19] The *Abacus Cities* case involved an insolvency proceeding. The person originally appointed as a receiver was later replaced with another receiver (a corporation), which later became a trustee in bankruptcy (the Trustee). The Trustee's authority was made retroactive to the date of the first appointment. Much later, the Trustee commenced an action against the initial receiver for damages in trespass, based on improprieties and alleged conflicts that existed at the time of that initial appointment; *Abacus Cities Ltd (Trustee of) v Bank of Montreal*, 1987 ABCA 166.

[20] The chambers judge granted an application to dismiss the Trustee's action, saying that its appointment as a replacement receiver would not have happened if the alleged improprieties had been raised at that time. He therefore found the Trustee was estopped from proceeding with its action, notwithstanding the Trustee argued that there was some information which it only obtained later in time.

[21] Even though the Court of Appeal corrected the chambers judge's conclusion that even a fraudulently obtained order could not be set aside, it still upheld his decision. It did so on the basis that the Trustee had all the necessary information at the time of that initial appointment to raise those issues *vis-a-vis* the initial receiver at that time – when the discretion to appoint or not appoint could have been exercised – but the Trustee had not done so. The Court of Appeal called this impermissible litigation by instalments.

[22] While these cases incontrovertibly establish that a party can be estopped from advancing causes of action or arguments that could have been raised earlier, whether they were or not, the circumstances under which the estopped party failed to do so are central to the decision to apply the doctrine. In each of these cases, there is, first, an element of unfairness in allowing a party to continue to litigate (akin to collateral attack and/or abuse of process) and secondly, a connection between the arguments advanced and the implied inclusion of those arguments in the prior decisions.

[23] For example, in *ATB v Opsteen*, in order for ATB to obtain its foreclosure order, there was a necessary finding that it had the contractual right to do so. In *Abacus Cities*, the party that could have blocked the appointment of the Trustee did not attempt to do so, the implication being that the appointment was proper. In my view, we ought not to dispense with this part of the analysis, namely was the issue or claim now sought to be estopped necessarily part of the prior decision, as described in the more recent Court of Appeal decision in *Thai v Kernick* (see paragraph as 14-16 above).

2. What Does this Mean for Mr. Kiehlbauch?

[24] Mr. Kiehlbauch has been in front of this court on multiple occasions in multiple actions, arguing that Stuart Financial should not be able to enforce its Default Judgment against him. Although the criteria for setting aside a default judgment have never been argued nor considered, that relief was included in some, but not all, of his pleadings.

[25] Should he be estopped from the present application, which squarely seeks that relief again? No. In my view, it would be manifestly unfair in view of circumstances of each of his appearances in court, as I will explain.

[26] His first application was the *ex parte* application dismissed by Justice Eamon made in the 1101-08125 Action. The Desk Endorsement issued makes no decision on whether this Default Judgment ought to stand or not but that it could not be done in that manner, namely without

notice to the judgment creditor. Mr. Kiehlbauch's drafting can be fairly described as disorganized and inflammatory, both to the parties and to the Court.

[27] Having been told that he needed to give notice of his applications, Mr. Kiehlbauch then commenced a new action to remove the writ on his property and stay further enforcement actions. He should have simply brought an application in this existing Action but, as noted, he was still unrepresented. His material was confusing and insulting to the parties and to the Court. Justice Devlin dismissed the motion but without consideration of the tests for setting aside a default judgment under Rule 9.15.

[28] The next application was again a separate application, this one brought in surrogate proceedings involving Mr. Kiehlbauch's mother and again returnable in morning chambers, this time before Dario, J. As she noted several times, there were technical difficulties that morning which were making it difficult for people to call or log in virtually. Mr. Kiehlbauch was unable to reach the courtroom, despite trying to, and Justice Dario deferred and then dismissed his application. There is no way for a judge in a courtroom to know who is trying, unsuccessfully, to call in and therefore Justice Dario had no choice but to dismiss the application of someone not present to speak to it. However, that also means it is obvious that that particular court appearance involved no consideration of the merits of the application.

[29] The next application was filed, now with the assistance of counsel, in the proper action. An application was brought in Applications Judges' Chambers for interim relief to block the sale of the Kiehlbauch property and discharge the writ. Although the application also referenced setting aside the Default Judgment, it expressly sought interim relief "pending resolution" of the set aside application and the supporting Affidavit of Mr. Kiehlbauch made it clear that he was reserving the issue of the Default Judgment to argue at a later date, after the sale of the property was dealt with.

[30] This is, in fact, how Applications Judge Prowse dealt with the matter. While he made a few references to Mr. Kiehlbauch's wanting to set aside the Default Judgment and Stuart Financial's position that it was *res judicata*, he repeatedly said that the earlier transcripts and the Affidavit of Service of the claim (none of which he had), would have to be reviewed in order to address that underlying issue. He focused on the sale of the property, which he ultimately allowed although he directed the money be paid into court to preserve Mr. Kiehlbauch's right to argue about the disposition thereof.

[31] Not only was the test for setting aside the Default Judgment not addressed, it was expressly left open for future argument.

[32] The result of all these applications is that the issue of whether or not Mr. Kiehlbauch satisfies the well-known and discreet tests for setting aside a default judgment have never been made, heard or adjudicated. A person seeking to set aside a default judgment must establish: (1) he has an adequate explanation for failing to defend; (2) whether there is unexplained delay in applying to set aside the default judgment; and (3) whether there is a meritorious defence, sufficient to raise triable issues; *David M Gottlieb Professional Corporation v Nahal*, 2011 ABQB 355 at para 68.

[33] The "setting aside" tests were not, expressly or impliedly, part of the many futile attempts that Mr. Kiehlbauch made to fight the sale of his house and so those decisions cannot estop the consideration of the "setting aside" factors now. Given that there is a sworn Affidavit of Service

of the original claim on the file, it may be an uphill road for Mr. Kiehlbauch to meet those tests, but he should be given a chance to address them.

Conclusion

[34] In my view, Mr. Kiehlbauch ought to have an opportunity to advance those arguments and Stuart Financial should have an opportunity to respond to the merits, or lack thereof, on the substance.

[35] Because I have spent the time to reconstruct this rather tortured history, I will seize myself with hearing Mr. Kiehlbauch's set aside application and will contact counsel regarding that scheduling and directions on what may and may not be filed in respect thereof. Costs of this application will be reserved to the adjudication of that hearing.

Heard on the 19th day of June, 2024.
Dated at the City of Calgary, Alberta this 4th day of September, 2024.

M.H. Hollins
J.C.K.B.A.

Appearances:

Brent Robinson
for the Applicant, Milton Kiehlbauch

Ivan Bernardo, KC
for the Respondent, Stuart Financial Corporation