

THE DOCTRINE OF MERGER

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Overview

The doctrine of merger, distilled to its essence, prohibits the reassertion of already decided claims. *Res judicata*, by contrast, prohibits contradiction. The doctrine of merger provides that a plaintiff who has been granted final judgment in an action is precluded from seeking a second judgment against the same party under the same cause of action; thus, it prohibits a second action for the relief already granted. The critical element of merger is that the claims arise from the same cause of action against the same party or against parties who are jointly, rather than severally, liable.

The leading case of *Zukowski v. Royal Insurance Co. of Canada*, 2000 ABCA 165, [2000] A.J. No. 683, 266 A.R. 81 creates an exemption for the application of the doctrine of merger in certain specified circumstances in which the defendant has clearly waived its application. The doctrine of merger will be waived where (i) the only parties with an interest in the cause of action have agreed that the judgment will not have that effect, thereby waiving operation of the doctrine as between them, (ii) the right of the plaintiff to pursue further recovery against the same defendant or defendants is clearly preserved in the judgment, (iii) the rights of third parties are not directly affected, and (iv) preservation of the right to pursue further claims is not an inappropriate or pointless fragmentation of the cause of action.

Vicarious liability presents an interesting challenge since liability against different parties rests on the same cause of action. It appears from the jurisprudence that the doctrine of merger applies to prohibit further proceedings against the vicariously liable defendants if the plaintiff has obtained judgment against the principal defendant without preserving its right to maintain further proceedings. In a case decided subsequent to *Zukowski*, the doctrine of merger was

applied to preclude the vehicle owner's vicarious liability because the vehicle owner was not party to the earlier consent judgment: *Pederson v. Norton*, 2012 ABQB 304, [2012] A.J. No. 509.

The Doctrine of Merger

In *Zukowski v. Royal Insurance Co. of Canada*, 2000 ABCA 165, [2000] A.J. No. 683, 266 A.R. 81 the Alberta Court of Appeal reviewed the doctrines of merger and *res judicata*. In essence, the doctrine of merger prevents reassertion of already decided claims, while *res judicata* prohibits contradiction. The doctrine of merger provides that a plaintiff who has been granted final judgment in an action is precluded from seeking a second judgment against the same party under the same cause of action; it prohibits a second action for the relief already granted. The critical element of merger is that the claims arise from the same cause of action.

Thus, a mortgagee who has sought and obtained recovery via foreclosure against the defaulting mortgagor is not precluded from pursuing the guarantor for the deficiency. Although the claims arise from the same facts, namely the default under the mortgage, the cause of action arises from two separate contracts: the first being the contract of mortgage, the second the contract of guarantee. See, for example, *Signature Finance Ltd. v. Golden Key Rental Co. Ltd.*, [1982] A.J. No. 845, 38 A.R. 495 (Q.B.) in which Master Funduk clearly set out this proposition:

“Even if the same subject-matter is involved in the claim against the corporate defendant and the claim against Deslaurier a judgment against one is not a bar to a claim against the other as long as there is a separate cause of action against each...” [Emphasis added.] (at para. 41)

Similarly, in *Calmonton Investments Ltd. v. Tangye*, [1988] A.J. No. 423, 87 A.R. 22 Côté J.A. stated for the Alberta Court of Appeal:

“...The causes of action against the debtor (tenant) and against the guarantor, Tangye, are completely separate; they do not even arise from the same contract. Indeed the earlier judgment was not even against the old tenant (assignor) whose debt Tangye guaranteed; it was against the new (assignee) tenant. In any event, a debtor and his guarantor are not joint debtors; **though**

their obligations are often co-extensive, they are separate and distinct: ... They are liable on two different contracts. So judgment against one does not bar a later judgment against the other ...

Nor is there any general rule that different causes of action against different people merge into one judgment against one of those people. Apart from joint debts or joint tort-feasors or those alternately liable, **a plaintiff may sue and take judgment at different times against different persons liable ...** [Emphasis added.] (at QL p. 10)

This principle also was clearly explained in *C.P.H.C. Holding Co. v. Western Pacific Trust Co.*, [1973] B.C.J. No. 485, 36 D.R.L. (3d) 431 (S.C.):

“The cause of action may be extinguished by judgment against one of the defendants if the cause of action is indivisible. In this case it is the subject matter not the cause of action that is identical and it follows that **judgment on one cause of action does not preclude judgment on the other cause of action. ...**” [Emphasis added.] (at para. 11)

Similarly, the doctrine of merger applies only where there is joint liability. If liability is joint and several, as was the case in a lease agreement in *Arbutus Leasing Ltd. v. Deghati*, 2000 ABQB 831, [2000] A.J. No. 1363, 278 A.R. 176 then the doctrine does not apply; the default judgments against two defendants did not preclude the plaintiff from pursuing the third defendant.

Where different damages arise from the same cause of action, the doctrine of merger applies to preclude subsequent claims. For example, a plaintiff who has already recovered damages from the defendant through default judgment for property damage resulting from a motor vehicle accident is precluded from pursuing a later claim for personal injuries – the two claims arise from the same cause of action in negligence.

This was the situation in *Edwards v. Ferris*, 2001 ABQB 1125, [2001] A.J. No. 1667, 316 A.R. 41. The plaintiff brought an action in provincial court for property damage. The defendant opted not to defend, finding the amount claimed to be reasonable. He was noted in default and paid the claim. The plaintiff then sought to bring an action in the Court of Queen’s Bench for

personal injuries suffered in the same collision. The plaintiff was barred from doing so because of the default judgment; there was only one cause of action and taking the prior judgment precluded further recovery:

“...it is clear that the motor vehicle accident created **one cause of action only**. There is not a separate cause of action for the property damage, and another for the personal injuries. **Taking a judgment for either type of damage results in a merger of the cause of action, and precludes any further proceedings...**”
[Emphasis added.] (at para. 10)

See also *Malcolm v. Carr*, 1997 ABCA 202, [1997] A.J. No. 485, 200 A.R. 53 for the same proposition.

In *Zukowski v. Royal Insurance Co. of Canada*, the Alberta Court of Appeal set out an exception to the application of the doctrine of merger. The doctrine of merger does not operate to extinguish a plaintiff's cause of action where:

- “(i) the only parties with an interest in the cause of action have agreed that the judgment will not have that effect, thereby waiving operation of the doctrine as between them,
- (ii) the right of the plaintiff to pursue further recovery against the same defendant or defendants is clearly preserved in the judgment,
- (iii) the rights of third parties are not directly affected, and
- (iv) preservation of the right to pursue further claims is not an inappropriate or pointless fragmentation of the cause of action.” (at para. 10)

On the facts in *Zukowski*, the plaintiff was injured in a motor vehicle accident in which the defendant driver was uninsured. The Administrator of the Accident Claims Fund agreed to pay the plaintiff the \$100,000 limit. The consent judgment between the plaintiff and the Administrator, on behalf of the defendant uninsured motorist, was without prejudice to the plaintiff's right to pursue the defendant for damages beyond the \$100,000 paid by the Fund

and without prejudice to the plaintiff's right to seek protection under the SEF 44 endorsement on his own insurance policy.

The plaintiff's insurer argued merger: the plaintiff could not make a claim under his own policy because he no longer had a claim against the defendant (a condition precedent to recovery under the SEF 44 endorsement) as a result of the consent judgment between the plaintiff and the Administrator.

The Court found that the facts satisfied the requirements to waive the application of the doctrine of merger. In the absence of the specific agreement to preserve the plaintiff's rights, the doctrine of merger would have applied to prohibit him from claiming additional damages.

Vicarious liability raises an additional challenging twist with respect to the doctrine of merger since the parties are different but the underlying cause of action is the same. It appears that the consent requirement to waive the application of the doctrine of merger applies to defendants who might be vicariously liable. In *Pederson v. Norton*, 2012 ABQB 304, [2012] A.J. No. 509 the parties disagreed as to the effect of a partial judgment. When the claim was first brought the identity of the driver was unknown. Over time, the plaintiff claimed to have discovered the identity of the driver and alleged that the driver was in possession of the vehicle with the owner's consent.

The plaintiff obtained partial judgment from the Administrator of the Accident Claims Fund for \$200,000 in damages. The judgment purported to preserve the plaintiff's right to continue her action against John Doe and the owner of the vehicle, Danyluk, in vicarious liability.

Michalyshyn J. held that the requirements set out in *Zukowski* to exempt the application of the doctrine of merger were not met, in that Danyluk's consent was not obtained. As such, the claim against her in vicarious liability was extinguished:

“Malcolm illustrates that cases on merger can be harsh and narrowly-decided. *Zukowski* must be read in that context. **Danyluk's consent was clearly required. It was not given. Danyluk is therefore entitled to resist Pederson's claims on the basis of vicarious liability.**” [Emphasis added.] (at para. 57)

Although *Pederson* was decided in 2012, there is no reference to the new Rules of Court in the judgment or their potential application to the claim.

Master Breitzkreuz came to the same conclusion as Michalyshyn J. in the earlier case of *Badger v. John*, 2003 ABQB 231, [2003] A.J. No. 341. The Administrator consented to a judgment but did not do so on behalf of the owner. The owner’s alleged statutory liability was based on the same cause of action (the negligence causing the accident); the owner’s statutory liability could not exceed that of the negligent driver. Since there was no separate cause of action against the owner in the statement of claim, the single cause of action merged in the consent judgment. In the absence of the vehicle owner’s consent to the waiver of the doctrine of merger, there could be no further action against him.

The impact of the New Rules of Court on the doctrine of merger

Rule 3.40 of the *Alberta Rules of Court*, Alta. Reg. 124/2010 provides for the continuation of an action following judgment:

“3.40 If judgment is entered against some but not all defendants under

- (a) **rule 3.36**, [*Judgment in default of defence and noting in default*]
- (b) **rule 3.37**, [*Application for judgment against defendant noted in default*]
- (c) **rule 3.38**, or [*Judgment for recovery of property*]
- (d) **rule 3.39**, [*Judgment for debt or liquidated demand*]

the plaintiff may continue the action in respect of any defendant against whom judgment is not entered.” [Italics added.]

Rule 7.4 provides for proceedings after summary judgment is granted against a party:

“7.4 If summary judgment is given against one or more defendants or plaintiffs, the action may **be continued by or with respect to any plaintiff or defendant not bound by the judgment.**” [Emphasis added.]

We could find no relevant judicial consideration of Rule 3.40 or Rule 7.4, nor could we find commentary discussing these provisions in the Alberta Reform Institutes’ Rules of Court Project Reports.

The Canadian Encyclopedic Digest contains an entry, however, suggesting that the rules of court in many jurisdictions, including Alberta, have modified the doctrine of merger:

“The rules of court now **modify the doctrine of merger** to provide that in some circumstances the **signing of default judgment against one co-defendant does not preclude the plaintiff from proceeding against any of the other defendants in the same action.**” (Actions (Western), VIII Extinction of Right of Action at para. 191)

The CED cites the following provisions from other jurisdictions:

Manitoba Rules of Court, Rule 19.07

A judgment obtained against a defendant who has been noted in default **does not prevent the plaintiff from proceeding against the same defendant for any other relief or against any other defendant for the same or any other relief.**

British Columbia *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 53

53(2) The obtaining of an **order against any one person jointly liable does not release any others jointly liable who have been sued** in the proceedings...

Saskatchewan Queen’s Bench Rules, Rule 134

If it appears to the court that any defendant has a good defence to, or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled **to enter final judgment**

against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

A straightforward interpretation of these rules clearly excludes the operation of the doctrine of merger in the specific circumstances outlined. Similarly, a straightforward interpretation of Rule 3.40 suggests that the doctrine of merger has been precluded in the circumstances outlined in the Rule.

There is support for the straightforward interpretation of Rule 3.40 in this jurisprudence. In *Balogun v. Pandher*, 2004 ABQB 142, [2004] A.J. No. 191, old Rule 159(6.1) was given a straightforward interpretation. The plaintiff was entitled to summary judgment for \$4,200 for vehicle damage. By virtue of Rule 159(6.1) he was entitled to continue his action for property damage in excess of that amount. Rule 159(6.1) provided that the court could give summary judgment for or in respect of a part of a claim or a lesser amount and send the rest of the claim to trial or assessment, **“whether or not the claim is for a single and undivided debt or other cause of action”**.

Veit J. explained that “R. 159 (6.1) provides an opportunity, in an appropriate case, for **disposing of any aspects of a claim about which there is no argument without fear of technical effects on the remainder of the claim**” (at para. 16). It precluded the operation of the doctrine of merger and allowed the court to give summary judgment on the undisputed part of the claim (\$4,200) and send the disputed issue (the value over \$4,200) to trial.

Similarly, old Rule 160 provided that a summary judgment was without prejudice to the plaintiff’s right to proceed against others in respect of any other claim in the action:

“160 Judgment given and a writ issued under this Part are without prejudice to the right to proceed against any other defendants, and a plaintiff who obtains judgment on a claim, or part of a claim, hereunder, may proceed with the action in respect of any other claim.” [Emphasis added.]

In *United Grain Growers v. Kellar*, [1996] A.J. No. 165 (C.A.), the Alberta Court of Appeal applied the section in a straightforward manner:

“We order summary judgment against the respondents Kellar and Boomhower in the amount agreed upon with a direction that the plaintiff, **United Grain Growers Limited, has the right to proceed without prejudice against the other defendants in accordance with Rule 160.**” [Emphasis added.] (at para. 2)

Similarly, in the substantive hearing at Queen’s Bench the court noted that the plaintiff was not precluded from proceeding against the other defendants in spite of the summary judgment because of the provisions of Rule 160: *United Grain Growers v. Kellar*, [1997] A.J. No. 805; 205 A.R. 205 (at para 10).

Finally, in *Arbutus Leasing Ltd., supra*, Master Funduk considered old Rule 148 in relation to a liquidated demand. Rule 148 provided:

“148(1) Where a statement of claim includes a claim for a debt or liquidated demand with or without interest, (whether as debt or damages) and any defendant fails to defend or demand notice as to that debt or demand, or any part thereof, the plaintiff may enter judgment against the defendant ...

(2) In any case to which subrule (1) applies the plaintiff may, after entering judgment, proceed with the action against any other defendants and in respect of any other claims. ...” [Emphasis added.]

On the facts in *Arbutus*, the plaintiff had entered default judgment against the first two defendants. The third defendant argued that the doctrine of merger applied to extinguish the cause of action against him. Master Funduk held that the plaintiff was entitled to proceed against the third defendant – the doctrine of merger did not apply. The Master stated that Rule 148 “means what it plainly says” (at para. 12).

The old Rule 148 is very similar to the current Rule 3.39 and Rule 3.40. This suggests that the entirety of Rule 3.40 “means what it plainly says” and that the new Rules preclude the application of the doctrine of merger with respect to default judgments.

Finally, old Rule 154 permitted the plaintiff to proceed against some defendants but not others without prejudice to the plaintiff’s rights to proceed with the action against the other defendants:

“154 Where there are several defendants and some only have defended or demanded notice the plaintiff may

- (a) proceed to trial against those who have defended, (and the court may give judgment against any or all of the defendants), or
- (b) apply to the court on notice to the defendants who have defended or demanded notice, for judgment against the other defendants, and **the court may give final judgment** or direct an assessment of damages **against those defendants as the plaintiff is entitled to without prejudice to the right of the plaintiff to proceed with the action against the other defendants.**” [Emphasis added.]

In applying a straightforward interpretation of the new Rules, therefore, it seems that they simply extend or clarify some of the exceptions to the doctrine of merger that already existed in the old Rules.

END