

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
THE TORONTO-DOMINION BANK)
) Natalie Marconi, for the Plaintiff
Plaintiff)
)
– and –)
)
CELLULAR TRANSPORT INC. and) Deborah A. Corcoran, for the Defendant
HELEN MARIE MACNEILL) MacNeill
)
Defendants)
)
)
)
) **HEARD:** May 24, 2024

2024 ONSC 4609 (CanLII)

TRANQUILLI J.

- [1] The bank moves for summary judgment against the guarantor of a loan made to the defendant corporation under a small business line of credit in the amount of \$54,908.06 including interest. The corporate defendant is in default and judgment issued.
- [2] The principal of the corporate defendant is the former spouse of the guarantor. By terms of a 2017 Separation Agreement, the defendant guarantor transferred her shares in the defendant corporation to her former spouse and resigned from the corporation as an officer. Her spouse was to indemnify and hold her harmless her from any liability in respect of her former involvement in the corporation. Unfortunately, the corporation since defaulted on the loan and the defendant remains noted as guarantor, notwithstanding the Separation Agreement.
- [3] At issue is whether this simplified procedure action is an “exceptional” case such that summary judgment is appropriate.
- [4] The defendant corporation obtained the line of credit from the plaintiff in the sum of \$60,000 in 2004. The defendant MacNeill signed a small business guarantee in August 2024. In her statement of defence, Ms. MacNeill pleads that she had no knowledge of the guarantee. In the alternative, she pleads that if she guaranteed the loan, it would have been during the time in which she was a shareholder, officer, and employee of the company.

She has ceased to be a shareholder, officer, and employee of the defendant corporation since November 2017 and pleads she is no longer responsible for the debts of the company.

- [5] In her affidavit responding to this motion, she claims that the plaintiff asked her to sign papers in 2004 but that she does not recall signing the Small Business Guarantee in issue. She would have been focused on caring for her three young children at the time. Apart from being formally noted as a shareholder, officer, and employee, she was not actively involved in the company. Her former spouse was controlling and made decisions without her input. She felt obligated to sign any papers he required, including the Small Business Guarantee, to keep the family together. She claims that she signed the guarantee due to undue influence. She also submits that Toronto-Dominion Bank should not have let her guarantee a loan when it knew the company was not making a profit.
- [6] She claims her former spouse has now filed for bankruptcy, has not remained in contact, and has left her “holding the bag” for this corporate debt, notwithstanding the Separation Agreement. This will result in financial hardship for her and her children, particularly her disabled dependent daughter, as it could mean they will lose their home.
- [7] I recognize that caution is to be used when considering summary judgment in the context of a simplified procedure action. Discovery is restricted and cross-examination on affidavits are not permitted: *Manthadi v. ASCO Manufacturing*, 2020 ONCA 485. To that end, there has not been any examination for discovery.
- [8] It is also troubling that the defendant’s former spouse has not fulfilled his obligation to assume all responsibility for the corporation in exchange for the defendant’s transfer of her shares in 2017. The defendant would appear to rightfully have a claim for indemnity by her former spouse pursuant to the terms of the Separation Agreement and consistent with the mutual expectation at the time of separation that Ms. MacNeill had ended all involvement in the corporation. If he has, in fact, filed for bankruptcy the court trusts she has filed a proof of claim.
- [9] However, after some anxious consideration, I am satisfied that this motion for summary judgment for collection of a liquidated debt leads to a fair process and just adjudication. Summary judgment is accordingly granted on the guarantee in the amount of \$54,908.06.
- [10] I reach this conclusion for the following reasons:
- a. Notwithstanding the defendant’s equivocation regarding the circumstances of the guarantee, there are no material facts in dispute. At most, the defendant submits she has no recollection of signing the guarantee, which is not surprising. However, she does not deny that it is her signature on the personal guarantee dated August 31, 2004. She does not claim that her signature was forged.
 - b. While the bank cannot locate a copy of the loan agreement itself, there is no evidence that challenges the bank’s sworn evidence that such a small business loan

was made to the corporation in August 2004. Other banking documentation demonstrates the corporation made regular use of a line of credit.

- c. The defendant was more than simply the spouse of the principal of the corporation when she guaranteed the corporate loan. She was not a stranger to the corporation. She was an equal shareholder, officer, and employee at the time that she signed as guarantor. Although she may not have been actively involved in the business, she nevertheless received a direct benefit from the loan. Independent legal advice is not required for a guarantor who is a direct beneficiary from a loan transaction: *Trez Capital Limited Partnership v. Ontario International College Inc.*, 2018 ONSC 4978 at para. 46.
- d. She suggests the plaintiff had an obligation to intervene and not allow her to sign the guarantee when the corporation was not making a profit. Again, since she was a direct beneficiary of the loan, the bank was not obliged to require that she receive independent legal advice. In any event, she does not provide any evidence in support of this bald assertion regarding the financial state of the company. Banking records filed by the plaintiff indicate that Cellular Transport had been making payments on the line of credit. The 2017 Separation Agreement assumes projected annual income of \$110,000 to the defendant's former spouse and refers to assets in the range of \$350,000.
- e. While the defendant raises the argument of undue influence, her evidence does not rise to the level of an inability to exercise her free will or that she acted without regard for the consequences. She did not expressly raise the defence of *non est factum*, but submissions were made at some length in oral argument. Again, the evidence does not suggest she either did not understand the nature of the guarantee or that she signed it as a result of a misrepresentation. *Non est factum* would be available if the person who signed the document in such circumstances was not careless: *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774 at 787. She allows that would have signed the guarantee for the sake of the family and in order to keep the peace. In my view, this would amount to "carelessness" within the meaning of *non est factum*. It was entirely within her power to seek independent legal advice or to seek more information from the bank. The evidence also falls short of suggesting the bank ought to have been on notice of the defendant's vulnerability and make inquiries of her understanding of the guarantee. In the absence of any evidence of undue influence, fraud or misrepresentation or any evidence supporting a defence of *non est factum*, the failure of a bank to ensure that the spouse obtained independent legal advice may not be fatal to the bank's claim: *Bank of Montreal v. Featherstone*, 1989 CanLII 4218 (ON CA).

Disposition

- [11] Judgment therefore issues against the defendant Helen Marie MacNeill for payment of the sum of \$54,908.06 plus prejudgment interest on the aforesaid sum from December 27, 2023 to date of payment or judgment at the rate of the plaintiff's prime rate plus 3 per cent

pursuant to the terms of the loan and post-judgment interest at the rate of the plaintiff's prime rate plus 3 per cent pursuant to the terms of the loan. The draft judgment has been signed accordingly, amended to the date of this judgment.

- [12] The court has the plaintiff's costs outline. If the parties are unable to resolve costs, the plaintiff shall submit supplementary written submissions, if any, by September 16, 2024, and the defendant her written submissions by September 26, 2024. Written submissions are limited to two pages, excluding any offers to settle.

Justice K. Tranquilli

Released: August 20, 2024

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TORONTO-DOMINION BANK

Plaintiff

– and –

CELLULAR TRANSPORT INC. and HELEN MARIE
MACNEILL

Defendants

REASONS ON SUMMARY JUDGMENT

Justice K. Tranquilli

Released: August 20, 2024