In the Court of Appeal of Alberta

Citation: The Toronto Dominion Bank v Manah, 2025 ABCA 201

Date: 20250609
Docket: 2403-0160AC;
2503-0005AC
Registry: Edmonton

Between:

The Toronto Dominion Bank

Respondent

- and -

Najeeb Rafic Manah and Kristin Renee Manah

Appellants

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Dawn Pentelechuk
The Honourable Justice Kevin Feth

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice D. Lee
Dated the 27th day of June, 2024
Filed on the 2nd day of July, 2024
(Docket: 2203-07060)

Appeal from the Order by
The Honourable Justice S. Leonard
Dated the 18th day of December, 2024
Filed on the 18th day of January, 2025
(Docket: 2203-07060)

Memorandum of Judgment

The Court:

[1] The appellants have filed two appeals:

(a) an appeal of an order of June 27, 2024 (#2403-0160AC)

(b) an appeal of an order of December 18, 2024 (#2503-0005AC)

The two appeals were argued together.

Background Facts

[2] These two appeals are a part of a lengthy course of litigation arising from the foreclosure of the appellants' residence by the respondent. After the statement of claim for foreclosure was issued in May 2022, the appellants were noted in default. A redemption order was granted on September 20, 2022. Following the expiry of the redemption period, the respondent attempted to list the property for sale through the judicial process.

[3] The appellants have resisted the foreclosure proceedings throughout. They refused to cooperate with the judicial listing. The respondent obtained orders for vacant possession which were not complied with by the appellants. The respondent eventually obtained possession of the property on May 31, 2024 through the intervention of duly authorized bailiffs, with the assistance of the Edmonton Police Service. However, the appellants unlawfully re-entered the residence, and they were again evicted on July 4, 2024.

[4] The first appealed order arose from an application filed by the appellants on June 21, 2024. This application complained about procedural irregularities. It sought "proof of debt" by affidavit, and an immediate return to them of possession of the residence. Further, it implied that if the respondent did not file affidavit evidence rebutting each allegation in the appellants' affidavit, then the appellants' allegations should be taken as being true. It also argued that the procedures invoked in obtaining possession of the residence were unlawful. On June 27, 2024 the chambers judge ordered the respondent to provide by affidavit a statement of the amount owing under the mortgage, which affidavit was filed on July 5, 2024. The chambers judge otherwise dismissed the application.

[5] The second appealed order arose from an application filed by the appellants on December 6, 2024. This application sought an immediate stay of the proceedings and return of the residence

to the appellants. It also requested a "point by point rebuttal" of the issues raised in the appellants' affidavits, and collateral forms of relief. The chambers judge dismissed this application.

[6] On March 10, 2025 the respondent obtained an Order for Sale to Plaintiff from an Applications Judge. That order is under appeal to the Court of King's Bench, but it has not been stayed.

The Two Appeals

[7] In the appeal of the order of June 27, 2024 (#2403-0160AC) the appellants argue the chambers judge did not act as a "neutral referee" and properly apply the *Rules of Court*. They argue that the chambers judge purported to exercise a discretion when the rules were mandatory, which, they argue, demonstrates collusion with counsel for the respondent. They also argue that the form of the order is irregular because, for example, the chambers judge did not print his name next to his signature.

[8] The relief claimed in appeal #2403-0160AC is

(a) an order that the respondent provide "proof of debt" by way of the original promissory note "signed in wet ink", or by "ledger proof from a TD chartered accountant",

(b) proof that all occupants of the residence were served with the eviction notice,

(c) return of keys to the residence, and

(d) damages for unlawful eviction.

[9] In the appeal of the order of December 18, 2024 (#2503-0005AC) the appellants argue the Applications Judge exceeded his jurisdiction in granting a warrant authorizing forcible entry to the residence, making the actions of the Edmonton Police Service a trespass. Secondly, they argue that the respondent failed to obtain a writ of enforcement and serve a notice of seizure, and failed to follow other mandatory enforcement procedures. Thirdly, they argue that the respondent failed to provide "valid affidavit evidence", and the chambers judge refused to swear in all parties. Fourthly, they claim breaches of the *Charter of Rights*, the *Bill of Rights*, and the *UN Convention on the Rights of the Child*. Fifthly, they claim bad faith conduct and procedural unfairness by the respondent allegedly sabotaging a private sale and refusing to accept payment of the debt. The appellants deny that they are vexatious litigants.

[10] The relief claimed in appeal #2503-0005AC is

(a) declaring the enforcement actions of the Toronto Dominion Bank and Edmonton Police Service unlawful,

(b) declaring a breach of *Charter* and other fundamental rights,

(c) return of all seized property, and

(d) compensatory damages.

Contents of Extracts of Key Evidence

[11] The appellants brought a preliminary application to strike aspects of the respondent's Extracts of Key Evidence. As the appellants note, R. 14.27(1)(c) specifies that Extracts of Key Evidence must not contain "new evidence". A party intending to rely on "new evidence" on the appeal must bring an application under R. 14.45. In accordance with the procedure in ***McDonald v Brookfield Asset Management Inc***, 2016 ABCA 419 at paras. 6-7 the panel reserved its decision on this application.

[12] Evidence or exhibits filed in the trial court become part of the record on the appeal even if a copy is not filed with the Court of Appeal:

> 14.28(1) Subject to any enactment, all evidence or exhibits received by the court appealed from are an official part of the record before the Court of Appeal, notwithstanding that no copy is filed with the Court of Appeal.

If a party intends to rely on documents on the trial court record it is prudent to file a copy on the appeal record, usually through the Extracts of Key Evidence. In addition, parts of the trial court record that are not "evidence", such as the pleadings and orders granted by the trial court, may be referred to on appeal. These are not "new evidence" because they are not "evidence".

[13] This rule is summarized in the Court's Information Sheet on *Applications for New Evidence*:

> What is new evidence?
>
> Only the evidence given (oral or written) and exhibits entered in the court or body appealed from can form part of the record on appeal (rules 14.70 and 14.28(1)). Any evidence, facts or other information that was not considered by the lower court or body (including any information that was created or discovered after the date of the decision that is being appealed) is "new" evidence. New evidence may only be

> introduced in the appeal with the court's permission (rule 14.70). If you wish to rely on new evidence, you must bring an application to admit new evidence (rule 14.45). (emphasis added)

Evidence filed in the trial court that was not expressly referred to by the trial court judge can be referred to on appeal, although there are limits to a party advancing arguments that were not raised in the trial court.

[14] The appellants object to the following materials included in the respondent's Extracts of Key Evidence:

(a) Orders made in this action prior to the orders under appeal. Firstly, orders of the court are part of the court record and are not "evidence" covered by R. 14.45. Secondly, orders granted prior to the orders under appeal that are needed to resolve the appeals should have been included in the Appeal Record under R. 14.18(1)(c)(iv). Since the appellants did not include these orders in the Appeal Record, the respondent was entitled to include them in its Extracts of Key Evidence: R. 14.27(2).

(b) Orders made in the action after the orders under appeal, including those of July 3, 2024 and October 11, 2024 (granted after the first of the orders under appeal) and orders of February 13, 2025 and March 10, 2025 (granted after both of the orders under appeal). When litigation is ongoing while an appeal is pending, the parties are entitled to refer to subsequent developments in the litigation in order to bring the Court of Appeal up-to-date. The respondent is entitled to refer to these subsequent orders for that limited purpose, and their inclusion for convenience in the respondent's Extracts of Key Evidence is unobjectionable.

(c) Pleadings filed in the foreclosure action, including the statement of claim and applications. These include some of the applications that resulted in the orders that have been granted. Pleadings are not "evidence" and are not covered by R. 14.45. To the extent that they are needed to resolve the issues in the appeals they should have been included in the Appeal Record under R. 14.18(1)(b). Since the appellants did not include them in the Appeal Record, the respondent was entitled to include them in its Extracts of Key Evidence.

(d) Affidavits filed in the trial court. Affidavits filed in the trial court are "evidence" that are part of the appeal record under R. 14.28. Since they were part of the trial court's record they are not "new" evidence, and the respondent was entitled to include them in its Extracts of Key Evidence.

(e) King's Bench Statement of Claim in action 2403-03292 (which was struck out on April 22, 2024 for failure to disclose a cause of action), and the Federal Court Statement of Claim issued March 3, 2025. These documents were not a part of the trial court's record, and therefore are not a proper part of the appeal record and will be disregarded by the Court.

[15] Documents that are a proper part of the record on the appeal under R. 14.28, or because they are included in the Appeal Record or the Extracts of Key Evidence, do not have to be re-sworn or supported by affidavit. True copies are simply filed with the Court of Appeal. For clarity, the requirement of R. 14.40(1)(c) and 14.42(1)(c) that additional copies of records to be used on an application should be included with the application materials is only to ensure that the judge or panel hearing the application has a complete record without having to search the Court file. These rules do not require that the previously filed information be re-sworn. Further, by their wording these rules only apply to applications, not appeals; the record on an appeal is found in the Appeal Record, the Extracts of Key Evidence, and other filed materials.

[16] In summary, the application to strike portions of the respondent's Extracts of Key Evidence is dismissed, excepting for the records listed in para. 14(e).

Procedural Irregularities

[17] There are no procedural irregularities disclosed that would undermine the validity of the orders in question.

[18] All litigants are required to prove their case on a balance of probabilities. They may do that with any admissible evidence that satisfies the chambers judge. There is no legal requirement that the proof include "wet ink" documents, an "original promissory note", "ledger proof", or any other type of formal proof. Those organized pseudolegal arguments have no merit: ***Bonville v President's Choice Financial***, 2024 ABKB 483 at paras. 22-23, 78 Alta LR (7th) 120. Further, so long as the case is proven on a balance of probabilities, there is no obligation on any litigant to rebut the allegations made by the opposing litigant on a "point by point basis". The chambers judge must consider the evidence as a whole, and does not have to accept as true any allegation just because it is not specifically rebutted.

[19] The respondent filed a number of affidavits in the trial court, which are part of the appeal record under R. 14.28. The respondent's affiants deposed that they had access to the necessary records, and authority to swear the affidavits. No further proof is required. There is no rule that only a chartered accountant can extract financial information from a record.

[20] In this case the existence of the underlying debt was deemed to be admitted when the appellants were noted in default in the foreclosure action, resulting in the original redemption order. That unappealed order declared the amount owing on the mortgage, and that it was owing to the respondent. As ordered, the respondent has now filed an up-to-date affidavit disclosing the present amount of the debt. No further proof is required. In particular, the chambers judge was not required to respond to unsubstantiated speculation that the debt may have been securitized or transferred. On this record, there is uncontradicted evidence that the appellants are indebted to the respondent in the amounts claimed.

[21] The appellants rely heavily on the fact that R. 13.19(1)(a) provides that affidavits must be in Form 49, arguing that some of the respondent's affidavits lack prescribed form numbers, governing rule references, and initialized alterations. The appellants do not indicate how they suffered any prejudice by these alleged deficiencies. Rule 1.5 enables the court to cure any non-prejudicial irregularity. The Statement of Claim for Foreclosure was clearly what it purported to be, and the applications for related relief were also clearly applications; no reasonable person would have been misled by the absence of references to particular rule numbers. Further, any objection to these forms had to be made in a timely way: R. 1.5(2).

[22] In any event, there is no rule that a document must recite on it the Rule or Form number from which it originates. Further, R. 13.13(1) confirms that forms can be "modified as circumstances require", and Rule 13.16 specifically provides that deviation from a form is not a contravention of the rules and does not invalidate the document:

> 13.16 A prescribed form or a document prepared in place of a prescribed form is not invalidated nor is there any contravention of these rules if there is a deviation from or an addition to or omission from the form or document that
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> > (a) does not adversely affect the substance of the information required to be provided or that the Court requires to be provided, and
> >
> > (b) is not intended to mislead.

The chambers judge was entitled to look at the substance of the matter, and disregard non-prejudicial alleged procedural irregularities.

[23] Proceedings in chambers are presumptively conducted based on the paper record. The receipt of oral evidence under R. 6.11(1)(g) is exceptional and within the discretion of the chambers judge. The fact that the chambers judge declined to swear in all the witnesses or hear oral evidence does not disclose any error.

[24] Lawyers are officers of the court, not witnesses, and they never provide their submissions under oath. Lawyers are entitled to refer to the evidence on the record when making their submissions. The submissions of counsel are an inherent part of the hearing process, and not something that has to be listed in the Form 27 application notice.

[25] While there is a standard format used for orders and judgments, there is no rule that any irregularity affects the validity of the order or judgment. If it is not appealed, the order or judgment is effective. Specifically, there is no rule that a judge must print his or her name next to the signature. Section 42(1) of the *Alberta Evidence Act*, RSA 2000, c. A-18 requires that judicial notice be taken of the signatures of judges. Rule 9.1 lists some requirements of orders even if they are not specifically included in the templates.

Unfairness

[26] There is no indication on this record of any unfairness or lack of impartiality on the part of the chambers judges. Litigants are not entitled to an unlimited amount of court time to make their position known. The appellants were given an opportunity to present their arguments in writing and orally, and the fact that their applications were dismissed does not disclose any bias or collusion.

Fundamental Rights

[27] This litigation is private litigation between the parties. It does not engage any *Charter* rights, or any rights under public law documents like the *Canadian Bill of Rights*, and the *UN Convention on the Rights of the Child*. The essence of the private contractual relationship between the appellants and the respondent was that the appellants would pay back the money they had borrowed. There is no fundamental right that prevents the respondent from enforcing its debt.

Means of Enforcement

[28] The appellants have not shown any reviewable error in the way that the respondent enforced its debt and its related security on the appellants' residence.

[29] Foreclosures are conducted under the *Law of Property Act*, RSA 2000, c. L-7 and the *Rules of Court*. Foreclosure proceedings are routinely conducted before the Applications Judges (formerly Masters in Chambers), who have general jurisdiction over the procedure. That general jurisdiction is confirmed and actually extended by s. 10 of the *Court of King's Bench Act*, RSA 2000, c. C-31. Orders for possession in foreclosure actions can be made by Applications Judges

under R. 9.25 of the *Rules of Court*. These provisions are not displaced by the *Civil Enforcement Act*, RSA 2000, c. C-7[1], and an order for possession can be granted without a writ of execution being filed. There is no merit to the appellants' arguments that the Applications Judges had no jurisdiction in this matter, or that the procedures in the *Civil Enforcement Act* had to be followed. Specifically, the various possession orders that were granted were valid and properly enforceable.

[30] Bailiffs and the police who are enforcing eviction orders of the court that authorize entry do not require the permission of the occupants to enter the premises. Requiring permission would defeat the whole point of the eviction order. While the police do not get involved in the enforcement of civil debts, they do get involved in enforcement of orders of the court: *Court of King's Bench Act*, RSA 2000, c. C-31, s. 19. Involvement of the bailiffs and the police was expressly authorized by the various possession orders. That is all that happened here when the appellants resisted the efforts of the bailiffs to obtain possession of the house.

[31] The appellants argue that there is no proof that all of the occupants of the residence were served. However, the appellants were clearly served or had notice of all these proceedings. No other occupants have come forward alleging any breach of their rights.

[32] Foreclosure proceedings are not criminal proceedings, and the provisions of the *Criminal Code* are inapplicable.

[33] The appellants were provided with an affidavit disclosing the present balance owing to the respondent. If they wished to redeem the property (with the assistance of a private lender or otherwise) they only needed to pay into court the balance shown in the affidavit. Contrived pseudolegal arguments about further proof of the debt being required are without merit and merely serve to obstruct the proceedings.

Collateral Attack

[34] As the respondent points out, many of the appellants' arguments involve a collateral attack on previous court orders. The original redemption order, the various orders for possession, and any of the other interlocutory orders that have not been successfully appealed are valid and binding. There are now binding court orders confirming that the appellants are indebted to the respondent,

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[1] The applicants also cite the "*Seizures Act*, RSA 2000, c. S-4" and the "*Execution Creditors Act*, RSA 2000, c. E-10", but no such statutes exist. The previous statutes with similar names were repealed in 1994.

and that the respondent is entitled to foreclosure remedies. The appellants' request for a return of the possession of the residence is a collateral attack of all of these orders.

Conclusion

[35] In conclusion, the documents improperly included in the respondent's Extracts of Key Evidence are not a part of the appeal record. The appellants have failed to show any reviewable error in the orders under appeal. An appeal is not the proper forum for compensatory remedies, but as the appellants have not shown any breach they are not entitled to compensation or damages anyway. The appeals are dismissed. In accordance with the covenant in the mortgage, the respondent is entitled to costs on a solicitor and client basis. The Court will prepare the judgments.

Appeal heard on June 2, 2025

Memorandum filed at Edmonton, Alberta
this 9th day of June, 2025

Slatter J.A.

Pentelechuk J.A.

Feth J.A.

Appearances:

D. Hughes (no appearance)
K.L. Sejr
for the Respondent

Appellant Najeeb Rafic Manah

Appellant Kristin Renee Manah