

COURT OF APPEAL FOR ONTARIO

CITATION: Toronto-Dominion Bank v. Dhaliwal, 2012 ONCA 148

DATE: 20120309

DOCKET: C54010

Feldman and Hoy JJ.A. and Spence J. (*ad hoc*)

BETWEEN

The Toronto-Dominion Bank

Plaintiff (Respondent)

and

Harcharan Dhaliwal

Defendant (Appellant)

Abba Chima, for the appellant

Amanda Jackson, for the respondent

Heard: February 16, 2012

On appeal from the order of Justice Patrick J. Flynn of the Superior Court of Justice, dated June 23, 2011.

ENDORSEMENT

[1] The appellant appeals from the decision of the motion judge dismissing his motion to set aside default judgment in the amount of \$83,619.30. On the appeal the appellant takes the position that the decision must be set aside as the motion judge, by some of his comments, particularly during argument, as well as in his ruling, displayed a reasonable apprehension of bias against the appellant.

[2] Counsel has directed the court to a number of places in the transcript of the motion proceedings where he suggests that the judge's comments demonstrate pre-judgment of the issues and a disposition against the appellant.

[3] We have read the entire transcript in order to evaluate the impugned comments in the context of all of the facts and of the entire hearing. Having done so, we reject the position of the appellant.

[4] As an example, at the opening of the motion, the trial judge commented on the length of time it had taken to bring on the motion – one year- and the fact that counsel for the appellant had sworn the affidavit. Counsel explained that he had not been counsel at the time he swore the affidavit but that he was helping original counsel who was currently unable to practice. The appellant eventually swore another affidavit and current counsel stated that he had decided, for purposes of expediency, to argue the motion himself. Following this discussion, at p. 3 of the transcript, the motion judge said:

THE COURT: I, I would sort of take issue, Mr. Chima, with anyone's use of the word expedient in this proceeding. It has not, you, you could have dissected this thing a thousand times by the time it's got to me. *It's not going to go further than me, though.* [Emphasis added.]

[5] Counsel submits that the last line of this comment means that the judge had already decided to dismiss the motion. We do not agree. In context, he was

saying that the motion was going to be heard by him that day, and not delayed any further.

[6] The appellant also points to the motion judge's use of words such as "puffery", "smoke screen" and "phantasmagoric" to describe the appellant's proposed defence as indicating bias or prejudgment. While these words are colourful, they do not demonstrate bias. We agree with the submission of counsel for the respondent who submitted that when the transcript is read in its entirety, it shows that while the motion judge was somewhat informal and colourful in his use of adjectives and imagery, he was not biased and made a just and fair determination based on the facts and evidence.

[7] The appeal is therefore dismissed with costs to the respondent fixed at \$5,500 inclusive of disbursements and H.S.T.

Signed: "K. Feldman J.A."
"Alexandra Hoy J.A."
"Spence J. (ad hoc)"