

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tolzmann v. Royal Bank of Canada*,
2023 BCCA 366

Date: 20230921
Docket: CA48587

Between:

Josip Tolzmann

Appellant
(Defendant)

And

Royal Bank of Canada

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated
September 9, 2022 (*Royal Bank of Canada v. Superior Flood and
Fire Restoration Inc.*, Kamloops Docket S57607).

Oral Reasons for Judgment

The Appellant, appearing in person:

J. Tolzmann

Counsel for the Respondent:

T.W. McNeil-Hay

Place and Date of Hearing:

Vancouver, British Columbia
September 21, 2023

Place and Date of Judgment:

Vancouver, British Columbia
September 21, 2023

Summary:

This is an appeal of an order granting judgment in favour of the respondent, the Royal Bank of Canada, following a summary trial hearing. The appellant, Josip Tolzmann, contends that the chambers judge erred in granting the order notwithstanding credibility issues involving a key witness and conflicts in the affidavit evidence before him. He says the chambers judge should not have resolved the conflict in the evidence and granted judgment by summary trial. Held: Appeal dismissed. In appropriate circumstances, it is acceptable for a summary trial judge to make credibility findings on affidavit evidence alone. In this case, there was no conflict between the material evidence of two witnesses, but rather a discrepancy in the affidavits tendered by the respondent. That discrepancy was well within the scope of errors that can be resolved on summary trial applications and was resolved based on the evidence before the chambers judge. The chambers judge did not err by relying on evidence adduced by the respondent to resolve the conflict and order judgment against the appellant.

WILLCOCK J.A.:**Introduction**

[1] On September 9, 2022, following a summary trial, Mr. Justice Hori, in chambers, granted judgment in favour of the Royal Bank of Canada against Josip Tolzmann, finding him liable to pay the Bank the sum of \$689,509.75 and post-judgment interest on that amount from September 10, 2022, as the guarantor of the indebtedness of Superior Flood and Fire Restoration Inc. (the “Company”) pursuant to the terms of two guarantees.

[2] Mr. Tolzmann appeals from the order, arguing the chambers judge erred in law “by failing to recognize, consider, or resolve an issue regarding the credibility of a key witness” and “by resolving a conflict in the evidence in a manner contrary to established law”; and that he committed an error of mixed law and fact “by arriving at a conclusion contrary to the weight of the evidence”.

[3] The chambers judge noted that Mr. Tolzmann did not contest the validity of the guarantees or that the Company was indebted to the Bank. Rather, he denied having received the demand for payment from the Bank and, most importantly, argued the Bank did not make the demand for payment on the guarantees as required by their terms.

[4] The sole issue before the chambers judge was thus whether the Bank effectively delivered a demand for payment to Mr. Tolzmann before instituting the action.

[5] Had it failed to do so, the Bank would have run afoul of the condition imposed by the terms of both guarantees that the Bank make demand for payment on Mr. Tolzmann before instituting any suit on the guarantees.

Background

[6] On September 24, 2020, pursuant to a summary judgment application, the Bank obtained judgment against the Company in the total amount of \$656,793.43 and judgment against Mr. Tolzmann on the guarantees: *Royal Bank of Canada v. Superior Flood and Fire Restoration Inc.*, 2020 BCSC 1803.

[7] Mr. Tolzmann successfully appealed the September 24, 2020 judgment on the guarantee. While Mr. Tolzmann appealed on the basis that the chambers judge had erred in finding the Bank delivered a demand for payment on the guarantees, the appeal was determined on the basis that there was an unresolved discrepancy in the evidence before the Court with respect to the delivery of the Bank’s demand for payment: *Royal Bank of Canada v. Tolzmann*, 2021 BCCA 383 [*Tolzmann*].

[8] The discrepancy arose in the evidence tendered by the Bank in support of its summary judgment application. Angella White, a Manager of Special Loans and Advisory Services for the Bank, had deposed in an affidavit sworn on August 12, 2020, that “the last known and only address the Bank has on file for the Defendant, Josip Tolzmann is Suite 1401, 1710 Bayshore Drive, Vancouver, British Columbia, V6G 3G4” (emphasis added). However, the demand letter sent to Mr. Tolzmann, which was also tendered by the Bank as evidence in support of its summary judgment application, was addressed to: Suite 1404 – 1710 Bayshore Drive.

[9] On that appeal, the Bank conceded, in light of the discrepancy and the nature of the evidence presented in the court below, it was not properly open to the

chambers judge to grant summary judgment. She could not, on the evidence presented, find that there was no genuine issue for trial: *Tolzmann* at para. 2.

[10] Counsel for Mr. Tolzmann sought an order dismissing the entire action against him. The Court held:

[5] ... it would be inappropriate to make an order dismissing the action as against the appellant. In suggesting that the action should be dismissed, counsel for Mr. Tolzmann relies on *Air Canada v. British Columbia*, 1985 CanLII 227 (B.C.C.A.), aff'd [1989] 1 S.C.R. 1161. He says that issue estoppel precludes the bank from continuing to litigate the issue of whether the demand was made. *Air Canada* is a qualitatively different case and has no application here. The issue decided against the appellant in that case involved a question of law and was strictly a matter of statutory interpretation. That is not the situation here, where the summary judgment is being set aside because of a deficiency in the evidence that made it impossible to make a factual determination one way or the other as to whether the demand had been made. *Air Canada*, itself, recognizes, at para. 38, that "... in ordinary circumstances, where a plaintiff is unsuccessful in an application under [the summary judgment rule, the plaintiff] is entitled to a full trial of [the] action.". In our view, that entitlement continues to exist in this case.

[11] Accordingly, the Court allowed the appeal and dismissed the Bank's application for summary judgment: *Tolzmann* at para. 7.

[12] The Bank applied again for summary judgment on the guarantees. Ms. White deposed, in a new affidavit sworn on January 31, 2022, that her August 12, 2020 affidavit contained a typographical error in the last known address for Mr. Tolzmann. She deposed that the Bank's last known address for Mr. Tolzmann was in fact: Suite 1404 – 1710 Bayshore Drive.

[13] Justice Hori heard the Bank's second summary judgment application. He dismissed it on the basis that the discrepancy in the evidence with respect to Mr. Tolzmann's last known address required him to weigh and assess the evidence tendered by the Bank, and to do so would not be appropriate on a *summary judgment* application.

[14] The Bank then brought an application for judgment against Mr. Tolzmann pursuant to the summary trial provisions under R. 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[15] Justice Hori heard the Bank's application. He was satisfied that the application was suitable for disposition by summary trial and he was able to find the facts necessary to decide the issue. There was a single, well-defined issue, the resolution of which did not require a traditional trial: namely, whether 1404 – 1710 Bayshore Drive, Vancouver, B.C., was the address of Mr. Tolzmann last known to the Bank.

[16] He held:

- a) The Company was indebted to the Bank pursuant to a judgment of the Supreme Court of British Columbia rendered on September 24, 2020;
- b) As of September 24, 2020, the Company's indebtedness to the Bank was \$656,793.43;
- c) With post-judgment interest from September 25, 2020, the Company's indebtedness to the Bank was \$689,509.75 as of September 9, 2022;
- d) The guarantees executed by Mr. Tolzmann provided that demand for payment on the guarantees must be made before the Bank instituted any suit based on the guarantees;
- e) Demand on the guarantees is deemed to have been made when an envelope containing such demand addressed to the guarantor at the address of the guarantor last known to the Bank is posted postage prepaid;
- f) The address for Mr. Tolzmann stated in the guarantee documents is 1404 – 1710 Bayshore Drive, Vancouver, B.C.; and

- g) A letter demanding payment of the Company's indebtedness pursuant to the guarantees was posted by the Bank's counsel and addressed to Mr. Tolzmann at 1404 – 1710 Bayshore Drive, Vancouver, B.C., V6G 3G4.

[17] Ms. White's January 31, 2022 affidavit explained the discrepancy in the evidence with respect to the last address of Mr. Tolzmann known to the Bank. She deposed that the reference, in her affidavit of August 12, 2020, to the suite number 1401 in Mr. Tolzmann's address, was an error that she had not noticed when swearing the affidavit, and the last address known to the Bank for Mr. Tolzmann was in fact Suite 1404 – 1710 Bayshore Drive, Vancouver, B.C. The chambers judge also had before him the evidence of Rianne Jeeves, a legal administrative assistant for the Bank's solicitors, that she made a typographical error when preparing the August 12, 2020 affidavit.

[18] Mr. Tolzmann tendered no evidence to suggest the Bank had a different address for him than the one set out in the guarantee documents. That being the case, the chambers judge accepted that Ms. White was mistaken about the address in her August 12, 2020 affidavit.

[19] Based on the evidence before him on the summary trial application, the chambers judge found that 1404 – 1710 Bayshore Drive was, in fact, Mr. Tolzmann's address last known to the Bank.

[20] He dismissed Mr. Tolzmann's argument that the application for judgment should be dismissed because the Bank's previous summary judgment applications had been dismissed, noting that summary judgment applications are much different than summary trial applications.

Argument

[21] The appellant, Mr. Tolzmann, argues that Ms. White gave "directly inconsistent evidence on a pivotal issue" and that this gives rise to an issue of credibility that should not have been determined on a summary trial.

[22] He says the explanation offered for the typographical error, that the affidavit was drafted by a legal administrative assistant, implies that the August 12, 2020 affidavit was not in the deponent's own words, offending the principle (referred to in *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 at para. 33, 1991 CanLII 5730 (C.A.) [*Cotton*]) that affidavits used on an application for summary trial should be in the words of the witness. He argues Ms. White's admission that she did not draft the affidavit herself further impugns her credibility as a witness.

[23] He says, relying upon *Mayer v. Mayer*, 2012 BCCA 77 at para. 83, that once credibility issues arise, it is unjust to proceed on a summary trial without permitting a party to develop its case through discovery and cross-examination or through a conventional trial. He says this notwithstanding the fact that, as we have been advised in argument today, Ms. White was available and tendered for cross-examination at the hearing of the summary trial.

[24] He says, relying on *Cory v. Cory*, 2016 BCCA 409 at para. 10, that conflicts in the evidence in a summary trial cannot be properly resolved where there is no documentary evidence, evidence of independent witnesses or undisputed evidence that resolves the conflict.

[25] He submits there was no proper basis on which the chambers judge could prefer the evidence tendered in Ms. White's January 31, 2022 affidavit over her August 12, 2020 affidavit.

[26] He further contends the chambers judge erroneously found the address contained in the guarantee documents was the address last known to the Bank without any evidence to suggest that was the case, and wrongly drew an adverse inference from the fact that the appellant had not tendered any evidence that the respondent, the Bank, had a different address for him than the one set out in the guarantee documents.

Analysis

[27] I would not accede to any of these arguments. As the respondent notes, this Court has on a number of occasions, and recently in *Amacon Alaska Development Partnership v. ARC Digital Canada Corp.*, 2023 BCCA 34 at para. 40, held that “[i]n appropriate circumstances, it is perfectly acceptable for a summary trial judge to make credibility findings on affidavit evidence alone”.

[28] There was no direct conflict in this case between the material evidence of two witnesses, but rather a discrepancy created by the appearance of the “Suite 1401” address in Ms. White’s first affidavit—the August 12, 2020 affidavit. I agree with the respondent that the evidentiary conflict here was “well within the scope of errors that can be resolved on summary trial applications and was readily able to be resolved”.

[29] I further agree with the respondent’s submission that it was appropriate for the chambers judge to accept the explanation that “Suite 1401” appeared in Ms. White’s August 12, 2020 affidavit because of a typographical error because:

- a) the typographical error explanation was logical and plausible;
- b) the appellant did not provide another theory of how the “Suite 1401” address came to appear in Ms. White’s first affidavit; and
- c) the appellant declined the opportunity to cross-examine Ms. White on this question (or at all).

[30] In my view, it was not inappropriate for the chambers judge to consider the fact the appellant led no evidence to suggest the Bank had any address for him other than that set out in the guarantee documents. In doing so, he was not placing an onus of proof upon the appellant but, rather, observing that the Bank’s evidence on this point was not challenged. The Bank had displaced the evidentiary burden upon it, and the appellant had not responded.

[31] Finally, the cautionary words of Justice Southin in the *Cotton* case, to the effect that affidavits used in summary trials should be in the words of the witness,

not the words of counsel, do not imply that affidavits cannot be prepared with assistance. It cannot be said the chambers judge in this case erred in accepting the evidence with respect to how the typographical error occurred and placing weight upon Ms. White's evidence, as corrected, despite the fact the affidavit containing the typographical error was drafted for her by Ms. Jeeves.

[32] To the contrary, the chambers judge was, in the circumstances, entitled to rely upon Ms. White's evidence as to the source and nature of the discrepancy in order to resolve the evidentiary conflict before him and to conclude that the "Suite 1404" address was the Bank's last known address for Mr. Tolzmann.

[33] For those reasons, I would dismiss the appeal.

[34] **DEWITT-VAN OOSTEN J.A.:** I agree.

[35] **VOITH J.A.:** I agree.

[36] **WILLCOCK J.A.:** The appeal is dismissed.

"The Honourable Mr. Justice Willcock"