Federal Court  Cour fédérale

Date: 20210831

Docket: T-841-20

Citation: 2021 FC 905

Ottawa, Ontario, August 31, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Plaintiff

and

H & M FARM LTD., HARVEY G. KIMMEL AND MARTHA S. KIMMEL (ALSO KNOWN AS MARTY KIMMEL)

Defendants

ORDER AND REASONS

[1] "On or about" is a phrase lawyers use to avoid problems—one is less likely to state a falsehood if one seeks in advance tolerance for imprecision. Yet, in this case, using "on or about" created a problem—we do not know precisely when the cause of action arose and, consequently, whether the action was brought within the limitation period. As a result, I am unable to issue summary judgment in a case in which it would otherwise have been warranted.

I. Background

[2] The *Agricultural Marketing Programs Act*, SC 1997, c 20 [the Act], creates a scheme for guaranteeing advances to agricultural producers. Briefly put, the Act empowers the Minister of Agriculture and Agri-Food to guarantee advances made to producers by administrators or lenders. If a producer is in default of repaying an advance, the Minster may honour the guarantee and pay the amount of the advance payment to the administrator or lender.

[3] Manitoba Livestock Cash Advance inc. [MLCA] is an administrator pursuant to the Act. In 2011 and 2012, it made two advance payments to the defendant H & M Farm Ltd., respectively for $200,000 and $100,000. The individual defendants, Harvey and Martha Kimmel, executed guarantees in respect of these advances.

[4] The defendants did not repay the advances when they became due. MLCA notified the defendants of their default. In July and August 2014, the Minister honoured the guarantee and paid the outstanding amounts to MLCA. According to section 23 of the Act, the Minister was then subrogated to MLCA's rights against the defendants.

[5] After several attempts to collect the debt from the defendants, the Minister brought an action against the defendants. The statement of claim was issued on July 30, 2020. The Minister then brought a motion for summary judgment.

[6] The defendants oppose summary judgment. They note that in the affidavit filed in support of the motion, the representative of the Minister states that the Minister honoured the guarantee with respect to the first advance "on or about July 31, 2014." Given the imprecision inherent in such a statement, they allege that one does not know whether the action commenced on July 30, 2020 was brought within the six-year limitation period. Moreover, they allege that the information given regarding the calculation of interest is insufficient.

II. Analysis

A. *Summary Judgment*

[7] A motion for summary judgment is a procedure for obtaining judgment on the basis of written evidence, without the necessity to proceed to a full trial. It is a tool to reduce the costs of litigation and to improve access to justice. In *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*], the Supreme Court of Canada wrote that the legal profession must embrace a "culture shift," which entails increased recourse to more proportional procedures, such as the motion for summary judgment.

[8] Rules 213–219 of the *Federal Courts Rules*, SOR/98-106, provide for summary judgment and summary trial. Relevant here is rule 215(1), which states:

215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	**215 (1)** Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

[9] Thus, the central question on a motion for summary judgment is whether there is a genuine issue for trial. In *Hryniak*, at paragraph 49, the Supreme Court explained the concept as follows:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[10] Additional comments are found in the recent decision of the Federal Court of Appeal in *Canmar Foods Ltd v TA Foods Ltd*, 2021 FCA 7:

> The test is not whether a party cannot possibly succeed at trial, but rather whether the case is clearly without foundation, or is so doubtful that it does not deserve consideration by the trier of fact at a future trial. There does not appear to be any definitive or determinative formulation of the test, but the underlying rationale is clear: a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial.

[11] The principles governing the application of this test were summarized in *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 [*Milano Pizza*]. The party who seeks summary judgment bears the burden of establishing that there is no genuine issue for trial. The party who opposes summary judgment cannot merely rely on its pleadings or on a bare denial, but must rather bring evidence to show that there is a genuine issue for trial. To use the consecrated expression, it must “put its best foot forward.”

[12] With this in mind, we may now review the Minister's cause of action and assess whether it raises a genuine issue for trial.

B. *The Act*

[13] It is not necessary to provide a complete description of the functioning of the Act. What is critical for our purposes, however, are the provisions that create the Minister's cause of action against the defendants. Subsection 23(1) provides that when a producer is in default and the administrator or lender makes a request to this effect, the Minister must pay the outstanding amounts to the administrator or lender. Subsection 23(2) then provides as follows:

(2) The Minister is, to the extent of any payment under subsection (1) or (1.1), subrogated to the administrator's rights against the producer in default and against persons who are liable under paragraphs 10(1)(c) and (d) and may maintain an action, in the name of the administrator or in the name of the Crown, against that producer and those persons.	**(2)** Le ministre est subrogé dans les droits de l'agent d'exécution contre le producteur défaillant et les personnes qui se sont engagées au titre des alinéas 10(1)c) et d), à concurrence du paiement qu'il fait en application des paragraphes (1) ou (1.1). Il peut notamment prendre action, au nom de l'agent d'exécution ou au nom de la Couronne, contre ce producteur et ces personnes.

[14] Thus, the event that triggers the Minister's subrogation is the payment made to the administrator.

[15] The limitation period is provided by subsection 23(4):

(4) Subject to the other provisions of this section, no	**(4)** Sous réserve des autres dispositions du présent article,

action or proceedings may be taken by the Minister to recover any amounts, interest and costs owing after the six year period that begins on the day on which the Minister is subrogated to the administrator's rights.	toute poursuite visant le recouvrement par le ministre d'une créance relative au montant non remboursé de l'avance, aux intérêts ou aux frais se prescrit par six ans à compter de la date à laquelle il est subrogé dans les droits de l'agent d'exécution.

[16] Combining the two subsections together, the "day on which the Minister is subrogated" is the day the Minister makes a payment to the administrator. Thus, the limitation period begins to run when a payment is made. See, in this regard, *Moodie v Canada*, 2021 FCA 121.

C. *A Genuine Issue for Trial?*

[17] The Minister asserts that its affidavit evidence conclusively establishes all the elements of the cause of action and that the action was begun within the limitation period. Thus, there would be no genuine issue for trial. The defendants, however, argue that the evidence does not show with certainty when the Minister made the payment to MLCA with respect to the first advance and that we therefore do not know exactly when the limitation period began to run. Moreover, they argue that there is insufficient information to enable them to verify the calculation of interest. For the reasons that follow, I agree with the defendants' first argument, but not with the second.

(1) "On or About"

[18] The action was commenced on July 30, 2020.

[19] If the Minister was subrogated on July 30, 2014, the six-year limitation period began on that day and included that day, pursuant to subsection 27(3) of the *Interpretation Act*, RSC 1985, c I-21. Thus, the last day of the limitation period would be July 29, 2020. Section 23(4) of the Act states that no action can be taken after this six-year period. Thus, the action would be statute-barred on July 30, 2020.

[20] It follows that the Minister can bring the present action only if the payment to MLCA occurred on or after July 31, 2014. If the payment was made on or before July 30, 2014, the action is statute-barred.

[21] The affidavit evidence provided in support of the motion for summary judgment includes the following statement:

> On or about July 31, 2014 (Advance Payment l) and August 19, 2014 (Advance Payment 2), the Minister of AAFC ("the Minister") honoured the guarantees available under Section 23 of the *AMPA* for the Advance Payments. The Minister is subrogated to the rights of the MLCA in respect of the debts owing. Attached and marked as Exhibits "H" and "I" are copies of letters showing the payments made from the Minister to the MLCA for the remaining debts owing from the Advance Payments. Attached and marked as Exhibits "J" and "K" are computer printouts from AAFC records which have posting dates of July 31, 2014 and August 19, 2014. They show that payments in the amounts of $210,222.02 and $98,376.73 were made to the Bank of Montreal account of the MLCA with respect to the defaulted 2011-2012 and 2012-2013 advances.

[22] The difficulty is that the date of the payment is not stated with precision. The guarantee was honoured "on or about" July 31, 2014. Yet, as we have seen above, precision is critical in this case, at least with respect to the first advance.

[23] According to Bryan A Garner, ed, *Black's Law Dictionary* (11th ed, Thomson Reuters, 2019), "on or about" means

> Approximately; at or around the time specified. • This language is used in pleading to prevent a variance between the pleading and the proof, usu. when there is any uncertainty about the exact date of a pivotal event. When used in nonpleading contexts, the phrase is mere jargon.

[24] The Wex dictionary maintained by Cornell University's Legal Information Institute gives the following explanation (https://www.law.cornell.edu/wex/on_or_about):

> On or about
>
> A phrase that is used throughout civil and criminal legal practice to refer to a specific date or place by narrow approximation. […] It provides an approximation of a time and/or place and expands the accuracy or coverage of a statement without pointing to an exact date or place that would be more easily challenged. […] When used to describe a date, it means generally in the time around the date specified. For purposes of the pleading requirement that a petition must give fair and adequate notice of the facts forming the basis of a claim, the term "on or about" means a date of approximate certainty, with a possible variance of a few days. Although this is generally sufficient where a particular date is not material, it is not sufficient where the statute of limitations is involved.

[25] Thus, "on or about July 31, 2014" means that the payment could have been made a few days before that date, in which case the action would be statute-barred with respect to the first advance.

[26] I am prepared, however, to inquire further. A motion for summary judgment should not be defeated on a mere technicality. The ambiguity flowing from the use of the phrase "on or about" may be dissipated by considering the affidavit in its totality or by looking at the exhibits.

[27] In this regard, the affidavit refers to computer records showing a “posting date” of July 31, 2014. One could surmise that this is the actual date of the payment. Several reasons, however, preclude me from finding that there is no genuine issue in this respect.

[28] First, the evidence does not describe the Department of Agriculture and Agri-Food’s internal payment process. Thus, we do not know exactly what “posting” means and whether it can be equated with payment. The affidavit does not state that the posting date is the payment date. I also note that the affidavit states the “posting date” with precision, but uses “on or about” with respect to the date of payment. This may indeed reflect the affiant’s knowledge that the two cannot be equated.

[29] Second, the computer printout itself is blurred and hard to read. I am prepared to accept that the date shown as the “posting date” is July 31, 2014, as indicated in the affidavit. I have no indication, however, as to what this means. The plaintiff did not provide any guide to understand the information found on the computer printout. Moreover, I note that the document bears stamps with the date of July 31, 2014, one with the mention “posted” and the other, with the mention “approved” struck out and replaced with the handwritten “reviewed,” both with handwritten initials. One interpretation of this is that the payment was approved on July 31, 2014, but without more information about the process, I am unable to say that this is the only interpretation available. In this regard, the printout regarding the second advance shows a “posted” stamp bearing the date of August 19, 2014 and an “approved” stamp bearing the date of August 20, 2014. This does not help resolve the ambiguity.

[30] Third, the affidavit also refers to a notice of payment sent to MLCA. Because it is undated, this notice is not helpful. The only mention of time in the notice is that the interest was calculated up to June 2, 2014, but that may simply be the date when MLCA made the request to honour the guarantee.

[31] To summarize, the evidence does not reveal whether the "posting date" is the actual payment date. Nothing in the evidence dispels the ambiguity. As a result, I am unable to make a necessary finding of fact. Thus, there is a genuine issue for trial with respect to the first advance and summary judgment cannot be granted.

[32] This ambiguity, however, does not extend to the second advance. The Minister honoured the guarantee "on or about August 19, 2014." Even if the payment took place a few days before that date, the limitation period with respect to this part of the claim had not run its course when the action was begun on July 30, 2020. There is no genuine issue regarding the second advance and I will issue summary judgment with respect to this part of the claim.

[33] In the spirit of *Hryniak*, I have considered the possibility of seeking additional evidence to remedy the ambiguity regarding the date of the honouring of the guarantee with respect to the first advance. I note, however, that the *Federal Courts Rules* are framed differently from the Ontario rules discussed in *Hryniak*. In particular, they do not contain the enhanced fact-finding powers mentioned in that case. Thus, I cannot try to fill the gap in the plaintiff's evidence to reach a finding of no genuine issue.

[34] If I find that the matter raises a genuine issue, the only powers I may exercise are found in rules 215(2) and (3) and 218 and pertain to subsequent steps in the proceeding. Here, the Minister did not reply to the defendants' memorandum of fact and law on the motion and did not ask me to exercise these powers. Doubts have been raised as to whether judges can exercise them on their own motion: *Milano Pizza*, at paragraph 32. Accordingly, I will not make any orders regarding the remainder of the proceedings.

(2) Calculation of Interest

[35] The defendants also oppose summary judgment because the plaintiff has not provided a detailed calculation of interest. They assert that they are unable to verify the accuracy of the interest amount provided by the plaintiff.

[36] Bald assertions like this, however, are insufficient to avoid summary judgment. The amount of interest is found in a sworn statement filed in support of the motion. I have no reason to doubt its accuracy. It constitutes *prima facie* proof of the amount owed. The statement is not qualified by "on or about" or any similar indication of approximation or uncertainty.

[37] The party opposing a motion for summary judgment must put its "best foot forward." In the present context, this means that the defendants could not simply allege that they do not understand the plaintiff's calculation. They had to positively show that the amount put forward by the plaintiff was wrong and provide their own calculation.

[38] I also note that the defendants were notified several times of their default. There is no indication that they ever raised the issue of interest calculation.

III. Conclusion

[39] For these reasons, the motion for summary judgment will be granted in part, with respect to the second advance only. The plaintiff calculates the amount owed on July 28, 2020 as being $160,844.42 and the daily interest since then at $23.95. Thus, as of today, the amount owed is $170,400.47.

[40] The cause of action arose in Saskatchewan, where the defendants reside. Pursuant to subsection 37(1) of the *Federal Courts Act*, RSC 1985, c F-7, the laws governing interest in that province apply to the determination of post-judgment interest. In Saskatchewan, post-judgment interest is set at 5%: *Enforcement of Money Judgments Act*, RSS c E-9.22, s 113; *Enforcement of Money Judgment Regulations*, RSS c E-9.22 Reg 1, s 10.

[41] As success is divided, no costs will be awarded on this motion.

ORDER in T-841-20

THIS COURT ORDERS that:

1. The motion for summary judgment is granted in part.

2. The defendants are condemned to pay to the plaintiff the sum of $170,400.47 plus interest at the rate of five percent per annum from the date of this judgment.

3. No costs are awarded.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-841-20
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v H & M FARM LTD., HARVEY G. KIMMEL AND MARTHA S. KIMMEL (ALSO KNOWN AS MARTY KIMMEL)

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369

ORDER AND REASONS:	GRAMMOND J.
DATED:	AUGUST 31, 2021

APPEARANCES:

Cailen Brust	FOR THE PLAINTIFF
Kevin Mellor	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE PLAINTIFF
Nychuk & Company Barristers and Solicitors Regina, Saskatchewan	FOR THE DEFENDANTS