

CITATION: Business Development Bank of Canada v. 2611948 Ont. Ltd. et al.,
2024 ONSC 604
COURT FILE NO.: CV-23-0232-00
DATE: 2024-01-26

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:)
)
Business Development Bank of Canada) *V. Cesario*, for the Plaintiff
)
)
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Plaintiff)
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- and -)
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)
2611948 Ontario Ltd., Robert James Walsh) *Self rep*, for the Defendants
also known as Robert Walsh, and Michelle)
Helga Walsh also known as Michelle H.)
Walsh and also known as Michelle Walsh)
)
Defendants)
)
)
)
) **HEARD:** January 25, 2024,
) at Thunder Bay, Ontario

Madam Justice T. J. Nieckarz

Summary Judgment

Overview:

[1] The Plaintiff, Business Development Bank of Canada (the “Bank”), moves for summary judgment against the Defendants in the total amount of \$148,359.72, plus interest and costs.

[2] The claim arises out of two loan agreements and guarantees entered into between the Bank and the Defendants. Pursuant to the terms of those agreements, the Bank advanced funds totalling \$185,000. The Bank alleges that the Defendants have defaulted in payment.

[3] No materials were filed by the Defendants. No one appeared on behalf of Michelle Helga Walsh. An individual who wishes to be identified as “Rob” appeared on behalf of the Defendant Robert James Walsh. His identification confirmed he is one and the same as Robert James Walsh. Whether he also appeared on behalf of 2611948 Ontario Ltd., is unclear. The materials suggest he is an officer and director of the corporate defendant.

[4] Rob was affirmed and gave evidence at the hearing. I did not afford counsel for the Plaintiff an opportunity to cross-examine as no cross-examination was required.

[5] Rob did not dispute that funds were advanced by the Bank and that the loans had not been repaid in full. His arguments will be addressed later in this decision.

[6] For the following reasons, the Bank shall have judgment for the outstanding amounts on the loans, interest, and \$8,500 on account of costs of the proceeding.

Facts:

[7] This action was commenced by way of Statement of Claim issued on June 8, 2023 (the “Claim”).

[8] The Defendant, 2611948 Ontario Ltd. (the “Borrower”) operated a business called “Seattle Coffeehouse” in the City of Thunder Bay, in the Province of Ontario.

[9] The Defendants, Robert James Walsh (“Rob”), and Michelle Helga Walsh (“Michelle”) were officers and directors of the Borrower.

First Loan:

[10] By Letter of Offer signed and dated May 28, 2020, the Bank loaned and advanced the sum of \$125,000 (the “First Loan”). Rob signed the First Loan on behalf of the Borrower, and personally as the Guarantor. Michelle also signed the First Loan as Guarantor.

[11] The First Loan outlined the required security, covenants, reporting requirements and other such matters.

[12] Pursuant to a guarantee in writing signed on June 2, 2020, Rob and Michelle unconditionally guaranteed payment of all amounts owing by the Borrower under the First Loan. This guarantee also included interest at the rate under First Loan accruing from the date of demand for payment, and all costs and expenses incurred by the Bank in enforcing upon its rights and remedies under this first guarantee (the “First Guarantee”).

[13] Rob and Michelle acknowledged having read and understood the First Guarantee and represented in the First Guarantee that they either obtained independent legal advice or voluntarily determined not to do so.

[14] The First Guarantee contains clauses by which Rob and Michelle warranted that there are no agreements, representations, and warranties which have been relied on by Rob or Michelle and which are not contained in the guarantee.

Second Loan:

[15] By Letter of Offer signed and dated July 26, 2021, the Bank loaned and advanced the sum of \$60,000 (the “Second Loan”). Rob signed the Second Loan on behalf of the Borrower, and personally as the Guarantor. Michelle signed the Second Loan as the Guarantor.

[16] The Second Loan provides that the Bank may demand payment of the indebtedness in full if an Event of Default occurs, including, but not limited to, a failure to make the required loan payments.

[17] Pursuant to a guarantee in writing signed on July 26, 2021 by Rob, and on July 27, 2021 by Michelle (the “Second Guarantee”), Rob and Michelle unconditionally guaranteed payment of all amounts owing by the Borrower under the Second Loan, plus interest at the rate provided for in the Second Loan accruing from the date of demand for payment, and all costs and expenses incurred by the Bank in enforcing upon its rights and remedies under the Second Guarantee.

GSA:

[18] The Borrower also granted the Bank a General Security Agreement (the “GSA”) signed on June 10, 2020, which gave the Bank a security interest in all of the Borrower’s property, assets, and undertaking (the “Collateral”), as collateral security for the indebtedness under the First Loan and the Second Loan (collectively, the “Loans”).

[19] The GSA provides that in the event of default by the Borrower in its payment or other obligations under the Loans, the Bank is entitled to possession of the Collateral.

Deferral of Payment:

[20] On August 19, 2022, the Bank agreed to a temporary deferral of principal payments, as an accommodation to the Defendants.

[21] On December 19, 2022, the Bank agreed to a further temporary deferral of principal payments and revised repayment schedule.

[22] Despite these accommodations, the Borrower still defaulted in payment under the Loans.

[23] By letters dated May 25, 2023, (collectively, the “Demand Letters”), the Bank demanded payment from the Borrower under the Loans, and from Rob and Michelle pursuant to the First Guarantee and Second Guarantee (collectively referred to as the “Guarantees”).

[24] As of May 23, 2023, the indebtedness of the Borrower under the Loans, and that of Rob and Michelle pursuant to the Guarantees, was as follows:

FIRST LOAN AND FIRST GUARANTEE:

Principal: \$91,560.00

Interest: \$1,511.19

First Loan Fees \$750.00

Total Amount: \$93,821.19

SECOND LOAN AND SECOND GUARANTEE:

Principal: \$52,499.79

Interest: \$1,288.74

Second Loan Fees \$750.00

Total Amount: \$54,538.53

The Defence:

[25] The Defendants do not deny that the amounts claimed are owing by them. The Statement of Defence specifically states that the Defendants do not dispute any material facts contained in the Claim. The Defendants have not filed any responding material.

[26] The one-page Statement of Defence reads as follows (note: where words have been crossed out in handwriting in the Defence, they have been omitted from this excerpt – otherwise this excerpt is typed exactly as it is written):

Mr. Frydenberg,

We are writing to indicate we are not disputing any material facts contained within the charging instrument, CV-22-00000232-0000.

We are writing to provide notice that WALSH, robert as settlor of said property, do hereby express and make known to all parties the intent and purpose to the grant property evidenced by loan agreement #188099 as of May 28, 2020 was for BUSINESS DEVELOPMENT BANK OF CANADA as trustee to take and process the loan agreement and return the credits on the paper in favour of 26119118 ONTARIO LTD as beneficiary.

WALSH, robert as settlor of said property, do hereby express and make know to all the parties the intent and purpose to the grant in property evidenced by loan agreement file #77297 as of September 7, 2023 was for CHAITONS LLP as trustee to take and process the loan agreement file number in its possession and return the credits on the paper in favour of 2611948 ONTARIO LTD.

The legal names and respective business numbers registered with Canada Revenue Agency are required for both CHAITONS and BDC.

In the event either trustee fails to perform or is incapable to perform said duties, the settlor will take position as trustee and settle the property as it was initially intended to and set out for in favour of 2611948 ONTARIO LTD. The settlor will also use the respective Trustees name to report any transactions, documents and instruments in effort to settle the trust.

Sincerely

FOR WALSH, robert et al.

The Positions of the Parties:

[27] It is the Bank's position that the narrative which comprises the Statement of Defence is incomprehensible, does not set forth a genuine issue requiring a trial, and appears to have been delivered for the sole reason of delaying the Bank in obtaining judgment.

[28] At the motion hearing, Rob did not dispute that the Borrower entered into the loan agreements or that he and his partner guaranteed the indebtedness of the Borrower to the Bank. He did not dispute that the monies were advanced by the Bank, and that the loans have not fully been repaid.

[29] Rob's request was for the "physicalization and securitization" of the "securities". When asked what this meant, the best I could glean from Rob's explanation is as follows:

- a. Even though his legal name as indicated on his birth certificate, and as signed by him on the loans/guarantees is "Robert James Walsh", he claims he represents the person of Robert James Walsh, and this is not his legal persona. He is separate from the legal status of Robert James Walsh as a person.
- b. He tendered his birth certificate as evidence and argued that it is property of the Province of Ontario. He says it is 'evidence of interest in the person'.
- c. He claims that each time the Bank uses the name, Robert James Walsh, both in the loan agreements/guarantees and in this proceeding, they are creating a separate "security" that he demands an accounting of. He argues that by being in possession of his signature or his name (I am unclear which), the Bank is in possession of a valuable asset that they have not accounted for in this court proceeding. He seeks a set-off against the debt owed to the Bank for the value attributable to the Bank's possession of his asset (name/signature).
- d. He asks for the opportunity to cross-examine the affiant in support of the Bank's motion. He asks for this not to challenge the facts as set out in the affidavit, which he does not deny, but rather to have the opportunity to ensure that the 'valuable asset' has been properly accounted for both in this proceeding, but more importantly with

the Canada Revenue Agency (“CRA”). In my view, there was no reason to adjourn the proceeding to permit the cross-examination sought by the Defendant. Cross-examination for the reasons stated by Rob would not assist Rob’s defence, would provide no assistance whatsoever to the Court in the determination of this motion, and would be a waste of financial resources.

- e. Rob’s primary concern is that the Bank has received this ‘valuable asset’ and they have not accounted for it for tax purposes. He states he has reported this violation of taxation requirements to the CRA and is awaiting their response.

Issue:

[30] The issue to be determined by me is whether there is a genuine issue for trial with respect to the claim?

Analysis:

Test on Summary Judgment Motion

[31] Summary judgment motions must be granted whenever there is no genuine issue requiring a trial. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits of the motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: *Rule 20.04 of the Rules of Civil Procedure; Hryniak v. Mauldin, 2014 1 S.C.R. 87 at para 49.*

[32] On a summary judgment motion, the evidence need not be equivalent to that at trial but must be such that the judge is confident that she or he can fairly resolve the dispute: *Hryniak*, at para. 57.

[33] On a motion for summary judgment, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before him or her. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2): *Hryniak*, at para. 66. Resort to these powers is not required on the facts of this case.

[34] A respondent to a motion for summary judgment has an obligation to provide evidence, showing that there is a genuine issue for trial. A respondent to a summary judgment motion may not rest solely on the allegations or denials contained in its pleadings: Rule 20.02 of the *Rules of Civil Procedure*.

[35] A responding party to a motion for summary judgment is obliged to put their best foot forward. They must do more than simply assert an uncorroborated fact or rely on bald allegations: *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, and *Park v. Chung*, 2011 ONSC 6969 at para 25.

[36] On a motion for summary judgment, the court may assume that the record contains all the evidence that will be available at trial.

Discussion:

[37] The Defendants have not tendered any evidence in response to the motion for summary judgment other than the evidence provided by Rob orally at the motion hearing. Neither this evidence, the issues raised by Rob at the hearing, nor the Statement of Defence raise any legally tenable defence to the Bank's claims.

[38] I am satisfied that Judgment should issue on the Bank's claims. The loans were entered into between the Bank and the Borrower and guaranteed by Rob and Michelle. The Bank fulfilled its obligations to the Defendants by advancing the loan amounts. The Borrower has not fulfilled its obligation to repay those loans. Rob and Michelle, as guarantors of the loans, are also responsible for payment.

[39] Rob's argument that there is no admissible evidence from the Bank in support of its claims, absent an employee present at court or the Bank's counsel being sworn, cannot succeed. As was explained to Rob at the hearing, the Bank has filed an affidavit from an employee who attested to facts about the debt that was both drawn from Bank records and her personal knowledge as the individual responsible for managing the loan account of the Borrower. This is proper evidence before the Court, as explained by the Ontario Court of Appeal in *Royal Bank of Canada v. Francoeur*, 2023 ONCA 837 (CanLII), at para. 5.

Costs:

[40] The Bank seeks its costs of the action and the motion. The Costs Outline of the Bank provides for costs on a substantial indemnity of \$15,931.57 (inclusive of fees, HST, and disbursements), and \$10,353.89 on a partial indemnity basis. The Bank seeks substantial indemnity costs.

[41] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, provides that an award of costs is in the discretion of the judge. It is a wide discretion, to be exercised taking into consideration the factors outlined in Rule 57.01 of the *Rules of Civil Procedure*. Success and

reasonableness of the conduct of the parties are but a couple of the factors to be considered in an award of costs.

[42] In *Serra v. Serra* (2009), 2009 ONCA 395 (CanL11), 66 R.F.L. (6th) 40 (Ont. C.A.), at p. 42, the Court of Appeal reiterated the three fundamental purposes of modern costs rules, as set out in *Fong v. Chan*, (1999), 46 OR. (3d) 330 (Ont C.A.):

1. To indemnify successful litigants for the cost of litigation;
2. To encourage settlements; and
3. To discourage and sanction inappropriate behaviour by litigants.

[43] The Ontario Court of Appeal has also made it clear that in assessing costs, the overriding principle is one of reasonableness: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (Ont CA) at para. 37.

[44] Keeping these principles in mind, I find:

- a. The Bank obtained judgment in the amount sought, and on the terms sought, and therefore was the successful party on the motion and in the proceeding.
- b. The proceeding was not complex, and in fact was quite simple.
- c. The Defendants acknowledged the facts set out in the Bank's claim. They did not dispute the amount outstanding on the loan. There was no legally tenable defence to the claim. While it could be said that Rob has a genuinely held belief in the issues he raised at the motion, I note that there is no evidence that any of these types of issues were raised during the loan process, when the funds were advanced, or at any time after until enforcement action commenced. Nonetheless, other than the motion, the Defendants' position did not significantly increase the cost of the matter. No additional materials were filed, and the motion hearing was short. No additional research or preparation was necessitated by the position adopted by the Defendants.

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- d. The terms of the First and Second Loan provide that the “Bank may charge the Borrower...legal fees and expenses in connection with enforcing ...” The loan agreements do not specify the level of costs.
 - e. I find that costs on a partial indemnity basis are warranted on the circumstances of this case. There is nothing about the conduct of the Defendants, or that is specified in the loan agreement that necessitates an award of substantial indemnity costs.
 - f. In determining quantum, I note that there appears to be some overlap in time for the two responsible lawyers for the Bank. Having said this, most of the time is spent by junior counsel at a rate significantly less than senior counsel. I also note the “projected counsel fee” for attendance at the motion hearing is \$1,260 plus HST, when the hearing itself was only approximately one hour (or slightly more) in length.
 - g. I find that a reasonable amount of costs for this proceeding and this motion is \$8,500 inclusive.

Order:

[45] Judgment shall issue as follows:

- a. The Defendants shall pay to the Plaintiff the sum of \$93,821.19 together with interest thereon at the Plaintiff’s floating base rate minus 1.75% per annum, calculated from May 24, 2023, to the date of payment in full.
- b. The Defendants shall pay to the Plaintiff the sum of \$54,538.53 together with interest thereon at the Plaintiff’s floating base rate plus 3.91% per annum, calculated from May 24, 2023, to the date of payment in full.
- c. The Defendant, 2611948 Ontario Ltd., shall deliver possession to the Plaintiff of all of its personal assets, property, and undertaking secured in favour of the Plaintiff in accordance with a general security agreement.
- d. The Defendants shall pay to the Plaintiff its costs of the motion and action, fixed in the amount of \$8,500, inclusive of fees, HST, and disbursements.
- e. Post-judgment interest shall be payable at the rate of 7% per annum on costs.

“Original signed by”
The Honourable Madam Justice T.J. Nieckarz

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Business Development Bank of Canada

Plaintiff

- and -

2611948 Ontario Ltd., Robert James Walsh also
known as Robert Walsh, and Michelle Helga Walsh
also known as Michelle H. Walsh and also known
as Michelle Walsh

Defendants

SUMMARY JUDGMENT

Nieckarz J.

Released: January 26, 2024