Court of King's Bench of Alberta

Citation: Royal Bank of Canada v Simmer, 2025 ABKB 432

Date: 20250715
Docket: 2101 00450
Registry: Calgary

Between:

Royal Bank of Canada

Plaintiff

- and -

Simmer Project Solutions Inc.,
Todd Simmer, and Rayanne Simmer

Defendants

Reasons for Judgment
of the
Honourable Justice N.E. Devlin

Overview

[1] The Defendants and their company [the "Simmers"] were sued for the amounts outstanding on a credit facility that the Plaintiff bank ["RBC"] had demanded payment on due to various alleged defaults. They defended the action and countersued RBC, alleging that earlier misdeeds by their creditor had caused the financial hardships being used against them to call the loan.

[2] The parties now appeal and cross appeal the decision of the learned Applications Judge dismissing RBC's application for summary and striking the Simmers' counterclaim as statute

barred by limitations. For the reasons that follow, the appeal against the limitations decision is dismissed, and RBC's appeal is allowed and summary judgment granted.

Relevant Facts

[3] The Simmers were longtime customers of RBC, whose services they used in relation to their business ventures which included landscaping and farming. They entered into a number of loan agreements with RBC from 2012 through 2018. Through these, RBC provided Simmer Project Solutions with a $100,000 revolving credit line, in the form of a demand loan, and a $10,000 visa credit card. RBC held a general floating charge against the corporate defendants' assets, backed by personal guarantees from Mr. and Mrs. Simmer. The dispute at hand involves these two credit facilities.

[4] This action arose after RBC demanded full payment of all outstanding indebtedness on October 7, 2020. RBC justified this demand by asserting that Simmer Project Solutions was multiply in default of its obligations. The events of default alleged included a failure to abide by financial covenants, failure to pay outstanding amounts, and generally failing to pay the debts as they became due.

[5] The Simmers did not pay, asserting an oral agreement between themselves and their branch manager to pay "interest only" on the account, and subsequently no amounts at all as informal pandemic relief, also offered orally by the branch manager. They claim they are willing and able to pay what they owe, though they do not appear to have made any payments now for going on over five years.

[6] RBC denies that the Simmers were ever told that they did not have to make payments to keep the line of credit current. RBC asserts that the Simmers owed $135,000 as of March 25, 2021, as well as further interest and costs in accordance with the loan agreements and guarantees.

[7] The Simmers defended the claim in part by counter suing, alleging that actions by their previous account manager, occurring in early 2018, in the form of improperly demanding repayment of their $370,000 business mortgage, precipitated unfair and wrongful financial hardship. RBC in turn moved to strike the counterclaim as limitations barred.

Applications Judge's Decision

[8] The Applications Judge recited the key legal principles from ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49, and ***Hryniak v Mauldin***, 2014 SCC 7, and held that there "is conflicting evidence as to whether there was an agreement to accept interest-only payments and whether there was an indulgence or waiver given in March 2020 in respect of payments." She found that she could not have sufficient confidence that there was no genuine issue for trial to decide the matter summarily.

[9] Notwithstanding the fact that the loan agreements contain standard terms requiring any changes or alterations to obligations under them being recorded in writing, she relied on ***Jack Ganz Consulting Ltd v Recipe Unlimited Corporation***, 2021 ONCA 907 to hold that the existence of any indulgence or waiver by RBC of ongoing payments under the loan had to be determined at trial.

[10] As regards the counter claim, she determined that it ought to be struck under *Rule* 3.68(2) of the *Alberta Rules of Court,* Alta Reg 124/2010, as the claim had been brought plainly and obviously out of time. She rejected the Simmers' discoverability argument that they first realized that RBC's previous misconduct created an injury warranting bringing a proceeding after the loans were called in the fall of 2020. She concluded that:

> It is clear from the counterclaim itself that in January 2018 or shortly thereafter when the loan was paid out, the defendants, or plaintiffs by counterclaim, knew or, in the circumstances, ought to have known that RBC had engaged in what they say was wrongful conduct in breach of its duties and that they had suffered harm.
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> All three of the requirements under section 3(1)(a) of the *Limitations Act* are satisfied by that time, and I find that the counterclaim filed February 21, 2021, is outside the two-year limitation period and is therefore statute barred.
>
> And accordingly, the counterclaim discloses no reasonable claim under rule 3.68(2)(b) and must be struck.

[11] She therefore struck the counterclaim as out of time.

The Appeal

[12] Both parties appeal. The Simmers repeat their discoverability argument and also submit that s 6(2) of the *Limitations Act,* RSA 2000, c L-12, shields their claim from complaints of lateness, as its subject matter is intimately inter-related with the conduct described in RBC's originating claim. They further emphasize that RBC agrees that there had been a verbal agreement regarding ongoing minimum payments and forbearance of a sort on calling the loan, making the existence of the further non-payment offer they claim to have relied on a real issue for trial.

[13] RBC argues that there can be no question the Simmers owe substantial sums over and above the limits of their credit facilities, were in default, and are legally obligated to repay. Thus, even a dispute about alleged oral modifications of the contract is no bar to summary judgement. They further deny such an agreement and submit that the Simmers' evidence cannot sustain its existence.

[14] The review to be conducted by this Court under *Rule* 6.14 is *de novo* in nature, and I am not bound by the learned Applications Judge's findings. The standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 3. The parties filed some further evidence, as they are entitled to, though I find that none of that materially changes the applicable analysis.

The Limitations Issue

[15] The Simmers' claim that they only knew that they had incurred damages that "warrant[ed] bringing a proceeding" within the meaning of s 3 of the *Limitations Act* once RBC invoked their compromised financial situation to call the loans in late 2021. This misconstrues the nature of discoverability. The concept of discoverability refers to knowledge that damage has been done, not knowledge that that damage will have secondary consequential impacts down the road: G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (4th ed. 2023), at p. 105 and 403.

[16] The relevant injury from RBC's alleged demand that the Simmers pay out their mortgage in 2018 (itself a disputed fact on which the Simmers have advanced no documentary evidence), would have been the weakening of the Simmers' financial position. That damage would have been self-evident at the time that they restructured their affairs in early 2018. The limitations clock began to run when they had made the requisite arrangements and taken on the corollary new obligations, which they argue had burdened them beyond the debt obligation they were discharging.

[17] It is self-evident that a weakened financial situation can have follow-on consequences, sometimes far into the future. The discoverability principle embodied in s 3 does not invite a postponement of limitations pending the uncertain crystallization of such future collateral consequences. Such a construction of the law would defeat the purpose of limitations and largely undo them in the context of economic injuries. Therefore, the Applications Judge was correct in her application of the two-year s 3 limitation to this case.

[18] On appeal, the Simmers also argue that s 6(2) of the *Limitations Act* permits them to late-file their counterclaim. That provision reads as follows:

> **Claims added to a proceeding**
>
> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
>
> (2) When the added claim
>
> a) is made by a defendant in the proceeding against a claimant in the proceeding, or
>
> b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,
>
> the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.
>
> [emphasis added]

[19] Section 6(2) is a rule of fairness. It provides that where a plaintiff has sued in-time on some facets of a transaction, the defendants may counterclaim, in whole or part, on aspects of that same event that have slipped beyond the two-year limitation. This prevents limitations from artificially bifurcating events, and permits the Court to hear and rule upon the entirety of the related conduct and circumstances.

[20] This section does not assist in this case. There is no link between the 2018 mortgage payout and the 2020 calling of the line of credit. These are separate transactional events between corporate counterparties. The 2018 payout was in no way ever explicitly linked to the formation of the herein disputed credit facilities, nor were they linked in any way other than in the Simmers' minds. In particular, nothing in RBC's Statement of Claim in any way refers to the 2018 events.

[21] The Court of Appeal provided the following guidance on the application of s 6(2) in ***DeSoto Resources Limited v EnCana Corporation***, 2010 ABCA 110 at paras 8 and 10:

> Whether a new pleading arises from the same "conduct, transaction or events" must be based on an assessment of the whole factual and legal context. No firm line can be drawn between an unrelated new claim, and what has previously been pleaded. Too general a definition would give the plaintiff an unlimited ability to add statute barred claims: ***CHS v Alberta (Director of Child Welfare)***, 2006 ABQB 528 at para 32, aff'd 2006 ABCA 355.
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> Section 6 allows the addition of new claims because the defendant will not be prejudiced or surprised since they arise out of the same conduct, transactions and events. Therefore, one test of whether a new claim is involved is to examine the extent to which a new set of conduct, transactions and events would have to be proven at the trial. The documents and other evidence that would be needed to prove the appellant's new allegations would differ significantly from those required to prove the originally pleaded facts.
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> [emphasis added]

[22] In this case, an entirely new set of documents, events, and even individuals would be required to litigate the counterclaim. Other than the identity of the parties, there would exist little or no commonality in evidence or issues. Attempting to characterize the counterclaim as a related matter is, on this record, effectively a reframing of the unsuccessful discoverability argument that the 2020 claim of default by RBC was a direct injury flowing from the 2018 payout of the mortgage. Neither side of this coin can satisfy the toll of limitations.

[23] Finally, though the point was not pursued on the appeal, I agree with the Applications Judge that this was a proper case in which to strike the claim on limitations grounds, as the time-barring defects are evident on the face of the pleadings. While such use of *Rule* 3.68 is limited to cases where there is truly no factual issue to be determined on the limitation, this is such a case.

[24] The Simmers' appeal against the striking of their counterclaim is dismissed.

Summary Judgment on RBC's Debt Claim

[25] The dominant and overriding facts in this case are that the Simmers borrowed and owe money under their agreements with RBC, that indebtedness grew well beyond its agreed limits, and the Simmers failed (now for years) to pay anything to even bring that debt down to its maximum levels.

[26] The Simmers' defence to RBC's claim – namely that the events of default alleged in RBC's letter of September 2020 either did not exist or were the products of RBC's actions/misdeeds – are respectively incorrect and without sufficient merit to require a trial.

[27] The only plausible reading of the record is that the RBC branch manager had told the Simmers that he retained the discretion as to whether to call their credit lines and business account, so long as their accounts did not remain overdrawn for more than 90-days. Since the accumulating debt appears to have been comprised mostly of unpaid interest, this explains Mr. Simmer's description of repaying the debt as an "interest only" payment scheme.

[28] However, the account records do not support that the Simmers adhered to even this payment scheme. Their principle deposit account was in overdraft chronically through the relevant period, and "in the red" from January through June of 2019. It was then brought just above the line for a brief instant, returning immediately to overdraft and remained increasingly overdrawn until November 18, 2019, when it was again, momentarily, brought ever so slightly into the black. No further deposit was ever made and the overdraft continued to grow.

[29] Under the Simmers' claimed arrangement, the next payment after November 2019 was due in February 2020. No deposit was made. RBC's assertion that they were in default and subject to collections action was indisputably correct.

[30] Summary judgment is appropriate in this case on the simple basis that, even taking the Simmers' claim about the 90-day payment scheme at face value, they were well and repeatedly in default of even this minimal obligation before Covid ever struck. That alone would have justified RBC invoking its remedies under the applicable credit agreements.

[31] Furthermore, the Simmers' claim to an agreement for forward-going forbearance on repayment similarly lacks sufficient merit to require a trial.

[32] Specifically, the Simmers claim that "on or around" March 13, 2020, the bank manager told Mr. Simmer to "hold on" to their next payment (which had come due in February of 2020), and to "take care of [his] family". They say he told them this was part of RBC's efforts to help customers during the Covid pandemic.

[33] The Simmers bear the burden of proving such an agreement on balance of probabilities. They have no documentation recording such an exceptional indulgence from RBC. The timing of their claim is also suspect on its face, as it coincides with the very beginning of the pandemic, when the scope of its impact was yet to unfold. It is inherently improbable that RBC would have made such offers at that point in time. Rather, this smacks as an after-the-fact justification for a failure to make even the February payment required to keep enforcement action within the branch manager's discretion.

[34] Moreover, the manager in question categorically denies making any such offer of non-payment to the Simmers. He deposes this would run afoul of the policies of RBC and be invalid under the standard terms of its credit agreements. This make sense and is a position that the defendants' undocumented and counterintuitive claims alone would not overcome.

[35] Finally, it strains logic and common sense that RBC would simply tell a perennially troubled customer to stop paying indefinitely. The fact that RBC neither chased the Simmers for payment, nor raised their increasingly tenuous position in routine communications, is not capable of hoisting the Simmers up the evidentiary mountain they must climb to win this case.

[36] As Neufeld J. held in ***Templanza v Ford***, 2018 ABQB 168 at paras 64-65:

> A party who resists a summary judgment application must "put its best foot forward" and cannot rely on vague assertions that more or better evidence might turn up if the matter was sent to trial: *Canada (Attorney General) v Lameman*, 2008 SCC 14 at paras 11, 19, [2008] 1 SCR 372.
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> Certain factual disputes do not block a summary judgment application, including:

- a "bare denial" or "bald allegation" (*Canada (Attorney General) v Lameman*, at para 11; *Shefsky v California Gold Mining Inc*, 2016 ABCA 103 at para 113, 616 AR 290);
- self-serving affidavit evidence unsupported by other evidence (*Guarantee Co of North America v Gordon Capital Corp*, 1999 CanLII 664 (SCC), [1999] 3 SCR 423 at 436-37; *Shefsky v California Gold Mining Inc*, at para 113) ...

[37] Those principles find traction in this case.

[38] Similarly, in ***Windsor v Canadian Pacific Railway Ltd***, 2014 ABCA 108 at para 13, the Court of Appeal stressed that the "culture shift" mandated in the Supreme Court of Canada's decision in ***Hryniak*** requires an expansion of the decision-making role played by the Court in summary judgement determinations under *Rule* 7.3. This principle led the Court of Appeal to describe the "modern test for summary judgment" as being the process of examining "the record to see if a disposition that is fair and just to both parties can be made on" it: ***Windsor*** at para 13.

[39] In other words, what is called for in summary judgment applications is not a slavish resort to sending matters to trial where any factual disagreement is asserted, but rather a final decision disposing of the matter where the Court has "confidence that it can find the necessary facts" to reach that determination: ***Hryniak*** at paras 49-50.

[40] The Supreme Court's decision in ***Hryniak*** itself could not be clearer in its support for a more robust assessment and decision process on summary judgment, stating in its overview, at paras 4-5, that what is called for is:

> ... 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.
>
> To that end, ... summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

[41] In this case, the record at trial would look much the same as here, with Mr. Simmer offering his own oral evidence about an offer from RBC that is illogical, improbable, and without corroboration, while his company fell repeatedly afoul of the agreement that RBC acknowledges they did have. Moreover, argument would be joined on this point years from now, against a backdrop of the Simmers omnipresent, ever-increasing, and inescapable indebtedness.

[42] Respectfully, I find that this case can be resolved on summary judgment. Doing so is more proportional to the dispute at hand, and the interests of justice favour that outcome, notwithstanding Mr. Jadusingh's exemplary efforts acting on the Simmers' behalf as limited retainer counsel.

Conclusion

[43] The record shows, and I find, that the Simmers were in long-running default of their loan obligations, irrespective of any "deal" with RBC. Moreover, their defence to RBC's calling of the loan lacks the merit to warrant a trial, and summary judgment is granted in favour of RBC.

[44] The parties may speak to the total amount presently owed, as well as costs, though they are urged to resolve those matters reasonably between themselves.

Heard on the 15th day of May 2025

Dated at the City of Calgary, Alberta this 15th day of July 2025.

N.E. Devlin, JCKBA

Appearances:

Catrina Webster, Lorne Graburn and Jaye Sutherland
for the Royal Bank of Canada

Ravi Jadusingh
Limited Retainer
for the Simmer Parties