

COURT OF APPEAL FOR ONTARIO

CITATION: York Region Condominium Corporation No. 890 v. RPS Resource
Property Services Ltd., 2012 ONCA 670
DATE: 20121003
DOCKET: C53346

Sharpe, Simmons and MacFarland J.J.A.

BETWEEN

York Region Condominium Corporation No. 890

Plaintiff (Appellant)

and

RPS Resource Property Services Ltd., William Garland, Karyn Garland, Kandiah
Sivaneswaran, Brett Matus, Eric Schraibman, Richard Taylor, James Wilson,
W.H. Bosley & Co. Ltd. and Royal Bank of Canada

Defendants (Respondent in Appeal)

Peter J. Osborne and Naomi D. Loewith, for the appellant

Catherine Francis, for the respondent Royal Bank of Canada

Heard and released orally: September 24, 2012

On appeal from the judgment of Justice L.A. Pattillo of the Superior Court of
Justice, dated January 19, 2011.

ENDORSEMENT

[1] The appellant appeals the dismissal of its claim against the Royal Bank of
Canada ("RBC").

[2] The appellant retained the services of the defendant RPS Resource
Property Services Ltd. ("RPS") as property manager. RPS maintained a bank

account with RBC to hold trust funds belonging to the appellant. RPS maintained a number of other similar accounts and, as the trial judge found, RPS improperly moved funds from account to account in breach of its trust obligations. As a result, the appellant suffered a loss of over \$370,000.

[3] The trial judge awarded the appellant judgment against RPS and its principal Garland but dismissed the claim against RBC. The claim against RBC was pleaded as breach of contract, conversion and negligence although the allegations of negligence were sketchy. At trial the appellant was allowed to advance a claim for breach of trust (knowing receipt and knowing assistance). The trial judge gave comprehensive reasons dismissing the claim against RBC. He briefly mentioned that the claim included negligence but did not otherwise deal with negligence as a discrete cause of action. The claim for breach of contract was more or less abandoned at trial.

[4] On this appeal, the appellant invites us to set aside the dismissal of its claim against RBC and to award damages in negligence.

[5] The threshold issue is whether the appellant advanced a claim in negligence at trial.

[6] We are not persuaded that negligence was advanced at trial as a distinct claim. We reach that conclusion for the following reasons.

[7] First, in his otherwise very thorough and comprehensive reasons, the trial judge did not deal with negligence. In our view, it is virtually certain that the reason the trial judge did not deal with negligence because he did not consider the appellant to have relied on that cause of action at the trial.

[8] Second, the trial record strongly suggests that negligence was not advanced as a distinct claim. There is no indication that the appellant dealt with the very contentious issue of whether a bank owes a duty of care to a third party. The plaintiff led no evidence as to the standard of care that would apply to a bank should there be such a duty of care. It is impossible for us to understand how a claim in negligence could be made out in the absence of evidence on these issues.

[9] We are not persuaded by the material filed as fresh evidence to supplement the trial record demonstrates that the appellant relied on negligence as a discrete cause of action at trial. The opening and closing arguments of counsel were not transcribed but the factum filed by the appellant's trial counsel at the opening of trial did not advance negligence as a distinct claim. Trial counsel's notes are, at best, ambiguous and indicate a concerted strategy to avoid the defence of contributory negligence.

[10] That leads to the third point, namely, that there was a very strong tactical reason for the appellant to have focused on breach of trust and conversion and

to have avoided negligence as a distinct cause of action. RBC was in a position to mount a strong defence of contributory negligence. Throughout the period in which RPS operated its fraud, the appellant received monthly statements from RBC from which it could readily be discerned that unauthorized transfers were being made from the account. The appellant failed to notice these unauthorized transfers. It was to avoid that defence that the appellant relied on breach of trust and conversion.

[11] We do not accept the submission that this court could or should entertain and determine the claim in negligence without a proper record from the trial court. As noted, the appellant's claim is far from straightforward. Difficult issues of duty of care and standard of care would have to be confronted. That would require a trial on issues of fact and as we read the record, no such trial took place in this case.

[12] As we have concluded that the theory of recovery advanced before this court was not advanced at trial, we dismiss the appeal.

[13] Accordingly, the appeal is dismissed with costs to the respondent fixed in the amount of \$30,000 inclusive of disbursements and applicable taxes.

"Robert J. Sharpe J.A."
"Janet Simmons J.A."
"J. MacFarland J.A."