

CANADA / JUDGMENT

Capital One, National Association v. Solehdin

2019 BCSC 1593

COURT

Supreme Court of British Columbia

DECIDED

20 September 2019

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2019 BCSC 1593 Capital One, National Association v. Solehdin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Capital One, National Association v. Solehdin,

2019 BCSC 1593

Date: 20190920

Docket: L180183

Registry: Vancouver

Between:

Capital One, National Association, formerly known as Hibernia National Bank

Plaintiff

Judgment Creditor

And

Nizar Solehdin and Yasmeen Solehdin

Defendants

Judgment Debtors

Before: The Honourable Mr. Justice Gomery

On appeal from: A certificate of the Registrar of the Court dated June 8, 2019.

Reasons for Judgment

In Chambers

Counsel for the Plaintiff/Judgment Creditor:

R. Wu

E. Hatch

Counsel for the Defendants/Judgment Debtors:

T. Boyd

Place and Date of Hearing:

Vancouver, B.C.

August 16, 2019

Place and Date of Judgment:

Vancouver, B.C.

September 20, 2019

Introduction

- [1] In 2007 and 2008, Capital One, National Association ("CONA") obtained judgments against the defendants in Louisiana, in the United States of America. Based on the Louisiana judgments, in March 2010, CONA obtained a judgment against the defendants in the Ontario Superior Court. The defendants unsuccessfully appealed that decision.
- [2] In 2013, CONA sold its assets to SMS Financial CAP ("SMS"). The sale was intended to include CONA's rights against the defendants under the Louisiana and Ontario judgments. There is an issue as to whether the sale documentation was sufficient to accomplish that intention at the time.
- [3] On June 4, 2018, SMS registered CONA's Ontario judgment against the defendants as a judgment of this Court. On June 8, 2018, the Registrar certified that CONA had obtained the judgment in March 2010 and SMS used that certification to register the judgment against title to real property owned by the defendants in British Columbia.
- [4] The defendants appeal the certificate of June 8, 2018. They also apply to set the certification aside and seek a stay of execution on the certificate. They maintain that, even if SMS was an assignee of CONA's rights under the Ontario judgment, by reason of a requirement under Ontario's Rules of Civil Procedure, SMS did not have standing to register and enforce the judgment in British Columbia in June 2018 and that the steps taken by SMS in CONA's name were invalid.
- [5] The defendants' appeal and application raise the following issues:

1. In June 2018, was SMS authorized by an assignment to take steps in CONA's name to pursue payment of the Ontario judgment?
2. If so, did SMS have standing to register the Ontario judgment as a judgment of this Court?
3. Does it matter that the defendants' notice of appeal and notice of application reference the registrar's certification on June 8, and not the registration of the Ontario judgment on June 4?

Background

- [6] The issues on this application are essentially technical and little factual background is required.
- [7] The defendants are husband and wife. The Louisiana judgments arose from guarantees given by the defendants. They were originally for USD \$791,000 plus interest and costs. The amount owing is now substantially larger. The Louisiana court gave judgment against Mr. Solehdin on May 30, 2007 and against Ms. Solehdin on December 5, 2008.
- [8] CONA's application to register the Louisiana judgments in Ontario was vigorously contested. In written reasons for judgment indexed at 2010 ONSC 1012, Leitch J. allowed the application on March 2, 2010. The Ontario Court of Appeal dismissed an appeal in reasons indexed at 2011 ONCA 286. The Supreme Court of Canada denied the defendants' application for leave to appeal on October 20, 2011.
- [9] On September 6, 2013, CONA and SMS entered into an Asset Purchase Agreement (the "APA"). Pursuant to the APA, on September 9, 2013, CONA and SMS entered into a "General Assignment and Assumption" (the "General Assignment"). CONA also executed two documents entitled "Assignment of Judgment" that were filed with the Louisiana court on October 3, 2013, but it no longer relies on these documents.
- [10] On May 26, 2017, SMS filed a notice of civil claim in the Vancouver Registry of this Court under number S174971 seeking to enforce the judgments of the Louisiana court. It pleaded that:

On or about October 8, 2013, Capital One, National Association formerly known as Hibernia National Bank sold, transferred and assigned all of its right, title and interest in the Nizar Solehdin Judgment and the Yasmeen Solehdin Judgment to the plaintiff.

- [11] On July 31, 2017, the defendants filed a response to civil claim. SMS did not further pursue action S174971. Its present significance is that, through the exchange of pleadings, the defendants were made aware of SMS's claim that it is an assignee of CONA's rights to collect the amounts owing under the Louisiana judgments.

- [12] After the Ontario judgment was registered in British Columbia on June 4, 2018, SMS became aware that the defendants were contending that it was not an assignee of the Ontario judgment obtained by CONA and had no standing to take steps in British Columbia based on the Ontario judgment. SMS and CONA took the following steps to attempt to address the defendants' contentions:
- a) On February 11, 2019, CONA and SMS entered into a further assignment agreement specifically confirming the assignment of the Ontario judgment to SMS; and
 - b) On March 5, 2019, SMS obtained an order in the Ontario proceeding granting it leave to continue the proceeding in its own name in place of CONA.
- [13] The defendants say that these steps could not retroactively validate the registration and certification obtained by SMS in June 2018.

Analysis

Issue #1: In June 2018, was SMS authorized by an assignment to take steps in CONA's name to pursue payment of the Ontario judgment?

- [14] Whether CONA effectively assigned to SMS its right to pursue payment of the Ontario judgment is a question of contractual construction. The court's task is to interpret the documents in accordance with sound commercial principles and good business sense; Geoff R. Hall, *Canadian Contractual Interpretation Law* (LexisNexis, Toronto: 2016), p. 55; Scanlon v. Castlepoint Development Corp. (1992), 11 O.R. (3d) 744 at 770 (C.A.), leave to appeal refused 1993 2 S.C.R. x (note); Aquadel Golf Course Limited v. Lindell, 2009 BCCA 5 at para. 13.
- [15] For present purposes, SMS relies on the APA and the General Assignment. In my view, for present purposes, the General Assignment is the more important document.
- [16] The APA and the General Assignment share certain common definitions and schedules. A list of judgments is Schedule 2 to the APA, forming part of Schedule A to the General Assignment. It expressly lists the two Louisiana judgments against the defendants. It does not list the Ontario judgment.
- [17] "Judgments" is a defined term common to both the APA and the General Assignment. The definition is as follows:

"Judgments" means those certain judgments entered into by any applicable Court, as more particularly described on Schedule 2, including, without limitation, any related deficiency claim or judgment in respect thereto.

[18] The defendants submit that "deficiency claim" is a term of art referring specifically to any shortfall after the property is sold in a mortgage foreclosure proceeding. The indebtedness giving rise to the Louisiana judgments in this case was not a deficiency claim. They submit that the Ontario judgment is therefore outside the scope of this definition.

[19] The APA provides for the purchase by SMS of "Assets" described as "a certain portfolio of Notes (as hereinafter defined) and Judgments (as hereinafter defined)". "Notes" is defined as follows:

"Note" or "Notes" shall mean all underlying documentation in respect to certain obligations owed to Seller as well as Claims and all Collections arising therefrom, including the Loan Documents, as more particularly described on Schedule 1.

[20] There is no reference to claims against the defendants in Schedule 1. The defendants submit that it follows that the Ontario judgment is neither a Note nor a Judgment and it is therefore not an Asset purchased by SMS under the APA. Their contention is specific to the Ontario judgment. They concede that the Louisiana judgments are Assets.

[21] The General Assignment defines CONA as the Assignor and SMS as the Assignee. It contains the following words of assignment:

Assignor has granted, bargained, sold, assigned, transferred and set over without recourse, and by these presents does grant, bargain, sell assign, transfer and set over unto Assignee: the Judgments and Notes referenced in Schedule A (the "the Assets") and all of the Assignor's rights, title and interests in, to and under the Assets, and all of Assignor's rights, title and interests in, to and under the instruments, documents, certificates, letters, records and papers relating to the Assets and all other documents executed and/or delivered in connection with the Assets including, without limitation, all of Assignor's rights, tile and interests in any cause of action, , all rights and benefits of Assignor related to the Assets , all supporting obligations related to the Assets , and all claims and choses in action related to the Assets and such instruments, documents, certificates, letters, records and papers, and all of Assignor's rights, title and interests in, to and under such claims and choses in action,

[Emphasis added.]

[22] The evident purpose of this comprehensive language is to cover all the bases and ensure that SMS obtains all the rights associated with the Assets SMS purchased from CONA. It is a backstop to cover any gaps.

[23] The defendants contend that the Ontario judgment is neither an Asset, nor is it encompassed in the supplementary language of the General Assignment. I disagree. The Louisiana judgments are an Asset. The Ontario and Louisiana judgments concern the same underlying indebtedness. The Ontario judgment is predicated on the Louisiana judgments. In the language of the General Assignment, it is a supporting obligation related to the Louisiana judgments and a chose in action related to the Louisiana judgments.

- [24] The defendants' position is not commercially sensible. It would not be possible for CONA to have assigned to SMS the Louisiana judgments while retaining for itself the right to collect the Ontario judgment because the defendants could only be obliged to pay one or the other, but not both independently. CONA would be bound to account to SMS for any money received from the defendants on account of the Ontario judgment.
- [25] As between CONA and SMS, the General Assignment constituted SMS an assignee of CONA's rights under the Ontario judgment. The assignment was in writing. It was absolute, and did not purport to be by way of charge only. The defendants were on notice of SMS's status as an assignee of the Louisiana judgments, and therefore of the Ontario judgment, by the notice of civil claim in action S174971. The requirements of s. 36 of the Law and Equity Act, R.S.B.C. 1996, c. 253 were accordingly satisfied and SMS was entitled to assert "all legal and other remedies for the debt or chose in action".
- [26] It makes no difference that the notice of civil claim misstated the actual date of the assignment (October 8, 2013 rather than September 9, 2013), because s. 36 only requires notice of the fact of the assignment, and not details of the instrument by which the assignment was accomplished or the date on which it occurred.

Issue #2: Did SMS have standing to register the Ontario judgment as a judgment of this Court?

- [27] The Ontario judgment was registered in this Court pursuant to s. 2 of the Enforcement of Canadian Judgments and Decrees Act, S.B.C. 2003, c. 29 [ECJDA]. The ECJDA permits an "enforcing party" to register a final judgment of a court of a province or territory of Canada other than British Columbia, subject to certain exceptions, by filing a certified true copy of the judgment in this Court's registry. Pursuant to s. 4, the effect of registration is that the judgment may be enforced in British Columbia as if it were a judgment of this Court.
- [28] None of the exceptions applies. In *Solehdin v. Stern*, 2014 BCCA 482 - a case involving another judgment creditor under the judgment of Leitch J. and these same judgment debtors - it was settled that the Ontario judgment could be registered under the ECJDA. The only issue is whether SMS had standing to register it.
- [29] Section 1(1) of the ECJDA contains the following definition:
- "enforcing party" means
- (a) in the case of a Canadian judgment that is not a domestic trade agreement award, a person entitled to enforce the Canadian judgment in the province or territory of Canada where the Canadian judgment was made, or
- [30] The defendants contend that, as of June 2018, SMS was not entitled to enforce the Ontario judgment in Ontario, and therefore did not have the rights of an enforcing party under the statute. They rely on Rule 11.01 of Ontario's Rules of Civil Procedure, R.R.O. 1990, Reg. 194. It states:

Effect of Transfer or Transmission

11.01 Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed with respect to the party whose interest or liability has been transferred or transmitted until an order to continue the proceeding by or against the other person has been obtained.

- [31] British Columbia's Supreme Court Civil Rules do not contain an equivalent provision. Rule 13-2(10) comes closest. It deals with the situation where there has been a transmission of interest after judgment and provides that the party claiming to be entitled to execute on the judgment may apply for leave to issue execution. It does not automatically stay the proceeding. The party claiming the rights of a judgment creditor only need apply for leave to issue execution if it seems necessary.
- [32] The effect of Ontario Rule 11.01 is that the Ontario proceeding was stayed by the assignment in September 2013 until an order to continue the proceeding was obtained in March 2019. It was stayed when SMS registered the Ontario judgment in British Columbia on June 4, 2018.
- [33] As I understand the requirement in Ontario Rule 11.01, obtaining an order to continue is a procedural step. It does not create rights but rather recognizes and confirms a transmission of interest that has occurred out of court. The requirement is procedural rather than substantive in nature. This interpretation is supported by Ontario cases that have considered the rule; 1467736 Ontario Ltd. v. Galli, [2003] O.J. No. 4186 (S.C.J., Master) at paras. 8-9; Outfront Media Canada LP v. Clarity Outdoor Media, 2017 ONSC 2136 at paras. 73-75.
- [34] The defendants say that registration of the Ontario judgment while the Ontario action was stayed was a nullity, as well all subsequent steps taken in reliance on the registered judgment. They rely upon cases where a failure to identify a plaintiff with legal standing to sue has resulted in an action being dismissed; Rubbert v. Boxrud, 2014 SKQB 221 at paras. 14-21; Lotzkar v. Canadian National Railway Company, 2015 BCCA 434 [Lotzkar] at paras. 14-20; Composite Technologies Inc. v. Shawcor Ltd., 2017 ABCA 160 [Composite] at paras. 95-101; Soloman v. Education Fund Services Inc., [2006] O.J. No 4773 (S.C.J.) [Soloman] at paras. 16-28; Moffoot v. E. Sands & Associates Inc., 2011 BCSC 1167 [Moffoot] at paras. 5-8.
- [35] Dismissal is an extreme result that is sometimes necessary because a lawsuit requires a plaintiff with the capacity to sue. None of these cases involved a failure to satisfy a merely procedural requirement. Moffoot at paras. 47-48 and 57 comes closest. The putative plaintiff lacked capacity but because the incapacity could potentially be addressed by a further order, the court provisionally stayed an action on terms rather than dismissing it.
- [36] While these actions describe an action in which the plaintiff lacks capacity as a nullity, this terminology is problematic because the court's process is engaged and an order dismissing or staying the action results. It would not be right to characterize the court's process in

dealing with the matter as a nullity. It is well established that the order of a superior court is not a nullity, even if the order was improperly obtained; *Kriegman v. Wilson*, 2016 BCCA 122 at paras. 47-70. As Southin J.A. put it, speaking for the Court in *Virani v. Virani*, 2006 BCCA 63 at para. 37:

An order of a court of superior jurisdiction is never a "nullity", no matter how wrong it may be.

- [37] For the most part, modern civil procedure has moved away from discussion of nullities to a more nuanced analysis of the effect of procedural irregularities, always bearing in mind the object of the Rules and court procedures generally is to secure the just, speedy and inexpensive determination of every proceeding on its merits; *XY, Inc. v. International Newtech Development Incorporated*, 2013 BCSC 541 at paras. 28-33; Rule 1-3. Sometimes a procedural irregularity is so serious or irremediable that the only just solution is that the action be dismissed. Sometimes another outcome will better serve the interests of justice.
- [38] I accept that, in light of Ontario Rule 11.01, SMS should have obtained a continuation order in Ontario before registering the judgment in British Columbia. The question is whether this procedural irregularity requires that the registration and subsequent steps taken under the judgment be set aside in the interests of justice.
- [39] The defendants rely on *Bekar v. TD Evergreen*, 2006 BCCA 266 [Bekar]. It concerned a fatally flawed attempt to obtain a certificate of judgment based upon an arbitration award pursuant to s. 29 of the Commercial Arbitration Act (now the Arbitration Act, R.S.B.C. 1996, c. 55). Section 29 permits enforcement of an arbitration award as a judgment only with leave of the court on notice to the respondent. The applicant for registration obtained the certificate of judgment without notice to the respondent and without speaking to the matter, and the certificate was only signed by a registrar and not by a judge. Speaking for the Court, Prowse J.A. described the approach taken by the applicant's counsel in obtaining the certificate as "misguided". She set aside the certificate, declining to retroactively validate it by an order *nunc pro tunc*.
- [40] *Bekar* does not assist the defendants because the legislation is quite different. An application for leave is not a precondition to registration of a judgment under the ECJDA. Registration of a judgment pursuant to the ECJDA is not a judicial act requiring the imprimatur of a judge. The reasoning in *Bekar* offers no guidance as to the proper treatment of the irregularity arising from non-compliance with Ontario Rule 11.01.
- [41] Section 6(1) of the ECJDA provides that a party to the proceeding in which an order was made (in this case the Ontario proceeding) may apply to this Court for directions concerning its enforcement. Section 6(2)(c) provides that this Court may stay enforcement of the order in British Columbia if a stay is in effect in the home jurisdiction. Enforcement in British Columbia is not automatically stayed by a stay in the home jurisdiction. It requires an order from this Court on application.

- [42] The limited effect afforded an Ontario stay under s. 6(2)(c) weighs against treating the definition of an enforcing party in s. 1(1) as imposing an absolute prohibition on registration of a judgment previously given in a currently stayed proceeding.
- [43] The irregularity resulting from non-compliance with Ontario Rule 11.01 did not undermine SMS's status as an assignee of the Ontario judgment. It was the only person entitled to pursue payment of the judgment. It was not in the position of a plaintiff that lacks capacity, such as a bankrupt whose rights have vested in a trustee in bankruptcy (Moffoot and Soloman) or a dissolved corporation (Lotzkar and Composite Technologies). The defendants do not suggest that they were prejudiced by the non-compliance.
- [44] SMS has now obtained an order to continue in Ontario and the non-compliance is ended.
- [45] The purposes underlying the ECJDA and Ontario Rule 11.01 would not be served by an order invalidating the registration of the judgment in British Columbia and subsequent steps taken on the judgment. The ECJDA exists to facilitate the recognition and enforcement in British Columbia of judgments from other provinces and Canadian territories. Rule 11.01 exists in order that the Ontario court may oversee transmissions of interest affecting a proceeding, both before and after judgment. I do not think it at all likely that the issuance of a continuation order prior to June 2018 would have been refused. The defendants are judgment debtors whose debt remains unpaid more than a decade after the Louisiana court gave judgment. SMS is entitled to receive anything that is collected on account of the judgment debt.
- [46] Setting aside registration of the Ontario judgment in British Columbia would not serve the interests of justice. It would permit the defendants to take advantage of a technical slip by which they were not prejudiced and give undue weight to an essentially procedural requirement.
- [47] I conclude that, notwithstanding Ontario Rule 11.01, SMS had sufficient standing to register the Ontario judgment on June 4, 2018 and obtain a certificate of judgment on June 8, 2018. The registered judgment and resulting certificate are not subject to being set aside simply on the basis of stay formerly imposed by the Ontario Rule.

Issue #3: Does it matter that the defendants' notice of appeal and notice of application reference the registrar's certification on June 8, 2018 and not the registration of the Ontario judgment on June 4?

- [48] In light of my conclusions as set out above, I need not address SMS's argument that the defendants challenged the wrong decision - the registrar's certification on June 8, 2018 and not the registration of the Ontario judgment on June 4 - in their notice of appeal and notice of application.

Disposition

[49] For these reasons, the defendants' appeal and notice of application are dismissed. SMS is entitled to its costs.

"Gomery J."

The Honourable Mr. Justice Gomery

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