

CITATION: South Holly Holdings Limited v. The Toronto-Dominion Bank, 2007 ONCA 456

DATE: 20070622

DOCKET: C46330

COURT OF APPEAL FOR ONTARIO

DOHERTY, CRONK & ARMSTRONG JJ.A.

BETWEEN:

SOUTH HOLLY HOLDINGS LIMITED

Plaintiff

and

THE TORONTO-DOMINION BANK
carrying on business as TD CANADA TRUST

Defendant/Appellant

and

MIRIAM TOLLIS and VICTOR TOLLIS

Third Parties/Respondents

John Polyzogopoulos, for the Toronto-Dominion Bank

Pellegrino Capone, for Miriam and Victor Tollis

Heard and released orally: June 14, 2007

On appeal from the order of Justice H.M. Pierce of the Superior Court of Justice dated November 17, 2006.

ENDORSEMENT

[1] The appellant Bank appeals from the order of Pierce J. of the Superior Court of Justice striking its amended third party claim, without leave to amend, as disclosing no reasonable cause of action. The Bank alleges that the motion judge erred: (i) in concluding that its pleading was fatally deficient for failing to allege a reasonable cause of action, when in fact three separate causes of action were pleaded (fraudulent misrepresentation, negligent misrepresentation and a right to contribution and indemnity under the *Negligence Act*); (ii) by engaging in a fact finding exercise that is prohibited on a rule 21.01(1)(b) motion; and (iii) by relying on evidence that was inadmissible on a motion of this type.

[2] In our view, the Bank's amended third party claim fails to satisfy the requirements of rule 25.06(8), which provides that where fraud or misrepresentation is alleged, full particulars of such an allegation must be pleaded. No particulars are pleaded. Instead, the Bank baldly claimed that if it was found liable in the main action, it necessarily followed that some or all of the challenged statements by the respondents' solicitor were false. The Bank provided no particulars of the basis or nature of the alleged falsity of these statements, nor did it identify which of the representations in issue were said to be false.

[3] Moreover, the premise of the Bank's falsity assertion is inaccurate. A finding of liability against the Bank in the main action need not depend on the truth or falsity of any representations made by the respondents' solicitor.

[4] Accordingly, in our view, even a generous reading of the Bank's pleading supports the motion judge's conclusion that it should be struck under rule 21.01(1)(b) as disclosing no reasonable cause of action.

[5] However, we agree with the Bank that the motion judge erred in reaching this conclusion by making findings of fact relating to the Bank. This was not open to the motion judge on this type of motion. In addition, the motion judge based her decision, at least in part, on her consideration of documents that were not properly admissible on a rule 21.01(1)(b) motion.

[6] We also agree with the Bank that, in the circumstances, it should have been granted leave to amend its third party claim. A litigant's pleading should not lightly be struck without leave to amend. To the contrary, leave to amend should be denied only in the clearest of cases. This is particularly so where the deficiencies in the pleading may be cured by an appropriate amendment, as in this case. Importantly, on this record, there is no evidence of prejudice to the respondents if leave to amend is granted.

[7] Finally, the respondents' contention that the failure of the Bank to claim rescission of the settlement defeats the Bank's third party claim cannot be accepted. The relevance, if any, of the settlement to the claim advanced by the Bank is an issue to be raised in defence if the respondents are so advised.

[8] For the reasons given, the appeal is allowed in part and the Bank is granted leave to amend its amended third party claim within twenty days from the date hereof.

[9] The Bank acknowledges, fairly, that the costs of this appeal and of the motion below should be awarded to the respondents in the circumstances of this case. We fix those costs, as agreed by counsel, in the total amount of \$10,000, inclusive of disbursements and G.S.T.

"Doherty J.A."

"E.A. Cronk J.A."

"Robert P. Armstrong J.A."