*TD Bank v Leikeim*, 2018 NWTSC 81 **SC-1-CV-2015-000146**

# IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**THE TORONTO DOMINION BANK**

**- v -**

**Plaintiff**

**KENNETH J. LEIKEIM also known as KENNETH JOHN LEIKEIM**

**Defendant**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Transcript of an Application for Summary Judgment held before The Honourable Justice V.A. Schuler, sitting in Yellowknife, in the Northwest Territories, on the 21st day of November, 2018.

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**APPEARANCES:**

Mr. F. Virji Counsel for The Toronto Dominion Bank

Mr. K. Leikeim Self-represented

# (TELECONFERENCE CONNECTED)

1. THE COURT: Good morning, and madam clerk,
2. do we have the parties on the phone?
3. THE COURT CLERK: We do, yes.
4. THE COURT: All right. So I am just going
5. to ask that the parties in this matter, which is
6. Toronto Dominion Bank v. Leikeim, and I hope I am
7. pronouncing that correctly, that you just
8. identify yourselves for the record. First of
9. all, for the applicant.
10. MR. VIRJI: Yes, Justice, this is Faiz
11. Virji, I am counsel for the applicant, the
12. Toronto Dominion Bank. I am with Field Law.
13. THE COURT: All right. Thank you. And do
14. we have Mr. Leikeim in person?
15. MR. LEIKEIM: Yes. Ken Leikeim.
16. THE COURT: All right. Leikeim, then, is
17. the pronunciation.
18. MR. LEIKEIM: Yeah.
19. THE COURT: All right. So are you both
20. prepared to go ahead with this application?
21. MR. LEIKEIM: Definitely.
22. MR. VIRJI: Yes, My Lady.
23. THE COURT: All right. So I will hear
24. first from Mr. Virji, and then since it is his
25. application and then from Mr. Leikeim.
26. MR. VIRJI: Thank you, My Lady. So as you
    1. can see from the Notice of Motion, this is an
    2. application for summary judgment, granting
    3. judgment in favor of the plaintiff, Toronto
    4. Dominion Bank, against the defendant, Mr. Leikeim
    5. for amounts owing under a finance agreement and a
    6. Line of Credit Agreement. There's also
    7. application to dismiss the counterclaim of the
    8. defendant, Mr. Leikeim. So the facts of this
    9. case, My Lady, as set out in the special chambers
    10. brief is that Mr. Leikeim entered into a Variable
    11. Rate Sales Finance Contract, which I'll dub "the
    12. finance agreement," with TD on March 14th, 2009,
    13. for the loan in the amount of $18,153.45, with
    14. interest at the variable annual interest rate of
    15. the TD prime rate plus 2.99 percent. On November
    16. 19th, 2012, Mr. Leikeim entered into a Line of
    17. Credit Agreement for an amount of 13,500 and the
    18. interest for that would be prime rate plus 2
    19. percent. On May 5th, 2014, TD demanded full
    20. payment on the outstanding balances as a result
    21. of failure to make payments in accordance with
    22. both agreements. It was terms of both of the
    23. agreements that Mr. Leikeim could have to pay all
    24. legal costs on a solicitor and own client basis,
    25. for a collection of the same. The TD commenced
    26. an action, this action, against Mr. Leikeim, on

27 August 25, 2015 for the outstanding balances.

1. Mr. Leikeim filed a Statement of Defence and
2. counterclaim on October 6th of that year, making
3. allegations that the bank accounts were frozen
4. and therefore he was denied access to the funds,
5. as well as misallocation of the funds. So, My
6. Lady, as you may -- as you are aware the test for
7. summary judgment as set out in the *Rules of Court*
8. under Rule 174 and 175, that a plaintiff may
9. apply after the delivery of a Statement of
10. Defence, for a summary judgment, and that a
11. defendant may apply -- or excuse me, and that --
12. and respondent to an application is to provide
13. evidence and may not rest on the mere allegations
14. or (indiscernible)in the pleadings and that's
15. section -- or Rule 176(1). So in the Northwest
16. Territories, the case of *Leishman*, which is a
17. 2016 case by Justice Shaner, the test of summary
18. judgments was stated to be the question is not
19. whether a genuine issue for trial, but rather
20. whether there is a genuine issue requiring trial.
21. And so -- and so our position is that today there
22. is no genuine issue requiring trial. The reason
23. for this, My Lady, is that the Statement of
24. Defence disclose -- discloses no defence to the
25. claim. It does not deny that the amount -- that
26. Mr. Leikeim entered into the agreements, and it
27. further admits that there are amounts
28. outstanding. With respect to the defence that
29. the bank accounts were frozen, the Affidavit of
30. Kavita Medera (phonetic) which we filed in --
31. THE COURT: Can I have that Affidavit,
32. Madam Clerk? Thank you. All right. Go ahead.
33. MR. VIRJI: At paragraph 16, My Lady, it
34. states that the bank placed a hold on the
35. accounts on three occasions, October 22nd, 2013,

9 September 3rd, 2014, and January 2nd, 2015. At

1. paragraph 17, it states that the hold was placed
2. as a result of support Deduction Notices received
3. by TD from Alberta Justice and Solicitor General
4. Maintenance Enforcement, as a result of the
5. Alberta Maintenance Enforcement order against
6. Mr. Leikeim.
7. So the position of TD is that they were
8. required to place the hold to comply with the
9. order, and therefore the hold on the accounts
10. were as a result of Mr. Leikeim's own actions and
11. therefore TD is not responsible or liable for the
12. same. With respect to Mr. Leikeim's
13. counterclaim, My Lady, there's an allegation that
14. there were funds deposited by Mr. Leikeim on May
15. 17th, 2014, in the amount of $12,317.64, which
16. are no longer in the account. We had an
17. allegation that Mr. Leikeim had a mortgage, which
18. was sold in 2000 and -- a mortgage for a home,
19. which was sold in 2007, which the bank improperly
20. deducted funds when there was nothing
21. outstanding. The first issue with respect to the
22. alleged missing funds that were deposited into
23. the account, if you look at the Affidavit,
24. paragraphs 20 to 23 discuss the details of that
25. transaction. What is in the account is that
26. Mr. Leikeim deposited a cheque in that amount on

9 March 17th, 2014, on the same day he caused a

1. draft -- a bank draft to be withdrawn in the
2. amount of $12,310.14. There was also a bank
3. draft cost of $7.50, which is the total amount of
4. the -- the amount that was deposited in. The
5. cheque that was deposited and was eventually
6. returned for insufficient funds with an overdrawn
7. balance of that amount. On March 31st, 2014,
8. there was six transfers made to bring the account
9. back to zero to the exact amount. As a result,
10. TD states that there is no merit to the claim
11. that there is any missing funds as alleged in the
12. counterclaim as they're all accounted for in the
13. account.
14. With respect to the -- the mortgage sale and
15. deduction, on September 5th, 2007, a sum of
16. $22,014.63 was deposited into the account, and,
17. My Lady, excuse me, this was at the Affidavit at
18. paragraphs 26 to 28. So an amount on the same

1 day, an amount of $22,000 -- $22,011.01 was

1. removed from the account, along with $3.62, which
2. was deducted as interest. That sum was deposited
3. into account -- an account previously used by
4. Mr. Leikeim. As a result, any amount deducted
5. from the sale were as a result of actions taken
6. by Mr. Leikeim, not TD. And in any event, My
7. Lady, the *Limitation of Actions Act* bars any
8. action for recovery of money if an action is not
9. commenced within six years of the cause of action
10. arising. This cause of action would have arisen
11. in 2007, the counterclaim was not brought until
12. 2015, and so our submission is that as a result
13. of *the Act*, that the claim is statute barred.
14. And so, My Lady, today we are seeking
15. judgement for the amounts owing under the finance
16. agreement, and the -- and the Line of Credit
17. Agreement as well interest pursuant to the
18. contract, for both of those, dismissal of the
19. counterclaim, and costs of this application on a
20. solicitor and own client basis pursuant to the --
21. the agreement. Yeah.
22. Subject to any questions you may have, those
23. are all my submissions.
24. THE COURT: Well, I did not see, in the
25. material, I guess, the Line of Credit Agreement
26. and so I do not see where the agreement for
27. solicitor costs is.
28. MR. VIRJI: Let me just check. One
29. second, My Lady. Oh, I see. Yes. I -- I see
30. that. It appears the Line of Credit Agreement
31. was not attached as an exhibit to the Affidavit.
32. It was provided in the discovery that was in the
33. Statement of Documents that was filed on December
34. 4th, 2015. It's Document 9 -- oh, no, excuse me.
35. That's the wrong document. Yes, My Lady. I
36. apologize. I guess it's not -- it's not
37. included. We only have the Variable Rate Sales
38. Contract. I can advise that all of TD's
39. accounts -- TD's contracts do state that costs
40. are on a solicitor and own client basis, but I
41. understand that that might not be something you
42. can take judicial notice of.
43. THE COURT: All right. Is there anything
44. further you want to say on the application?
45. MR. VIRJI: No, My Lady. Those are my
46. submissions.
47. THE COURT: All right. And, Mr. Leikeim.
48. MR. LEIKEIM: Yeah. I'm not really too too
49. sure what I can say. Yeah. Because when I tried
50. to access my funds, from my TD account, my
51. accounts were frozen, so at that time I wasn't
52. able to pay my bills. When I made my
53. counterclaim, I guess the TD says -- I don't have
54. the papers in front of me, in 2015, I never ever
55. received a response from them, so -- and I guess
56. if my understanding is correct, what TD is saying
57. if there was amounts from my prior mortgage,
58. that, I guess, I should -- haven't been paid,
59. they're saying that the time frame was too long,
60. so they're just not going to pay me for amounts
61. that they could owe me back from 2007. I don't
62. think that's right. Yeah. That I made the
63. deposit, and I had submitted all that information
64. to TD, back in 2015, and I just never ever heard
65. a response from them to say whether or not, you
66. know, they confirmed because, I mean, I had the
67. deposit slip which I had sent to TD, but I never
68. did receive a response from them. And I think
69. the deposit was, and it's probably in the
70. application there, around 12,000 or so dollars.
71. THE COURT: All right. But you have read
72. the Affidavit, and you have seen what their
73. explanation is for -- of what happened with that

21 $12,000 deposit?

1. MR. LEIKEIM: Yeah. But I just never saw
2. the -- never saw the amounts in the account,
3. so -- and I'm not -- wasn't able to, I guess,
4. trace back to see where the -- where the funds
5. came from because the cheque was taken out of TD,
6. then I think it was to pay the mortgage I had on
7. the house. So I went down and they didn't accept
8. the cheque, so then I came back to TD to take out
9. a certified cheque, and then use those funds to
10. deposit in the account, but then those funds
11. never went into the account, and then TD's saying
12. that account was in overdraft position, but then
13. the funds I had from that cheque that I
14. originally had from my TD account should have
15. covered -- covered the amounts. So I don't
16. understand why the amounts were never deposited
17. back into the account. So it seems like I'm --
18. I'm -- I was always short that -- that money,
19. with no explanation from -- from TD.
20. THE COURT: So your real complaint, then,
21. as I understand it, is that they did not
22. explain -- you feel they did not explain at the
23. time what had happened with the money?
24. MR. LEIKEIM: Yes. So -- yeah. So I -- so
25. I think that -- that there should kind of -- kind
26. of be an offset if there's an amount owing, then
27. it should be offset against those -- those funds
28. that I probably should have had, you know, in the
29. account. Because, I mean, after -- after I
30. submitted the information to TD, you know, I
31. never heard anything back either from TD or from
32. their legal counsel, like -- like, when I did
33. my -- my application for my defence.
    1. THE COURT: All right. But do you -- but,
    2. now that you see the explanation that -- in their
    3. Affidavit, I am not quite sure what you are
    4. saying. I am not sure whether you are
    5. complaining that you did not get that explanation
    6. at the time, or whether you are disagreeing with
    7. the explanation that they are giving.
    8. MR. LEIKEIM: Well, I mean, I haven't -- I
    9. mean, I haven't been able to -- I don't have
    10. access to the account anymore, but I was never
    11. able to -- like, they -- like, they match up the
    12. funds going back into my account, so it just
    13. sometimes seems like if I understand their --
    14. their explanation, like, the funds were just
    15. lost, and I don't understand how they could be
    16. lost. I mean, the funds have to be some place.
    17. Because I had a deposit slip. It was deposited
    18. into the account from the deposit slip I had, but
    19. then I never did see the -- see the funds in the
    20. account.
    21. THE COURT: All right. Is there anything
    22. else that you wanted to say on this application?
    23. MR. LEIKEIM: No. I mean, I -- I had
    24. reported to TD after they had, I guess, sent me
    25. the -- about this court date, just about, you
    26. know, if there's any funds that are owing.
    27. There -- is money in court in Alberta, you know,
34. and the funds could come from -- could come from
35. that could -- could come from that money.
36. THE COURT: Funds in Alberta in court, on
37. another court action?
38. MR. LEIKEIM: Yes.
39. THE COURT: I see. All right.
40. MR. LEIKEIM: Other than that -- other than
41. that, I don't really have -- have any funds.
42. THE COURT: All right. Thank you.
43. Mr. Virji, anything further from you?
44. MR. VIRJI: No. I think our -- I think --
45. I think -- I don't think -- I think you
46. understand our position with respect to the funds
47. in the Affidavit that that -- what our position
48. is and what happened, so I don't have anything
49. further to state.
50. THE COURT: All right. Well, the -- I
51. have reviewed the materials and the -- the
52. application is for summary judgment in the total
53. amount of $20,320.66, for amounts owing under a
54. finance agreement and a Line of Credit Agreement,
55. and the bank also claims interest and
56. solicitor-client costs as well as dismissal of
57. the counterclaim that was filed by Mr. Leikeim.
58. The -- Mr. Leikeim did file a Statement of
59. Defence to the bank's Statement of Claim and he
60. also filed a counterclaim on this particular
61. application for summary judgment. The bank filed
62. the Affidavit of Kavita Madera, and that sets out
63. the bank's position on both its claim and
64. Mr. Leikeim's counterclaim. Mr. Leikeim has not
65. filed an Affidavit, as required by Rule 176(1),
66. so in determining whether to grant the bank's
67. application, all I have from him really is his
68. Statement of Defence and his counterclaim but I
69. do not have sworn evidence.
70. So under Rule 176(2), the test on this type
71. of application is whether the Court is satisfied
72. that there is no genuine issue for trial, and if
73. the Court is satisfied of that, then the Court is
74. to grant summary judgment, meaning that there
75. would be judgment without a trial. And as has
76. been referred to the case of *Leichman v*
77. *Hoechsmann,* that was decided by Justice Shaner.
78. She describes the test as being whether there is
79. a genuine issue requiring a trial to allow the
80. Court to reach a fair and just result, and in
81. other words, if the Court can determine the
82. matter on the basis of the documents filed,
83. without the need for a trial, then the Court can
84. grant a summary judgment.
85. So light of that, it is in light of that
86. test that I look at the documents that have been
87. filed and the only thing I see in terms of the
88. documents submitted by the bank, because
89. solicitor-client costs are usually an -- somewhat
90. of a -- of a special remedy, and I do not have
91. anything before me, in terms of a document saying
92. that the bank would be entitled to
93. solicitor-client costs on the line of credit.
94. But apart from that, the bank's documentation
95. seems to be straightforward. In his Statement of
96. Defence, Mr. Leikeim makes a general denial. He
97. talks about the bank freezing his accounts
98. because -- and therefore, being in a position
99. where he could not make payments, but in my view,
100. the bank has explained that because it had legal
101. obligations to act on the notices from Alberta
102. Maintenance Enforcement, so there is no -- the
103. fact that it acted on those notices because of
104. its legal obligation, does not provide a defence
105. to the claim. In his counterclaim, Mr. Leikeim
106. has also talked about various -- about deposits
107. that he made in the account and being -- being
108. not satisfied, I suppose, that the bank had
109. illustrated to him what had happened with those
110. deposits. Now, again, I do not have anything by
111. way of an Affidavit from him, but the bank has,
112. in its Affidavit, explained what happened with
113. the deposits and has countered any suggestion
114. that the bank, somehow, did not account for the
115. money, or used the money in some way that it
116. should not have.
117. So in light of the bank's explanations, and
118. without any Affidavit evidence from Mr. Leikeim
119. to counter those explanations, or to show that
120. they are not reasonable explanations, I am
121. prepared to accept and find that the bank has
122. satisfactorily explained what happened with money
123. in -- the money in the absence of any evidence
124. showing that their explanation is not correct.
125. And then there is also, of course, as raised by
126. the bank, the question of the *Limitations of*
127. *Actions Act* and the fact that the issues about
128. the mortgage money occurred in 2007, and there is
129. a six-year limitation on claiming money, and so
130. Mr. Leikeim did not make a claim for that money,
131. did not institute legal proceedings to make a
132. claim for that money until 2015, so he would be
133. outside the limitation period.
134. So the bottom line is that, based on the
135. information -- the sworn information that is
136. before the Court and in the absence of -- of any
137. sworn information to counter it, there is no
138. defence, in other words, the issues Mr. Leikeim
139. raised in his Statement of Defence and
140. counterclaim do not constitute a defence to the
141. bank's action, and so I am going to grant the
142. application for summary judgment, except that on
143. the line of credit there will -- there will be
144. costs, but on a party-party basis, but not
145. solicitor-client costs. As far as the
146. solicitor-client costs on the finance agreement,
147. which was put before the Court and which does
148. provide for solicitor-client costs, they will
149. then be granted to be taxed by the clerk.
150. So, again, just not to repeat myself too
151. much, but I am satisfied that a trial is not
152. required in this matter, that the documents that
153. have been provided, other than as I have
154. indicated, are straightforward. There is not any
155. evidence to indicate that Mr. Leikeim either did
156. not owe the money, or is entitled to a setoff of
157. any kind against money owed. So the application
158. is granted on the terms that I have already
159. specified. The only thing I would suggest,
160. Mr. Leikeim, is that you try to make arrangements
161. with the bank to pay off that debt, now that they
162. will have a judgment. It is up to them, of
163. course, but it may be that you can work out some
164. kind of a repayment plan which would probably
165. make it easier on you than being in a situation
166. where they can, with their judgment, seize your
167. assets, or garnishee your wages, or take other
168. steps, but that is really up to you and the bank
169. to see if you can come to some kind of an
170. agreement about that.
171. All right. So unless either of you has any
172. questions, or if there is anything further, that
173. is my judgment in the case.
174. MR. VIRJI: Yes, My Lady. I just -- I
175. guess, do you want me to prepare a form of order?
176. THE COURT: Yes. I think you will have to
177. do that, prepare a formal order and you can
178. submit it to the Court. You do not need to send
179. it to Mr. Leikeim before you submit it.
180. MR. VIRJI: Thank you. And then in terms
181. of the -- the final judgment amount because we
182. are at -- we are seeking interest to -- and --
183. when the Notice of Motion was filed, it was to

|  |  |  |
| --- | --- | --- |
| 16 |  | July 10th, 2018. Should we -- should we include |
| 17 |  | the amount up until the date of judgment? |
| 18 | THE | COURT: Yes. |
| 19 | MR. | VIRJI: Okay. |
| 20 | THE | COURT: All right. And so, |
| 21 |  | Mr. Leikeim, you understand the decision, then? |
| 22 | MR. | LEIKEIM: No, not fully. Can I say -- |

1. can I say the money can come from -- from the
2. monies that are held in court, in Alberta?
3. THE COURT: Well, I do not know anything
4. about the monies in court, in Alberta, other than
5. what you are saying, and I -- and I certainly do
6. not have any control over them, so I am -- I
7. cannot make an order directing the Alberta court
8. to pay those monies to you or to the bank. You
9. would have to see what arrangements you can make
10. with the Court, in Alberta, about that.
11. MR. LEIKEIM: Okay.
12. THE COURT: But I -- it is not just
13. something I can order because I know absolutely
14. nothing about that court action, but also, I
15. would not have jurisdiction to make that order.
16. MR. LEIKEIM: Oh, okay.
17. THE COURT: All right.
18. MR. LEIKEIM: I mean, and after I filed
19. my -- my notice of defence, I mean, I never heard
20. anything either from their counsel or from the TD
21. Bank about trying to make any arrangements until
22. they served this -- I guess, this notice to -- to
23. appear in court.
24. THE COURT: Well, you probably have to,
25. you know, take the initiative and go to them
26. about making arrangements. I think that is
27. normally how it works, and, you know, rather than
28. leaving it and waiting for them to come to you, I
29. think it is probably in your best interest that
30. you go to them and see what you can work out.
31. And, I mean, I do not know whether Mr. Virji is
32. in a position to talk to you about that, but you
33. probably have to take -- should take the
34. initiative on that. I do not know, Mr. Virji, do
35. you have anything to say?
36. MR. VIRJI: I mean, I don't have
37. instructions, but I am sure once the judgment's
38. filed, then we -- I'm sure the bank would be open
39. to discussions with Mr. Leikeim. I don't think
40. that would be an issue.
41. THE COURT: All right. Would you be in a
42. position to tell him who he should talk to about
43. that?
44. MR. VIRJI: Yes. So, Mr. Leikeim, my
45. paralegal, Sienna Himalay, who I believe you have
46. been speaking with about this application,
47. once -- she'll be in contact with you, again,
48. with this judgment. But you can discuss, with
49. her, proposals to make payments and arrangements,
50. and whatnot, and she can take it back to our
51. client to get instructions.
52. MR. LEIKEIM: Okay.
53. THE COURT: All right? All right. Thank
54. you both very much, and we will close court then. 23 **-----------------------------------------------------** 24

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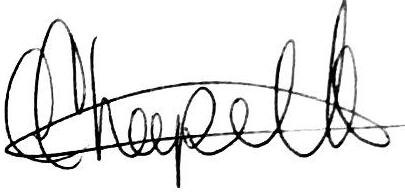
# 1 CERTIFICATE OF TRANSCRIPT

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1. I, the undersigned, hereby certify that the
2. foregoing transcribed pages are a complete and
3. accurate transcript of the digitally recorded
4. proceedings taken herein to the best of my skill and.
5. ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 6th day of December, 2018.

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1. Certified Pursuant to Rule 723
2. of the Rules of Court

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1. Carolina Chapelle, CSR(A)
2. Court Transcriber

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