COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. Trang, 2012 ONCA 902
DATE: 20121221
DOCKET: C55684

Cronk, Juriansz and Pepall J.A.

BETWEEN

Royal Bank of Canada

Plaintiff (Appellant)

and

Phat Trang and Phuong Trang aka Phuong Thi Trang

Defendants

and

Bank of Nova Scotia

Respondent

James M. Satin and Justin R. Winch, for the plaintiff/appellant

No one appearing for the respondent, the Bank of Nova Scotia

Heard: December 17, 2012

On appeal from the judgment of Justice Douglas K. Gray of the Superior Court of Justice, dated June 6, 2012.

ENDORSEMENT

[1] The appellant, Royal Bank of Canada, has filed an appeal to this court from the order of Justice Douglas K. Gray of the Superior Court of Justice dismissing its motion for an order that the Bank of Nova Scotia (BNS), a third party creditor,

provide it with a mortgage discharge statement relating to property owned by judgment debtors of the Bank. The appellant had sought to enforce its judgment by filing a writ of seizure and sale. The sheriff refused to execute the writ without a mortgage statement from the mortgagee BNS. The BNS refused to provide the statement taking the position it was prohibited from doing so by the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, as interpreted by this court in *Citi Cards Canada Inc. v. Pleasance*, 2011 ONCA 3.

[2] The appellant submitted to the motion judge that *Citi Cards* is not binding authority because it was decided *per incuriam*. The appellant points out that s. 4.3.6. of Schedule I to PIPEDA was not brought to the court's attention, and consequently was not considered, when the court decided *Citi Cards*. Section 4.3.6. of the Schedule permits an organization to release less sensitive personal information on the implied consent of the individual.

[3] The motion judge provided a thoughtful discussion of the *per incuriam* argument and the notion of implied consent. He observed at para. 44 of his reasons:

> Thus, the notion of implied consent is specifically recognized in the Schedule. In view of the fact that the state of account as between mortgagee and mortgagor is publically disclosed at the outset of the relationship, and that the current state of account governs a number of rights of third parties, it would be reasonable to ask

> whether there is implied consent on the part of the mortgagor to disclose to third parties the state of account when the exercise of those rights is in issue. In my view, a strong argument can be made that the answer to that question is yes. At the very least, for the reasons articulated, it can be argued that information as to the current state of the account is "less sensitive" as contemplated in s. 4.3.6 of the Schedule, and thus consent to its disclosure is implied.

[4] Ultimately, however, the motion judge was not persuaded he could decline to follow *Citi Cards*.

[5] In this court the appellant renews the argument that *Citi Cards* was decided *per incuriam*. We conclude that the argument that the court should revisist its decision in *Citi Cards*, while ably advanced, cannot be considered in this case. It cannot be considered because the court lacks jurisdiction to hear this appeal since the motion judge's order in this case was interlocutory.

[6] The order from which the appeal was filed was made on a motion brought within the appellant's action against the judgment debtors. The appellants brought the motion after the judgment debtors twice failed to appear on judgment debtor examinations. That order does not finally dispose of the question whether the appellant can obtain an order compelling the BNS to provide the mortgage statement. The appellant is still able to seek to examine a representative of the BNS under rule 60.18(6)(a) as discussed in para. 33 of *Citi Cards*. While the appellant did not do so in the interests of efficiency, whether the appellant is able to

obtain an order that the BNS disclose the mortgage statement has not been finally determined.

[7] As the order from which the appeal is taken is interlocutory, the appeal is quashed.

"E.A. Cronk J.A."
"R.G. Juriansz J.A."
"S.E. Pepall J.A."