# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Forrest v. Vriend,*
2015 BCSC 1878

Date: 20151015
Docket: S138862
Registry: Vancouver

Between:

**Clifford Roy Forrest**

Plaintiff

And

**John Vriend, Toronto-Dominion Bank, Daryl Martz, and Manulife Securities Investment Services Inc.**

Defendants

Before: The Honourable Mr. Justice Ehrcke

## Reasons for Judgment

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| Counsel for the Plaintiff: | A.A. Macdonald |
| Counsel for the Defendants J. Vriend and Toronto Dominion Bank: | C.J. Munroe |
| Counsel for the Defendants D. Martz and Manulife Securities Investment Services Inc.: | J.K. Lamb |
| Place and Date of Hearing: | Vancouver, B.C.<br>September 8, 2015 |
| Place and Date of Judgment: | Vancouver, B.C.<br>October 15, 2015 |

## I. INTRODUCTION

[1] The defendant John Vriend ("Vriend") is employed by the defendant Toronto-Dominion Bank ("TD") as a mobile mortgage specialist. The defendant Daryl Martz ("Martz") is an investment advisor employed by the defendant Manulife Securities Investment Services Inc. ("Manulife').

[2] In 2006 the plaintiff, Clifford Roy Forest, met individually with Vriend and with Martz, and took out a home equity line of credit ("HELOC") with TD secured by a mortgage on his home, and he used the proceeds to purchase investments with Manulife.

[3] After failing to make the minimum payments required by the HELOC agreement, the plaintiff lost his home in a foreclosure.

[4] On November 28, 2013, the plaintiff filed a notice of civil claim against the defendants, claiming, among other things, that Vriend negligently and in breach of fiduciary duty gave him poor advice about risk.

[5] I now have before me two applications in relation to the plaintiff's action.

[6] One is an application by the plaintiff for an order pursuant to Rule 6-1(1)(b)(i) granting leave to amend his notice of civil claim.

[7] The other is an application by the defendants TD and Vriend for an order pursuant to Rule 9-5(1) that the action against them be struck and the proceedings dismissed on the ground that they are an abuse of process.

## II. BACKGROUND

[8] On May 15, 2006, the plaintiff entered into a HELOC agreement with TD. The HELOC agreement had a credit limit of $185,250 and was secured against the plaintiff's home in Chilliwack.

[9] In January 2012, the plaintiff failed to make the minimum payments required by the HELOC agreement.

[10] On July 12, 2012, TD filed a petition in the Chilliwack registry of this Court under No. 024789 commencing foreclosure proceedings against the plaintiff pursuant to the HELOC agreement (the "Foreclosure Proceedings").

[11] On July 22, 2013, an *order nisi* was granted in the Foreclosure Proceedings.

[12] On November 28, 2013, the plaintiff filed a notice of civil claim under number S138862 containing a variety of allegations against TD, Vriend, Martz, and Manulife (the "Civil Claim").

[13] On May 7, 2014, TD and Vriend filed an amended response to the Civil Claim arguing, amongst other things, that the issues raised by the plaintiff in the Civil Claim have already been determined in the Foreclosure Proceedings.

[14] On June 23, 2014, TD was granted conduct of sale of the plaintiff's home.

[15] On October 27, 2014, TD was granted an order approving the sale for the sum of $267,500. The sale took place on December 1, 2014.

## III. THE APPLICATION FOR LEAVE TO AMEND THE NOTICE OF CIVIL CLAIM

[16] The plaintiff seeks to amend his notice of civil claim to add, amongst other things, a tort claim for damages, including damage to his health, as a result of his reliance on the advice he received. The claims are based on negligence, breach of fiduciary duty, and vicarious liability.

[17] Martz and Manulife have consented to the application to amend. TD and Vriend have said that they take no position on the application to amend if their application to strike the claim is dismissed.

[18] The application to amend the pleadings ought properly to be considered before the application to strike the claim: *Drummond v. Moore*, 2012 BCSC 496 at para. 22.

[19] I am satisfied that there should be an order pursuant to Rule 6-1(1) granting the plaintiff leave to amend the notice of civil claim as set out in Schedule "A" of his notice of application.



## IV. THE APPLICATION TO STRIKE THE CLAIM AGAINST TD AND VRIEND

[20] TD and Vriend's application to have the Civil Claim dismissed or struck out as against them is brought pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*. They submit that the issues raised on the Civil Claim are either the same as, or so closely related to, the issues determined on the Foreclosure Proceedings that they are *res judicata*, and the Civil Claim amounts to an abuse of process.

[21] At para. 39 of *Reliable Mortgages Investment Corp. v. Chan*, 2014 BCCA 14, our Court of Appeal, citing *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44, set out three preconditions to the operation of issue estoppel:

> Issue estoppel may be invoked where:
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> 1. the same question as that before the court has been previously decided;
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> 2. the judicial decision said to create the estoppel was final; and
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> 3. the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised.

[22] Citing *Bank of Montreal v. Singh* (1979), 109 D.L.R. (3d) 117 (B.C.C.A.), TD and Vriend say that the order *nisi* in the Foreclosure Proceeding was a final judgment of this Court which could not have been granted unless the Court was satisfied that the mortgage was both valid and legally enforceable, and therefore, it is not open to the plaintiff to challenge the validity of the mortgage by way of a separate action.

[23] TD and Vriend rely on *Ba-Oose Inc. v. HSBC Bank of Canada*, 2011 BCCA 511, where our Court of Appeal said at para. 22:

> Once an order *nisi* is pronounced, it is not open to a mortgagor to challenge the validity of the mortgage by way of a separate action. Because the validity and enforceability of the mortgage are prerequisites to the granting of an order *nisi,* the facts necessary to determine that the mortgage is enforceable become *res judicata.'*

[24] The plaintiff submits that his Civil Claim, as amended, does not impugn the validity and enforceability of the mortgage or the HELOC agreement; rather, it claims damages for negligence and breach of trust. The plaintiff says that since the issues to be decided on the Civil Claim are distinct from the issues that were determined in the Foreclosure Proceeding, TD and Vriend cannot rely on issue estoppel to say that the *order nisi* is a bar to the Civil Claim.

[25] TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed." : see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "...prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

[26] TD and Vriend contend that even if the Civil Claim does not directly impugn the validity or enforceability of the mortgage and HELOC agreement, the issues raised on the Civil Claim are so closely related that they should properly have been raised in the Foreclosure Proceeding. They rely on *Ba-Oose* at para. 26 for the

proposition that, if a matter is closely related to the issues before a court in a foreclosure proceeding, and could have affected the judgment, cause of action estoppel will preclude the raising of those matters in a new action, even though they may not be matters covered by issue estoppel.



[27] I do not agree that the judgment of our Court of Appeal in *Ba-Oose* goes that far. In *Ba-Oose* the bank sought to strike out all of the plaintiffs' claims, including a claim that the plaintiffs had given up an opportunity to sell the property on the basis of a false representation that the bank would renew the mortgage. In dealing with the question of whether that issue should have been struck by the chambers judge, the Court of Appeal wrote at paras. 26-27:

> [26] It was not necessary for the court, in issuing an *order nisi* of foreclosure, to examine the question of whether a misrepresentation by the bank as to its readiness to renew the mortgage induced the plaintiffs to forego the sale of the property. Nonetheless, it would have been sensible for the matter to have been raised in the foreclosure proceeding, as it was closely tied to the issues that were before the court in that proceeding, and could have affected the judgment. It is strongly arguable, therefore, that cause of action estoppel would preclude the raising of that issue in a new action, even though it is not a matter covered by issue estoppel (see, for example, *420093 BC Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4th) 488, particularly at para. 42).
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> [27] In my view, it is unnecessary to reach any final conclusion on the question of whether that part of the plaintiffs' action is barred by cause of action estoppel. I say this because the evidence that was before the court on the summary trial application makes it apparent that the claim could not succeed.
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> [Emphasis added.]

[28] Thus, any comment by the Court of Appeal that the issue may have been barred by cause of action estoppel was, in the circumstances of that case, *obiter dicta*.

[29] In any event, *Ba-Oose* is distinguishable, because the issues raised by the plaintiff in the amended Civil Claim in the present case are quite different from the issue in *Ba-Oose*, and are much further removed from the question of the validity and enforceability of the mortgage.

[30] It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30, and 37, he wrote:

> 25 The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
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> 30 The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matters not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
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> ...
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> 37 Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.
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> [Underline in original.]

[31] The *order nisi* obtained by TD against Mr. Forrest was an *in rem* remedy granted by a Master of this Court. The Civil Claim, as amended, seeks damages in tort. The Master would not have had jurisdiction to entertain a tort issue, had the plaintiff attempted to raise it in the Foreclosure Proceeding: *Mulligan v. Stephenson*, 2013 BCSC 1384 at para. 35. As well, Vriend is one of the defendants in the Civil Claim, although he was not a party in the Foreclosure Proceeding. I do not accept the argument of TD and Vriend that Vriend was a "privy" to the Foreclosure Proceeding: *XY, LLC v. Canadian Topsires Selection Inc.,* 2014 BCSC 2017 at paras. 88-91.

[32] In all the circumstances, I do not agree that the issues raised in the Civil Claim as amended ought properly to have been raised in the Foreclosure Proceeding. The application of TD and Vriend to strike the Civil Claim as against them is dismissed.

[33] The plaintiff is entitled to its costs of this application in the cause as against TD and Vriend.

[34] I make no order for costs with respect to Martz and Manulife.

The Honourable Mr. Justice W.F. Ehrcke