

CITATION: Royal Bank of Canada v. Karen Lee Kerby, 2025 ONSC 172
COURT FILE NO.: CV-24-1010
DATE: 2025/01/08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ROYAL BANK OF CANADA, Plaintiff

AND:

KAREN LEE KERBY, Defendant

BEFORE: Justice M.A. Cook

COUNSEL: N. Marconi, Counsel for the Plaintiff

D. Mazzorato, Counsel for Karen Lee Kerby

HEARD: September 13, 2024

ENDORSEMENT

- [1] The plaintiff, Royal Bank of Canada (“**RBC**”), seeks summary judgment against the defendant, Karen Lee Kerby (“**Kerby**”), for the balance owing on a Visa credit card account. As at June 20, 2024, the amount owing is \$56,641.35 plus pre-judgment interest calculated at the contractual rate of 25.99% per year.
- [2] RBC’s statement of claim also includes a claim in relation to a line of credit account, but that was resolved by consent judgment signed by Justice ten Cate dated August 30, 2024.
- [3] Kerby denies liability on the Visa credit card debt, and seeks summary judgment dismissing the balance of the action against her.

Summary Judgment Test

- [4] Rule 20.01 of the *Rules of Civil Procedure* permits the plaintiff or the defendant to move with supporting affidavit evidence, for summary judgment.
- [5] The Supreme Court in *Hryniak v Mauldin*, 2014 SCC 7 prescribed the correct process by which the court should hear and decide a motion for summary judgment, at paras. 66-68:
 - a. The judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the discretionary fact-finding powers set out at rr. 20.04(2.1) and 20.04(2.2);

- b. If there appears to be a genuine issue requiring a trial, then the judge should determine if the need for a trial can be avoided by using the discretionary powers. The discretionary powers at rr. 20.04(2.1) and 20.04(2.2) are presumptively available and should be used provided that their use is not contrary to the interest of justice.

- [6] There will be no genuine issue requiring a trial where the evidence before the Court: (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak*, para. 49.
- [7] The parties seeking summary judgment have the obligation to “put their best foot forward” on the motion, and the court is entitled to assume that the motion record contains all of the evidence the parties would present at trial: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at paras. 26, 27, 32, and 33, *aff’d* 2014 ONCA 878, at paras. 2-4, leave to appeal refused, [2015] S.C.C.A. No. 97. See also *Khabouth v. Niko Investments Ltd.*, 2013 ONCA 671, at para. 6.

Facts

- [8] Kerby is married to Robert Kerby (“**RK**”). At all material times, RK was primarily responsible for financial matters in the marriage.
- [9] In or about 2003, RK applied for, and RBC issued to RK, an RBC Avion Rewards credit card (the “**Credit Card**”). RK was bound by the term of RBC’s Royal Bank Credit Card Agreement (the “**CC Agreement**”), as it was amended from time to time.
- [10] RBC included in its motion materials a full text copy of the CC Agreement.
- [11] Section 1 of the CC Agreement states that all cardholders on an account, other than Authorized Users, are personally liable for the entirety of the debt associated with the account:

When this Agreement refers to “you” or “your,” it includes each person who signed or submitted the Credit Card Application, whose name is on the Account or to whom a Credit Card on the Account has been issued (each Credit Card issued on the Account will have its own unique card number) other than an Authorized User. If this includes more than one person, “you” means each one of you. All of you are, individually and together, responsible under and bound by this Agreement. This means that each of you is fully responsible for amounts owing on the Account, irrespective of which one of you incurred or which Credit Card was used to incur any particular charge. The amounts for which you are responsible include any amounts that may have been owing on your Account at the time your Credit Card was issued.

“You” and “your” do not include Authorized Users unless otherwise indicated. An “Authorized User” is a person to whom we have issued a Credit Card on your Account at your request. The terms under which we will issue a Credit Card to an Authorized User are set out in the “Authorized Users” section of this Agreement. **While your Authorized Users will have the same ability to charge transactions to your Account as you do, you will be responsible for all amounts owing on your account, including those incurred by Authorized Users.** (emphasis mine)

- [12] Other provisions of the CC Agreement speak to the different rights and obligations of an Authorized User as compared to those of a co-borrower. For example, an Authorized User is entitled to only limited information about the credit card account and their consent is not required for any aspect of account administration. In contrast, a co-borrower (referenced in the CC Agreement as “you”) is entitled to notice and disclosure about the credit card account, and their express consent is required to increase the credit limit on the account. Relevant provisions outlining the rights and obligations of co-borrowers and Authorized Users, respectively, are set out in sections 9, 23, 24, and 29 of the CC Agreement:

9. Credit Limit

From time to time, as part of the administration of your account, we may ask if you want to change your credit limit. **We will not increase your credit limit without your express consent to do so.**

* * *

23. Authorized Users.

An Authorized User is a person to whom we have issued a Credit Card on your Account at your request. You can add or remove Authorized Users by contacting us, though we may limit the number of Authorized Users on the Account.

Authorized Users have the same ability to charge transactions to your Account as you do. However, they have no responsibility to us for any amounts owing for purchases, Cash Advances, fees and interest on the Account. If an Authorized User is responsible to you for any of these amounts, you will need to make your own arrangements with that Authorized User for repayment.

It is your responsibility to ensure that each Authorized User receives a copy of this Agreement and any replacements or amendments to this Agreement, as well as any notices that affect the use of a Credit Card or your Account. **You are responsible for ensuring that all of your Authorized Users comply with the applicable terms and conditions of this Agreement.**

We may provide Authorized Users with access to information about their transactions on your Account, the credit limit on your Account and the amount of credit available to them on your Account.

You may assign individual card limits (up to your current credit limit) to each Authorized User. The card limit is the maximum amount that can be charged to an Authorized User Card each month. This option is not available for all Credit Card types and is subject to additional terms we set out when you enroll.

* * *

24. Obligations as an Authorized User

By signing, using or activating a Credit Card in his or her name, an Authorized User confirms that they have received and agree to comply with the terms and conditions of this Agreement, except that an Authorized User will not be responsible to us for the payment of any amounts owing in respect of purchases, Cash Advances, fees or interest on the Account, and will not be bound by the provisions in this Agreement relating to the repayment of such amounts. An Authorized User is not entering into a credit agreement with us. Without limiting the general obligation of an Authorized User to comply with this Agreement, an Authorized User agrees, among other things, that:

- The Credit Card issued to the Authorized User will not be used for any illegal, improper or unlawful purpose or if it has expired;
- The Credit Card issued to the Authorized User is for his or her use exclusively and will not be used nor will his or her use be directed by any other person;
- All security requirements including those designed to protect Personal Authentication Information will be complied with;
- The Authorized User will report to us if he or she suspects that his or her Credit Card has been lost or stolen.

In addition, the Authorized User agrees to permit the collection, use and disclosure of personal information as set out in the “Collection, Use, and Disclosure of Personal Information” section of the Agreement.

* * *

29. Co-Borrower Authority and Disclosure Options

If there is more than one of you, then each of you acknowledges that we may choose to consider each of you as having the authority to act for each

other and receive documents on behalf of each other. This means that we may take instructions from any one of you without dealing with any other one of you.

We are required to give you cost of borrowing disclosure documents (for example, your initial disclosure or your monthly statements). If there is more than one of you, we will send each of you your own separate copy of these documents to the addresses that appears in our records unless both of you consent to receiving joint disclosure. Joint disclosure means these documents will be sent to one address you jointly designate. If you chose joint disclosure, it is the responsibility of the person designated to receive the disclosure to provide a copy to the other one of you. You may change your disclosure options at any time....(emphasis mine)

- [13] At some juncture, RBC issued a secondary card on RK's account in Kerby's name. Kerby says that RK requested the secondary card in response to an RBC promotion, and RBC acted on the request without her knowledge or involvement. It is common ground that Kerby did not sign anything authorizing RBC to issue a credit card in her name.
- [14] Kerby received and used the RBC credit card issued to her. Kerby states that she always understood her card to be a secondary 'spousal card' issued under RK's Credit Card account, and she would not be personally liable for the Credit Card debt.
- [15] For at least six years, RBC issued Credit Card statements addressed to both RK and Kerby at their home at 481 Bell Street, Milton, Ontario. The Credit Card statements identified RK as the "Primary" cardholder and Kerby as "Co-Applicant." Neither term is defined anywhere in the CC Agreement. There is no evidence in the record about whether RBC delivered separate statements to each of RK and Kerby or whether one statement was delivered to them jointly. There is no evidence about how RBC delivered the statement(s) to Kerby or RK.
- [16] Over time, the credit limit on the Credit Card account was increased. In 2017, the credit limit on the Credit Card was \$28,000.00. On or about May 16, 2018, the credit limit was increased to \$32,500.00. In November 2018, the credit limit was further increased to \$37,000.00. In October 2021, the credit limit was further increased to \$45,000.00.
- [17] Kerby's card was last used on April 17, 2023. On that day, the Credit Card had a balance of \$44,864.61.
- [18] On April 29, 2023, RK made a consumer proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B3 (as amended), by which RK proposed paying \$2,000 per month for 60 months commencing May 2023 to retire his debt. RK's consumer proposal was accepted by his creditors, including RBC.

- [19] On May 16, 2023, RBC issued a Credit Card Statement showing Kerby as the “Primary” cardholder. RK was listed as a “Co-applicant”. The credit limit on the Credit Card account was set to \$0, and the balance owing was \$45,654.51.
- [20] The May 16 Credit Card statement indicated that, due to missed payments, the interest rate applicable to the outstanding balance would increase from 20.99% to 25.99% per year. That rate increase was made, effective June 17, 2023.
- [21] On December 20, 2023, RBC delivered notice to Kerby cancelling the Credit Card and demanding payment of \$50,069.42 then owing. That amount included additional interest accrued on the amount outstanding, and reflected payments received from RK in accordance with the consumer proposal.
- [22] On March 22, 2024, RBC issued its statement of claim seeking, among other things, payment of the Credit Card account balance plus pre- and post-judgment interest calculated at the rate of 25.99% per year.
- [23] By its notice of motion dated June 17, 2024, RBC seeks summary judgment in the amount of \$56,641.35 plus pre-judgment interest calculated at 25.99% per year from June 20, 2024.

Analysis

- [24] RBC submits that there is no issue requiring a trial that Kerby is liable to pay the full amount owing on the Credit Card. Kerby submits that she was an Authorized User of RK’s Credit Card, and RBC has failed to prove that she is liable to pay the Credit Card debt. Each seeks summary judgment against the other.
- [25] Consistent with the decision of the Supreme Court in *Hryniak* and the clear wording and purpose of the summary judgment rule, I find that there is no issue requiring a trial in this action.
- [26] In arriving at my decision, I have assumed that the evidence contained in the record is all the evidence the parties would rely upon if the matter proceeded to trial. RBC placed a comprehensive record before the court, and delivered a supplementary record to answer Kerby’s evidence denying liability as a co-borrower. RBC elected not to cross-examine Kerby on her evidence that RK applied for a secondary card on his Credit Card account, without her knowledge or participation, and she was not involved in the management of the Credit Card account. I accept Kerby’s unchallenged evidence that RK asked RBC to issue an additional card for Kerby, and that Kerby was not involved or even aware of the plan.
- [27] The circumstances under which RBC issued Kerby’s card are consistent with Kerby being an “Authorized User” as defined in the CC Agreement. RBC issued a Credit Card at RK’s request, without any involvement of Kerby.

- [28] RBC submits that Kerby's use of the Credit Card, together with her receipt of Credit Card account statements addressed to her, proves that Kerby was a co-borrower and is liable to pay.
- [29] RBC relies on the case of *RBC v Petitclerc*, 2016 ONSC 19, affirmed 2016 ONCA 716, in which Justice Hood held a secondary card holder liable to pay the entire credit card debt owing after the primary cardholder made an assignment into bankruptcy. In support of his decision, Justice Hood relied on Petitclerc's admission that he had used the credit card since 1998. Justice Hood found that by using the credit card, Petitclerc was bound by the terms of the credit card agreement and was liable to pay.
- [30] *Petitclerc* is distinguishable on the facts. The governing credit card agreement in *Petitclerc* made no reference to an Authorized User. In this case, not only does the CC Agreement specifically define Authorized User, but the circumstances in which Kerby received her credit card supports an inference that Kerby was an Authorized User rather than a co-borrower.
- [31] I agree with RBC that Kerby's use of her card bound her to the terms of the CC Agreement. However, Kerby's use of the card does not assist the court in determining the capacity in which Kerby was contracted. The CC Agreement states that an Authorized User is not personally liable for the debt, notwithstanding she has used the issued card. Kerby's use of the credit card is simply not relevant to the question of whether Kerby was a co-borrower or Authorized User on the Credit Card account.
- [32] I acknowledge that Credit Card account statements were issued in the name of Kerby and RK for many years, and identified Kerby as a "Co-Applicant." However, the Credit Card statements do little to help the court determine Kerby's legal status under the CC Agreement. The CC Agreement contemplates that multiple individuals could be associated with a given Credit Card account. Each individual's rights and obligations under the CC Agreement are tied to their status either as a co-borrower or Authorized User. I take nothing from the fact that Kerby was referenced as a "Co-applicant" on the Credit Card account statements given that "Co-applicant" is not a term defined in the CC Agreement and Kerby never applied for a card.
- [33] In my view, RBC's evidence falls short of establishing Kerby was a co-borrower. If Kerby was a co-borrower, one would expect RBC to lead evidence of Kerby's consent to joint disclosure as was required by section 29 of the CC Agreement. One would also expect evidence of Kerby's express consent to each of the increases to the Credit Card credit limit over time, as was required by section 9 of the CC Agreement. I infer from the absence of such evidence that Kerby was as an Authorized User on RK's Credit Card account, rather than a co-borrower.
- [34] For all the foregoing reasons, I find that there is no issue requiring a trial as to whether Kerby was a co-borrower on the Credit Card account. Kerby was an Authorized User of RK's Credit Card account and accordingly is not liable to RBC for the amounts outstanding on the Credit Card.

[35] In light of the prior partial consent judgment in relation to Kerby's RBC line of credit account, the balance of the action shall be dismissed.

Costs

[36] The parties are encouraged to resolve the issue of costs of the motion and action between them bearing in mind the partial Judgment signed by Justice ten Cate dated August 30, 2024. If the parties are unable to agree, Kerby shall serve and file her written submissions, not to exceed three pages, excluding attachments by January 21, 2025. RBC shall serve and file its responding submissions, not to exceed three pages, excluding attachments, by January 28, 2025. No reply submissions shall be delivered without leave of the court obtained in advance.

Justice M.A. Cook

Date: January 8, 2025