STILLMAN LLP'S

LegalEye

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Presenting Legal News, Views and Updates from
Stillman LLP
Barristers & Solicitors

EDITOR'S NOTE

Our office will be closed during the holiday season from the December 24, 2014, to and including December 26, 2014, and we will be closed January 1, 2015. Our office is open during regular business hours on December 22 and 23, 2014, as well as December 29, 2014 through December 31, 2014.

We wish you all the best this holiday season and a safe and happy New Year!

Should you have any questions, concerns or suggestions for future articles please contact Erik Bruveris by phone at 930-3639, or email at ebruveris@stillmanllp.com.

HEADS UP

Heads Up is a column which appears in each issue of the Stillman LLP LegalEye, highlighting new or upcoming legislation and legal issues in the Province of Alberta.

Increase in Provincial Court Limits

By Ara McKee

Certain civil litigation actions may be commenced in either the Provincial Court of Alberta (small claims division) or the Court of Queen's Bench of Alberta. The course of litigation, outcome and cost consequences can be very different depending on the choice of court. Prior to August 1, 2014, if the amount claimed in an action was greater than $25,000.00, the matter could only be heard in the Court of Queen's Bench. If the claim was commenced in Provincial Court, any amount claimed over $25,000.00 would be waived. As of August 1, 2014, the monetary jurisdiction of the Provincial Court of Alberta increased to $50,000.00.

In comparison, the monetary jurisdictions of the other provincial courts are as follows:

BC - $25,000.00
Saskatchewan - $20,000.00
Manitoba - $10,000.00
Ontario - $25,000.00
Quebec - $7,000.00
New Brunswick - $12,500.00
Newfoundland - $25,000.00
Nova Scotia - $25,000.00
Prince Edward Island - $8,000.00

An advantage of Provincial Court is the more streamlined and less formal process, which is organized to guide litigants through remedial steps such as mediation and pre-trial conferences with mediators and judges prior to setting the matter for trial. In most cases, Provincial Court provides a more cost effective and quicker resolution to civil litigation

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matters. With the increase in monetary jurisdiction, many cases that are between the range of $25,000 - $50,000 can now be processed through the Provincial Court system. This change should result in reducing the back log of cases in the Court of Queen's Bench.

Even if your claim is $50,000.00 or less, the matter may still be commenced in the Court of Queen's Bench. In fact, there are specific matters that must be heard in the Court of Queen's Bench regardless of the amount claimed. Prior to commencing a civil litigation claim, a lawyer can be contacted to discuss with you the options of commencing the claim in Provincial Court or the Court of Queen's Bench and the advantages and disadvantages of each according to the specifics of your claim. Any of the lawyers at Stillman LLP may be contacted in this regard.

FIRM NOTES

As the end of 2014 draws to a close, we would like to thank all of our clients for their continued trust in our legal services. We would also like to thank all of our staff for their hard work and dedication; all of which made 2014 a wonderful year. We wish everyone a very Happy Holiday Season.

In July of this year, the real estate department welcomed Guang "Kitty" Yang, as a paralegal.
Stillman LLP has always endeavored to maintain involvement in not only the legal community, but also the community of Edmonton in general. This summer marked the rookie season for the Stillman LLP Stealers softball team. Stillman LLP is happy to announce that the Stealers won their division championship and the team is already looking forward to next season!

Greg Bentz took a position this fall as learning group facilitator, for the CPLED program. The CPLED program is a mandatory program which all Students-at-Law are required to successfully complete prior to being admitted to the Law Society of Alberta.

Ara McKee has been appointed Secretary, taking over from Greg Bentz in the West Edmonton Business Association (WeBA). If you have any questions about how to get involved in WeBA, please contact Greg Bentz or Ara McKee.

CAUSE CÉLÈBRES

Summary Judgment Applications in Alberta
By Christopher L. Younker

Unfortunately, yet all too often, individuals and corporations find themselves as defendants in a lawsuit brought with questionable merit. The Alberta Rules of Court provides one possible remedy to such a dilemma, by way of an application for summary dismissal pursuant to Rule 7.3. Conversely, Rule 7.3 can also be used by plaintiffs to bring an application for summary judgment of their claim.

The benefits of Rule 7.3 are substantial. When used in a successful application, Rule 7.3 allows an applicant a timely resolution of their legal action in a cost efficient manner and without the stress and inconvenience of a trial. In practice, Rule 7.3 has arguably not lived up to the drafters original intentions. In Alberta, the test that an applicant for summary judgment must satisfy is that "there is no merit to a claim or part of it." Until now, this test has been interpreted narrowly, arguably allowing too many claims to proceed to trial that lacked sufficient evidentiary basis to succeed.

In 2007 a movement to change the applicable test began in Ontario with the Ontario Civil Justice Reform Project. This movement culminated in the case of *Hyrniak v. Mauldin* (2014 SCC 7) this year when the Supreme Court of Canada decided it was time for a change.

In the recent decision of *1214777 Alberta Ltd*. v. *480955 Alberta Ltd*., (2014 ABQB 301), Master Schlosser provided a roadmap for the new test for summary judgment/dismissal. Master Schlosser stated that the starting point is to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record. The court is to look at the record and the dispute to decide whether it is essential to the resolution of the dispute that the court see the witnesses. If the answer is yes, then the matter must go to trial. If the initial answer is no, the court is to engage in a six step process, summarized as follows:

1. The court is to presume that the best evidence from both sides is before the court. The decided cases tell us that summary judgment applications have to be decided on the evidence before the court and not on what the evidence might be. Parties are required to put their best foot forward.

2. As a corollary to number one, the court is to ask whether a negative inference can be drawn from the absence of evidence on certain points.

3. Next, the court should look at the complete package and ask whether all of the evidence is admissible. Rule 13.18(3), for example, tells us that we cannot use hearsay for our final application, such as summary judgment or summary dismissal application.

4. Next, the court should ask whether there is a conflict in the evidence, and, if so, whether,
    a. The conflict has been resolved on cross examination, or
    b. Whether the evidence giving rise to the conflict is purely self serving and is otherwise unsupported. Self serving evidence does not give rise to a triable issue.

5. The next step is to examine the evidence. The court may assess the sufficiency, admissibility and reliability of the evidence without access to enhanced fact finding powers (such as a trial Judge would have). Assessing the sufficiency of the evidence would also involve considering whether the issue can fairly be decided on the factual record before the court.

6. A plaintiff will be entitled to judgment if the plaintiff can prove all elements of the cause of action and the defendant either has no defence or is missing critical evidence of proof necessary to maintain that defence. A defendant will be entitled to judgment if the plaintiff cannot prove an essential element of its cause, or if the defendant has a complete defence.

As Master Schlosser pointed out in his decision, much of the above is not truly new. The main change is that the concept of proportionality urges the court to give summary remedies where it can. The legal or persuasive burden remains on the applicant. Now, however, when an applicant discharges its' evidentiary burden, the respondent must not only show that it has an arguable case, but that there is also a compelling reason that the matter should go to trial.

Whether or not the threshold for granting summary judgment is at the civil standard (on a balance of probalities) or at the higher standard of 'plain and obvious' or 'beyond doubt' remains unsettled. The need for further clarification remains, either through new legislation, or from decisions of the higher courts. That being said, what is clear is that the Alberta test to apply to in summary judgment cases has been substantively altered and should be carefully considered before bringing an application of this nature.

AS WE SEE IT

BANKRUPTCY: LIFTING THE STAY OF PROCEEDINGS

By John Hagg

The *Bankruptcy and Insolvency Act* (R.S.A. 1985, c B-3) (the "Act") is a Federal Act which governs the administration and litigation of Bankruptcy matters in all Provinces of Canada. Section 69 of the Act prevents a creditor from commencing or continuing an action, or collecting on a judgment for a claim which is provable in bankruptcy. However, the automatic stay provided for by the Act is not without exceptions. A stay may be lifted upon application to the Court if the creditor is able to demonstrate that the stay of proceedings will materially prejudice the creditor, or such other equitable grounds as the Court may determine. The matter of *Munro (Re)*, 2014 ABQB 636, explores the evidentiary requirements necessary to lift a stay of proceedings pursuant to the Act.

The Applicants (creditors) filed an application to lift the stay of proceedings against the Respondents (the bankrupts). The Applicants entered into an investment deal with the Respondents, to build a 51 unit luxury condominium development. That development never occurred, despite the fact that the Applicants gave funds to the Respondents to do so. The Respondents went into bankruptcy approximately 7 years following the investment of the Applicants into the failed development.

The Applicants' primary argument was that their claim would survive bankruptcy pursuant to s. 178(1) given that they allege the debt owing to them resulted from a fraudulent misrepresentation or false pretence, and should they be successful, their recovery of the judgment would be prejudiced if the stay was not lifted. The Applicants argued if they were allowed to proceed with their claim, they would have access to the funds held by the Real Estate Fraud Prevention Fund, which were funds held outside of the bankruptcy. Justice Veit found, that there was no evidence supporting the claim of the applicant as against the bankrupt, and therefore their applicant failed.

Justice Veit advises in her decision that in order to demonstrate prejudice suffered by a creditor in failing to lift the stay, the applicant (creditor) must establish that the claim against the debtor would survive the bankruptcy, by virtue of an enumerated ground contained in s. 178(1) of the Act. In order to do so, the applicant must demonstrate some evidence of merit of the claim, which would bring the claim under the protection of s. 178(1). The evidence required must be more than allegations. The evidence produced must prove to the Court that there is substance to the allegations against the debtor/bankrupt.

The requirements to lift the stay, as outlined in *Munro (Re)*, are structured as such to protect the purpose of the Act. Justice Veit reminds readers that the purpose of the Act was to recognize a fresh start principle, which assists individuals experiencing financial difficulties to begin anew. If a creditor attempts to deprive a creditor of the benefit of the Act, it must be something more than by way of a mere allegation.

In summary, the framework of an application to lift the stay of proceedings pursuant to the Act is as follows:

a. The applicant must show that they will be prejudiced if the Court fails to lift the stay;
b. In order to show prejudice, the applicant must establish that the claim against the debtor would survive bankruptcy. In order to do so, the applicant's claim must fall into the enumerated grounds listed in s. 178(1) of the Act, which are primarily rooted in fraud; and
c. If the applicant is to be successful in demonstrating that there claim would survive bankruptcy, they must put forward some evidence. Claims which are mere allegations without further evidence will not be sufficient.

Despite the fact that the Applicants in this case were not successful in lifting the stay of proceedings, this case provides a useful framework for creditors and their counsel to determine whether or not an application of this type may be a fruitful course of action in attempting to either pursue a claim or collect a judgment, against a bankrupt debtor.

STILLMAN LLP

Barristers and Solicitors

#300, 10335 - 172 Street
Edmonton, Alberta, Canada T5S 1K9
Tel: (780) 484-4445
Fax: (780) 484-4184
Canada Toll Free: 1-888-258-2529
E-Mail: lawyers@stillmanllp.com
Website: www.stillmanllp.com

Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various jurisdictions in France, Ireland and the United States.

The firm has a well established network of agents in Canada, including Vancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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