Court of Appeal for Saskatchewan

Docket: CACV4230

Citation: *4 Star Ventures (2012) Ltd. v 1983283 Ontario Inc. (Secure Digital Markets)*, 2024 SKCA 82

Date: 2024-08-28

Between:

4 Star Ventures (2012) Ltd.

Appellant
(Plaintiff)

And

1983283 Ontario Inc. o/a Secure Digital Markets, Innovation Credit Union, Yaakov Eizicovics and Gropper Law PC

Respondents
(Defendants/Plaintiffs and Defendants by Crossclaims)

Before:	Caldwell, Schwann and Barrington-Foote JJ.A.
Disposition:	Appeal allowed
Written reasons by: In concurrence:	The Honourable Mr. Justice Caldwell The Honourable Madam Justice Schwann The Honourable Mr. Justice Barrington-Foote
On appeal from: Appeal heard:	2023 SKKB 121, Swift Current December 6, 2023
Counsel:	Jean-Pierre Jordaan for 4 Star Ventures (2012) Ltd. Janine Lavoie-Harding and Cole Wilson for 1983283 Ontario Inc. o/a Secure Digital Markets Paul Olfert and Katie Newman for Innovation Credit Union (watching brief only) No one appearing for Yaakov Eizicovics and Gropper Law PC

Caldwell J.A.

[1] In *4 Star Ventures (2012) Ltd. v Eizicovics*, 2023 SKKB 121 [*Decision*], a Court of King's Bench Chambers judge granted summary judgment pursuant to Rule 7-5 of *The King's Bench Rules* [*Rules*] in favour of 1983283 Ontario Inc., which carries on business under the name Secure Digital Markets [SDM]. He also summarily dismissed several related claims, including an action that 4 Star Ventures (2012) Ltd. [Appellant] had brought against SDM and others. In the overall result, he ordered that funds held in court be released to SDM.

[2] The litigation concerns money that a non-party to the proceedings, Denzel Blackett, had fraudulently taken from the Appellant and used to acquire cryptocurrency from SDM. In the *Decision*, the Chambers judge found that SDM was entitled to keep the money as a *bona fide* purchaser for value without notice who had acquired the funds in the ordinary course of its business of selling cryptocurrency. The Appellant says that the Chambers judge erred when granting summary judgment to SDM principally by striking or rejecting relevant evidence and by determining that there was no genuine issue requiring a trial in the dispute over the money.

[3] I conclude that the Chambers judge erred in law by rejecting and overlooking evidence relevant to the issue of when SDM learned that the funds it received from Mr. Blackett might have been obtained by him through fraud. This conclusion vitiates the Chambers judge's determination that there was "no genuine issue requiring a trial" with respect to SDM's claim to the funds (at para 57). Since this means that the matters at issue must be remitted to the Court of King's Bench, I will only briefly address the details of the litigation and the evidence in the court record that underpins my reasoning in this appeal.

[4] On October 16, 2019, the Appellant noticed that $110,673.00 had been transferred the previous day from its account at Innovation Credit Union [Innovation CU] without its authorisation. The money went into a Bank of Montreal [BMO] account in the name of "D&B General Mechanical Services", which was a business name used by Mr. Blackett. He was later charged criminally in connection with the transaction, but he has never been a party to this civil litigation.

[5] Between October 15 and 17, 2019, Mr. Blackett used $103,932.50 [Funds] of the money he had stolen to acquire 9.6823 bitcoins from SDM. GlobalxChange, an online digital-asset transaction broker, had put Mr. Blackett in touch with SDM, and it had brokered the Bitcoin purchase-and-sale transaction between them. The transaction involved a wire transfer of the Funds on October 16, 2019, from Mr. Blackett's BMO account to the Toronto Dominion Bank [TD Bank] trust account of Gropper Law PC [Gropper], a law firm acting for SDM.

[6] On October 17, 2019, SDM advised GlobalxChange that it had received the Funds and would sell bitcoins to Mr. Blackett. Also on October 17, 2019, SDM transferred 9.6823 bitcoins to Mr. Blackett's "Bitcoin wallet". Six days later, on October 23, 2019, BMO formally notified SDM that it was recalling the Funds due to Mr. Blackett's alleged fraud. At this point, the Funds were still in Gropper's trust account, where they remained until TD Bank paid them into court in these proceedings.

[7] One of the key issues that the Appellant had raised before the Chambers judge when responding to SDM's application for summary judgment was whether SDM knew that the Funds had been obtained by fraud when it transferred the bitcoins to Mr. Blackett's wallet. In the *Decision*, the Chambers judge determined that the Appellant's equitable claims to the Funds were defeated by the fact that SDM had acquired the Funds in good faith and for value *without notice of the fraud*. The Appellant argues that the Chambers judge erred in reaching that conclusion, *inter alia*, because SDM had failed to establish that it did not have knowledge that Mr. Blackett had obtained the Funds through fraud when it transferred the bitcoins to him. In the *Decision*, the Chambers judge dismissed this argument when setting out his findings of fact:

> [25] … Secondly, I accept Mr. Mueller's [Chief Compliance Officer of SDM] evidence that SDM paid out the Bitcoin to Mr. Blackett and thought all was well and at this point, just wants to be paid the Funds held in trust. Finally, *since much of Ms. Lloyd's [director/officer of the Appellant] evidence has been struck, there is nothing to support 4 Star's argument contained in it's brief of law that seems to be an attempt to provide expert evidence instead of legal argument*. In the end, I find this approach to have no merit.
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> [26] Mr. Mueller deposed that SDM was "not a party to Mr. Blackett's fraudulent scheme, nor had knowledge of the fraudulent scheme" (para. 32, Mueller affidavit). Mr. Mueller went on to depose that "on October 23, 2019, six days after the funds were deposited and the Transaction was completed, SDM was notified by BMO that the Funds wire transferred to Gropper's TD account were being recalled as being possible fraudulent" (para. 18, Mueller affidavit).
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> [27] In my view, *the above facts are not in issue. I find SDM did not have notice of the theft until well after the horse had left the barn—October 23, 2019—and there is no*

> *evidence that SDM in any fashion colluded with Mr. Blackett to perpetrate a fraud on 4 Star*. I also conclude that SDM sold to Mr. Blackett 9.6823 Bitcoin for a sale price being the same amount as the Funds. Finally, I am satisfied that all the Bitcoin went into Mr. Blackett's hands and unfortunately, has disappeared into the untraceable world of cryptocurrency.
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> (Emphasis added)

[8] As noted, the Chambers judge's finding that "SDM did not have notice of the theft until well after the horse had left the barn" (*Decision* at para 27) underpins his assessment and rejection of the various claims in equity that the Appellant had asserted over the Funds (i.e., constructive trust, unjust enrichment and the equitable remedy of tracing), thereby removing any doubt about whether there was a genuine issue requiring a trial and any obstacle to the granting of summary judgment in favour of SDM. As is also apparent from his reasons, the Chambers judge concluded that the timing of SDM's knowledge of the fraud was not in issue because he had rejected or struck all of the Appellant's evidence that was relevant to that question. However, as I will briefly explain, I conclude that the Chambers judge erred in law by rejecting one of the Appellant's affidavits and by overlooking other relevant evidence in reaching this conclusion.

[9] It is important to begin with an understanding of the basis upon which SDM sought summary judgment in this litigation. It stated in its grounds for applying for summary judgment that "the evidence is clear that", among other things, "On October 16, 2019, SDM received the Funds via wire-transfer from [Mr. Blackett's] BMO Bank Account". SDM said that it "deposited the Funds in the bank account of Gropper Law PC, SDM's legal counsel at the time, held with the Toronto Dominion Bank". SDM's application and the affidavit of its principal, Ryan Mueller, suggest – but do not state – that SDM deposited the Funds in its lawyer's trust account after it had transferred the bitcoins to Mr. Blackett's wallet. Markedly, these statements do not appear to be consistent with Exhibit "D" to Mr. Mueller's affidavit. That exhibit is BMO's "Requisition for Wire Transfer" recording the instructions it received from Mr. Blackett to transfer the Funds into an account at TD Bank held by Gropper. That is, according to BMO's business records, it appears that Gropper received the Funds directly from BMO.

[10] However, the Chambers judge accepted an admission, declared in the hearing before him by SDM's counsel, that "there had been an error made in the drafting of paragraphs 14 and 16 of the Mueller affidavit" and also in SDM's brief of law, and that the Mueller affidavit "should have

read that Mr. Blackett (and not SDM) deposited the wire transfer funds into the trust account of Gropper Law PC" (*Decision* at para 21). Addressing this circumstance in the *Decision*, the Chambers judge wrote:

> [22] I accept SDM's counsel's explanation that this was a mistake and that Exhibit "D" sets out the actual transaction. Mr. Blackett sent the money from his BMO bank account directly to the Gropper Law PC trust account.
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> [23] To clarify this further, *I am satisfied that Gropper Law PC received into that law offices' TD trust account on October 16, 2019, the money sent by Mr. Blackett* (para. 15, Mueller affidavit).
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> [24] *Mr. Mueller deposed that on October 17, 2019, SDM told GlobalxChange that Mr. Blackett's money had arrived and that SDM would sell to Mr. Blackett, an equivalent market value of Bitcoin being 9.6823 Bitcoin for the Funds he had deposited in Gropper Law PC's TD trust account* (para. 3(3), Exhibit "A" – Mueller reply affidavit sworn April 17, 2023). The Bitcoin went to Mr. Blackett's "wallet" (para. 3d, g and Exhibit "A", Mueller affidavit).
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> (Emphasis added)

[11] Notably in this regard, the Appellant had sought to put the question of SDM's knowledge directly at issue in this proceeding in part through the affidavit of Emily Kroeker, sworn May 10, 2023 [Kroeker Affidavit]. The Appellant also proffered an affidavit, which had been sworn on April 18, 2023, by the Appellant's principal, Laurie Lloyd, that tended to support the Appellant's position on the issue of SDM's knowledge [Lloyd Affidavit], which I will address later in this judgment.

[12] Importantly, exhibited to the Kroeker Affidavit was a carbon-copy of correspondence dated May 11, 2022, from SDM's legal counsel to Innovation CU's legal counsel [Undertakings Letter]. The letter contains responses to undertakings given by Mr. Mueller in the course of his questioning for discovery by legal counsel acting for Innovation CU. In the letter, counsel for SDM disputed an argument by Innovation CU's lawyers that no solicitor-client privilege existed between SDM and Gropper and Yaakov Eizicovics, who is a lawyer with Gropper. Nevertheless, SDM's counsel advised Innovation CU's counsel that, "in the interest of avoiding unnecessary additional legal proceedings", they had spoken with Mr. Eizicovics and had received his authorisation to disclose, *inter alia*, his "verbatim comments" on certain matters. The second of those "verbatim comments" was that:

> 2. There is no solicitor's file for this issue. The funds hit our account, and were frozen by the bank shortly thereafter *(in fact, my recollection is that by the time we noticed them*

> *they were already frozen).* I never met or had contact with the party that sent the funds, and there was no advance notice that this transaction was happening.
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> (Emphasis added)

[13] The Chambers judge rejected the Kroeker Affidavit principally due to it having been late filed, although he also commented that it should not have been submitted for filing because it had been sworn by an employee of the Appellant's legal counsel. Further, he agreed with SDM's counsel that the exhibited letter was "irrelevant in any event", and he said that the letter "displays at least double hearsay and the probative value of what Mr. Eizicovics is purported to have said suffers accordingly" (*Decision* at paras 9 and 11). He also stated that he would have "placed little weight on [Mr. Eizicovics's] comments as the wording is rather vague" (at para 11).

[14] Among its arguments in this appeal, the Appellant alleges that the Chambers judge erred by finding that the Undertakings Letter was not relevant to a matter at issue in the proceedings. It interprets the letter as "strong evidence speaking to the knowledge of Mr. Eizicovics of the stolen funds and when he became aware of the stolen funds". The Appellant further argues that the letter "essentially formed part of the pleadings", since it was a response to undertakings and that SDM had waived any objection to hearsay.

[15] I begin by addressing the Chambers judge's late-filing rationale for rejecting the Kroeker Affidavit. Rule 13-38(3) provides that an affidavit filed "after the deadline set out in these rules or set by order of the Court must not be used without leave of the Court". The scheduling order for this proceeding required all respondents who intended to oppose SDM's summary judgment application to "file their opposing affidavits on or before 26 days prior to the Hearing Date". It also permitted SDM to file "any response to opposing affidavits on or before 20 days prior to the Hearing Date". Although the Chambers judge misunderstood when the Kroeker Affidavit had been sworn, there is no doubt that the Appellant sought to file it after the court-imposed filing deadline and therefore required the Chambers judge's leave to do so.

[16] It is trite to say that the interests of justice presumptively require that all relevant information be placed before the court. Therefore, a judge assessing a party's request for leave to late file an affidavit should take into account more than simply the fact that the affidavit was filed out of time. Judges should consider several factors including the reasons for the delay, the extent or seriousness of the delay, the intrinsic worth of the evidence, any prejudice that might befall the

opposing party by late admission of the affidavit into evidence, and how anticipated prejudice might be remedied or mitigated. By intrinsic worth, I mean the relevance, admissibility and potential use by the court of the evidence in question. Of course, the weight to be given to any of these factors in the balance of determining whether it is in the interests of justice to admit a late-filed affidavit would depend on the context in which the request for leave is made.

[17] In this case, there does not appear to be any palpable error in the facts upon which the Chambers judge relied when rejecting the Appellant's request for leave to late file the Kroeker Affidavit. However, in my assessment, the legal effect of those facts does not support the denial of leave in this case.

[18] Regardless of the weight that might be given to it, the Undertakings Letter is relevant evidence because it tends, as a matter of logic and human experience, to prove or disprove a fact in issue in the dispute over the Funds – i.e., when SDM knew that the Funds had been obtained through fraud. While the Undertakings Letter and the information attributed therein to Mr. Eizicovics might have formed part of the court record because the letter was a response to undertakings, it was not part of the pleadings or in evidence in this proceeding. Transcribed depositions and affidavits in response to undertakings must be filed with the local registrar of the Court of King's Bench, but such filings are sealed and may not be inspected by anyone without an order of the Court (Rules 5-29(4) and 5-32(9)).

[19] Nonetheless, Rule 5-34(1) provides that, in support of an application or proceeding or at trial, a party "may use in evidence" the depositions and affidavits in answer to written questions of a party adverse in interest (see also Rule 5-19(6) and (7)). Furthermore, in the absence of "just exceptions" (Rule 5-19(6)), it does not appear that a party intending to use parts of a transcript of questioning or an affidavit in answer to written questions in evidence (within the time allowed therefor) is generally required to obtain the court's approval before doing so. Moreover, recent jurisprudence suggests that the *Rules* do not anticipate applications to disallow read ins (see *Canadian Pacific Railway Company v Saskatchewan*, 2022 SKQB 30 at paras 100–102).

[20] While the Undertakings Letter is not an affidavit sworn in response to written questions, it may be considered as equivalent evidence (or a facsimile of a reply to undertakings) in the context of this matter; which is to say that the letter was admissible in the proceeding before the Chambers

judge because it had been provided by SDM to an opposing party in answer to questioning for discovery.

[21] To briefly address a loose thread regarding admissibility, although the Chambers judge commented that the Undertakings Letter was "double hearsay" (at para 11), affidavit evidence made on information and belief as provided in Rule 13-30 is not presumptively inadmissible in summary judgment applications (see Rule 7-3(3) as interpreted in *Kennett v Diarco Farms Ltd.*, 2018 SKQB 61 at paras 17–22; and *Skjerven v Fauser Energy Inc.*, 2018 SKQB 41 at para 22, aff'd 2019 SKCA 81, 437 DLR (4th) 345). The weight to be given to hearsay evidence in a proceeding is another matter.

[22] Further, although the Chambers judge appears to take issue with the fact that the Kroeker Affidavit had been sworn by an employee in the offices of the Appellant's legal counsel, that fact did not automatically put the Appellant's counsel offside the *Code of Professional Conduct*, September 2023 Consolidation (Regina: Law Society of Saskatchewan) and Civil Practice Directive No. 1 (1 July 2016) of this Court, both of which prohibit lawyers from appearing as an advocate in proceedings in which they have submitted their own affidavit. As this Court's practice directive notes, exceptions to this rule of conduct are available if the matter deposed to in the affidavit "is purely a formal one" or "although not a mere formality, is uncontroverted, that is, not in issue" (at 1(b) and (c)). In this case, Ms. Kroeker averred only that Exhibit A to her affidavit "is a true and correct copy of a letter from McKercher LLP dated May 11, 2022 which is a correspondence on the file relevant to the Summary Judgment Application of SDM". She also stated her reliance on the mere-formality exception. Her averments are not, as I understand it, controversial, in that SDM's lawyers do not deny sending a carbon copy of the Undertakings Letter to the Appellant's lawyers.

[23] For these reasons, I conclude that the Kroeker Affidavit was rejected through errors of law, primarily because the Chambers judge misapprehended the legal effect of what Mr. Eizicovics had purportedly said about his knowledge as to when the Funds were deposited in his firm's trust account. As noted, that information appears to be directly relevant to the issue of when SDM first knew about the fraud because it could be found to be inconsistent with its evidence on that point. Markedly, SDM admitted to the Chambers judge that its own evidence relevant to that point was

erroneous. The Chambers judge also misunderstood the legal effect of the affidavit having been sworn by someone employed by the Appellant's counsel. Further, keeping in mind that the Undertakings Letter was written by SDM's legal counsel when responding to Mr. Mueller's undertakings, it is difficult to discern how its late introduction into evidence ambushed or otherwise prejudiced SDM in the proceeding. SDM did not satisfactorily explain in this appeal how it might have been prejudiced by the late admission of the Undertakings Letter. Moreover, if prejudice were established, there was no consideration in the *Decision* about whether or how it might have been mitigated in the circumstances of this matter.

[24] At its most basic, and speaking generally, it is in the interests of justice to admit relevant evidence where its probative value outweighs any prejudice that may result from its admission. Put another way, the rejection of relevant and otherwise admissible evidence in the absence of any evidence of prejudice undermines the court's ability to fairly adjudicate the merits of the dispute and thereby damages the justness of the result. Where that occurs, the interests of justice may compel appellate intervention.

[25] The Lloyd Affidavit also plays a role in my reasoning for allowing this appeal. That affidavit outlined the Appellant's position that SDM had failed to proffer sufficient evidence to establish that it had actually transferred the bitcoins to Mr. Blackett, with reference to exhibits that were also appended to the affidavit of Mr. Mueller. Those exhibits included printouts of Blockchair wallet statements that document some of the transfers of bitcoin by SDM to Mr. Blackett, which includes details about the timing of those transfers. The Chambers judge struck most of Ms. Lloyd's averments by embracing SDM's grounds for objecting to their admissibility without comment or critique. While it is permissible for a judge to wholly adopt the written arguments of one party to a proceeding (see *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 SCR 357), the broad scope of SDM's objections coupled with the brevity of their arguments makes it difficult to follow the Chambers judge's reasoning for striking some of the averments. All of that said, most of the averments in the Lloyd Affidavit are plainly objectionable for at least one of the grounds SDM had put forward.

[26] Nonetheless, although the Chambers judge struck those averments, the exhibits to the Lloyd Affidavit were still in evidence in these proceedings because they were originally appended

to Mr. Mueller's affidavit, which the Chambers judge had accepted. Those exhibits were relevant to the issue of when SDM first knew about the fraud. That is, contrary to the Chambers judge's stated understanding that the evidentiary record did not put SDM's knowledge at issue, there was evidence in this matter that could be found to be inconsistent with what SDM had to say on the subject of when it learned about the fraud.

[27] For these reasons, I conclude that the Chambers judge failed to address the pivotal question of whether SDM might have had knowledge of the fraud before it transferred the bitcoins to Mr. Blackett. In my view, it was necessary for the Chambers judge to squarely tackle and dispel that possibility in order to reach the conclusion that the Appellant's claim to the Funds had been defeated by SDM's claim to them. That conclusion was essential to his finding that there was no genuine issue requiring a trial in this litigation.

[28] The question as to whether there is a genuine issue for trial is a mixed question of fact and law (*Hryniak v Mauldin*, 2014 SCC 7 at para 81, [2014] 1 SCR 87 [*Hryniak*]; *Deren v SaskPower*, 2017 SKCA 104 at para 41). So too is the question of whether it is in the interests of justice to exercise the fact-finding powers provided by Rule 7-5(2)(b). For that reason, a judge making either of these decisions is making a discretionary decision.

[29] However, the fact that these decisions are discretionary does not determine the standard of review when they are appealed and does not mean that deference is owed by an appellate court. It is inherent to appellate practice that the standard of review to be applied by an appellate court depends on the nature of the error alleged to have been made and not on the type of judicial decision that was made (*MacInnis v Bayer Inc.*, 2023 SKCA 37 at para 38; *Stromberg v Olafson*, 2023 SKCA 67 at para 120, 45 BLR (6th) 171; and *Kolodziejski v Maximiuk*, 2023 SKCA 103 at paras 23–25).

[30] The standard of review in relation to alleged errors of fact or of mixed fact and law is palpable and overriding error. The standard of review in relation to alleged errors of law is correctness. Error under the latter category may arise from a misidentification or misapplication of the legal criteria that govern the exercise of the discretion, including a failure to give any or sufficient weight to a relevant consideration. It is also an error of law to fail to consider material

evidence (see *Kot v Kot*, 2021 SKCA 4 at para 20, 63 ETR (4th) 161), or to fail to address an issue that must be resolved in order to answer the question.

[31] As I have explained, the Chambers judge in this case erred by failing to consider the exhibits that were attached to the Lloyd Affidavit and by striking the Kroeker Affidavit. These errors were the result of a failure to identify and apply the criteria governing those decisions, and they led to the exclusion of and failure to consider evidence that was relevant to the question of when SDM had learned of the fraud. As a result, the Chambers judge was unable to apply the law to the facts in a manner that properly enabled him to answer that question, which was essential to his bottom-line decision.

[32] Interpreting rules equivalent to Rule 7-5, the Supreme Court of Canada said that "a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial" (*Hryniak* at para 4). In *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 10, [2008] 1 SCR 372, the Supreme Court said that "it is essential to justice that claims disclosing real issues that may be successful proceed to trial". Having found legal error in the decision to grant summary judgment, I would set aside the *Decision* granting summary judgment to SDM, revive the claims and applications of other parties dismissed thereunder, and remit all matters in this litigation to the Court of King's Bench for determination at trial.

[33] In short, I would allow the appeal and order costs in this Court of $3,000 payable by SDM to the Appellant.

"Caldwell J.A."

Caldwell J.A.

I concur.

"Schwann J.A."

Schwann J.A.

I concur.

"Barrington-Foote J.A."

Barrington-Foote J.A.