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financial services litigation bulletin

April 2010

…because sometimes it makes cents to rush to judgment

Ontario's new summary judgment rule allows banks to deal expeditiously with meritless claims and hopeless defences

Perhaps owing to the significant number of clients and transactions with which they are involved on a daily basis, litigation is an unfortunate fact of life for most, if not all, financial institutions. Banks are forced to expend money and other resources defending against frivolous claims and dealing with meritless defences in actions to protect and enforce their rights.

Given this situation, changes to the law relating to summary judgment in Ontario may well be viewed as a welcome development for financial institutions. Under the newly amended *Rules of Civil Procedure* (the "Rules"), judges hearing summary judgment motions are expressly granted the power to weigh evidence, evaluate the credibility of an affiant and draw any reasonable inferences from the evidence put forward on a summary judgment motion. Decisions made on motions for summary judgment involving banks since the amendments to the Rules took effect indicate that judges are willing to exercise their new authority, with positive results for banks.

how the rules changed…

On January 1st of this year, amendments to the Rules (the "Amended Rules") came into force. The amendments included significant changes to Ontario law relating to summary judgment. Under the version of the Rules in place prior to January 1, 2010 (the "Old Rules"), summary judgment was to be granted unless the motion judge determined that there was a genuine issue between the parties that could be resolved via trial, with live evidence from witnesses. The Old Rules were silent on the ability of a judge hearing a motion for summary judgment to make findings of fact, draw inferences or assess the credibility of those giving affidavit evidence on the motion. However, under the common law built through application of the Old Rules, judges hearing summary judgment motions were precluded from making such evidentiary determinations when examining whether there was a genuine issue for trial. As a result, usually all that a responding party was required to do to avoid summary judgment was to put forward conflicting evidence on any material issue in dispute. Given that the bar for obtaining summary judgment was

set so high, in all but the most clear cut of cases, financial institutions were forced to continue down the expensive and time consuming road of discovery and trial in order to receive judgment.

Under the Amended Rules, judges are expressly granted discretion to exercise the powers that they were previously forbidden from employing under common law. The Amended Rules not only specifically allow a judge to assess credibility, weigh evidence and draw inferences, but provide that such powers may be exercised "unless it is in the interest of justice for such power to be exercised only at trial." Further, under the Amended Rules, summary judgment is to be granted unless there is a genuine issue not just for trial, but rather a genuine issue requiring a trial to resolve. These changes suggest that while judges have discretion as to whether to exercise their authority to make evidentiary determinations, such authority ought to be exercised unless justice demands that the issue be resolved through a trial.[1]

As set out below, Ontario courts have, at least to date, proven quite willing to exercise such authority to grant summary judgment in favour of financial institutions.

..and the court flexed its freshly bulked judicial muscle

On just the seventh day of life under the Amended Rules, an Ontario court was asked to grant judgment in favour of a bank in respect of a claim relating to a default on a residential mortgage. In *BCP Bank Canada v. Silva*,[2] the responding party conceded that the mortgage was in default, but challenged the plaintiff bank's claim for the deficiency in the amount realized from the sale of the mortgaged property relative to the outstanding obligation. Specifically, the mortgagor challenged the bank's interest calculations, its accounting of the proceeds of sale and the adequacy of the steps taken by the bank to realize a sufficient price on the sale of the property.

The Court granted summary judgment in favour of the bank. In reaching his decision, Stinson J. specifically cited his ability to weigh evidence, evaluate the credibility of the affiants and draw reasonable inferences from the evidence. Perhaps most notably, in assessing the sufficiency of the bank's realization efforts, the court weighed competing evidence, including competing appraisals of the mortgaged property.

Given the significant differences between the evidence put forward by each of the parties on the motion, the likelihood that summary judgment would have been granted under the Old Rules is questionable at best. The decision thus suggests that the hurdle to be overcome to achieve summary judgment has been significantly lowered.

[1] The Amended Rules also include a new emphasis on proportionality in the litigation process. Rule 1.04(1.1) provides that in applying the Amended Rules, "the court shall make orders and give directions that are appropriate to the importance and complexity of the issues, and to the amount involved, in the proceeding." This further suggests that in determining whether or not to grant summary judgment, the court should take a hard look at the relative merit of the case in determining whether justice demands that the litigation be resolved via a full trial, rather than on the basis of written evidence tested through cross-examination.

[2] 2010 ONSC 392.

Further evidence of this shift was delivered less than a month later in the form of a decision granting summary judgment in favour of two other financial institutions.[3] In this case, a bank was the defendant in an action arising from a mortgage fraud (the "Defendant Bank"). Another bank, which was a third party to the litigation (the "Third Party Bank"), had advanced funds in relation to what it believed were four valid mortgages. At the direction of a lawyer acting in relation to the mortgages, who was later convicted for his role in the fraud, the Third Party Bank made five advances totalling $454,115.64 (the "Advanced Funds") to the plaintiff. After discovering the fraud, the Third Party Bank was able to trace $112,327.33 of the Advanced Funds (the "Traced Funds") to an account held by the plaintiff at the Defendant Bank. In light of the fraud and pursuant to an indemnity agreement between the Defendant Bank and the Third Party Bank, the Defendant Bank delivered the Traced Funds to the Third Party Bank.

The plaintiff subsequently brought an action against the Defendant Bank, contending that the Defendant Bank was not entitled to give funds held in his account, and belonging to him, to the Third Party Bank. In defending against the claim, both banks relied largely on a decision of the Supreme Court of Canada (discussed here), in which the Court held that in certain circumstances, a victim of fraud, like the Third Party Bank, may trace and recover its losses on the basis that the amounts lost were transferred to a third party, like the plaintiff, under a mistake of fact. However, this defence would not apply if the plaintiff was able to establish that the Traced Funds were his property and were advanced to him in satisfaction of a legitimate obligation owed to him. The litigation thus turned on the issue of the plaintiff's entitlement to the Traced Funds and, in particular, on whether his explanation of how and why he received the Traced Funds should be accepted.

The plaintiff brought a motion for a summary judgment on his claim to the Traced Funds and the banks also brought motions for summary judgment seeking dismissal of the plaintiff's claim.

In granting summary judgment in favour of the banks, Karakatsanis J. specifically noted her new powers under the Amended Rules and exercised them, concluding that the plaintiff's evidence that the Traced Funds came into his account in satisfaction of a legitimate obligation owed to him was "not credible and does not raise an issue requiring a trial." In supporting her finding relating to the plaintiff's credibility, Karakatsanis J. specifically cited:

- internal inconsistencies in the plaintiff's evidence;
- the lack of documentary evidence to support the plaintiff's sworn evidence;
- the documentary evidence advanced by the banks that conflicted with the plaintiff's evidence; and
- the degree to which the plaintiff's evidence defied common sense.

If the motion had been heard under the Old Rules, it is quite likely that Karakatsanis J. would not have been able to make these key determinations and summary judgment would not have granted in favour of the banks.

[3] *Cuthbert v. TD Canada Trust*, 2010 ONSC 830.

a positive change for financial institutions

Decisions on summary judgment motions delivered to date under the Amended Rules thus suggest that the Amended Rules may assist financial institutions in dealing with litigation in a more efficient and cost-effective manner.

Further, some of the risk involved in moving for summary judgment has been alleviated under the Amended Rules. Under the Old Rules, if a motion for summary judgment was unsuccessful, the responding party was generally entitled to costs on a substantial indemnity basis or, in other words, had the right to recover a significant portion of its legal costs from the unsuccessful party. The prospect of the imposition of a significant cost award, coupled with the high hurdle that had to be overcome to obtain summary judgment, were significant deterrents to litigants who were considering seeking summary relief. However, under the Amended Rules, costs are to be awarded on a substantial indemnity basis only in instances where the losing party "acted unreasonably or acted in bad faith for the purpose of delay."

Motions for summary judgment are still relatively costly to litigate and should only be brought in appropriate circumstances. However, as indicated by some of the decisions delivered to date, the Amended Rules offer financial institutions involved in Ontario litigation a cost-effective and effective means of dealing with meritless claims and hopeless defences.

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