# Court of King's Bench of Alberta

**Citation: Liberty Mortgage Services Ltd v. Shaw, 2024 ABKB 092**

**Date:** 20240215
**Docket:** 1601-02288
**Registry:** Calgary



Between:

**Liberty Mortgage Services Ltd.**

Applicant

- and -

**Natasha Shaw**

Respondent

**Corrected judgment:** A corrigendum was issued on February 27, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

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**Reasons for Judgment**
**of the**
**Honourable Justice B.H Aloneissi**

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**Introduction**

[1] Liberty Mortgage Services Ltd. (Liberty) is a private mortgage lender.

[2] Natasha Shaw (Natasha), along with her husband Owen Shaw (Owen), owns and operates several companies, including River Valley Development Corporation (RVDC), Shaw Capital Group Ltd. (Shaw Capital), and Shaw Properties Group Inc. (Shaw Properties).

[3] In late 2011, RVDC mortgaged a collection of properties (the Properties) in Peace River, Alberta, to secure a $1.25 million loan from Liberty (the Mortgage). Owen was the director of RVDC at the time. To obtain the Mortgage, Owen provided a personal guarantee. Shaw Capital and Shaw Properties also guaranteed the Mortgage.

[4] In November 2012, Natasha became the director and sole owner of RVDC, Shaw Capital, and Shaw Properties after Owen declared personal bankruptcy. To obtain an extension on the Mortgage, Natasha personally guaranteed the loan in March 2014 (the Guarantee).

[5] The Mortgage has never been repaid. The Defendants were noted in default on February 14, 2019.

[6] Liberty has applied for summary judgment allowing it to enforce the Guarantee against Natasha. The Defendants have applied to have the noting in default set aside.

[7] For the reasons that follow, I grant summary judgment in favour of Liberty and I decline to set aside the noting in default.

**Facts**

[8] On October 17, 2011, RVDC mortgaged 21 condominium units (the Condos) and a bare lot to Liberty to secure the payment of the Mortgage with a principal of $1.25 million at an interest rate of 11% per annum. The Mortgage was used to buy out RVDC's main investor, Discovery Valley Resources (DVR). DVR's remaining investment in RVDC became a second mortgage on the properties.

[9] The Shaws' initial primary contact at Liberty for the Mortgage was Mr. Clint Evangelista. Mr. Evangelista was a shareholder of and partner at Liberty and a personal friend of the Shaws. Mr. Evangelista's personal relationship with the Shaws began in 2008 at the latest, when Natasha Shaw was a mortgage associate at Liberty.

[10] On October 22, 2012, the Mortgage was extended (the 2012 Extension) and the principal sum under the Mortgage was increased by $31,250.

[11] On November 29, 2012, Owen filed for personal bankruptcy and could no longer act as a director of the various Shaw companies. Natasha became the director and sole owner of RVDC, Shaw Capital, and Shaw Properties.

[12] On August 2, 2013, the Mortgage was again extended by means of an extension agreement (the 2013 Extension). The principal sum under the Mortgage was increased by $25,000.

[13] From 2012 to 2014, Natasha led an effort to find alternative financing at a lower interest rate. She was unable to find another lender.

[14] In early 2014, the parties agreed to renew and extend the Mortgage (the 2014 Renewal). The terms of the 2014 Renewal were laid out in a commitment letter (the Commitment Letter) dated January 6, 2014. One of the terms of the Commitment Letter was that Natasha provide a personal guarantee for the Mortgage. Natasha signed the Commitment Letter on January 9, 2014 in two places, once as the director of RVDC and second as a personal guarantor. The Commitment Letter also increased the principal sum of the Mortgage to $1.5 million, an increase of $193,750 from the 2013 Extension.

[15] Following the signing of the Commitment Letter, Liberty's counsel prepared a formal Mortgage Renewal and Amendment Agreement and a Guarantee Agreement. These documents were sent to Natasha's counsel, who then provided the documents to Natasha.

[16] On March 6, 2014, Natasha and Owen attended a Public Notary in Mexico and executed several documents related to the Mortgage Renewal and Amendment Agreement, including a *GAA* Certificate of Notary Public for the Guarantee (the Certificate). The documents were then sent to Natasha's lawyer, who forwarded them on to Liberty.

[17] On January 16, 2015, the Mortgage was extended again with a Mortgage Extension Agreement (the 2015 Extension).

[18] RVDC continued to face a shortfall between rental revenues and the amounts owing under the Mortgage through the first half of 2015. On August 17, 2015, Ms. Kari Gillespie, an Operations Manager at Liberty, emailed Natasha to inform her that Liberty considered RVDC to be in default, and that Liberty's Board of Directors had removed Mr. Evangelista from the file due to his conflicts of interest with the Shaws. Going forward, all communications with Liberty were to be directed to Ms. Gillespie or to Gordon Taylor, a member of Liberty's Board.

[19] On October 9, 2015, Natasha received a term sheet from Vision Credit Union indicating that DVR's second mortgage on the properties was a key obstacle to refinancing. In response, the Shaws began exploring ways of restructuring the business to make it more appealing to lenders. By October 19, 2015, the owner of DVR, Tim Kozmyk, agreed to discharge the second mortgage in favour of a limited partnership position where RVDC would act as general partner. However, the Shaws continued to be unsuccessful in finding alternative financing for RVDC.

[20] Discussions between Liberty and the Shaws on the restructuring continued through November, 2015. Ms. Gillespie sent RVDC an email on November 27, 2015, indicating that Liberty would stay enforcement of the Mortgage to allow RVDC to restructure.

[21] In early December, 2015, the Shaws travelled to Peace River to conduct market research. Their findings suggested that the depressed market conditions would continue. On December 14, 2015, Owen emailed Mr. Taylor, Ms. Gillespie, Mr. Evangelista, and DVR to inform them of the disappointing news. Mr. Taylor replied that Liberty was generally willing to support RVDC's efforts to restructure but that a Forbearance Agreement would be necessary. The Forbearance Agreement would lower the interest rate on the Mortgage to 9% in exchange for a principal payment of $750,000, which would require the sale of approximately five units.

[22] On February 1, 2016, Liberty issued a demand for payment to RVDC for payment of all outstanding principal and interest owing. Liberty also sent a demand to Natasha for the Guarantee. Liberty filed a Statement of Claim on February 16, 2016, and served it on RVDC the following day. The Defendants did not file a Statement of Defense.

[23] On April 19, 2016, Natasha accepted an offer to sell one of the Condos so that the proceeds could be put toward arrears on the Mortgage. The sale closed on August 2, 2016. Natasha released the funds from the sale to Liberty on September 12, 2016.

[24] In mid-2016, Mr. Evangelista expressed an interest in buying a property owned personally by Natasha. Natasha sent Mr. Evangelista a diligence package on August 16, 2016. However, the sale did not close until February 2018.

[25] Throughout 2017, the Shaws planned to renovate and furnish the Condos in order to make them more attractive as rental units (the Renovation Plan). These efforts were put into motion on November 17, 2016, when Mr. Evangelista advanced the Shaw's $22,095.78 on his credit card to purchase a discounted kitchen package from IKEA. The renovation efforts were funded by a further $100,000 investment from DVR and a $118,481 investment from Natasha's numbered company.

[26] On March 2, 2017, the parties entered into a Forbearance Agreement (the 2017 Forbearance). The 2017 Forbearance required that the full principle and accrued interest on the Mortgage be paid by September 1, 2017. Liberty also agreed to release $128,782 from the sale of the unit to support the renovation and furnishing effort.

[27] During the first half of 2017, the parties entered into discussions about the possibility of buying out the remaining condo units in one of the Condos buildings so that the building could be converted into apartments, which would help lower RVDC's ongoing costs by eliminating the condo fees. On April 7, 2017, Michelle Elliot (Michelle) of Liberty emailed the Shaw's indicating that Liberty had an interest in financing this consolidation plan (the Consolidation Plan).

[28] None of the above efforts succeeded in allowing RVDC to pay the Mortgage. RVDC defaulted on the terms of the 2017 Forbearance. On November 21, 2017, Owen emailed Liberty to share the bad news and to request a new funding facility to help complete the Consolidation Plan. On December 12, 2017, Owen emailed Mr. Evangelista to plead for assistance. On December 27, 2017, Mr. Evangelista emailed the Shaw's a list of notes on the Consolidation Plan.

[29] Over the next year, the parties discussed possible extensions of the Forbearance Agreement, but no agreement was reached. On December 7, 2018, Liberty issued demands for payment to RVDC for the full principle and accrued interest on the Mortgage. Liberty also demanded payment from Natasha for the Guarantee. The Defendants did not file a Statement of Defense.

[30] On February 14, 2019, the Defendants were noted in default. As of February 12, 2019, the total amount owing to Liberty was $2,018,366.87. On August 23, 2019, Liberty obtained an order appointing a property manager over the Properties to rent the Condos and provide the proceeds to Liberty.

[31] On September 24, 2019, Liberty brought an application for an Order for Sale. The application was adjourned to allow the Defendants to file an application to set aside the default

judgment. On October 10, 2019, Natasha filed an application to set aside the noting in default (the First Set Aside Application), claiming that she did not intend to sign the Guarantee in her personal capacity, that she had not received proper counsel before signing the Guarantee, and that her and Owen's signatures on the 2017 Forbearance were not properly witnessed.

[32] On October 24, 2019, the Court directed the Properties be sold under a Judicial Listing. The Court also held that further examination would be required to determine Liberty's application for sale to the plaintiff and the Defendants' application to set aside the noting in default. Questioning was completed for the First Set Aside Application on January 15, 2020. The Defendants took no further action on the First Set Aside Application until December 16, 2021, when they filed the current set aside application (the Second Set Aside Application).



## Issues

[33] The issues before this Court are:

1. Is this matter appropriate for summary judgment?
2. Should the noting in default be set aside despite the Defendants' delay?
3. If this matter is appropriate for summary judgment and the Noting in Default is not set aside, can Liberty enforce the Guarantee?
    a. Does the Guarantee comply with the statutory requirements in the *GAA?*
    b. Did Natasha know, or ought to know, that she was signing a personal guarantee?
    c. Does the alleged joint venture between the parties prevent Liberty from enforcing the Guarantee?

## Analysis

### Summary Judgment

[34] Rule 7.3 of the *Alberta Rules of Court* allows summary judgment when there is no merit to a claim, no defence against a claim, or when the only real issue is the amount to be awarded.

[35] Summary judgment is to be granted where there is "no genuine issue requiring a trial", which 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: ***Hryniak v Mauldin***, 2014 SCC 7 at para 49.

[36] The Alberta Court of Appeal laid out the considerations underlying summary judgment in ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 at para 47:

> 47 The proper approach to summary dispositions, based on the ***Hryniak v. Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities, or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding Judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding Judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[37] Summary judgment Judges are entitled to make findings of fact based on the record and what reasonable inferences can be drawn therefrom: ***Weir-Jones*** at para 21. The sufficiency of the record is to be considered holistically and in the context of the issues: ***Weir-Jones*** at para 36.

[38] The standard of proof applied to findings of fact is proof on a balance of probabilities: ***Weir-Jones*** at para 28 citing to ***C (R) v McDougall***, 2008 SCC 53 at para 40. This standard of proof applies to the facts of the case, not whether summary judgment is possible or appropriate in general: ***Weir-Jones*** at para 30. Some cases in which the facts are proven on a balance of probabilities are nonetheless inappropriate for summary judgment; for example, where there are “difficult factual questions, requiring a tough call on contested facts”: ***Weir-Jones*** at para 30.

[39] Summary judgment is not limited to cases where the facts are not in dispute: ***Weir-Jones*** at para 21. Put otherwise, not every conflict in evidence gives rise to a genuine need for a trial: ***Weir-Jones*** at para 38. That said, some factual disputes can create a need for trial, like conflicts of evidence on material issues or conflicts of evidence that require findings of credibility to be resolved: ***Weir-Jones*** at paras 35 and 38.

[40] Conflicts between affidavit evidence may require credibility findings to resolve. It is an error to disregard conflicting affidavit evidence entirely when that evidence could, if assessed for credibility, have a material impact on the outcome of the case: ***LRS v SSD***, 2020 ABCA 206 at paras 17 and 19 citing to ***Nieuwesteeg v Barron***, 2009 ABCA 235.

[41] However, conflicts in affidavit evidence do not necessarily preclude summary judgment. The circumstances in which facts may be found in despite conflicting affidavit evidence were described by Bielby JA in ***Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta***, 2015 ABCA 101 [***Sandhu***]:

> 1. Where the conflicts in the evidence do not concern essential facts.
>
> 2. Where the apparent conflict is a conflict of opinions or interpretations, rather than a factual conflict.
>
> 3. Where the issues can be resolved based only on facts that are not disputed.
>
> 4. Where one party relies on several affidavits which contain internally conflicting evidence, including some evidence which agrees with or supports the opposing party's evidence and thus amounts to an admission against interest.
>
> ***Sandhu*** at para 81.

[42] In ***R Floden Services Ltd v Solomon***, 2015 ABQB 450 [***Floden***], Justice Renke added an additional category:

> 5. Where the issues can be resolved on the basis of admissible evidence other than the conflicting affidavit evidence.
>
> ***Floden*** at para 21 citing to ***Compton Petroleum Corp v Alberta Power Ltd***, 1999 ABQB 42 [***Compton***] at para 14 and ***N V Reykdal & Associates v 571582 Alberta Ltd***, 2000 ABCA 330 at para 5 [***Reykdal***].

[43] Furthermore, not all affidavit evidence is equally weighty. In ***Floden*** at para 22, Justice Renke listed the circumstances in which a Judge may properly give less weight to particular affidavit evidence:

> 1. The Judge is satisfied the deponent was attempting to engineer circumstances which precluded being tested on credibility (e.g. by avoiding questioning): ***Sandhu*** at para 83.
>
> 2. The affidavit evidence is "destroyed by cross-examination": ***Janvier v 834474 Alberta Ltd***, 2010 ABQB 800 at para 15 [***Janvier***].
>
> 3. The evidence is not consistent with other evidence and known circumstances: ***Compton*** at para 14; ***Reykdal*** at para 5; ***Janvier*** at para 15.

[44] Affidavit evidence that is general, vague, or superficial may also be given reduced weight: ***Geophysical Service Inc v Falkland Oil and Gas Ltd***, 2020 ABCA 21 at para 61; ***MNP Ltd (Eco-Industrial Business Park Inc) v Symmetry Asset Management Inc***, 2023 ABKB 429 at para 87. Affidavit evidence that is self-serving and otherwise unsupported can be given no weight and does not give rise to a genuine need for trial: ***Guarantee Co of North America v Mr. Tayloron Capital Corp***, [1999] 3 SCR 423 at 436-437 [***Mr. Tayloron***] at 436-437. Other descriptions of this type of evidence include a "bare denial", a "bald assertion", or having no "air of reality": ***Goodswimmer v Canada (Attorney General)***, 2017 ABCA 365 at para 40 citing to

***Lameman*** at para 11 and ***Floden*** at para 23; ***Fitzpatrick v The College of Physical Therapists Alberta***, 2020 ABCA 164 at para 22.

**Setting Aside the Noting in Default**

[45] Rule 9.15 of the *Alberta Rules of Court* provides the procedure for setting aside a default judgment:

> **Setting aside, varying, and discharging judgments and orders**
>
> **9.15(1)** On application, the Court may set aside, vary, or discharge a judgment or an order, whether final or interlocutory, that was made
>
> (a) without notice to one or more affected persons, or
>
> (b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.
>
> (2) Unless the Court otherwise orders, the application must be made within 20 days after the earlier of
>
> (a) the service of the judgment or order on the applicant, and
>
> (b) the date the judgment or order first came to the applicant's attention.
>
> (3) The Court may, on any terms the Court considers just,
>
> (a) permit a defence to be filed by a party who has been noted in default,
>
> (b) set aside, vary, or discharge a judgment granted upon application against a defendant who was noted in default, or whose statement of defence was struck out under rule 3.37, or
>
> (c) set aside, vary, or discharge a judgment entered in default of defence by the plaintiff for the recovery of property under rule 3.38, or for a debt or liquidated demand under rule 3.39.
>
> (4) The Court may set aside, vary, or discharge an interlocutory order
>
> (a) because information arose or was discovered after the order was made,
>
> (b) with the agreement of every party, or
>
> (c) on other grounds that the Court considers just.

[46] While r 9.15(2) generally requires a party who has been noted in default to file a set aside application within 20 days of the judgment, r 9.15(3) gives the Court to discretion to set aside a default judgment after that time frame has elapsed. When determining whether to exercise the discretion provided by r 9.15(3), a three-part test is engaged:

1. The party noted in default has an arguable defense;

2. The party noted in default did not intend for judgment to go by default and has a reasonable excuse for the default;

3. The party noted in default promptly applied to have the noting in default set aside once the default came to that party's attention.

***Kraushar v Kraushar***, 2019 ABCA 186 at para 5 citing ***Palin v Duxbury***, 2010 ABQB 833 at para 21.

[47] The Defendants submit that they have an arguable defense that Liberty cannot enforce the terms of the Mortgage, namely that enforcing the Mortgage breaches the terms of an unwritten joint venture agreement between the Shaw's and Mr. Evangelista. I have considered this submission and, for the reasons detailed below, have found that it does not amount to an arguable defense. The lack of an arguable defense is sufficient for me to deny the Defendants' request to set aside the default judgment.

[48] I am also unwilling to grant the Second Set Aside Application because the Defendants failed to "promptly" file the application after learning of the default judgment. The default judgment against the Defendants was granted in February, 2019. The First Set Aside Application was filed eight months later, and, in response, the Court requested additional examinations be conducted. Those questionings were complete by January, 2020, after which the Defendants took no additional actions related to the first Set Aside Application until the second Set Aside Application was filed almost two years later in December, 2021.

[49] In short, the Defendants let the first Set Aside Application languish for so long that they were required to file the second Set Aside Application as a fresh application. While the first Set Aside Application may have been applied for "promptly" after learning of the default judgment, the same cannot be said for the second Set Aside Application.

[50] Natasha submits that she has several reasonable excuses for the delay. First, Natasha says she put her faith in Owen and their lawyer to resolve the matter and they failed to do so. Second, Natasha submits that the parties engaged in settlement negotiations in the summer of 2021 aimed at resolving both this action and a separate action involving the Shaw's and Mr. Evangelista, and claims these negotiations convinced her that the default judgment had been resolved. Third, Natasha notes that she was pregnant for the third time throughout 2021 and—tragically—the child did not survive childbirth in August, 2021; Natasha claims that the mental and emotional toll of the experience prevented her from monitoring the progress of the first Set Aside Application.

[51] I cannot accept these as reasonable excuses for the delay.

[52] Rule 9.15 is intended to provide parties who are subject to a default judgment the opportunity to contest it. At the same time, opening up a default judgment requires the court to expend more resources on an already-decided matter and risks prejudicing the party who obtained the original default judgment. Giving the non-attending party a second chance to contest the judgment is fair when some factor interfered with or prevented that party from defending against the judgment in the first place. Where the non-attending party did not defend against the judgment by choice or through a lack of diligence, it is not unfair to require that party live with the default judgment: ***Hammond v Hammond***, 2019 ABQB 522 at paras 16-18.

[53] While the above principles are normally considered with respect to why a party originally allowed a default judgment to be entered against them, I find them also applicable when

considering a party's ongoing conduct in pursuing a set aside application. The statutory deadline of 20 days and the reference to "promptly" applying to set aside a default judgment in the ***Palin*** test both reinforce that those seeking to contest default judgments must do so quickly and diligently.

[54] Regarding the first excuse, Natasha's decision to trust her husband and her lawyer to handle the first Set Aside Application does not constitute a factor that interfered with or prevented Natasha from responding to the default judgment. Natasha has submitted no evidence that Owen or her lawyer give her any indication that the matter had actually been resolved. Instead, Natasha appears to have operated under the assumption that no news was good news. This is not a reasonable excuse for the delay; indeed, it is functionally an admission of a lack of diligence.

[55] Natasha's second and third excused both fail for the same reason: they only explain the last few months of the delay because the excuses are based on events in the summer of 2021. By the time these events occurred, the first Set Aside Application had sat dormant for at least a year and a half, which, in my view, was likely a long enough delay to preclude the second Set Aside Application.



## Defences

### "Arguable Defence" and "No Defence"

[56] For the Defendant's second Set Aside Application, one of the questions under the ***Palin*** test for r 9.15(3) is whether there is an "arguable defense" against the enforcement of the Mortgage. Several Alberta cases have adopted the interpretation of "arguable defence" from ***GFK Capital Base Corp v Fernando***, [1993] MJ No 529 at para 14:

> The Judge should be satisfied that the proposed defence is arguable, in the sense that if the facts are proved it might well succeed…

[57] For Liberty's summary judgment application, the question under r 7.3 is whether there is "no defence" to the claim that Natasha's Guarantee is enforceable, where "no defence" is interpreted using the "no genuine issue requiring trial" standard set out in ***Hryniak*** and ***Weir Jones***. Determining whether there is "no genuine issue requiring a trial" requires considering the strength of the evidence that supports the proposed defence.

[58] Looking at the two phrases together leads to a linguistic oddity: a party can have an "arguable defence" using the definition from ***GFK Capital*** while simultaneously having "no defence" using the standard from ***Hryniak*** and ***Weir Jones***. In the normal sequence, this does not present an issue. A party may have a default judgment set aside on the basis of an "arguable defence", leading to a contested summary judgment application in which that defence may be found to be "no defence" because it presents "no genuine issue requiring a trial".

[59] In this case, however, the Second Set Aside Application is being heard together with a summary judgment application from the other party. In such a situation, the interests of judicial economy—as reinforced by the call in ***Hryniak*** for a "culture shift"—are best served by assessing both applications using the "no genuine issue requiring a trial" standard. I will therefore approach both defences raised in the Second Set Aside Application and the defences

raised in response to Liberty's summary judgment application using the "no genuine issue requiring a trial" standard.

### The Defences Raised

[60] For the second Set Aside Application, the Defendants have raised one potential defence against the enforcement of the Mortgage, namely that the Mortgage cannot be enforced due to the terms of an unwritten joint venture agreement. If the Defendants are successful on this point, a trial will be needed to determine the terms of the unwritten joint venture agreement and their possible impact on the enforceability of the Mortgage and, by extension, the Guarantee. If the Defendants are unsuccessful on this point, the default judgment will remain in place.

[61] For Liberty's summary judgment application to enforce the Guarantee, Natasha has raised two defences in addition to the joint venture defence raised in the Second Set Aside Application:

1. The Guarantee is unenforceable because it does not comply with the statutory requirements for guarantees set out in the current text of the *Guarantees Acknowledgement Act*; and
2. The Guarantee is unenforceable because Natasha signed the Guarantee without understanding it (i.e. a defence of *non est factum*).

If either of these defences raise a genuine issue requiring a trial, then Liberty cannot enforce the Guarantee until the conclusion of that trial (assuming Liberty prevails at trial).

[62] I have considered each of these defences and, for the reasons that follow, I find that none raise a genuine issue requiring a trial.

### *Guarantees Acknowledgment Act*

[63] When Natasha signed the Guarantee in 2014, the relevant sections of the *Guarantees Acknowledgement Act* read:

> **Definitions**
>
> **1** In this Act,
>
> ...
>
> (b) "notary public" means,
>
> ...
>
> (ii) with reference to an acknowledgment made in a jurisdiction outside Alberta, a notary public in and for that jurisdiction.
>
> …
>
> **Requirements**
>
> **3** No guarantee has any effect unless the person entering into the obligation

(a) appears before a notary public,

(b) acknowledges to the notary public that the person executed the guarantee, and

(c) in the presence of the notary public signs a statement at the foot of the certificate of the notary public in the prescribed form.

**Certificate**

**4**(1) The notary public, after being satisfied by examination of the person entering into the obligation that the person is aware of the contents of the guarantee and understands it, shall issue a certificate under the notary public's hand and seal of office in the prescribed form.

(2) Every certificate issued under this Act shall be attached to or noted on the instrument containing the guarantee to which the certificate relates.

**Certificate as evidence**

**5** A certificate issued under this Act that is

(a) substantially complete and regular on the face of it, and

(b) accepted in good faith by the person to whom the obligation was incurred without reason to believe that the requirements of this Act have not been complied with,

shall be admitted in evidence and is conclusive proof that this Act has been complied with.

*Guarantees Acknowledgement Act*, RSA 2000, c G-11 [as it read in March 2014].

[64] On December 17, 2014, amendments to the *GAA* came into force: *Notaries and Commissioners Act*, SA 2013, c N-5.5 s 31 as amended by *Justice Statutes Amendment Act, 2014*, SA 2014, c 13 s 7 (the Amendments). The Amendments require prospective guarantors appear before a lawyer, rather than a notary public. The lawyer's role in the amended *GAA* is substantially the same as the role previously played by the notary public: to ensure the prospective guarantor is aware of and understands the commitment being made, and to formally attest to that fact in the prescribed form.

[65] Natasha has not identified any irregularity in the Guarantee or Certificate under the *GAA* provisions that were in place when the Guarantee and Certificate were executed. Natasha appeared before a notary public, acknowledged that she had signed the Guarantee, and signed the Certificate in the prescribed form. The notary public attested in the Certificate that they were satisfied that Natasha was aware of and understood the Guarantee.

[66] Instead, Natasha argues that the Guarantee is not enforceable because it does not comply with the post-Amendments requirements found at sections 3 and 4 of the current *GAA*, since Natasha appeared before a notary public instead of a lawyer. Natasha submits that the legislature enacted the Amendments to protect prospective guarantors from personally guaranteeing debts

without fully understanding the nature and scope of their guarantees. This consumer-protection purpose, Natasha argues, militates for interpreting the Amendments as applying retroactively.

[67] I reject Natasha's argument on this point.

[68] There exists a strong presumption that legislation does not have retroactive effect, since people must be able to order their affairs in light of an established legal order: ***R v Albashir***, 2021 SCC 48 at paras 34-35. This presumption can be rebutted where a legislature indicates that it intends for the law to apply retroactively, either explicitly or by necessary implication: ***Albashir*** at para 37. A consumer-protection purpose for an amendment is not sufficient to displace the presumption that legislative changes operate only prospectively without some indication that the legislature intended for the law to apply retroactively.

[69] In this case, the Amendments do not give any indication that the legislature intended them to operate retroactively. By contrast, later amendments to the *GAA* are clearly intended to apply retroactively: see *COVID-19 Pandemic Response Statutes Amendment Act*, 2020, SA 2020, c 13 s 7(7).

[70] Furthermore, taken to its logical conclusion, Natasha's position is that the Amendments invalidated most, if not all, existing personal guarantees in Alberta. Prior to the Amendments coming into force, there would be no reason for a lender to require a prospective personal guarantor to use a lawyer, rather than a notary public, to meet the requirements laid out in the *GAA*.

[71] I therefore find Natasha's position impossible to reconcile with s 5, which provides that a certificate issued under the *GAA* that is substantially complete and regular on its face, and which has been accepted in good faith, is "conclusive proof" that the *GAA* has been complied with. If the legislature intended to retroactively invalidate pre-Amendments *GAA* certificates—which were substantially complete, facially regular, and accepted in good faith, all in accordance with the law as it stood—the legislature would have made clear that those documents are no longer "conclusive proof" of compliance under s 5. The legislature declined to do so.

[72] As such, I find that the Natasha's submission that the Guarantee is invalid because it fails to comply with the current version of the *GAA* does not raise an issue requiring a trial.

### ***Non-Est Factum***

[73] Natasha submits that she executed the Guarantee because she was under the misapprehension that she was signing a corporate guarantee on behalf of RVDC rather than a personal guarantee in her individual capacity. This is a defence of *non est factum*. A successful plea of *non est factum* renders an agreement void at common law: ***Bank of Montreal v Fraser***, 2013 BCSC 2328 at para 38 [***Fraser***].

[74] Two burdens must be met for the defence of *non est factum* to succeed.

[75] First, Natasha must demonstrate that the document she signed was "radically or fundamentally different" from what she believed she was signing: see ***Farm Credit Canada v Chan***, 2021 ABCA 168 at footnote 21.

[76] Second, Natasha must demonstrate that she was not careless in signing the document; that is, the signer must have taken reasonable measures to inform themselves of the substance and

effect of the document for the defence of *non est factum* to be available: ***Marvco Color Research Ltd v Harris***, [1982] 2 SCR 774 at 779. Whether a party exercised sufficient care when executing the document is a fact-specific and contextual inquiry: ***Fraser*** at para 40.

[77] Natasha's position clearly fails at this second step.

[78] Natasha was and is financially sophisticated. She is an accredited mortgage professional. Her affidavit speaks to her experience and skill in negotiating with lenders. She represented herself as an expert; her email signature says, "I give the best mortgage advice at the bank's expense!" While being questioned on her affidavit, she admitted that she knew the difference between a personal guarantee and a corporate guarantee when she executed the Guarantee.

[79] Further, the documents which Natasha signed to execute the Guarantee are clear as to their purpose. The Commitment Letter signed by Natasha on January 6, 2014, lists her as a personal guarantor on the first page. She signed the Commitment Letter under the heading "Personal Guarantors". The signature page of the Guarantee Agreement which Natasha signed includes "The Guarantor hereby acknowledges that the Guarantor has read the contents of this Guarantee and understands it." Natasha's signature line on the Guarantee Agreement contains no mention of RVDC or her role as a director of that corporation.

[80] Natasha also had professional assistance if she wished to clarify the meaning of the Guarantee. Natasha executed the Certificate before a notary public. The notary public she attended attested in the Certificate that they were satisfied Natasha was aware of and understood the contents of that document. The Certificate lists the Guarantee as being between Liberty and Natasha; it contains no mention of RVDC. Natasha then forwarded the signed Guarantee and Certificate to her then lawyer at DBH Law. Her lawyer then forwarded the package of documents to Liberty's lawyer at Caron & Partners LLP. If Natasha had any questions or concerns about the documents, she could have asked her counsel to explain.

[81] Lastly, after executing the Guarantee, Natasha received several documents and communications that identified her as a personal guarantor, and she did not raise any concerns in response. Natasha signed the 2015 Extension and 2017 Forbearance, both of which list her as a personal guarantor. In February 2019, Natasha was copied on an email sent by Owen to Liberty in which Owen requested that both he and Natasha be released from their personal guarantees in exchange for their cooperation in restructuring RVDC.

[82] Given the above, Natasha's claim that she did not understand the nature of the Guarantee has no air of reality. A person with her experience and expertise, who exercised any reasonable degree of due diligence, could not have been mistaken as to the nature of the Guarantee.

[83] In oral argument, Natasha's counsel argued that whether Natasha understood the Guarantee when she signed it is a matter that requires a determination of credibility, and that determinations of credibility require the court to hear *viva voce* evidence. However, I find that the evidence in this summary judgment application is more than sufficient to find, on a balance of probabilities, that Natasha did not exercise sufficient due diligence for this defence to succeed, regardless of her subjective understanding of the Guarantee.

[84] Accordingly, Natasha's defence of *non est factum* is hopeless and does not raise a genuine issue requiring a trial.

**Joint Venture/Estoppel**

[85] The Defendants submit that, starting in 2016, the Defendants entered an unwritten joint venture agreement with Mr. Evangelista and/or Liberty, which agreement prevents Liberty from enforcing the Mortgage. In general terms, the joint venture described by the Defendants was intended to make the Condos more attractive as rental units by renovating and furnishing them, and to lower RVDC's ongoing costs by buying out the remaining units in each condo building so that the buildings could be turned into apartments. The alleged joint venture was intended to improve the financial prospects of RVDC so as to attract an institutional lender to take over the Mortgage from Liberty.

[86] I note at the outset that I found the Defendants' submissions on this defence to be somewhat muddled. The Defendants appeared to base this defence on some combination of the following three claims:

1. The Defendants and Mr. Evangelista entered into an unwritten joint venture agreement, under which Mr. Evangelista agreed purchase a property belonging to Natasha. Mr. Evangelista breached the joint venture agreement by taking almost two years to close on the sale, and that breach prevents Liberty from enforcing the Mortgage and the Guarantee.
2. The Defendants and Mr. Evangelista entered into an unwritten joint venture agreement, which included as a specific term that Liberty would not enforce the Mortgage and the Guarantee; or, alternatively, Mr. Evangelista made representations to the Defendants to the effect that Liberty would not enforce the Mortgage or the Guarantee so long as the Defendants pursued the renovation, furnishing, and consolidation of the Condos.
3. Through one of its agents—Mr. Evangelista or another—Liberty expressly agreed not to enforce the Mortgage or the Guarantee.

[87] The issues raised by the above claims are as follows:

1. Did the joint venture exist? If so, what were its terms? Did Mr. Evangelista breach those terms?
2. Did Mr. Evangelista operate with apparent or ostensible authority as an agent of Liberty in his dealings with the Defendants?
3. Did Liberty expressly promise not to enforce the Mortgage or the Guarantee?

[88] I have considered each of these issues below.

**Existence, Terms, and Breach of Unwritten Joint Venture Agreement**

[89] Joint ventures are a broadly defined class of business relationship that have been explained as:

> Joint ventures are not a distinct form of business organization, nor a relationship that has any precise legal meaning. Functionally, the term "joint venture" is used to describe a relationship among persons who agree to combine their money, property, knowledge, skills, experience, time, or other resources for some common purpose. Usually, joint venturers agree to combine their money,

> property, knowledge, skills, experience, time, or other resources for some common purpose. Usually, the joint venturers agree to share the profits and losses from the venture, and each has some degree of control over it. The distinguishing feature of a joint venture is that it is an arrangement set up for a limited time, for a limited purpose, or for both. "Joint venture" is used loosely to refer to all sorts of legal arrangements given effect in corporations and partnerships and in relationships based exclusively on contract.
>
> J Anthony VanDuzer, *The Law of Partnerships and Corporations*, 2nd ed (Toronto: Irwin Law, 2003) at 67.

[90] The bulk of the Defendants' submissions on the alleged joint venture focused on the Defendants' relationship with Mr. Evangelista and his engagement with their efforts to improve RVDC's financial prospects. Several pieces of evidence are at least suggestive that Mr. Evangelista was involved in a joint venture with the Shaw's, including:

- Mr. Evangelista advanced the Shaw's $22,095.78 from his credit card to purchase a kitchen package from IKEA for the Condos.
- Mr. Evangelista agreed to purchase, and eventually did purchase, a property from Natasha so that the funds could be used to improve the Condos.
- Mr. Evangelista provided feedback on the Shaw's' Consolidation Plan, including a note that he may need to be on the title in order to attract a new institutional lender.

[91] While the above evidence is uncontested, Mr. Evangelista's position on the existence and scope of any joint venture is not known because the Defendants never put the alleged joint venture to Mr. Evangelista in questioning. Liberty argues that the failure to put the alleged joint venture to Mr. Evangelista violates the principle from ***Browne v Dunn***, and therefore any evidence adduced by the Defendants on this point should be given no weight.

[92] The rule from ***Brown v Dunn*** is a sound principle of general application but the extent of its application is within the discretion of the Judge after taking into account all the circumstances: ***R v Lyttle***, 2004 SCC 5 at para 65. In this case, I do not believe it is necessary to entirely discount the evidence submitted by the Defendants, both because doing so strikes me as overly harsh in the context of a party responding to a summary judgment application, and because the evidence does not change my findings of fact and is immaterial to the success or failure of the defence.

[93] Given the record before me, I am unable to make a finding of fact, on a balance of probabilities, that Mr. Evangelista did or did not enter into the alleged joint venture with the Defendants. The documentary evidence submitted by the Defendants demonstrates that Mr. Evangelista was supportive of the Defendants attempts to remedy RVDC's problems, but that evidence is insufficient to determine with any specificity the overall structure of the alleged joint venture, Mr. Evangelista's particular role within it, or what, if anything, Mr. Evangelista stood to gain by his involvement. Having been unable to determine whether Mr. Evangelista did or did not enter into the alleged joint venture agreement, I am necessarily unable to make a finding of fact on whether he breached it.

[94] Nonetheless, Liberty's right to enforce its security is unchanged even if one assumes *ad argumentum* that Mr. Evangelista, in his private capacity, was a party to the unwritten joint

venture described by the Defendants and that he breached that agreement as alleged. For the Defendants to raise a genuine issue requiring a trial, they must also show that Mr. Evangelista acted with actual or ostensible authority as an agent of Liberty in his dealings with them.

**The Doctrine of Ostensible Authority**

[95] Since I am unable to make a finding of fact on whether Mr. Evangelista entered into the alleged joint venture agreement, the Defendants can raise a genuine issue requiring a trial if they can provide evidence that Mr. Evangelista acted with actual or ostensible authority as an agent of Liberty in his dealings with them. If Mr. Evangelista was acting in a capacity that binds Liberty to his representations or agreement, then a trial will be required to determine the contents and legal implications of his representations or agreements.

[96] Since Liberty has denied that Mr. Evangelista had actual authority to enter the company into a joint venture with the Defendants, I will analyze whether Mr. Evangelista acted with ostensible authority. The Court of Appeal summarized the applicable law in ***Doiron v Devon Capital Corp***, 2003 ABCA 336 at paras 13-15:

> 13 The doctrine of ostensible authority serves to give an agent the authority to bind a principal to agreements made with third parties in circumstances where the agent has no actual authority to do so. The requirements to establish ostensible authority are set out in the leading case of ***Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd***., [1964] 1 All E.R. 630 (Eng. C.A.). They are:
>
> > a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
> >
> > b) that such representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
> >
> > c) that the contractor was induced by such representation to enter into the contract (i.e. that he in fact relied upon it); and
> >
> > d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.
>
> 14 The test for ostensible authority has also been stated by Slade, J., in ***Rama Corp. v. Proved Tin & General Investments***, [1952] 2 Q.B. 147 (Eng. Q.B.), at pp. 149-50:
>
> > Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, indeed, it has been termed agency by estoppel, and you cannot call in aid an estoppel unless you have three ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance.

> 15 The law of ostensible authority does not require an explicit representation of authority. It is found where the principal has created a situation such that it is reasonable to infer and rely upon the apparent authority of the person. ...
>
> [Emphasis added]

[97] In this case, Mr. Evangelista clearly operated with actual authority in relation to the Defendants up until 2014, during which time he was their primary contact at Liberty for the Mortgage. However, Mr. Evangelista was removed from the Defendants' file by Liberty's Board of Directors in 2014 because his close personal relationship with the Defendants presented a conflict of interest.

[98] The Defendants were notified of both the fact that Mr. Evangelista was removed from their file and the reasons behind that removal. From that point forward, the Defendants were directed to communicate with Ms. Gillespie and Mr. Taylor for any issues involving the Mortgage. The documentary evidence submitted by the Defendants confirms that the Defendants subsequently sent all official communications about the Mortgage to Ms. Gillespie and/or Mr. Taylor, including all negotiations surrounding the 2015 Extension and 2017 Forbearance. Furthermore, the Defendants have submitted no evidence to show that Mr. Evangelista ever claimed that he could or would continue to act as an agent of Liberty with respect to the Mortgage after his 2014 removal.

[99] In short, I find on a balance of probabilities that Mr. Evangelista did not create a situation in which it would be reasonable for the Defendants to infer and rely upon his apparent authority as an agent of Liberty, or conversely that it was unreasonable for the Defendants to believe that Mr. Evangelista was operating as an agent of Liberty after they were explicitly told that he had been removed from their file due to conflict of interest concerns.

**Express Promise of Non-Enforcement**

[100] The Defendants have failed to submit sufficient evidence to raise a genuine issue requiring a trial to determine whether the Defendants were directly engaged in a joint venture with Liberty or whether, as part of that joint venture, Liberty expressly agreed not to enforce the Mortgage and/or the Guarantee. Indeed, the Defendants have submitted no evidence that suggests that Liberty ever made such an agreement.

[101] Liberty denies the existence of any joint venture with the Defendants and denies ever agreeing not to enforce the Mortgage and/or Guarantee. In addition to the evidentiary vacuum at the centre of this defence, Liberty notes that the written documentation clearly precludes the existence of an unwritten agreement not to enforce the Mortgage or the Guarantee. The 2017 Forbearance provides that Liberty is not impeded from acting however it sees fit and that Liberty does not require the direction or consent of RVDC to act. The Guarantee provides that any alteration or waiver of its terms must be in writing and signed by Liberty.

[102] The Defendants responded that the issues raised in this defence are closely analogous to those raised in ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 [***Stankovic***]. In that case, the respondent to a summary judgment application seeking to enforce a mortgage claimed that the mortgage was unenforceable due to the terms of an unwritten joint venture between the parties. The respondent described the terms of the unwritten joint venture agreement in great detail in his affidavit. The applicant argued that the written agreements between the parties allowed him to

enforce the mortgage. The Chambers Judge granted summary judgment allowing the enforcement of the mortgage but held that the joint venture claims presented a genuine issue requiring a trial. In coming to this conclusion, the Chambers Judge relied heavily on the parol evidence rule and the "entire agreement" clause in the last written agreement.

[103] The Court of Appeal held that the Chambers Judge had erred in two ways. First, the Court held the Chambers Judge inappropriately disregarded the respondent's affidavit evidence using the parol evidence rule. The parol evidence rule has numerous exceptions, including where a prior oral agreement shapes the apparently contrary features of a written instrument and where an "umbrella agreement" requires several documents to be read as part of a unified whole. In ***Stankovic***, the written agreements contained clauses that made clear the agreements were contingent on a larger plan involving subdivision of the property, consistent with the respondent's affidavit. Second, the Court held that the Chambers Judge erred by granting summary judgment with respect to the mortgage while ordering the joint venture claim to trial. The joint venture claim was factually and legally linked to the enforceability of the mortgage, and this degree of interconnectedness was sufficient to make partial summary judgment unjust in the circumstances.

[104] I find that the present case can be distinguished from ***Stankovic*** on several grounds.

[105] First, the mortgage in ***Stankovic*** originated as part of the alleged joint venture and the mortgage was an integral component of the joint venture from the get-go. In this case, the alleged joint venture began more than five years into the life of the Mortgage and two years after Natasha signed the Guarantee. The difference in timing is crucial because the exceptions to the parol evidence rule discussed by the Court of Appeal in ***Stankovic*** all relate to using the context surrounding the origin of a written agreement to understand the content and boundaries of the agreement. The only document in this case that those exceptions could apply to is the 2017 Forbearance.

[106] Second, although the alleged joint venture in ***Stankovic*** was unwritten, the terms of the written agreements in that case supported the respondent's version of events. Those terms were not just consistent with the alleged joint venture, but difficult to make sense of if the alleged joint venture did not exist. In this case, the written documents contain no terms that would indicate those documents are part of a larger joint venture between the parties. Quite the opposite. The 2017 Forbearance is explicit that it does not restrain Liberty from acting however Liberty sees fit.

[107] Third, in ***Stankovic***, the respondent described the alleged joint venture in detail, including its origin, its progression over time, and the exact contributions and expectations of each of the parties. In this case, the Defendants were remarkably vague on the specifics of Liberty's involvement in the alleged joint venture. Most of the Defendants' evidence focused on the conduct of Mr. Evangelista, who the Defendants claimed was acting as Liberty's agent. As noted above, I have found on a balance of probabilities that Mr. Evangelista was not acting as Liberty's agent in his interactions with the Defendants and, furthermore, that it would have been unreasonable for the Defendants to understand Mr. Evangelista as acting as an agent for Liberty rather than in his personal capacity.

[108] Other than the conduct of Mr. Evangelista, the Defendants appeared to base their claim that Liberty was involved in a joint venture on the existence of the 2017 Forbearance, arguing, in essence, that the 2017 Forbearance can only be understood as Liberty's contribution to the

alleged joint venture. I cannot accept that argument. Providing a delinquent borrower with breathing room so the borrower can turn a failing business into a successful one is a normal part of the mortgage business; without more, these types of forbearance actions do not imply that the lender intends to enter a joint venture with the borrower, especially when the written agreement expressly provides that the lender can continue to operate as it sees fit.

[109] Fourth, although I have declined to make a finding of fact regarding Mr. Evangelista's involvement in the alleged joint venture, that fact is not so legally and factually intertwined with the enforcement of the Mortgage and Guarantee to make summary judgment unjust in the circumstances. I am confident that the evidence in this case is sufficient for me to find, on a balance of probabilities, that Liberty was not a party to the joint venture described by the Defendants, and that Liberty did not expressly agree to give up enforcement of the Mortgage or the Guarantee. As noted above, I have also found on a balance of probabilities that Mr. Evangelista was not acting as Liberty's agent in his post-2014 dealings with the Defendants and that the Defendants could not reasonably have been mistaken as to the fact that Mr. Evangelista was operating in his personal capacity.

[110] The Chambers Judge's error in ***Stankovic*** was to allow enforcement of the mortgage while finding that the joint venture claim presented a genuine issue requiring a trial. The problem was that the joint venture claims in ***Stankovic***, if proven at trial, would prevent enforcement of the mortgage. In this case, given my findings of fact, Liberty is not prevented from enforcing the Mortgage and the Guarantee regardless of whether Mr. Evangelista was or was not a member of the alleged joint venture in his personal capacity.

[111] Accordingly, this defence does not raise a genuine issue requiring a trial.

**Disposition**

[112] I grant summary judgment in favour of Liberty allowing it to enforce the Guarantee against Natasha Shaw in the amount of $2,588,577.26, adjusted for any disbursements or receipts that have occurred since August 21, 2021.

[113] I deny the Defendants' second Set Aside Application.

**Costs**

[114] Liberty was wholly successful on both its application and the Defendants' cross-application and is therefore presumptively entitled to costs. If the parties are unable to agree on costs, they may make short written submissions on the issue.

Heard on the 30th day of August, 2023.
**Dated** at the City of Calgary, Alberta this 15th day of February, 2024.

**B.H Aloneissi**
**J.C.K.B.A.**

**Appearances:**

Predrag Anic
for the Applicants

Scott Chimuk
for the Respondent

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**Corrigendum of the Reasons for Judgment**
**of**
**The Honourable Justice B.H Aloneissi**

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Corrected Judgement to reflect citation number changed from 2023 ABKB 0092 to 2024 ABKB 0092