

**CITATION:** The Bank of Nova Scotia v. Rosario Rosado, 2024 ONSC 4395  
**NEWMARKET COURT FILE NO.:** CV-23-805-00  
**DATE:** 20240808

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
THE BANK OF NOVA SCOTIA	)	Corra Madden, for the Plaintiff
	)	
	)	Plaintiff
	)	
<b>– and –</b>	)	
	)	
CARLOS MANUEL ROSARIO ROSADO	)	No one appearing, for the Defendant
also known as CARLOS-MANUEL	)	
ROSARIO-ROSADO	)	
	)	
	)	Defendant
	)	
	)	
	)	<b>HEARD:</b> July 31, 2024

2024 ONSC 4395 (CanLII)

**REASONS FOR DECISION**

**CHARNEY J.:**

- [1] The Plaintiff, the Bank of Nova Scotia (the "Bank"), brings this Motion on Notice to the Defendant for default judgment against the Defendant, Carlos Manuel Rosario Rosado.
- [2] The Plaintiff seeks judgment for \$350,000 plus interest for money loaned to the Defendant, and \$200,000 for punitive damages for the fraud committed by the Defendant.

**Facts**

- [3] In March 2022, the Bank advanced a professional student line of credit in the sum of \$350,000.00 to the Defendant. This line of credit is only available to students pursuing a professional designation in qualifying professional study programs.
- [4] In support of his credit line application, the Defendant represented to the Bank that he was enrolled in a Doctor of Dental Surgery program at the University of Toronto, Faculty of Dentistry, and provided certain back-up documentation to that effect. This was all a fraud.

The Defendant's representations and documentation he provided to the Bank in support of the financing were false.

- [5] The Bank therefore brought this action by Statement of Claim issued February 24, 2023 against the Defendant for liquidated damages and fraud seeking, among other relief, repayment of the credit line, an accounting and tracing order in connection with the fraudulently obtained credit line proceeds, applicable interest, punitive damages, a declaration that the debt arises from fraudulent misrepresentations and false pretences (within the meanings of s. 178 of the *Bankruptcy and Insolvency Act*), and costs on a full indemnity basis.
- [6] Following issuance, the Bank was unable to effect personal service of the Claim. The Bank brought a motion for substituted service of the Claim, which was granted on April 24, 2023. On August 18, 2023, the Defendant was served with the Claim in accordance with the Order.
- [7] The Defendant failed to file a Statement of Defence, and on September 27, 2023, the Bank noted him in default.
- [8] Pursuant to rule 19.02(1)(a) of the *Rules of Civil Procedure*, a defendant who is noted in default is deemed to admit the truth of all allegations made in the claim. Plaintiff's pleading of law or mixed fact and law are not binding on the court as admissions: *Nikore v. Jarmain Investment Management Inc.* (2009), 97 O.R. (3d) 132, [2009] O.J. No. 3717, 2009 CanLII 46655 (S.C.J.), at para. 19; *Churchill v. Aero Auction Sales Inc.*, 2019 ONSC 4766, at para. 14.
- [9] Accordingly, the following allegations of fact from the Statement of Claim are deemed to be true:
- (a) The Plaintiff is a Canadian chartered bank incorporated pursuant to the provisions of the *Bank Act* and carries on business, inter alia, in Toronto, Ontario.
  - (b) Pursuant to a Scotia Professional Student Plan (SPSP) Line of Credit - Credit Agreement dated March 3, 2022 (the "Credit Agreement") the Bank authorized credit facility in favour of the Defendant limited to the amount of \$350,000.00 plus interest to accrue on any amounts drawn at the Prime Rate minus 0.25% per annum (the "Credit Line").
  - (c) In or about January 2023, the Defendant was in default of his obligations and covenants to the Bank under the Credit Line. As of December 29, 2022, The Defendant was indebted to the Bank in the sum of \$355,357.41 with respect to the Credit Line, inclusive of principal and interest.

- (d) By letter dated January 4, 2023, the Bank, through its lawyers, made demands upon the Defendant for repayment of the entire amount outstanding on the Credit Line.
- (e) Despite the demands having expired, the Defendant has failed or refused to pay any amounts to the Bank and interest continues to accrue at the applicable rates.
- (f) Pursuant to the Credit Agreement, the Defendant is liable to the Bank for pre- and post-judgment interest on principal and costs, as applicable, at the rates set out in the agreement.
- (g) As part of the application process for the Credit Line, to secure financing from the Bank, the Defendant produced the following documentation to the Bank, which made certain express or implied representations to the Bank as particularized below:
  - i. A Scotia Professional Student Plan Application executed by the Defendant on or about February 18, 2022, wherein the Defendant represented that he was in a 4-year Doctor of Dental Surgery program at the University of Toronto, Faculty of Dentistry;
  - ii. A letter dated June 21, 2021 from Samantha Freeman-Attwood, Faculty Registrar at the University of Toronto, Faculty of Dentistry, representing that the Defendant had been offered a position in the Doctor of Dental Surgery (DDS) program at the Faculty of Dentistry, University of Toronto, for the upcoming 2021-2022 academic year; and
  - iii. A Confirmation of Enrolment letter dated February 16, 2022 and signed by Richard Levin, University Registrar, representing that the Defendant is registered for the Fall-Winter 2021-2022 session in the Faculty of Dentistry at the University of Toronto.
- (h) At all material times, the Application Documents were forgeries or falsified, and the Representations were false. The Defendant made the Representations, and produced the Application Documents to the Bank, knowing that they were false, with the intention that the Bank would rely on the Representations and Application Documents in advancing the Credit Line.
- (i) The Bank relied on the Representations and the Application Documents, which caused the Bank to suffer losses and damages, including for the amounts owing for the Credit Line, the expenses arising from the default and subsequent investigation of the Defendant.

- [10] Rule 19.05(2) provides that a motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages. In this case, the Plaintiff seeks punitive damages and other costs. Accordingly, the facts deemed to be true from the Statement of Claim have been supplemented by an affidavit sworn by the law clerk who contacted the University of Toronto, Faculty of Dentistry (the “Faculty”), to inquire into the Defendant’s status as a student at the Faculty.
- [11] The information from the Faculty set out in this affidavit, and the documents appended thereto, confirm that the Defendant was not listed in the directory of the Faculty as either a current or former student. While the Defendant had applied to the Faculty, he had not been accepted. The Faculty Admissions Office also examined the Faculty documents relied on by the Defendant and confirmed in correspondence with the law clerk that these documents were fraudulent.
- [12] The Plaintiff has also provided the affidavit of a Bank officer attaching a payout statement of the Credit Line as of January 4, 2024, showing that the Defendant remains indebted to the Bank in the amount of \$378,118.60 inclusive of principal and interest.

### **Default Judgment**

- [13] Rule 19.06 provides that a plaintiff is not entitled to judgment on a motion for judgment merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment. In other words, the deemed admissions of fact, together with any facts adduced at the hearing, must entitle the plaintiff to judgment on the claim as a matter of law. To the extent that the plaintiff claims unliquidated damages, the court must be persuaded, based on the deemed admissions and other evidence adduced, that the quantum of damages claimed is fair and appropriate in the circumstances.
- [14] In *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, Brown J., as he then was, summarized the issues to be addressed on a motion for default judgment, at para. 14:

Accordingly, on a motion for default judgment the inquiry undertaken by the court is the following:

- (i) What deemed admissions of fact flow from the facts pleaded in the Statement of Claim?
- (ii) Do those deemed admissions of fact entitle the plaintiffs, as a matter of law, to judgment on the claim?
- (iii) If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitles it to judgment on the pleaded claim?

[15] In this case, the deemed admissions of fact from the Statement of Claim, together with the affidavits filed in support of the motion for default judgment, are sufficient to support judgment in favour of the Bank.

### **Finding of Fraud**

[16] A plaintiff asserting a claim for fraud must prove the following elements on a balance of probabilities: (i) a false representation made by the defendant; (ii) some level of knowledge of the falsehood of the representation (whether through knowledge or recklessness); (iii) that the false representation caused the plaintiff to act; and (iv) that the plaintiff suffered a loss: *Bank of Montreal v. 1886758 Ontario Inc.*, 2022 ONSC 4642, at para. 33.

[17] The deemed admissions in the Statement of Claim together with the affidavit evidence demonstrates each of these elements. The Bank relied on the fraudulent Application Documents and the Representations in advancing the Credit Line. The Defendant used the Credit Line via a series of cash advances over a four month period following the opening of the account, and has failed to repay the money that was loaned to him.

[18] I am satisfied that the Bank is entitled not only to default judgment but also to findings that the Defendant induced the Bank to advance funds through fraudulent misrepresentation. Fraud is the only inference that I can draw from the numerous misrepresentations that the Bank has established.

### **Punitive Damages**

[19] The Bank seeks an award of punitive damages in the amount of \$200,000.00, on the basis that the Defendant's conduct was fraudulent, malicious, and premeditated.

[20] Punitive damages are an extraordinary remedy. The Supreme Court has held that they should receive "the most careful consideration" and their award "should be most cautiously exercised". Further, "conduct meriting punitive damages awards must be 'harsh, vindictive, reprehensible and malicious', as well as 'extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment'": *Honda Canada Inc. v. Keays*, 2008 SCC 39, at para. 68.

[21] In *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, the Court of Appeal stated, at para. 59:

Punitive damage awards are not compensatory. They are meant to punish the defendant in exceptional cases where the defendant's conduct has been "malicious, oppressive and high-handed" and "represents a marked departure from the ordinary standards of decent behaviour", see *Whiten*, at para. 36.

[22] A Court may award punitive damages on a motion for a default judgment: *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416, *Bank of Montreal*, para. 34.

[23] Punitive damages are awarded only where compensatory damages are insufficient to deter the conduct at issue.

[24] Applying these principles to the case at bar, the Bank's entitlement to punitive damages appears well justified. The fraud perpetrated against the Bank meets the standard of "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour". Additionally, it is hard to see how simply returning the funds fraudulently acquired would be sufficient, particularly with the goal of deterrence in mind.

[25] In *Bank of Montreal*, Perell J. summarized the factors to be taken into account in an assessment of punitive damages, at para. 36:

[A]n assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives of retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish their purposes.

[26] In *Gennett Lumber Co. v. John Doe*, 2019 ONSC 1345, Sossin J. (as he then was) found that the sum of \$100,000 was justified in a case in which the defendant defrauded the plaintiff of almost \$170,000. He stated, at para. 54:

With adjustments for the difference in currency, this award of punitive damages is roughly 50 per cent of the actual losses suffered by Gennett, which reflects the governing rule of proportionality. An award of punitive damages that is equal to or higher than the actual losses suffered by Gennett would not be rational given the criminal sentence already imposed on Aremu and the absence of vulnerability on the part of Gennett in this case. At the same time, an award of punitive damages that is a minor fraction of the actual losses of Gennett, or could be factored in as a modest risk in participating in an organized fraud, would not reflect sufficiently the goals of retribution, denunciation and deterrence in this context.

[27] A similar percentage was awarded in the case of *Bank of Nova Scotia v. Anirudh Kumar*, an unreported decision of Koehnen J. (October 27, 2022, CV-22-00682274-0000 (unreported)). The facts of that case are very similar to this action. In that case, the defendant fraudulently misrepresented to the Bank that he was a medical student enrolled as a resident cardiologist to induce the Bank to extend to him a Student Plan credit facility. Koehnen J. awarded the

Bank punitive damages in the amount of \$200,000, in addition to liquidated damages of \$340,395. He concluded that “the \$200,000 award sought by the bank amounts to approximately 57% of the balance owing on the loan and falls well within the range of punitive damages that other cases have established”.

- [28] Based on these decisions, I am satisfied that \$200,000 is the appropriate and proportionate award of punitive damages in the present case.

### **Tracing Order**

- [29] Courts may impress a constructive trust over fraudulently obtained funds, and issue tracing and accounting orders, in cases such as this, to assist in recovery efforts: *Bank of Montreal*, at para. 40 and cases cited therein. Tracing orders are appropriate in cases where the moneys were fraudulently procured, and the Bank is not able to trace what happened to the loan funds.
- [30] The Bank on this motion only seeks an accounting order and an order preserving its right to elect between a constructive trust/proprietary right and damages. This position is based on the decision of Sanderson J. in *Bank of Montreal v. 1870769 Ontario Inc.*, 2022 ONSC 5100, where the Court held, at para. 150, that the Bank’s inability to identify loan proceeds and link any specific property to the loan proceeds precluded a declaration of a constructive trust. The Court noted, at para. 151, that this might change “if the exercise of “tracing” uncovers and identifies loan proceeds and links them to property over which a constructive trust could be declared.” The Court explained, at paras. 152 – 154:

If by ‘tracing’ the Bank is able to identify such property, it may then call upon the Court to exercise its discretion to declare a Constructive Trust over such Property.

As the Supreme Court of Canada explained in paragraph 45 of *Soulos* the Court must then ensure that there are no other factors that would make the imposition of a Constructive Trust unjust. The Court specifically mentioned consideration of other creditors.

- [31] In the present case, the Bank has been unable to trace where the proceeds of the Credit Line went, or whether the proceeds were used to purchase assets. The Bank therefore seeks an accounting order to obtain further information about how the Defendant used the misappropriated funds, and an order preserving the Bank’s right to elect between a constructive trust/proprietary right and damages after gathering the requisite information via the accounting order.

### **Declaration that the Debt Arises due to Fraud**

- [32] Finally, the Bank seeks a declaration that the Defendant's debt and liability herein results from obtaining property or services by false pretences or fraudulent misrepresentations.
- [33] The Bank seeks this declaration because of s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A discharge from bankruptcy releases the insolvent debtor from pre-bankruptcy debts or liabilities, subject to certain exceptions. One exception is s. 178(1)(e), which excepts "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation". That kind of debt or liability is not released, and thus remains enforceable against the debtor post-bankruptcy: *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925, at para. 1.
- [34] The Plaintiff notes that there are divided Superior Court authorities in Ontario on whether, and to what extent, the Court can grant a declaration under s. 178 of the *BIA*, in cases such as this, prior to the defendant making an actual assignment in bankruptcy.
- [35] In one line of cases, the Courts have granted a declaration that the debt survives a bankruptcy discharge under s. 178, prior to the defendant making any bankruptcy assignment: *Sunwell Investments v. Cheung*, 2013 ONSC 483; *University Plumbing v. Solstice Two Limited*, 2019 ONSC 2242.
- [36] In a second line of cases, Courts have declined to grant a declaration that the debt will survive a bankruptcy discharge, but are willing to declare that a debt results from "fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity" or "from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim", parroting the exact language of s. 178(1)(d) and (e) of the *BIA*: *Bank of Montreal v. 1886758 Ontario Inc.*, 2022 ONSC 4642, at para. 45; *784773 Ontario Limited v. Larkin*, 2021 ONSC 1608, at para. 22; *B2B Bank v. Batson*, 2014 ONSC 6105, at paras. 12 -13 and 19; *National Bank of Canada v. Pahuja*, 2024 ONSC 736.
- [37] In a third line of cases, Courts declined to make any positive finding or declaration characterizing the debt as fraud, although these decisions appear to be premised on the fact that the pleadings did not expressly allege fraud or that a finding of fraud was not necessary to dispose of the default judgment motion: *Royal Bank of Canada v. Elsioufi*, 2016 ONSC 5257; *Bank of Montreal v. Mathivannan*, 2021 ONSC 2538.
- [38] My approach is closest to the second line of cases, although I am not comfortable describing my finding as a "declaration".
- [39] In the case before me, I have found that the Plaintiff has proven each of the four elements of fraud and I have made a finding that the Defendant obtained the subject loan through fraudulent misrepresentation (see paras. 16 - 18 above). Those findings were directly relevant to the Bank's claim for punitive damages.



[40] I am not issuing a declaration, which is, by definition, “a statement confirming the existence of a legal right” (see the discussion of declarations in *B2B Bank* at paras. 10 – 17). I have made a finding of fraudulent misrepresentation based on the evidence before me. Should the application of s. 178(1)(e) of the *BIA* arise in some future proceeding, the Court may rely on that finding to the extent that the Court considers it appropriate in determining the legal rights of the parties under that section.

### **Costs**

[41] The Plaintiff seeks costs on a full (\$15,290) or substantial indemnity (\$13,094) basis.

[42] Substantial indemnity costs are available where a party has engaged in reprehensible conduct. The Defendant’s fraudulent conduct in this case amounts to reprehensible conduct. The substantial indemnity costs requested appear reasonable considering the time required to investigate the fraud, prepare the affidavit material, and the very helpful factum filed by the Plaintiff. Costs are fixed at \$13,094, payable by the Defendant to the Plaintiff, forthwith.

### **Disposition**

[43] This Court Orders:

- a. Payment of the sum of \$355,357.41, plus pre- and post-judgment interest at the Bank’s prime rate of interest in effect from time to time minus 0.25% per annum;
- b. Punitive damages in the amount of \$200,000.00;
- c. Substantial indemnity costs fixed at \$13,094, payable by the Defendant to the Plaintiff forthwith;
- d. A mandatory Order that the Defendant deliver forthwith an accounting of all monies received from the Bank (the “Proceeds”), and the accounting shall include particulars as to how and where the money obtained from the Bank was expended,
- e. An Order for disgorgement of such funds and profits earned thereby;
- f. An Order that the Bank may, in each instance, elect in whole or in part between (i) the imposition of a constructive trust and/or equitable lien, and (ii) damages.

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Justice R.E. Charney

**Released:** August 8, 2024

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**BETWEEN:**

THE BANK OF NOVA SCOTIA

Plaintiff

– and –

CARLOS MANUEL ROSARIO ROSADO also known  
as CARLOS-MANUEL ROSARIO-ROSADO

Defendant

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**REASONS FOR DECISION**

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Justice R.E. Charney

**Released:** August 8, 2024