COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lyons v. Canadian Imperial Bank of Commerce,* 2025 BCCA 22

Date: 20250117
Docket: CA49853

Between:

Sharalynn Lyons

Appellant
(Defendant)

And

Canadian Imperial Bank of Commerce

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated April 9, 2024 (*Canadian Imperial Bank of Commerce v. Lyons*, New Westminster Docket S249014).

Oral Reasons for Judgment

The Appellant, appearing in person:	S. Lyons
Counsel for the Respondent:	L. Morris
Place and Date of Hearing:	Vancouver, British Columbia January 17, 2025
Place and Date of Judgment:	Vancouver, British Columbia January 17, 2025

Summary:

The Canadian Imperial Bank of Commerce obtained summary judgment against the appellant for unpaid credit card debt. She appealed the judgment, claiming that the judge made a number of errors. This included granting judgment without the CIBC advancing a valid claim. HELD: Appeal allowed, the summary judgment is set aside, and the matter is remitted to the Supreme Court for determination. The judge committed two material errors: (1) he granted summary judgment without accounting for evidence that directly contradicted an essential element of the respondent's case; and (2) he applied an incorrect standard of proof.

[1] **DEWITT-VAN OOSTEN J.A.**: In April 2024, the Canadian Imperial Bank of Commerce (the "CIBC"), obtained summary judgment against the appellant, Sharalynn Lyons, for $11,248.80 in unpaid credit card debt.

[2] Rule 9-6(5)(a) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 allows for summary judgment where a judge is "satisfied that there is no genuine issue for trial". To meet this test, a plaintiff must show beyond doubt that the defendant is bound to lose: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 65; *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188 at para. 25. Consequently, if the defendant submits evidence that contradicts the plaintiff's claim in "some material respect", the application for summary judgment must be dismissed: *Sakwi* at para. 25. A judge is not permitted to weigh evidence on a R. 9-6 application "… beyond determining whether [the evidence] is incontrovertible: any further weighing may only be done in a trial …": *Beach Estate* at para. 49 (internal references omitted).

[3] The appellant says it was not beyond doubt that the CIBC would succeed in its claim against her and asks that the summary judgment be set aside.

Background

[4] The credit card debt arises from the use of a CIBC Costco Mastercard. The card is in the appellant's name and was deemed to be in default in March 2022.

[5] In support of its R. 9-6 application, the CIBC filed an affidavit sworn by Alison Ferreira, who is a Relationship Officer with the CIBC. She has conduct of the collection against the appellant and deposed that:

- Capital One Bank ("Capital One") opened a Costco credit card account in the appellant's name in November 2014.
- Capital One provided the appellant with a credit card and cardholder agreement stating that it could assign its rights under the cardholder agreement to a third party without notice to the appellant.
- The appellant accessed the credit card and made payments that would then be reflected in monthly statements sent to her.
- In February 2022, Capital One notified the appellant that in March 2022, the CIBC would become the exclusive issuer of the credit card.
- Capital One sold, transferred, and assigned the appellant's account to the CIBC in March 2022.
- The CIBC sent a replacement card to the appellant, along with a "welcome package" that included a monthly statement for March 2022 and a cardholder agreement.
- A new or amended cardholder agreement was sent to the appellant in June 2022.
- Both CIBC cardholder agreements stipulated that if the appellant signed, used, or activated the credit card, this would constitute an acknowledgement that she received, understood, and agreed to the cardholder agreement.
- The appellant signed, used, or activated the CIBC credit card.

- The appellant defaulted on her payments in March 2022. A minimum payment was made for February 2022 but no further payments were made after that date.

- In August 2022, the CIBC demanded that the appellant immediately repay the total balance owing on the card.

- On January 26, 2023, the balance owing was $11,248.40 (with interest from that date). The credit card's interest rate is 19.75% per annum.

[6] Ms. Ferreira's affidavit attached copies of credit card statements in the appellant's name, including a statement dated March 26, 2022 that is labelled "CIBC Costco Mastercard" and shows an opening balance of $9,188.90. This statement recorded a cumulative $228.43 in purchases made during the month of March. The statement also contained this note:

> Your account information has been transferred to CIBC from Capital One. Please visit CIBC Online Banking or contact us at 1 866 346-2999 if any of your information has changed or to update your communication preferences. Your personal information will be handled in accordance with the CIBC privacy policy, Your Privacy is Protected, available at cibc.com/privacy.
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> [Emphasis added.]

[7] The appellant filed an affidavit in response to the R. 9-6 application. In the affidavit, she:

- denied "… signing, accessing, activating, agreeing, having knowledge, understanding of [or] receiving any card, terms or agreements …" from the CIBC;

- said the CIBC's correspondence was sent out "during the upheaval of the COVID-19 pandemic" and the appellant was "displaced" during that time. The CIBC correspondence went to a "campground, where numerous transient people" had access to the "100 plus mail slots in the mail room". Mail was "not always delivered properly" and/or would go missing; and,

- said she had “no knowledge of the contract intentions”.

[8] The affidavit is consistent with the appellant’s filed response to the CIBC’s notice of civil claim, which asserts that:

> 3. … the defendant at no time was notified, advised receiving any correspondence, written notices, assignments, transfers, or agreement.
>
> 4. … the defendant denies signing, accessing, activating, agreeing, having knowledge, understanding of [or] receiving any card, terms or agreements from the plaintiff (“CIBC”) …

Summary Judgment

[9] The judge delivered brief oral reasons. He noted that the appellant’s “main objection” to summary judgment was that there was “insufficient evidence” of a transfer of rights from Capital One to the CIBC.

[10] The judge disagreed. He noted that in her affidavit, Ms. Ferreira deposed that the CIBC is the “absolute assignee” of Capital One in respect of the credit card. She also set out the details of the appellant’s account. The judge said:

> [3] … this is adequate evidence to establish that an assignment occurred between those two companies. I have no doubt that there could have been more information provided in paragraph 2, but paragraph 2 is some evidence that an assignment occurred, and the defendant has not proffered any evidence of her own to suggest that an assignment did not occur. So I find myself left in a situation where I have paragraph 2 saying an assignment occurred, and I have no evidence saying that an assignment did not occur.
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> [4] In light of that, I accept that an assignment occurred on a balance of probabilities. Then, in terms of the existence of the debt, the account statements are clear that the debt amounts were incurred.
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> [5] In terms of evidence that the [defendant] had the card, that is clear from the fact that payments were made. I can infer from that, that the card was in her possession. So the only issue is whether or not there was a proper assignment, and I have already dealt with that argument earlier in these reasons.
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> [Emphasis added.]

Issues on Appeal

[11] The appellant, who is representing herself on the appeal, submits the judge made a number of errors: (a) he should have struck the R. 9-6 application

and directed that the CIBC's claim be adjudicated in the Provincial Court; (b) he erred in deciding the application was based on hearsay evidence; (c) he conducted a procedurally unfair hearing by not allowing the appellant to "refute the evidence presented", or cross-examine the CIBC's witness; and (d) he wrongly found the CIBC's evidence proved its claim. In particular, the appellant says there was "no valid evidence" of an assignment between Capital One and the CIBC; a cardholder agreement between the CIBC and the appellant; or a "valid debt".

Standard of Review

[12] A judge's decision on whether there is a genuine issue for trial is a matter of mixed fact and law. As a result, unless an appellant establishes an extricable error of law (assessed for correctness), a summary judgment may only be set aside for palpable and overriding error: *Wang v. Grace Canada Inc*., 2018 BCCA 255 at para. 26; *Anthem Crestpoint Tillicum Holdings Ltd. v. Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI*, 2022 BCCA 166 at para. 44.

[13] The appellant also alleges procedural unfairness. This ground of appeal attracts a correctness standard. The question to ask is whether the proceeding was fair: *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 at para. 52.

Discussion

[14] I do not consider it necessary to address each of the appellant's grounds of appeal. That is because I am satisfied the judge committed two material errors that require setting the judgment aside.

[15] First, the law is clear that if there is evidence that contradicts a plaintiff's claim in "some material respect", an application for summary judgment must be dismissed: *Sakwi* at para. 25. In support of its claim, the CIBC asserted the appellant signed, used, or activated the credit card in March 2022 and by doing so, acknowledged she had received, understood, and agreed to the terms of the CIBC cardholder agreement. The appellant's affidavit denied "… signing, accessing, activating,

agreeing, having knowledge, understanding of [or] receiving any card, terms or agreements …" from the CIBC. The judge's reasons do not account for this denial, which contradicts the CIBC's case in a "material respect": *Sakwi* at para. 25. To infer (as he did) that the card was in the appellant's possession at the time of default, the judge would have had to assess the credibility of her denial, weigh that evidence in the context of the record as a whole, and make a finding of fact to the contrary. This type of weighing is not permitted on a summary judgment application: *Beach Estate* at para. 49.

[16] Second, the judge could only grant summary judgment if satisfied the CIBC's evidence was incontrovertible, and as a result, it was beyond doubt there was no genuine issue for trial. This is a "high bar": *Beach Estate* at para. 65; *Rahman v. Windermere Valley Property Management Ltd.*, 2022 BCCA 258 at paras. 25–46. A serious question arises on the face of the judge's reasons as to whether he applied the correct standard of proof. At para. 4 of his reasons, he found the CIBC proved an assignment from Capital One to the CIBC "on a balance of probabilities". This was an essential element of establishing the claim against the appellant. The balance of probabilities standard is applied at a summary trial under R. 9-7, not an application for summary judgment under R. 9-6.

Disposition

[17] For these reasons, I am satisfied the judge committed two material errors that irreparably tainted the outcome of the summary judgment application and necessitate appellate intervention. Accordingly, I would allow the appeal, set the judgment aside, and remit this case to the Supreme Court for determination.

[18] The appellant asked that the appeal be allowed and the Supreme Court action be dismissed because it should have been commenced in the Victoria Provincial Court rather than the New Westminster Supreme Court. However, those arguments are without substantive merit. The Supreme Court had jurisdiction to hear the matter as filed and the proper remedy is to remit the case to that forum.

[19] **MARCHAND C.J.B.C.**: I agree.

[20] **DICKSON J.A.**: I agree.

[21] **MARCHAND C.J.B.C.**: The appeal is allowed, the judgment is set aside, and the case is remitted to the Supreme Court for determination. Thank you very much for your helpful submissions.

"The Honourable Madam Justice DeWitt-Van Oosten"