

CITATION: Clifton Blake Capital Corp. v. 10972827 Canada Inc., 2024 ONSC 3694
COURT FILE NO.: CV-22-00691878-0000
DATE: 20240628

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Clifton Blake Capital Corp.

Plaintiff

AND:

10972827 Canada Inc. and Jaing Liu, a.k.a. James Liu, FES Property Management Inc., FES Capital Inc. and Financial Eastern Star Inc.

Defendants

BEFORE: Chalmers J.

COUNSEL: *Christine Jonathan*, for the Plaintiff

David Contant, for the Defendants

HEARD: April 8, 2024

ENDORSEMENT

OVERVIEW

[1] Clifton Blake Capital Corp. (Clifton Blake) agreed to loan \$8,200,000 to 10972827 Canada Inc. (109 Canada). The agreement between the parties is set out in a commitment letter dated October 12, 2022 (the Commitment Letter). Pursuant to the terms of the Commitment Letter, 109 Canada agreed to pay a commitment fee to Clifton Blake in the amount of \$164,000 (the Commitment Fee). The Commitment Fee was payable upon acceptance of the Commitment Letter. The transaction did not close. 109 Canada did not pay the Commitment Fee.

[2] Clifton Blake brings this motion for summary judgment in the amount of the Commitment Fee of \$164,000, together with interest and costs. Clifton Blake argues that the defendants unilaterally terminated the transaction on October 21, 2022. The defendants argue that before the closing of the transaction, Clifton Blake advised that it would be unable to advance the funds in time. The defendants argue that because of the anticipatory breach by Clifton Blake, they are not obligated to pay the Commitment Fee.

[3] For the reasons set out below, I find that 109 Canada terminated the transaction on October 21, 2022. I grant judgment in favour of Clifton Blake in the amount of \$164,000, plus interest and

costs, payable by the defendant 109 Canada. I dismiss the action as against the guarantors. I dismiss the counterclaim.

FACTUAL BACKGROUND

[4] Clifton Blake carries on business as a mortgage fund and private lender for commercial real estate projects. 109 Canada was the registered owner of the property known municipally as 23 Bachman Terrace, Ottawa, (the Property).

[5] On October 12, 2022, Clifton Blake and 109 Canada entered into the Commitment Letter agreement whereby Clifton Blake agreed to provide 109 Canada with a \$8.2 million first priority loan (the Loan). The Loan was to be secured by an \$8.2 million first mortgage on the Property and a second blanket mortgage on additional properties James Lui was seeking to acquire. The Loan was personally guaranteed by James Lui. The Loan was also guaranteed by the corporations, FES Property Management Inc, FES Capital Inc. and Financial Eastern Star Inc. James Liu is an officer and director of the defendant corporations. James Liu signed the guarantee on behalf of the corporate defendants.

[6] The primary purpose of the Loan was to refinance approximately \$6,000,000 debt on the Property. In addition, approximately \$1,250,000 of the Loan was to be applied to vacate or discharge the construction liens registered against title to the Property. The amount of \$354,000 was allocated towards the purchase of two single family homes located at 551 Hilson Avenue and 624 Parkview Road in Ottawa (the Additional Properties). The purchase of the Additional Properties was scheduled to close on October 31, 2022.

[7] Pursuant to the terms of the Commitment Letter, 109 Canada agreed to pay Clifton Blake a Commitment Fee in the amount of \$164,000. The Commitment Fee is 2% of the total amount of the Loan. Schedule A to the Commitment Letter provides as follows:

The Commitment Fee shall be deemed to be fully earned upon acceptance of this Commitment, and payable on the earlier of the date of the Advance and the expiry of this Commitment.

The Commitment expired on October 31, 2022, if no advances had been made by that date.

[8] The Commitment Letter requires 109 Canada to pay a non-refundable deposit in the amount of \$20,000 (the Deposit). The Deposit was paid at the time the parties entered into the Commitment Letter. The Deposit, less any expenses incurred during the due diligence process was to be applied to the Commitment Fee. The Commitment Letter also provides that all costs incurred by Clifton Blake, including legal fees and disbursements would be payable by 109 Canada regardless of whether the transaction was completed.

[9] The Loan transaction was scheduled to close on October 31, 2022. One of the preconditions to the advance of funds was the removal of the liens registered on title to the Property. The removal of the liens was to be completed by the defendants.

[10] The Commitment Letter provides that the borrowers' legal counsel is Dong's Law Office Professional Corporation. The solicitor is identified as Dong Liu. On October 19, 2022, James Liu emailed Dong Liu and stated that the lender wants her to contact their lawyer. On the same day, Dong Liu sent an email to Matthew Himmel, counsel for Clifton Blake and advised that she had received an update from the litigation lawyer about the construction lien matters.

[11] On October 21, 2022, at 12:50 pm, the defendants' litigation counsel, David Contant emailed Mr. Himmel and proposed a plan to remove the liens. Mr. Contant advised that he had spoken with counsel for the main lien holder who was onboard with the proposal.

[12] On October 21, 2022, at 1:20 p.m., Mr. Himmel sent an email to Dong Liu asking if James Liu will be taking title to the Additional Properties in his own name or in trust. Shortly thereafter Dong Liu emailed Mr. Himmel and advised that her client does not intend to proceed with the Loan transaction. James Liu has since taken the position that Dong Liu was not acting for the defendants when she sent the email and had no authority to make the statement that the defendants would not be proceeding with the transaction.

[13] Clifton Blake took the position that based on Dong Liu's letter the Commitment Letter had expired. On October 24, 2022, Christine Jonathan, counsel for Clifton Blake wrote to James Lui. She stated that she had received an email from Dong Liu advising that the defendants did not intend to proceed with the Loan transaction. On behalf of Clifton Black, Ms. Jonathan made demand for payment of the Commitment Fee together with the legal fees incurred to that date in the amount of \$17,500. The total amount was \$181,500.00. She stated that if the funds are not received by 4:00 p.m. on October 28, 2022, their instructions were to pursue all legal remedies.

[14] James Liu confirmed that he received the letter from Ms. Jonathan. He testified on his cross-examination that he was surprised by the letter. He believed that the Commitment Fee would be deducted from the funds advanced. He did not expect the Commitment Fee to be owing if the Loan did not proceed. He also testified on his cross-examination that he did not cancel the transaction and wanted it to continue. James Liu did not respond to Ms. Jonathan's letter.

[15] Aly Jiwani, the principal of Clifton Blake tried contacting James Liu directly but did not receive an answer. He sent a follow up email on October 26, 2022. Later on October 26, 2022, James Liu sent an email in which he stated that he was very sick and would call when he feels better. Mr. Jiwani responded a short time later stating that he needs to speak to him about the status of the Loan.

[16] On October 26, 2022, James Liu responded to Mr. Jiwani and advised that Dong Liu is no longer his lawyer, and that Ping Chen is his new lawyer. On October 28, 2022, at approximately 1 pm, Mr. Jiwani sent a text to James Liu asking if he had instructed Ms. Peng, and to remind him that the deadline for the demand letter is at 4 pm that day. At approximately 2:30 pm on October 28, 2022, Mr. Jiwani asked when they can expect the funds. There was no response to the text message.

[17] In his affidavit, James Liu deposes that a few days before the Loan transaction was to close, Clifton Blake contacted him and advised that it could not advance funds in sufficient time to

finance the purchase of the Additional Properties. James Liu testified on his cross-examination that his discussion with Clifton Blake occurred on October 27, 2022. He did not provide any further detail. In support of this statement, James Liu referred to the text message exchange on October 26-28, 2022. In my view, the text messages do not support his position that Clifton Blake could not advance the funds. In fact, the text messages from Mr. Jiwani indicate that the Loan transaction could be revived if the amounts set out in the demand letter were paid by 4 pm on October 28, 2022.

[18] The Commitment Fee was not paid by 109 Canada. Clifton Blake applied the non-refundable deposit of \$20,000 to the expenses incurred by Clifton Blake during the due diligence period.

[19] According to Mr. Jiwani, James Lui contacted him in early November 2022, and expressed interest in continuing with the Loan transaction. Clifton Blake required an upfront payment of a further \$20,000 deposit before considering the proposal to continue with the Loan transaction. James Liu denies contacting Clifton Blake in early November 2022 to revive the transaction. He states that he refinanced another property located at 630 Parkview Avenue and had used that money to close the purchase of the Additional Properties.

[20] On cross-examination, James Liu testified that sometime after the closing of the Additional Properties, Clifton Blake contacted him seeking payment of the Commitment Fee. James Liu testified that he was prepared to pay the Commitment Fee if Clifton Blake would continue to lend him the money. He testified that he spoke with Mr. Jiwani on the phone who asked that he pay as much as he can. James Liu stated that he did not have the money to make the full payment of \$164,000. He asked his wife to make a payment of \$20,000.

[21] The text messages between James Liu and Mr. Jiwani refer to the payment of the additional deposit of \$20,000. James Liu sent a text message on November 9, 2022, at 9:53 am advising that he was on the way to the bank. Mr. Jiwani sent a text message on the same day at 11:10 am asking whether the deposit had been made. James Liu answered yes and included a photograph, presumably confirming the deposit.

[22] On November 16, 2022, Ms. Jonathan wrote to Ms. Chen and advised that because 109 Canada had terminated the Commitment Letter on October 21, 2022, Clifton Blake could not complete the transaction in 2022 but would be willing to revive the transaction in 2023. Clifton Blake renewed its demand for immediate payment of the Commitment Fee in the amount of \$164,000. The \$20,000 payment received on November 9, 2022, was applied to Clifton Blake's additional expenses.

[23] On December 19, 2022, Clifton Blake caused to be issued the Statement of Claim. The plaintiff seeks damages for breach of contract in the amount of \$164,000. The defendants delivered their Statement of Defence and Counterclaim dated January 20, 2023. In the Statement of Defence and Counterclaim, James Liu alleges that Clifton Blake breached the Commitment Letter because it could not advance the funds in sufficient time to finance the purchase of the Additional Properties.

[24] In the Statement of Defence and Counterclaim, the defendants allege that the action was brought in the wrong venue. The action was brought in Toronto, but the subject matter of the claim took place in Ottawa. The defendants did not bring a motion under R. 13.1.01 of the *Rules of Civil Procedure* to change the venue. This argument was not advanced at the summary judgment motion.

[25] This matter was spoken to at Civil Practice Court on March 28, 2023, to set a date for the hearing. The defendants did not take the position that the matter was not appropriate for summary judgment. The presiding judge scheduled the motion for April 8, 2024.

THE ISSUES

[26] The following issues will be addressed in this endorsement:

- a. Is this an appropriate case for summary judgment?
- b. Is the plaintiff entitled to judgment for the payment of the Commitment Fee?
- c. Who is liable for payment of the Commitment Fee?
- d. What are the damages?

ANALYSIS

Issue # 1 – Is this an appropriate case for summary judgment?

[27] The plaintiff brings this motion for summary judgment. Summary judgment will be granted if 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 on a motion for summary judgment. This will be the case when the process:

- a. allows the judge to make the necessary findings of fact;
- b. allows the judge to apply the law to the facts; and
- c. is a proportionate, more expeditious and less expensive means to achieve a just result:
Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 SCR 87, at paras. 48 and 49.

[28] The party resisting the motion for summary judgment must “lead trump or risk losing” and must demonstrate that their case has a real chance of success at trial: *1061590 Ontario Ltd. v. Ontario Jockey Club*, (1995) 21 O.R. (3d) 547 (ON CA) at p. 557. The evidence put forward by the parties must be considered their best evidence: *Khabouth v. Nuko Investments Ltd.*, 2013 ONCA 671, at para. 6.

[29] If the judge finds there is a genuine issue requiring a trial, the judge should then determine whether the issue can be decided using the “enhanced forensic tools” set out in Rules 20.04(2.1) and (2.2). Those powers are to be used where they will lead to a fair and just result: *Mason v.*

Perras Mongenais, 2018 ONCA 978, at para. 44. The enhanced powers include weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence: *Rule 20.04(2.1)*.

[30] The defendants argue that the action is not appropriate for summary judgment because it fails to dispose of all the issues. The defendants state that even if summary judgment is granted in favour of the plaintiff, the counterclaim will still require a trial: *Vandenberg v. Wilken*, 2019 ONCA 262 (CanLII). The defendants also state that there is a genuine issue requiring a trial as to whether the Commitment Letter was terminated, and whether the guarantor defendants are liable to Clifton Blake for payment of the Commitment Fee.

[31] I am satisfied that with the enhanced forensic tools, I can come to a fair and just result. I find that this matter is appropriate for summary judgment.

Issue #2 – Is the plaintiff entitled to judgment for the payment of the Commitment Fee?

[32] Clifton Blake argues that the Commitment Letter provides for the payment of the Commitment Fee regardless of whether the Loan is advanced. The nature of the Commitment Letter has been described as follows:

Commitment letters are another type of preliminary agreement in common use. Commitment letters are issued by lenders in circumstances where a potential borrower wishes to know that it will be able to make certain future borrowings of a particular size and on particular terms in order to ensure that the project to be undertaken by the borrower is financially viable.

In such circumstances, a lender may issue a commitment letter indicating a commitment to enter into a loan with the borrower on certain terms and conditions, it being understood that a formal lending agreement will be entered into at a later stage. In the typical case, it will be apparent from the terms of the commitment letter that a binding “commitment” is intended. Thus, it is a common feature of such arrangements that the borrower will be required to accept the commitment letter formally and to pay an initial commission or fee in return for the commitment. Provided that the parties have agreed to sufficient terms of the projected loan as to avoid the problem of lack of certainty of terms, commitment letters of this kind are held to be binding agreements: John D. McCamus, in *The Law of Contracts*, 3rd ed. (Toronto: Irwin Law, 2020), at pp. 135-136.

[33] The court must focus on the contractual interpretation of the relevant clause: *Chijindu v. Prudential Property Management*, 2014 ONSC 4759, at para. 13. Here the Commitment Letter specifically states that even if there is no advance, the Commitment Fee is payable on the expiry of the commitment. In my view the language of the Commitment Letter is clear and unambiguous.

[34] The defendants argue that the Commitment Fee is not payable because the plaintiff breached the Commitment Letter.

[35] The primary factual issue in dispute is which party terminated the Loan agreement. Clifton Blake states that on October 21, 2022, it received an email from 109 Canada's lawyer Dong Lui stating that her client is not prepared to continue with the agreement. The defendants state that Dong Liu was not 109 Canada's lawyer at the time she sent her email, and that she was not authorized to cancel the transaction. The defendants also state that a few days before the closing of the Loan transaction, James Liu was advised that Clifton Blake could not advance the funds for the purchase of the Additional Properties before those transactions were scheduled to close on October 31, 2022.

[36] Clifton Blake filed the affidavit of Mr. Jiwani affirmed on March 28, 2023. Mr. Jiwani is the vice president of commercial mortgage investments at Clifton Blake and has firsthand knowledge of the matters in issue. He was not cross-examined on his affidavit.

[37] Mr. Jiwani deposed that on October 21, 2022, at 1:29 pm, Dong Liu emailed Clifton Blake's real estate lawyer and stated that her client was not prepared to continue with the transaction. On October 24, 2022, Ms. Jonathan wrote to James Liu and advised that on October 21, 2022, Dong Liu had sent the email stating that her client would not continue with the deal. According to James Liu, he was surprised by the content of the letter. However, he did not immediately advise Ms. Jonathan that Dong Liu was not acting for 109 Canada at the time she sent the email or that she was not authorized to state that her client would not continue with the deal.

[38] There is no dispute that Dong Liu sent that email on October 21, 2022. However, James Liu states that at the time the email was sent, Dong Liu was not acting for the defendants and was not authorized to send the email.

[39] I do not find James Liu's evidence in this regard to be credible. Dong Liu is identified on the Commitment Letter as the lawyer for the borrower. Dong Liu was sending emails with respect to the transaction on October 19, 2022. Her email advising that 109 Canada would not continue with the transaction was in response to Clifton Blake's lawyer's question about how James Liu wanted to take title on the Additional Properties. There is no written documentation produced by the defendants to support their position that Dong Liu was not 109 Canada's lawyer at the time the email was sent. There is no evidence from Dong Liu filed by the defendants on the motion to address when she may have stopped acting for 109 Canada or whether she was authorized to advise that 109 Canada would not be proceeding with the transaction.

[40] Mr Jiwani also deposed in his affidavit that Clifton Blake was at all times ready, willing, and able to close the Loan transaction provided that the pre-conditions in the Commitment Letter were satisfied, including the discharge of the Liens.

[41] The defendants state that before the closing of the Loan, Clifton Blake advised that it was unable to advance the funds in time to close the purchase of the Additional Properties. In cross-examination, James Liu testified that his communications with Mr. Jiwani were by phone. James Liu confirmed that there is nothing in writing from Clifton Blake stating that it cannot advance funds in time to finance the purchase of the Additional Properties.

[42] James Liu testified that after he was told by Clifton Blake that it could not advance the funds, he had to extend the closing for the purchase of the Additional Properties. The agreement of purchase and sale that relates to 624 Parkview indicates that on October 22, 2022, the closing date was changed from October 31 to November 21, 2022. On cross examination James Liu confirmed that he signed the agreement to extend the closing date on October 22, 2022. This was one day after Dong Liu sent the email to counsel for Clifton Blake advising that the defendants did not intend to continue with the transaction. James Liu signed the agreement to extend the closing several days before he said that he was advised that Clifton Blake could not advance the funds.

[43] I conclude that Clifton Blake did not advise the defendants that it was not prepared to proceed with the transaction. There is no evidence in writing to substantiate the defendants' claim that Clifton Blake was unable to complete the transaction. Mr. Jiwani deposed that Clifton Blake was ready to proceed with the transaction. He was not cross-examined on his affidavit. The first time the defendants took the position that the Commitment Fee was not owing because Clifton Blake could not advance the funds was in the Statement of Defence that was delivered on January 20, 2023.

[44] The contemporaneous documentary evidence is consistent with Mr. Jiwani's evidence that Clifton Blake was willing and able to advance the funds. On October 21, 2022, counsel for the parties were exchanging emails with respect to the discharge of the liens. The discharge of the liens was a precondition to the Loan. There is no suggestion in those emails that Clifton Blake was not able to advance the funds.

[45] The text messages exchanged between James Liu and Mr. Jiwani on October 26-28, 2022, are also not consistent with Clifton Blake not being able to advance the funds. The text messages from Mr. Jiwani do not suggest that Clifton Blake was unable to advance the funds. Instead, the text messages ask whether James Liu still wanted to do the mortgage. Presumably if Clifton Blake was unable to advance the funds, it would not have asked whether James Liu wanted to continue the transaction.

[46] James Liu's conduct after receiving the demand letter is also not consistent with Clifton Blake breaching the Commitment Letter. In his affidavit James Liu deposes that after closing on the Additional Properties he thought he had enough money to pay the Commitment Fee with respect to the Property. If Clifton Blake had breached the Commitment Letter, it is inconsistent with common sense that James Liu would be trying to pay the Commitment Fee. James Liu deposed that a person at Clifton Blake told him to pay as much as he could towards the Commitment Fee. There is nothing in writing to support James Liu's evidence in this regard.

[47] On the evidence before me, I am satisfied that the Loan transaction was cancelled by the defendants' lawyer Dong Liu on October 21, 2022. Dong Lui was identified as the borrower's lawyer in the Commitment Letter and had sent an email with respect to the removal of the liens on October 19, 2022. There is no documentary evidence that supports the defendants' position that Dong Liu was not the defendants' lawyer at the time the email was sent on October 21, 2022, or that she was not authorized to make this statement. I am also satisfied that Clifton Blake did not breach the Commitment Letter and was ready, willing, and able to close the Loan transaction.

[48] I find that Clifton Blake is entitled to judgment for payment of the Commitment Fee.

[49] The plaintiff did not seek judgment on the counterclaim. The defendants state that judgment in the main action will result in partial summary judgment because the counterclaim will continue. I am satisfied that my finding that Clifton Blake did not breach the Commitment Letter disposes of the counterclaim. In the counterclaim, the defendants state that they are entitled to damages related to obtaining new financing because of the anticipatory breach of contract by the plaintiff. I find that the plaintiff did not breach the agreement and was ready, willing, and able to close the transaction. I dismiss the counterclaim.

Issue # 3 – Who is liable for payment of the commitment fee?

[50] The Commitment Letter was between Clifton Blake and 109 Canada. Schedule A to the Commitment Letter provides that the Commitment Fee is deemed to be fully earned upon acceptance of the commitment. The Commitment Letter also provides that the Commitment Fee is payable the earlier of the date of the advance and the expiry of the commitment. The commitment expired on October 31, 2022. The advance was not issued and therefore the Commitment Fee was due on October 31, 2022.

[51] I am of the view that the terms of the Commitment Letter are unambiguous. Once 109 Canada signed the Commitment Letter it was liable for the payment of the Commitment Fee. The Commitment Fee was payable regardless of whether any portion of the Loan was advanced. I find 109 Canada is liable to pay the Commitment Fee of \$164,000 to Clifton Blake.

[52] In their oral argument, the defendants focused on whether the guarantors are also responsible for the payment of the Commitment Fee. The Commitment Letter describes the guarantors as follows:

- GUARANTORS: The unlimited personal guarantee of Jiang Liu, and the unlimited corporate guarantee of FES Property Management Inc., FES Capital Inc., and Financial Eastern Star Inc., on a joint and several basis, throughout the Term of the Loan (collectively the “Guarantors”)

[53] The defendants argue that the guarantors agreed to guarantee the Loan if it was later advanced but did not guarantee payment of the Commitment Fee.

[54] The defendants rely on *Business Development Bank of Canada v. E & B Construction Ltd.*, 1999 CanLII 6338 (BC SC). In that case, the plaintiff entered into a loan agreement with E & B Construction. The agreement provided that if after acceptance of the loan the borrower cancels the loan or does not provide satisfactory documentation or does not draw upon the loan, the borrower will have to pay a commitment fee of \$17,350. E & B did not sign the security documentation and the loan was not advanced. The Bank sought payment of the commitment fee against E & B and the personal guarantors, Penner and Hauff. E & B did not defend the action. Penner and Hauff argued that they had agreed in principle to guarantee E & B’s obligations to the bank if, and when, the loan was completed. The court found that Penner and Hauff gave a conditional offer of a guarantee should the proposed loan proceed. The loan was not made to E & B and therefore the

condition precedent to its enforceability was not fulfilled. The action was dismissed as against Penner and Hauff.

[55] The defendants argue that as in the *E & B Construction* case, the personal and corporate guarantors provided a conditional offer to guarantee the Loan but did not provide a guarantee with respect to the Commitment Fee. They argue that the Loan was not advanced and therefore the guarantors did not become liable.

[56] The Commitment Letter provides that the guarantee of James Liu and the corporate defendants is on a joint and several basis, “throughout the Term of the Loan”. The Term of the Loan is defined in the Commitment Letter as 19 months. The Loan was not advanced and therefore the Term of the Loan did not begin to run.

[57] It is my view that because the Loan was not advanced, the personal and corporate guarantees did not become effective. The Commitment Letter provides that the personal and corporate guarantees applied “throughout the Term of the Loan”. The Commitment Letter does not provide that the guarantors are liable for the obligations of 109 Canada before the Term of the Loan commences. There was no Loan, and therefore the guarantors’ obligations did not begin to run. I dismiss the action as against the guarantors.

Issue # 4 – What are the Damages?

[58] The Commitment Letter provides that the Commitment Fee is \$164,000.

[59] In the Statement of Defence and Counterclaim, the defendants state that the Commitment Fee is a penalty and not a genuine pre-estimate of the damages that would be suffered by the plaintiff if the commitment did not result in the expected transaction. This argument was not advanced by the defendants on the summary judgment motion either in their factum or in oral argument.

[60] I find that the defendants did not satisfy their onus of establishing that the Commitment Fee is a penalty. I am satisfied that the Commitment Fee in the amount of \$164,000 is payable to the plaintiff.

[61] 109 Canada paid two separate deposits of \$20,000 each to Clifton Blake. The first deposit was paid at the time the Commitment Letter was entered into. The second deposit was paid on November 9, 2022, when Clifton Blake was considering reviving the loan. The Commitment Letter provides that the Deposit less any expenses incurred during the due diligence process shall be applied to the Commitment Fee. Clifton Blake submits that it incurred expenses in the amount of approximately \$40,000 and therefore 109 Canada is not entitled to a credit towards the Commitment Fee.

[62] Mr. Jiwani in his affidavit deposes that Clifton Blake had incurred expenses of \$38,458.03. The expenses related to travel from Toronto to Ottawa to conduct the site visit, an insurance review, a property appraisal, a planning review, and legal fees. Mr. Jiwani attached supporting invoices to his affidavit. Mr. Jiwani was not cross-examined on his affidavit with

respect to the expenses. The defendants did not take issue with the amount of the expenses in either their written or oral submissions on the summary judgment motion.

[63] The two deposits made by 109 Canada totaled \$40,000. According to the affidavit of Mr. Jiwani, the total expenses were \$38,458.03. I find that 109 Canada is entitled to a credit of \$1,541.97. This leaves a balance owing for the Commitment Fee in the amount of \$162,458.03.

[64] Pursuant to the Commitment Letter, the Commitment Fee was due and payable on October 31, 2022. Clifton Blake is entitled to pre-judgment interest on the sum of \$162,458.03 from October 31, 2022, to the date of judgment.

DISPOSITION

[65] For the reasons set out above, I grant judgment in favour of Clifton Blake against 109 Canada in the amount of \$162,458.03. Pre-judgment interest is payable on this amount from October 31, 2022.

[66] I dismiss the action against the guarantors.

[67] I dismiss the counterclaim.

[68] The plaintiff is successful on this summary judgment motion and is presumptively entitled to its costs. If the parties are unable to come to an agreement on costs, the issue will be determined in writing. The plaintiff may deliver its costs submissions of no more than 3 pages, excluding offers to settle and caselaw, within 15 days of the date of this endorsement. The defendants may deliver their responding costs submissions on the same basis within 15 days of receiving the plaintiff's submissions.

Chalmers J.

Date: June 28, 2024