Original
2013 ONSC 5440
Ontario Superior Court of Justice (Divisional Court)

Capital One Bank v. Wright

2013 CarswellOnt 12424, 2013 ONSC 5440, [2013] O.J. No. 4023, 232 A.C.W.S. (3d) 663, 313 O.A.C. 49

# Capital One Bank (Canada Branch), Plaintiff (Appellant) and Laura M. Toogood, aka Laura Maria Toogood, aka Laura Marie Degenova, Defendant (Respondent)

M.L. Edwards J.

Heard: June 27, 2013
Judgment: September 6, 2013
Docket: Newmarket DC-12-463-00

Proceedings: reversing *Capital One Bank v. Wright* (2012), 2012 CarswellOnt 9953 (Ont. S.C.J.)

Counsel: Menachem M. Fellig, for Plaintiff / Appellant
No one for Defendant / Respondent

Subject: Contracts; Civil Practice and Procedure; Corporate and Commercial

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

**Contracts --- Remedies for breach — Contractual remedies — Penalty or liquidated damages**

Plaintiff brought action for $7,101 owing on credit card — Cardholder did not defend claim — When matter came before small claims court, plaintiff had submitted final monthly statement for outstanding balance in customer agreement between parties as part of plaintiff's claim — Deputy small claims court judge dismissed claim on basis that plaintiff had not adduced evidence that would permit him to determine what part of claim was for charges actually incurred on account by cardholder and what part was for interest or other charges added by plaintiff — Judge ruled that claim under credit card account was not debt or liquidated demand in money — Appeal from decision that claim for credit card debt, set out on invoice and owing pursuant to written credit card agreement, was not liquidated demand for money — Appeal allowed — Where cardholder has been served with claim and has chosen not to defend claim, it made no sense for credit card company to be required to file with court all credit card statements back to first statement that may have been issued to cardholder — Cardholder agreement made clear that unless cardholder contested particular statement, cardholder was deemed to have accepted balance claimed as of date of statement — Plaintiff was granted judgment in amount of $5,536.

## Table of Authorities

**Cases considered by *M.L. Edwards J.*:**

*Canadian Imperial Bank of Commerce v. Prasad* (2010), 2010 CarswellOnt 108, 2010 ONSC 320 (Ont. S.C.J.) — considered

*Cantalia Sod Co. v. Patrick Harrison & Co.* (1967), [1968] 1 O.R. 169, 1967 CarswellOnt 176 (Ont. H.C.) — considered

*Capital One Bank v. Matovska* (2007), 2007 CarswellOnt 5605 (Ont. Div. Ct.) — followed

*Gyimah v. Bank of Nova Scotia* (2013), 2013 ONCA 252, 2013 CarswellOnt 4712 (Ont. C.A.) — considered

*Holden Day Wilson v. Ashton* (1993), 14 O.R. (3d) 306, 104 D.L.R. (4th) 266, 64 O.A.C. 4, 1993 CarswellOnt 1834 (Ont. Div. Ct.) — followed

**Statutes considered:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43
s. 25 — referred to

ss. 128-130 — referred to

  

APPEAL by plaintiff from judgment reported at *Capital One Bank v. Wright* (2012), 2012 CarswellOnt 9953 (Ont. S.C.J.), dismissing plaintiff's claim for amount owing on credit card.

***M.L. Edwards J.*:**

**Overview**

1 At issue on this appeal is whether the deputy Small Claims Court judge erred in ruling that a claim for a credit card debt, set out on an invoice and owing pursuant to a written credit card agreement, was not a liquidated demand for money. This appeal also deals with the issue of the contractual rate of interest and whether the contractual rate of interest applies after the breach of the contract.

**The Facts**

2 The plaintiff's claim was issued on February 23, 2011 for $7,101.08, which amount was due as of February 9, 2011, together with pre-judgment and post-judgment interest at the rate of 21.7 per cent per year. The claim was served on the defendant personally on March 15, 2011. No defence was ever filed. The clerk of the Small Claims Court refused to sign default judgment.

3 When the matter came before the Small Claims Court, the plaintiff had submitted a final monthly statement for the outstanding balance in the customer agreement between the parties as part of the plaintiff's claim.

4 The final monthly statement lists the amount owing by the defendant to the plaintiff. The customer agreement provides that the cardholder accepts the statement as accurate if the customer (i.e., the defendant), does not inform the plaintiff of any alleged errors within thirty days of the statement date. The agreement further provides the total debt must be paid if the cardholder fails to fulfill any of the terms of the agreement. As such, the amount appearing on the final statement is a "sum agreed upon or quantified in advance by the parties" which is how the Small Claims Court judge defined a liquidated amount.

5 In addition to the aforementioned evidence, the plaintiff had filed at the assessment hearing in the Small Claims Court, statements showing the final payment, which was made subsequent to all charges made on the account by the defendant through to the final statement on which the plaintiff's claim was based.

6 Also included in the information contained in the final statement, apart from the outstanding balance and customer agreement, was information with respect to the prevailing rate of interest and how the interest was calculated. The customer agreement provided:

> You are still responsible for paying interest at the rate current at the time under this agreement even if: you fail to meet the terms of this agreement; we obtain a court judgment against you for payment of the debt under this agreement; we close your account or cancel your card; we demand immediate payment of your total debt.

  

7 In his reasons for judgment, dated August 14, 2012 (the "Reasons"), the deputy Small Claims Court judge dismissed the plaintiffs claim on the basis that the plaintiff had not adduced evidence that would permit him to "determine what part of the claim was for charges actually incurred on account by the client and what part was for interest or other charges added by the plaintiff...".

8 In addition, the deputy Small Claims Court judge ruled that a claim under a credit card account is not a debt or liquidated demand in money. Of particular note, in his reasons, is a provision to the effect that in circumstances similar to those before the court, the credit card company must submit "...sufficient particulars or a detailed accounting that will permit a judge...to qualify it." On the facts before him, the deputy Small Claims Court judge found no such evidence submitted by the plaintiff

9 As to the sufficiency of the plaintiff's evidence, the following extract from the Reasons is particularly relevant:

> In my opinion, to prove its claim the plaintiff must adduce *prima facie* evidence showing what charges were incurred and payments made from a point in time when the account stood at a nil balance... Alternatively, if the client makes a partial payment without protest after receiving a monthly statement showing the balance that the plaintiff claimed was due on the account on a given date, then that payment may constitute an acknowledgement of the debt as of that date if there is evidence before the court from which such an inference may be drawn. There is no such evidence before me.

10 In fact there was an affidavit before the deputy Small Claims Court judge, including various statements showing the final payment which was made subsequent to charges made on the account by the defendant right through to the final statement on which the plaintiffs claim was based.

11 As to the question of the appropriate interest rate, the deputy Small Claims Court judge indicated that the plaintiff had provided no evidence of the interest rate at the time that the card was opened and no evidence of any notice of change in the interest rate. As previously noted, the plaintiff had in fact submitted the final statements setting forth the outstanding balance as well as the rate of interest on the final statement and how it was calculated.

12 Dealing with the rate of interest, the deputy Small Claims Court judge concluded:

> In the absence of any evidence or explanation to justify it, the rate of interest claimed offends my sense of justice and good conscience within the meaning of section 25 of the *Courts of Justice Act*.

13 Dealing with the question of the rate of interest at the determination of the contract, the deputy Small Claims Court judge concluded that the applicable rate of interest after the agreement was "terminated" should be the rate provided for by section 128 through section 130 of the *Courts of Justice Act*.[1] In this regard, the deputy Small Claims Court judge stated:

> If the contract is at an end, then the contractual rate of interest no longer applies from the date of termination forward; and

  

> After termination of the agreement, there is no agreed upon rate of interest.

14 The deputy Small Claims Court judge ruling, with respect to the rate of interest after the termination of the contract, flies in the face of section 8 of the customer agreement, which as previously noted provides for the rate of interest and method of calculation in connection within the court judgment obtained by the plaintiff.

15 The customer agreement provides for expenses incurred by the plaintiff with respect to the collection of the outstanding debt. In this regard, it is particularly noteworthy that when the matter came on before the deputy Small Claims Court judge, the plaintiff had, in fact, waived its claim to collection expenses which waiver was reflected in a handwritten endorsement of the deputy Small Claims Court judge. Despite the plaintiff having waived its collection expenses, the deputy Small Claims Court judge wrote extensive detailed reasons with respect to the issue of collection expenses. Prior to the release of the reasons, the deputy Small Claims Court judge did not give the plaintiff or its counsel an opportunity to make any submissions with respect to the question of collection fees.

**The Issues**

16 This appeal essentially raises two fundamental issues. The first is whether or not the deputy Small Claims Court judge erred in his conclusion that a claim made for an outstanding credit card account is not a claim for a liquidated debt. The second significant issue is whether the deputy Small Claims Court judge was correct to require that the plaintiff enter into evidence all of the credit card statements from the date that the account was opened to prove the amount owing or whether the plaintiff could submit, as proof of the outstanding balance, the last statement.

**The Law**

17 Dealing with the issue of what is a liquidated debt, Ferguson J. stated in *Cantalia Sod Co. v. Patrick Harrison & Co.* (1967), [1968] 1 O.R. 169 (Ont. H.C.) at para. 3, as follows:

> ...whether the amount to which the plaintiff is entitled (if he is entitled to anything) can be ascertained from the contract itself or by calculation or fixed by a scale of charges agreed upon by the contract or implied by it.

18 In *Holden Day Wilson v. Ashton*, [1993] O.J. No. 1195 (Ont. Div. Ct.), White J. for the Divisional Court undertook a lengthy review of the meaning of "liquidated demand". On behalf of the court, White J. concluded that the caselaw and secondary sources confirmed that whether a claim could be identified as liquidated would depend on the answers to several questions:

> (a) Is it ascertainable by calculation or by referring to a fixed scale of charges?;
>
> (b) Can the calculation be made by reference to the agreement between the parties itself, or at least implied by the agreement?;
>
> (c) Was the price or method of calculation of the price agreed upon by the parties?;
>
> (d) Has the defendant obliged himself/herself to pay a specific sum of money?; and

  

(e) Was a reasonable estimated cost established by the parties?

19 In *Capital One Bank v. Matovska*,[2] the Divisional Court considered whether a claim for pre-proceeding collection expenses provided for in a credit card agreement was a claim for a liquidated demand for money. In that regard, the Divisional Court relying on *Holden Day Wilson*, *supra*, determined that such a claim was a liquidated demand and stated:

> In my view, the pre-proceeding collection expenses claimed in the credit card agreement 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).

20 In *Matovska*, the Divisional Court found that the pre-proceeding collection expenses could be ascertained by calculation as agreed in the contract between the plaintiff and its counsel. Since the defendants agreed to pay the plaintiff "any expenses we (the plaintiff) incur to collect your debt", the court concluded that such expenses were enforceable as a liquidated demand. At paragraph 7 of its decision, the court explained:

> ...the claim for pre-proceeding collection expenses charged by the plaintiffs' counsel pursuant to a retainer agreement providing for a fixed percentage of the outstanding indebtedness is a "liquidated demand for money" and by necessary implication, it is enforceable as a liquidated demand for money by the plaintiff against the defendants.

21 Fundamentally, the question that this court has to decide is whether or not the deputy Small Claims Court judge erred in holding the claim under a credit card agreement is not a claim for a liquidated demand. Adopting the five pronged test set forth by White J. in *Holden Day Wilson* , *supra*, I am of the view that on the evidence before him, the deputy Small Claims Court judge erred in his conclusion that the plaintiff's claim on the credit card debt was not a claim for a liquidated debt. In that regard, I am satisfied that on the evidence before him, in fact, the debt was ascertainable by calculation; that the calculation could be made by a reference to the credit card agreement which was filed before the court and adopted by the parties as the operative agreement; and that the method of calculation was agreed upon by the parties in the cardholder agreement which set forth the interest rate and the terms of the card. As to the question of the calculation of the interest, I am equally satisfied, on the basis set forth in both *Holden Day Wilson* and *Matovska*, that the calculation of the interest was straight forward as it was a calculation based on the outstanding balance. There is no need to make reference to anything outside of the cardholder agreement.

22 As to the finding of the deputy Small Claims Court judge that in order to prove the debt the plaintiff was required to file all of the credit card statements, I am equally of the opinion that the ruling of the deputy Small Claims Court judge in this regard is fundamentally flawed.

23 In *Canadian Imperial Bank of Commerce v. Prasad*, 2010 ONSC 320 (Ont. S.C.J.), Corbett J. offered the following comments on the general approach which should be taken on credit card debt collection cases, in the context of a summary judgment motion:

> The goal of civil litigation, as embodied in R.1.04(1), is to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. It is clear that Ms. Prasad held and used a credit card. The principal amount claimed was not contested, and yet the court did not grant partial summary judgment. It is clear (and frankly notorious) that interest is charged on unpaid credit card balances. If the calculation of the interest is in serious question, the proper approach is to grant judgment for the uncontested portion of the claim, without prejudice to a further motion respecting any controversial issues. Where this happens, often the creditor does not pursue additional

  

> relief since it is unable to collect the amount of the partial judgment anyway. Where there does not appear to be any defence to the claim, as appears to have been the case here, such a motion should take no more than a few minutes of time in regular motions court. The manner in which this has been handled, the case would proceed to a trial.

24 In *Gyimah v. Bank of Nova Scotia*, 2013 ONCA 252 (Ont. C.A.), the Ontario Court of Appeal found no error on the part of the motion judge in accepting the bank's sworn testimony as to the amount outstanding in a claim for the amount owing on a line of credit and a credit card. While the decision of the motions court judge in *Gyimah* was not published, it seems fundamentally clear that the approach adopted by the deputy Small Claims Court judge is at odds with the prevailing caselaw.

25 Where there is overwhelming evidence that a holder of a credit card has used it and has failed to comply with its terms by not paying the outstanding balance with interest, and where the defendant has not filed any evidence in opposition to a claim made on a credit card debt, it flies in the face of common sense that whether it is a motion for summary judgment in the Superior Court of Justice or an assessment of damages in the Small Claims Court, that a plaintiff should have to file all of the credit card statements from day one in order to prove its claim against the cardholder.

26 The comments of Corbett J. in *Prasad* to the effect that credit card collection cases should be straight-forward matters that take no more than a few minutes in motions court are comments that should be taken to heart by all judges hearing these types of motions or assessments.

27 It may very well be that there will be cases where a credit cardholder will, in fact, take issue with the amount claimed by a credit card company whether it be with respect to an outstanding balance or with respect to collection fees or with respect to the prevailing rate of interest claimed. In such a situation, the cardholder has every right to contest those issues and fundamentally can do so by filing a defence and appropriate evidence in opposition to the summary claim that may be before the court. Where, however, the cardholder has been served with the claim and has chosen not to defend the claim, it makes absolutely no sense for the credit card company to be required to file, with the court, all of the credit card statements back to the first statement that may have been issued to the cardholder. The cardholder agreement makes clear that unless the cardholder contests a particular statement, the cardholder is deemed to have accepted the balance claimed as of the date of the statement.

28 The plaintiff's appeal is therefore allowed and an order made in the following terms:

> The appeal is allowed, the reasons for judgement of the deputy Small Claims Court judge of August 14, 2012 are set aside. Judgment is ordered for the plaintiff in the amount of $5,536.90 as of February 9, 2011, with pre-judgment and post-judgment interest accruing at the rate of 21.7 per cent, together with costs in the amount of $275.00, plus the costs of the appeal in the amount of $305.00.

29 These reasons are released in conjunction with appeals in: Division Court File Nos. 12-459-00; 12-461-00; 12-458-00; and 12-462-00. The appeals in those matters were argued on the same basis as the appeal in the Toogood matter and orders shall issue in a similar form which I have signed.

*Appeal allowed.*

  

Footnotes

[1] R.S.O. 1990, c. C43.

[2] [2007] O.J. No. 3368 (Ont. Div. Ct.).

## Citing References (2)

| Treatment | Title | Date | Type | Depth |
|---|---|---|---|---|
| — | 1. Zuker, Ontario Small Claims Court Practice Case Law RSmCC 7.01(2), Case Law | 2006 | Secondary Sources | — |
| — | 2. CED Debtor and Creditor II.14, §135-§136 | 2009 | CED | — |

  