CITATION: FactR Limited v. R.R.I.C.H. Construction, 2024 ONSC 4792
COURT FILE NO.: CV-23-00694305-0000
DATE: 20240829

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
FACTR LIMITED and CONSTRUCTR LIMITED	)	Eric Brousseau and Daniel Milton, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	Allan D. Weiss and Cody Miller, for the Defendant Bank of Nova Scotia
R.R.I.C.H. CONSTRUCTION & MANAGEMENT INC., 85242 NEWFOUNDLAND & LABRADOR INC., MICHAEL MULLETT, ROMAN ARTEMOVYCH and BANK OF NOVA SCOTIA	)	
	)	
Defendants	)	
	)	**HEARD:** August 29, 2024

PAPAGEORGIOU J.

Overview

[1] The Plaintiffs, FactR Limited ("FactR") and Constructr Limited ("Constructr") are factoring companies.

[2] The Plaintiffs brought a motion for summary judgment as against the defendants R.R.I.C.H. Construction & Management Inc. 85242 Newfoundland & Labrador Inc. (the "Contract Defendants") and Michael Mullet (the "Guarantor"), seeking repayment of amounts they loaned pursuant to two invoice factoring agreements.

[3] They also sought judgment in the amount of $118,983.51 as against the defendant Roman Artemovych for his alleged role in converting a cheque that was payable to the Plaintiffs.

[4] None of the Contract Defendants, the Guarantor or Mr. Artemovych filed affidavits on this motion. They did not attend r. 39.03 examinations when summonsed. The Plaintiffs obtained Certificates of Non-Attendance. They are no longer represented by counsel and have not participated in this action for almost a year. They have not submitted any evidence that disputes that: a) the factoring agreements attested to by the Plaintiffs and their terms are valid, and b) the Contract Defendants owe the Plaintiffs the amount claimed.

[5] Additionally, by order dated May 6, 2024, the Contract Defendants', Guarantor's and Mr. Artemovych's lawyer obtained an order removing him from the record. In contravention of the order removing counsel, these defendants failed to appoint a new lawyer of record or serve a Notice of Intent to Act in Person or obtain an order under r. 15.01(2) granting leave to be represented by a person other than a lawyer within 30 days.

[6] As such, at the outset of this motion, in accordance with the Plaintiffs' request, I struck the Contract Defendants', the Guarantor's and Mr. Artemovych's Statements of Defence.

Decision

[7] For the reasons that follow I award the Plaintiffs judgment as requested.

Issues

- Issue 1: Is there a genuine issue for trial regarding the Plaintiffs' claims against the Contract Defendants and Guarantor?

- Issue 2: Is there a genuine issue for trial regarding FactR's claims against Mr. Artemovych with respect to Cheque No. 615.

Analysis

The summary judgment test

[8] In accordance with r. 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), the court shall grant summary judgment if:

> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[9] In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and a judge may exercise any of the following powers under r. 20.04(2.1): (1) weighing the evidence; (2) evaluating the credibility of a deponent; and (3) drawing any reasonable inference from the evidence.

[10] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49, explained:

> 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: (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.

[11] In order to defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party cannot rest solely on allegations in a pleading. Each side must "put their best foot forward" with respect to the existence or non-existence of material issues to be tried: *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, at para. 9. Furthermore, "a summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial": *Diao v. Zhao*, 2017 ONSC 5511, at para. 18.

Issue 1: Is there a genuine issue for trial regarding the Plaintiffs' claims against the Contract Defendants and the Guarantor?

[12] The Plaintiffs provided evidence that in 2021 and 2022, they entered into agreements (the "Agreements") with the Contract Defendants to use the Plaintiffs' factoring services. The defendant Michael Mullett personally guaranteed the agreements.

[13] The Contract Defendants also executed an Invoice Advance Agreement for each loan that set out the amount of the invoice, the advance rate and amount, the administration rate and fee, the factor rate and fee, the daily factor rate and fee, and the net amount of the payment being made to the defendant under the agreement.

[14] In traditional invoice factoring agreements, the factor purchases the account receivable from the client, which gives them the right to collect on that invoice directly from the client's customer. FactR and Constructr offer *recourse* factoring services. Recourse factoring is a type of invoice factoring where the factor does not purchase the accounts receivable outright. Rather, the factor lends funds based on the accounts receivable that are assigned to them by their clients. FactR and Constructr collect on those loans either by being repaid by their clients when the client's customers have paid off their invoices, or from the client's customers directly. In recourse factoring, the factor maintains the right to recover the funds they lend from the factor's client if the client's customer fails to pay the invoice amount in full.

[15] Section 8 of the Agreements provides that the Plaintiffs do not assume any risk of non-payment of invoices, and section 4 of the Invoice Advance Agreements provides that the Plaintiffs can recover any amounts failed to be repaid by the account receivable from the Contract Defendants.

[16] Between 2021 and 2022, the Plaintiffs loaned the Contract Defendants almost $2 million. The Contract Defendants paid off some of these loans but over time, they began falling behind in their payments.

[17] The Plaintiffs attempted to contact the Contract Defendants but they did not return the calls, missed meetings and claimed to be able to provide updates. When they did respond to inquiries, the Contract Defendants alleged that they were behind because their client had not paid the invoice.

[18] As of June 2, 2023, the Contract Defendants owed the Plaintiffs a total of $440,882.75 on account of all loans under the 2021 and 2022 Agreements. Each loan accrues daily interest at a rate between 0.05% and 0.1% under each Invoice Advance Agreement. This is not compounded. The total outstanding principal accrues at a rate of $349.56 per day.

[19] As of the date of this motion, the total outstanding amount, including interest, is $599,582.98:

Client (Invoice #)	**Invoice Amount**	**Amount Owing**	**Interest Owed**	**Daily Interest**
ZGEMI (No. 138)	$44,841.37	$44,841.37	$30,805.40	$44.84
SunRay (No. 139)	$49,658.44	$49,658.44	$36,102.39	$49.66
FPC (No. 72)	$149,499.00	$149,499.00	$104,201.26	$149.50
ZGEMI (No. 137)	$100,658.92	$48,711.30	$35,315.10	$48.71
Complete Building Systems (No. 63)	$106,846.02	$56,846.02	$43,602.70	$56.85
TOTAL	**$451,503.75**	**$349,556.13**	**$250,026.85**	**$349.56**

[20] There is no genuine issue which requires a trial and I award the Plaintiffs $599,582.98 as at today. This amount includes the prejudgment interest.

[21] I award post judgment interest in the amount of $349.56 per day which is the combined daily interest in respect of all of the loans that are outstanding pursuant to the contract rate.

Issue 2: Is there a genuine issue for trial regarding FactR's claims against Mr. Artemovych with respect to Cheque No. 615?

[22] After the Contract Defendants became delinquent in paying their accounts, the Plaintiffs conducted an investigation that revealed that Mr. Artemovych (who is a Director of both Contract Defendants) had converted a cheque that had been written to FactR.

[23] In that regard, FactR had loaned the defendant RRICH $149,499 on the basis of an Invoice No. 72 for FPC Constructors Inc. ("FPC").

[24] When FactR contacted FPC about the fact that it had not paid the Contract Defendants back, FPC advised that although the face value of Invoice No. 72 was $149,499, FPC was entitled to and did deduct the cost of materials from the invoice such that only $118,983 was due. Further, FPC believed that it had paid this amount directly to FactR by way of cheque no. 615 made out to FactR. It left the cheque in FPC's mailbox to be picked up by a representative of the defendant RRICH and was to be delivered to FactR. Someone did then pick up that cheque and added "/RRICH Construction" to the payee line. The cheque was then deposited into the defendant RRICH's Bank of Nova Scotia account. The Plaintiffs never received this payment.

[25] There are text communications between the defendant Mr. Mullet and the Plaintiffs' CEO Mr. Skinner where Mullet confirmed that Mr. Artemovych was confirmed to pick up the FPC cheque. There are also text messages between Mr. Artemovych and Mr. Skinner that occurred after the cheque had already been picked up from FPC. Mr. Skinner asks about the FPC cheque (that Mr. Mullet said Mr. Artemovych would be picking up) and Mr. Artemovych said that nothing useful had happened, FPC was still conducting inspections before it paid, and that FPC would tell him when to pick up the cheque. This could not have been true at this time, as FPC had already written the cheque and it had already been picked up and deposited into RRICH's account.

[26] Because his defence has been struck out, it is also deemed admitted that Mr. Artemovych received the FPC cheque written to FactR, endorsed it and deposited it into RRICH's bank account.

[27] Based upon the evidence from which I draw inferences as well as the deemed admissions, I am satisfied that Mr. Artemovych committed the tort of conversion which involves the wrongful interference with the goods of another, such as taking those goods in a manner inconsistent with the owner's right of possession. As set out in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, 1996 CanLII 149 at para 8, the drawer, the payee or the endorsee of a cheque can bring an action for conversion of a cheque if they prove that they were either in actual possession or entitled to immediate possession of the cheque.

[28] I am satisfied that FactR had a possessory interest in the cheque because it was made out to FactR, FactR was the intended recipient and no authorization was given by FactR or FPC for the cheque to be altered and then cashed by RRICH. Further, the cheque is identifiable and specific and based upon the admitted facts, Mr. Artemovych intentionally committed a wrongful act in respect of the cheque that was inconsistent with FactR's rights of possession.

[29] Thus, I award the Plaintiff $118,983 with pre and post judgment interest at the *Courts of Justice Act*. This amount with prejudgment interest as at today is $120,122.96.

Costs

[30] The Plaintiffs have asked for full costs as against the Contract Defendants and Guarantor in the amount of $90,040 on the basis of the Agreements which provide for full indemnity if the Plaintiffs have to undertake any additional costs including legal costs to recover outstanding amounts not paid back pursuant to the Agreements.

[31] The Plaintiffs have provided a Bill of Costs which I have reviewed and find fair and reasonable as to the hours and rates.

[32] In accordance with the Agreements, I award full indemnity costs as against the Contract Defendants and Guarantor.

[33] As against Mr. Artemovych the Plaintiffs seek substantial indemnity costs because of the fraud. The court has the discretion to award substantial indemnity costs, but such costs are "rare and exceptional" and only warranted where there has been reprehensible, scandalous or outrageous conduct on the part of a party: see *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601, at para. 5; *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (C.A.); and most recently *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, at para. 43.

[34] I do not award substantial indemnity costs as in my view this matter does not reach the high bar. I award partial indemnity costs as against Mr. Artemovych in the amount of $46,161.

Papageorgiou J.

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Plaintiffs

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Defendants

REASONS FOR JUDGMENT

Papageorgiou J.

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