CITATION: National Bank of Canada v. Pahuja, 2024 ONSC 736
COURT FILE NO.: CV-20-82708
DATE: 2024/02/02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
National Bank of Canada Plaintiff/Defendant by Counterclaim	Scott Pollock, for the Plaintiff/Defendant by Counterclaim
– and –	
Rajendra Pahuja and Shanta Pahuja Defendants/Plaintiffs by Counterclaim	Rajneesh K. Sharda, for the Defendants/Plaintiffs by Counterclaim
	HEARD: January 18, 2024

REASONS FOR JUDGMENT

REES J.

Overview

[1] This action arises from a loan made by the plaintiff, National Bank of Canada, to Centrestone Granite and Marble Inc. The defendants, Mr. Rajendra Pahuja and Ms. Shanta Pahuja, provided personal guarantees for the loan. Centrestone, which is no longer a party to the action, defaulted on the loan. Centrestone has since gone into receivership and bankruptcy.

[2] The Bank brings its action against the defendants to enforce their guarantees. The Bank also claims that Mr. Pahuja fraudulently misrepresented the defendants' net worth and induced the Bank into the loan. The Bank seeks summary judgment against the defendants. The Bank also seeks a dismissal of the defendant's counterclaim.

[3] At the hearing, the defendants agreed that this matter is amendable to summary judgment, including the Bank's claim for fraud. Further, Mr. Pahuja admits liability in the amount of his guarantee to the Bank. But the defendants ask me to dismiss the fraud claim and they argue that the personal guarantee by Ms. Pahuja is not enforceable because they contend that it was entered into under duress and they plead *non est factum*. Finally, the defendants counterclaim against the Bank, arguing that the court-appointed receiver's activities regarding Centrestone's assets were improvident or otherwise wrongful.

[4] For the reasons that follow, I grant summary judgment to the Bank and dismiss the defendants' counterclaim.

Factual Background

[5] In January 2018, the Bank made Centrestone a financing offer. A Credit Facility Agreement extended Centrestone a $2.5 million operating credit facility, a $400,000 demand loan, and a Mastercard credit card with a $100,000 limit. The loans accrued interest daily at the Bank's prime rate plus 0.75 per cent per year for the operating facility, prime plus 1.25 per cent per year for the demand loan, and 18 per cent per year for the Mastercard.

[6] As a condition precedent to lending the money, Mr. Pahuja was required to provide a personal guarantee and to demonstrate that his net worth was over $4 million. Failing that, Ms. Pahuja was also required to guarantee the indebtedness.

[7] Ultimately, Mr. Pahuja could not demonstrate his net worth was over $4 million. Both he and Ms. Pahuja provided a personal guarantee of all of Centrestone's debts and liabilities owing to the Bank, up to a total of $825,000 plus interest. The personal guarantees were payable upon demand.

[8] That much is agreed. But the parties disagree over whether Mr. Pahuja disclosed a personal guarantee of $8 million that he previously provided to UMB Bank on August 1, 2017 in order secure a loan to Atlas Stone, a company for which he was the CEO and sole shareholder (the "U.S. Guarantee"). The parties also disagree over the circumstances in which Ms. Pahuja gave her guarantee. I will return to this below.

[9] Soon after the Bank extended the loans to Centrestone, it defaulted on its obligations. The Bank initially accommodated Centrestone, extending the time for repayment of the loans until the end of July 2019. Centrestone ultimately failed to repay the loans.

[10] In August 2019, the Bank made formal demands to Centrestone for repayment and demanded that Mr. and Ms. Pahuja pay the full amounts owing under their personal guarantees.

[11] Centrestone and the Pahujas failed to repay any amounts owing.

[12] Following Centrestone's defaults, the Bank commenced this action on February 3, 2020 seeking to recover the amounts owing, including under the Pahujas' personal guarantees.

[13] The Bank also applied for a receivership over Centrestone's assets and undertakings, which the court granted. The Pahujas now argue that the receiver's sale of Centrestone's assets was improvident or otherwise wrongful. I will return to this below.

[14] The receiver was only able to recover $67,018, net of costs and fees, from Centrestone. The court approved the receiver's activities and discharged it in May 2022. This leaves $3,097,316.72 plus interest and costs owing to the Bank.

[15] The Bank petitioned Centrestone into bankruptcy. The bankruptcy application was granted in July 2021. Given Centrestone's bankruptcy, the Bank later amended its Statement of Claim to remove it as a defendant in this action. The Bank also added a claim for fraudulent misrepresentation against Mr. Pahuja arising from the alleged non-disclosure of the U.S. Guarantee. The defendants delivered a fresh as amended statement of defence and counterclaim denying the fraud.

Analysis

The law of summary judgment

[16] The court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to the claim or the defence, or the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment: r. 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[17] There will be no genuine issue requiring a trial when the motion judge is able to reach a fair and just determination of the action during the motion. This is the case when summary judgment allows the judge to make the necessary findings of fact; allows the judge to apply the law to the facts; and is a proportionate, more expeditious and less expensive means to achieve a just result than a trial: *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 49.

[18] On a motion for summary judgment, the moving party has the onus to establish a *prima facie* case that there is no genuine issue requiring a trial. The onus then shifts to the responding party. To successfully resist a summary judgment motion, a responding party must set out sufficient facts to show that there is a genuine issue requiring a trial. The responding party must "lead trump or risk losing" and put their "best foot forward": *BNS v. Compas*, 2018 ONSC 3262, at para. 9.

[19] Here, there is no dispute that the action and counterclaim are amenable to summary judgment. Further, I am satisfied that the record before the court allows me to make the necessary findings of fact and allows me to apply the law to the facts. On the record, I am also satisfied that summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result than a trial.

Mr. Pahuja's Guarantee

[20] Mr. Pahuja consents to an order granting judgment against him under his personal guarantee. I therefore need not address this point further, except to say that I am satisfied on the record that this judgment ought to be granted in the amount of $825,000 plus interest.

Fraud Claim against Mr. Pahuja

[21] Summary judgment is available where debtors are alleged to have fraudulently misrepresented their net worth on personal financial statements, provided the moving party

satisfies the requirements of r. 20: *Toronto-Dominion Bank v. Jolly*, 2015 ONSC 5886, at paras. 2-7.

[22] The defendants agree that the fraud claim is amendable to summary judgment on the record before me. I agree. I find that oral evidence is not required to fairly and justly determine the fraud claim.

[23] As recognized by the Court of Appeal for Ontario in *Mariani v. Lemstra* (2004), 246 D.L.R. (4th) 489 (Ont. C.A.), at para. 12, and *Chaba v. Khan*, 2020 ONCA 643, at para. 15, the elements of fraudulent misrepresentation are:

a. that the defendant made a false representation of fact;

b. that the defendant knew the statement was false or was reckless as to its truth;

c. that the defendant made the representation with the intention that it would be acted upon by the plaintiff;

d. that the plaintiff relied upon the statement; and

e. that the plaintiff suffered damage as a result.

[24] The Bank bears the burden of proof.

[25] The Bank contends that Mr. Pahuja is liable for fraudulent misrepresentation. It says that Mr. Pahuja deliberately misrepresented his net worth by failing to disclose the existence of the U.S. Guarantee in the financial statements he provided to the Bank, knowing that the Bank would rely on these financial statements in deciding whether to offer Centrestone the loans. The Bank says it ultimately relied on Mr. Pahuja's representation of his net worth and suffered damage as a result.

[26] By contrast, Mr. Pahuja says that he did in fact disclose the U.S. Guarantee to the Bank and this is why the Bank sought the personal guarantee from Ms. Pahuja. Mr. Pahuja's evidence is that he told the Bank's representative of the U.S. Guarantee. The defendants suggested at the hearing that the Bank's representative's account that he was not told of the U.S. Guarantee was not credible. They suggested that there were two lines of communication going on. On the one hand, Mr. Pahuja says he told the Bank's representative about the U.S. Guarantee orally. On the other hand, the Bank's representative did not communicate that internally. At the hearing, the defendants sought to impugn the Bank representative's credibility and suggested that he didn't disclose this information internally because he had loan targets to meet.

[27] I accept the Bank's evidence regarding fraudulent misrepresentation and reject Mr. Pahuja's evidence for four reasons.

[28] First, I find the Bank's evidence to be more credible. It is more coherent, it is better supported by contemporaneous business records, and it is consistent with the broader timeline of events explaining the need for the personal guarantee from Ms. Pahuja. Moreover, the Bank was always consistent in requiring a personal guarantee from Ms. Pahuja if Mr. Pahuja could not demonstrate his net worth was over $4 million. Mr. Pahuja was unable to do so and thus the Bank required the personal guarantee from Ms. Pahuja before it would advance the loans.

[29] Second, I find Mr. Pahuja's evidence lacks credibility. He did not disclose the U.S. Guarantee in his financial statement. By way of explanation, he says he didn't believe it would be called on. But this is no explanation at all: the statement of assets and liabilities Mr. Pahuja completed *required* him to disclose all assets and liabilities. It was for the Bank to evaluate risk, not him. I find Mr. Pahuja's evidence of an oral disclosure to be self-serving.

[30] Third, Mr. Pahuja's account shifted significantly over the course of the litigation. In their statement of defence, the defendants allege that the Bank was informed of the U.S. Guarantee but the Bank claimed that the likelihood of it being exercised was so remote that the Bank did not require it to be listed and reference to it was removed by the Bank's representative. But Mr. Pahuja's affidavit evidence altered this account. His evidence became that the Bank changed the terms of its financing to require further security as a result of his disclosure of the U.S. Guarantee. He also says it was his view – rather than the Bank's – that the U.S. Guarantee was highly unlikely to be exercised. This shifting account undermines Mr. Pahuja's evidence.

[31] Fourth, Mr. Pahuja made a serious imputation regarding the Bank's representative's credibility and conduct. Mr. Pahuja effectively alleges that the representative hid the U.S. Guarantee from his colleagues at the Bank to make a loan quota. He chose not to cross-examine on the representative's affidavits. Having not put this allegation to the Bank's representative and allowed him to respond, I accord the suggestion little weight. Further, there is no support for this allegation, save Mr. Pahuja's evidence that he told the Bank's representative.

[32] The weight of the evidence leads me to make the following findings of fact:

a. In October 2017, the defendants completed a statement of their combined assets and liabilities ("the 2017 Statement"), which did not include the U.S. Guarantee. The defendants signed the 2017 Statement, which stated that the information provided was true and complete. The defendants provided the 2017 Statement to the Bank.

b. Mr. Pahuja provided the Bank with other documentation, including a second listing of assets and liabilities and additional information on their financial position. None of those documents disclosed the U.S. Guarantee.

c. Mr. Pahuja was aware that he misrepresented his net worth. Mr. Pahuja provided the U.S. Guarantee to UMB Bank only two months before completing the 2017 Statement.

d. Mr. Pahuja intended for the Bank to act on his misrepresentations. The defendants expressly acknowledged in the 2017 Statement that the Bank would use the information to determine Centrestone's eligibility for financing and assess their creditworthiness. By misrepresenting his liabilities, Mr. Pahuja intended for the Bank to extend financing to Centrestone.

e. The Bank relied upon Mr. Pahuja's representations, set out in the 2017 Statement and other documents, to determine the risk of lending to Centrestone.

f. Had the Bank known about the U.S. Guarantee, it would not have provided the loans on the terms that it did.

g. The Bank has suffered damages. $3,097,316.72 plus interest and costs remains owing under the loans. The Bank's maximum recovery under the defendants' personal guarantees is limited to $825,000 plus interest and costs.

[33] Thus, I find Mr. Pahuja liable for fraudulent misrepresentation in the amount of $825,000. (The Bank has limited its claim under this cause of action to $825,000.)

[34] The Bank also asked that I declare that this amount is a debt not released in the event of bankruptcy under s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as it is debt or liability resulting from obtaining property or services by fraudulent misrepresentation. See *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc*., 2021 ONCA 925, 160 O.R. (3d) 205.

[35] There is a debate in the case law about whether I should make this declaration outside of a bankruptcy proceeding. I am satisfied that I have the jurisdiction to do so. The Court of Appeal for Ontario explained that "declaratory orders under s. 178(1) do not engage the exercise of a power under the *BIA*. They are made in the exercise of the court's general jurisdiction": *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 202, 88 C.B.R. (6th) 1, at para. 15. See also *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, at para. 22.

[36] Courts have sometimes been cautious in making these declarations outside of bankruptcy proceedings where they are sought in a motion for default judgment: *Bank of Montreal v. Garasymovych*, 2023 ONSC 3630; *B2B Bank v. Batson*, 2014 ONSC 6105; *Royal Bank of Canada v. Elsioufi*, 2016 ONSC 5257, 40 C.B.R. (6th) 334. A main concern in the default judgment context is the adequacy of the record. Policy may also weigh in favour of leaving such a declaration to bankruptcy proceedings given the consequences: *Garasymovych*, at para. 37. Another reason for declining to make the declaration is that it is hypothetical. In *Batson,* Stinson J. refused to grant the declaration on this basis because the defendant had not yet been assigned into bankruptcy.

[37] Although I am satisfied that I have a full record on the summary judgment motion and I have found Mr. Pahuja liable for fraudulent misrepresentation in the amount of $825,000, it is preferrable to leave the issue of a declaration under s. 178(1) of the *Bankruptcy and Insolvency*

Act to future bankruptcy proceedings, if they were to arise. In any event, the court in a future proceeding will have the benefit of this judgment.

Ms. Pahuja's Guarantee

[38] The defendants agree that the validity of Ms. Pahuja's guarantee is amendable to summary judgment on the record before me. Again, I agree. I find that oral evidence is not required to fairly and justly determine the validity of Ms. Pahuja's guarantee.

[39] Ms. Pahuja argues that she only gave her personal guarantee under duress and pleads *non est factum*. She also argues that the Bank was under a duty of care to monitor Centrestone. The Bank says that there is no basis for any of these contentions.

[40] The burden of proof to demonstrate duress and *non est factum* is on the party alleging it: *Kawartha Capital Corp. v. 1723766 Ontario Ltd.*, 2020 ONCA 763, 454 D.L.R. (4th) 553, at para. 11; *B2B Bank v. Islam*, 2021 ONSC 5487, at paras. 46-49.

(a) There was no duress

[41] Courts will not lightly set aside a contract for alleged duress. To be successful, the defendant must demonstrate that the pressure constituting duress amounts to "coercion of the will" and only exists when there is "no realistic alternative" but to submit to it: *S.A. v. A.A.*, 2017 ONCA 243, at para. 27.

[42] The defendants argue that the Bank demanded Ms. Pahuja's personal guarantee in March 2018, shortly before the financing was needed, and Ms. Pahuja had no choice but to provide it and did so under duress.

[43] I find that the defendants' allegations are contradicted by: (1) the terms of the Credit Facility Agreement, provided on January 26, 2018, which required Ms. Pahuja to provide a personal guarantee; and (2) the acknowledgements set out in the letter confirming Ms. Pahuja's receipt of independent legal advice. Under the latter, Ms. Pahuja specifically acknowledges that she was not subject to any form of constraint or pressure from any individual to encourage her to sign the guarantee.

[44] Further, there is no evidence from Ms. Pahuja to support her allegation of duress. Ms. Pahuja did not swear an affidavit. The only evidence from the defendants on this issue comes from Mr. Pahuja, and it is vague and unpersuasive. At its highest, Ms. Pahuja provided the guarantee because it was needed to access the loans to keep Centrestone afloat. This does not amount to duress.

(b) There is no basis for the allegation of *non est factum*

[45] The defendants argue that Ms. Pahuja did not understand the nature of her personal guarantee and they allege that she was mistaken as to its terms. Thus, they plead *non est factum*.

[46] As for the allegation of *non est factum*, a lender is not obligated to have a debtor or guarantor receive independent legal advice for a contract to be valid: *Bank of Montreal v. Featherstone* (1989), 68 O.R. (2d) 541 (C.A.), at pp. 547-48. But the guarantor having received independent legal advice is a factor that can be considered to rebut allegations of *non est factum*: *Islam*, at paras. 39-52.

[47] The defendants have not persuaded me as to the allegation of *non est factum*. There is no evidence from Ms. Pahuja that she did not understand the nature of the personal guarantee. Further, when she provided the personal guarantee, she signed an acknowledgement that she understood its terms and had obtained independent legal advice. This was countersigned to the same effect by the solicitor who provided her with independent legal advice.

[48] At the hearing, for the first time, the defendants suggested that the independent legal advice was not truly independent because Ms. Pahuja was referred to the solicitor by the Bank. There is no evidence before me that the solicitor did not understand his duties to his client or that his advice was not truly independent. To the contrary, the solicitor's signed acknowledgement states that he acted in Ms. Pahuja's sole interest and gave her his opinion with no regard to the interests of Mr. Pahuja or the Bank.

(c) The Bank was under no duty of care to monitor Centrestone

[49] There is no merit to the defendants' argument that the Bank owed a duty of care to Ms. Pahuja to monitor Centrestone's affairs. The Bank was under no such duty. Moreover, Ms. Pahuja's guarantee specifically provides that the "Bank will have no obligation to advise the Guarantor of any change in the financial condition of [Centrestone] or in the Bank's dealings with [Centrestone]." Nor is there any evidence to support this allegation. Rather, it was Ms. Pahuja's responsibility under the terms of her personal guarantee to investigate the financial condition of Centrestone and to assess the risks arising from her guarantee.

***Are the defendant's allegations regarding the receiver* res judicata?**

[50] Finally, all are agreed that the defendant's allegations regarding the receiver's activities is amendable to summary judgment on the record before me. The issue is a purely legal one: are the allegations regarding the receiver's activities *res judicata*?

[51] The defendants' allegations regarding the receiver's activities are *res judicata*.

[52] The appropriate time for the court to determine whether a receiver has acted appropriately is when it reviews and approves the receiver's activities prior to discharging the receiver: *Marsh Engineering Ltd. v. Deloitte & Touche Inc.* (2008), 49 C.B.R. (5th) 286 (Ont. S.C.), at para. 33, aff'd 2009 ONCA 648, 56 C.B.R. (5th) 174. Allegations made against a receiver as part of a separate action where the court has already reviewed and approved the receiver's activities are *res judicata*: *Marsh Engineering* (Ont. S.C.), at para. 33.

[53] Here, the approval and discharge hearing for the receiver took place in May 2022. The defendants were specifically put on notice that if the receiver's activities were approved, it would mean that their allegations against the receiver would be *res judicata*. The defendants did not oppose the motion and confirmed that they understood that the outcome of the motion would impact their defence and counterclaim in the present action. The court approved the receiver's activities and discharged the receiver.

[54] The defendants cannot now raise allegations regarding the receiver's activities. Those issues have been conclusively determined by the court at the approval and discharge hearing.

[55] Thus, the defendants' counterclaim is dismissed.

Disposition

[56] Accordingly, I grant summary judgment to the Bank against the defendants, on a joint and several basis, for liquidated damages in the amount of $825,000, plus interest thereon at a rate of 3.45 per cent from December 11, 2019 onwards.

[57] I also grant summary judgment against Mr. Pahuja in the amount of $825,000 for fraudulent misrepresentation. Finally, I dismiss the defendants' counterclaim.

[58] If the parties cannot agree on costs, they can each make written submissions to me of no more than 750 words, accompanied by bills of costs and any Rule 49 offers, within two weeks of the release of these reasons for judgment.

Rees J.

Released: February 2, 2024

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