

1985 CarswellOnt 425
Ontario District Court, Frontenac County Judicial District

Royal Bank v. Metcalfe

1985 CarswellOnt 425, [1985] O.J. No. 1670, 32 A.C.W.S. (2d) 261, 3 C.P.C. (2d) 228

ROYAL BANK OF CANADA v. METCALFE

O'Flynn D.C.J.

Heard: June 27, 1985

Judgment: July 23, 1985

Docket: No. 88/85

Counsel: *D.K. Burkom*, for applicant.

G.E. Lloyd, for respondent.

Subject: Civil Practice and Procedure; Corporate and Commercial

Headnote

Actions --- Extinction of right of action — Release and satisfaction

Creditors and Debtors --- Payment by debtor — Effect of release and receipt — Release — Release of joint debtors

Actions — Extinction of right of action — Release and satisfaction — Release of person who is jointly liable not preventing judgment from being obtained against any other joint wrongdoer.

Creditors and debtors — Payment by debtor — Effect of release or receipt — Release of joint debtors — Release of one joint debtor not preventing judgment from being obtained against any other joint debtor.

Actions — Cause of action — General — Cause of action meaning entire set of facts giving rise to enforceable claim.

The applicant brought an action for default under a promissory note. The respondent defended on the basis that he was a joint debtor with his wife, and that his wife made a payment to the applicant in return for a full release from indebtedness. The respondent alleged that by the release of his wife by the applicant, the applicant released the respondent from all indebtedness. The applicant moved for an order striking out that allegation in the statement of defence, and granting judgment in the amount claimed in the statement of claim.

Held:

The motion was granted.

Section 149 of the Courts of Justice Act, 1984 abolished the rule that judgment against, or a release of, a person who was jointly liable prevented judgment from being obtained against any other joint wrongdoer.

The "cause of action" referred to in s. 149 meant the entire set of facts that gave rise to an enforceable claim. In this case, a cause of action was the default under the promissory note.

MOTION to strike paragraph of a statement of defence and for judgment in the amount claimed.

O'Flynn D.C.J.:

1 The motion is for an order striking out para. 3 of the respondent's (defendant in action No. 88/85) statement of defence and granting judgment in the amount claimed in the statement of claim.

2 The applicant submits that the respondent's statement of defence discloses no cause of action or defence.

3 The respondent states that he signed as a joint debtor with his wife and that his wife made a payment to the applicant in return for a full release from the indebtedness to the applicant.

4 The respondent pleads that by the release of his wife by the applicant, the applicant released the respondent from all indebtedness.

5 The applicant relies on s. 149(1) of the Courts of Justice Act, S.O. 1984, c. 11, which states:

Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding.

6 The Ministry Comment in Watson and McGowan, Ontario Supreme and District Court Practice 1985, at p. 104 states:

This provision abolishes the rule that judgment against, or a release of, a person who is jointly liable prevents judgment from being obtained against any other joint wrongdoer. The provision makes it unnecessary for the new Rules to incorporate the joint liability provisions of former Rules 54 and 65.

7 The old R. 54 stated:

Where the plaintiff is entitled to sign default judgment, the judgment may be signed notwithstanding that the writ may be endorsed with any other claim and any such judgment shall be without prejudice to his right to proceed against any other defendant for the same relief or against any defendant for any other relief.

8 The effect of this Rule was to prevent the operation of the general rule that a plaintiff having signed judgment against one of several joint debtors, cannot recover against the others. *Capital Carbon & Ribbon Co. v. West End Bakery*, [1948] O.W.N. 815, [1949] 1 D.L.R. 509 (Ont. C.A.).

9 The old R. 65 stated:

On any motion for judgment, judgment may be awarded against any defendant and any such judgment shall be without prejudice to the plaintiff's right to proceed against any other defendant for the same relief or against any defendant for any other relief.

10 The common law rule was set out in the case of *T.D. Bank v. Higgott* (1984), 48 O.R. (2d) 708 at 711, 14 D.L.R. (4th) 5 (Ont. H.C.):

Where a creditor receives a part payment from a debtor who is jointly, or jointly and severally bound, and that debtor intends by that payment to secure his release from his liability to the creditor, the creditor may do one of two things. He may give the debtor a full and unqualified release of his liability for the debt. If he does so, the release operates to discharge all the other debtors.

It is true that there are some cases where a release of one joint debtor has *not* had the effect of releasing the others, but they are all cases where the release in question was of a right or obligation independent of and separate from the debt on which the creditor sued.

Instead of giving the joint debtor a release, the creditor may covenant with him not to sue him on the obligation. The covenant not to sue will not release the other joint debtors. The covenant does not prejudice the creditor's rights to proceed against the others for the balance: *Chitty on Contracts*, 24th ed. (1977), vol. 1, pp. 507-8, para. 1077.

See also *Castle v. Bilsby* (1921), 50 O.L.R. 536, 67 D.L.R. 259 (Ont. S.C.) and *Bogart v. Robertson* (1905), 11 O.L.R. 295 (Ont. C.A.).

11 I conclude that s. 149 of the Courts of Justice Act changes the common law in Ontario in that although primarily a full and unqualified release of liability for the debt given to one joint debtor, operates to discharge all the other debtors, pursuant to s. 149(1) that defence is no longer recognized in Ontario.

12 The Legislature by means of statutory enactment is capable of creating or renewing a right of action. McLaren v. McLaren (1979), 24 O.R. (2d) 481, 8 R.F.L. (2d) 301, 100 D.L.R. (3d) 163 (Ont. C.A.).

13 Section 149(1) applies to two or more persons jointly liable in respect of the same cause of action. A cause of action is the entire set of facts that gives rise to an enforceable claim.

14 Porter J.A. in Franks v. Cahoon (1967), 58 W.W.R. 513, 60 D.L.R. (2d) 237 at p. 239 (Alta. C.A.), affirmed [1967] S.C.R. 455, 60 W.W.R. 684, 63 D.L.R. (2d) 274 (S.C.C.) stated:

The cause of action or, to use the expression of Diplock, L.J. (the Letang case), 'the factual situation' which entitles the plaintiff here to recover damages from the defendant ...

15 "Action" is defined in s. 1(a) as meaning a civil proceeding that is not an application.

16 Here the cause of action is the default under the promissory note, which default rendered both the joint debtors liable and entitled the applicant to commence an action against each one, separately or jointly or to release one and proceed against the other.

17 I conclude that the pleading set out in para. 3 of the respondent's (defendant) statement of defence provides no defence to the applicant's (plaintiff) claim.

18 The applicant is relying on r. 21.01(1)(a) and (b) which states:

21.01(1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

19 I conclude that an order shall go striking out para. 3 of the respondent's (defendant in action No. 88/85) statement of defence and granting judgment in the amount claimed in the statement of claim.

20 Costs to the applicant provided that, if so desired, counsel may speak to me about costs.

Motion granted.