

Superior Court of Justice
Cour supérieure de justice

Endorsement Record/Order of the Court
Fiche d'inscription/Ordonnance judiciaire

Richmond Hill

SC-10-00086008-0000

Small Claims Court / Cour des petites créances de

Court File No./ N° de la demande

855 Major MacKenzie Dr E

Address / Adresse

Richmond Hill, ON L4B 4X7

(905)737-4416

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CAPITAL ONE BANK (CANADA BRANCH)

Plaintiff
Demandeur

and / et

ELENA IOUPATOVA

Defendant
Défendeur

Representative of the plaintiff(s):

Représentant du demandeur :

Representative of the defendant(s):

Représentant du défendeur :

Graham Scott, *pro se*
Self represented

Event type:

Trial appealable

Type d'affaire:

On 23-SEP-2011, a hearing was held in the above matter and the following order was made:

Le 23-SEP-2011, une audience a eu lieu concernant l'affaire susmentionnée, et l'ordonnance suivante a été re

See attached reasons for
judgment dated Sept 23, 2011.

Signature of judge / Signature du juge

DEPUTY JUDGE ELLIOTT GOLDSTEIN
ONTARIO SMALL CLAIMS COURT

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CHRISTENSEN LAW FIRM
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ELENA IOUPATOVA
350 RED MAPLE ROAD, SUITE 1012
RICHMOND HILL ON CA L4C 0T5

Capital One (Canada Branch) v Elena Ioupatova

RHill SCC # SC-10-86008

REASONS FOR JUDGMENT

Per Deputy Judge ELLIOTT GOLDSTEIN

The Plaintiff, Capital One Bank (Canada Branch) seeks recovery of a debt pursuant to a written credit card agreement for outstanding principal, interest, and pre-proceeding collection expenses. The amount claimed in the Plaintiff's Claim is the amount owing, inclusive of interest \$8,805.70, plus (pre-proceeding) collection expenses of \$2,493.26, for a total of \$11,298.96, as at October 6, 2010, plus pre- and post-judgment interest at the rate of 21.70% per annum.

The Plaintiff's evidence is contained in the affidavit of Amit Chadha and exhibits thereto, sworn May 11, 2011, (the "Chadha Affidavit") and marked as Exhibit 1 at trial. Ms Chadha is a law firm liaison officer employed by the Plaintiff.

The Chadha Affidavit was served on the Defendant on May 13, 2011.

The Defendant admits receiving the Chadha Affidavit and did not object to its admission in evidence.

The Defendant did not summons Ms Chadha as a witness to cross-examine her [R. 18.02(3)(4), and 18.03].

I find that the Chadha Affidavit is admissible pursuant to Rule 18.02 of the Small Claims Court Rules notwithstanding that its author (the deponent Chadha) was not called as a witness at trial by either party. In support, I rely upon *Woolcott v Rocheleau* 2010 CarswellOnt 4345, at para 9.

The evidence of the Plaintiff is that the Defendant applied for a Capital One MasterCard credit card (the "MasterCard") by signing a credit application form on January 8, 2007. The Capital One Customer Agreement was mailed to the Defendant along with the MasterCard, which agreement governs the use and operation of the MasterCard account.

On March 5, 2007, the Defendant began using the MasterCard and used it continuously until March 20, 2008, when she stopped using it, but continued to make payments to reduce its balance until November 3, 2009.

Throughout the aforementioned period, the Plaintiff mailed statements to the Defendant on a monthly basis detailing the use and operation of the account. Those statements clearly set out, inter alia, the credit limit, the total available credit, the interest charges (including the interest rates on an annual basis for both purchases and cash), the new balance, minimum payment, and payment due date.

Default occurred on December 23, 2009 when no further payment was received. A demand letter was sent by the Plaintiff's lawyer, Christensen Law Firm (the "Law Firm").

The Defendant admits that since the date of default, she never sent money to the Plaintiff or the Law Firm.

The Defendant testified that she used the MasterCard and received the goods and services described therein. She admits that she owes the Plaintiff money, but disputes the amount.

For example, the Defendant believes that she should not have to pay any over limit fees (charged at \$29.00 per month) even though she admits that the amount she owed when she ceased using the MasterCard exceeded its credit limit of \$5,500.00. Her subsequent payments, being less than

the interest charged per month, increased the amount owing to over \$5,500 per month and the over limit fees applied.

Over limit fees are provided for in paragraph 9 of the Capital One Customer Agreement and I find that the Defendant agreed to same when she began using the MasterCard.

The Defendant also objects to paying any amount for pre-proceeding collection expenses. However, the Defendant agreed to pay “any expenses (the Plaintiff) incurs to collect (the Defendant’s) debt; such expenses shall be considered ‘debt’ under this Agreement.” See paragraph 12 of the Capital One Customer Agreement.

According to the retainer agreement between the Law Firm and the Plaintiff, the Plaintiff is obligated to pay the Law Firm a fee of 25 percent of principal and interest owed by the debtor plus costs of any legal proceeding. In accordance with this agreement, at the commencement of proceedings the Plaintiff’s fee obligation to the Law Firm was \$2,487.61 (including HST). <1> The Plaintiff claims this amount as a pre-proceeding collection expense.

I find that the Plaintiff is liable to pay the Law Firm for debt collection services on a contingent percentage of the outstanding debt. I find the 25 percent fee to be a reasonable one. (See *Loans Till Payday v. Brereton* 2010 CarswellOnt 9150 (Ont. Div. Ct.) at para. 35 and 36.)

The Plaintiff submits that pre-proceeding collection expenses are a claim for a liquidated demand for money, within the meaning of the Small Claims Court Rules 11.10(1) and 11.02(1). The

1. The Plaintiff says that the amount claimed in the Plaintiff’s Claim, \$2,493.26, was calculated incorrectly and the correct amount should be \$2,487.61. I have used the latter amount in my calculations. This reduces the total to \$11,293.31, from \$11,298.96

Plaintiff relies on the case of *Capital One Bank v Matovska* 2007 CarswellOnt 565 (Ont. Div. Ct).

I agree with the Plaintiff's submission in this regard and find that the amount of \$2,487.61 (which includes HST) is a valid pre-proceeding collection expense that is recoverable by the Plaintiff.

The Plaintiff has claimed pre- and post-judgment interest at the rate of 21.70% per annum. In *Bank of America Canada v. Mutual Trust Co.* 2002 CarswellOnt 1114, at paras. 49 and 50, the Supreme Court of Canada held that "Absent exceptional circumstances, the interest rate which had governed the loan prior to breach would be the appropriate rate to govern the post-breach loan. The application of a lower interest rate would be unjust to the lender. This analysis applies equally to pre-judgment and post-judgment interest."

I award compound pre-judgment interest and post-judgment interest at the rate of 21.70% per annum as damages to enable the Plaintiff to be fully compensated when the judgment is finally paid.

In these circumstances, the Plaintiff will have judgment against the Defendant for \$11,293.31 (\$8,805.70 plus \$2,487.61) plus pre-judgment interest (at 21.70% per annum from October 6, 2010 to the date of judgment) in the amount of \$2,451.87, for a total of \$13,745.18, and post-judgment interest at the rate of 21.70% per annum from the date of this judgment.

As the successful party, the Plaintiff is also entitled to costs.

I allow the Plaintiff a total of \$1,474.33 in costs calculated as follows:

\$145.00 (as court fees paid to issue the claim – frequent plaintiff)

\$100.00 (as court fees to list the action for trial)

\$100.00 (preparation and filing of claim)

\$1,129.33 (10% of \$11,293.31)

Such costs to be paid by the Defendant to the Plaintiff.

Spt 23, 2011



**DEPUTY JUDGE ELLIOTT GOLDSTEIN
ONTARIO SMALL CLAIMS COURT**