CITATION: The Guarantee Company of North America v. Raeside, 2024 ONSC 4902
COURT FILE NO.: CV-23-31915
DATE: 20240905

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
The Guarantee Company of North America Plaintiff	Mr. Aaron Challis, for the Plaintiff
– and –	
Alan G. Raeside Defendant	Mr. Barton Seguin, for the Defendant
	HEARD: February 27, 2024

2024 ONSC 4902 (CanLII)

RULING ON MOTION

HEBNER J.

[1] This action deals with a bond that was issued by the plaintiff in respect of the estate of the late Vernon S. Bates who died intestate on November 17, 2018 in Michigan. The plaintiff's motion is for summary judgment granting an order that the defendant is required to post collateral in the amount of $3,585,000, or some other amount that this court determines, in performance of his obligations pursuant to the indemnity agreement between the parties.

Background Facts

[2] Mr. Bates was predeceased by his parents, never married, and did not have any children. At the time of his death, Mr. Bates' estate had an estimated value of $8.6 million USD.

[3] The defendant, Mr. Raeside, and Mr. Bates were maternal cousins. Their mothers were sisters. On December 20, 2018, Mr. Raeside filed a petition for probate to open Mr. Bates' estate in Michigan's Oakland County Probate Court. Mr. Raeside lived on Lincoln Road in Windsor, Ontario at the time. Mr. Raeside sought to be appointed personal representative of the estate and requested a bond be issued in the petition. In the petition, Mr. Raeside named 21 maternal first cousins and second cousins of Mr. Bates as heirs. No paternal heirs were identified.

[4] On January 23, 2019, at a hearing before Judge Callaghan of the Michigan Probate Court, an order of formal proceedings was made granting the petition. Mr. Raeside was appointed the personal representative of Mr Bates' estate and was required to post a bond in the amount of $4,000,000.

[5] Mr. Raeside applied for a bond from the plaintiff, and one was issued on February 4, 2019. Mr. Raeside signed an indemnity agreement dated January 30, 2019 in favour of the plaintiff (referred to as "the Company"). In that document, Mr. Raeside agreed to a number of conditions including the following:

> (2) To completely indemnify the Company from and against any liability, loss, cost, attorneys fees, and expenses of whatsoever kind or nature, including the enforcement of this agreement, which the Company shall at any time sustain, or incur by reason or in consequence of having executed or procured the execution of the bond.
>
> (4) lf the Company shall set up a reserve to cover any liability, claim, suit or judgment under said bond, the undersigned will, immediately upon demand, deposit with Company a sum of money, equal to such reserve and any increase thereof, to be held by the Company as collateral security on said bond. Any money or property which shall have been or shall hereafter be pledged by any of the undersigned's collateral security on said bond shall be held subject to the terms of the Company's regular form of collateral receipt which is hereby made a part of this Instrument to the same extent as if set out at length herein, and any such collateral shall be available, in the discretion of the Company, as collateral security on any other or all bonds heretofore or hereafter executed to for or at the request of any of the undersigned. Surety shall have the right and sole discretion to determine whether a claim or liability involving any Bond shall be settled, compromised, paid, defended, prosecuted or appealed, and/or take any action it may deem necessary or expedient with respect to such claims.

[6] On February 22, 2019, a Notice of Appearance was filed in the probate proceeding by attorney Eugene Casazza on behalf of Lawrence Cooper, Michael Prokop and John Prokop identifying these three persons as putative heirs to the estate (the "paternal heirs").

The Distribution

[7] In October of 2019, Mr. Raeside caused approximately $7,000,000 to be distributed out of the estate, all to maternal heirs. Mr. Raeside himself received the sum of $500,000.

[8] In his affidavit sworn December 5, 2023, Mr. Raeside deposed that he was informed of the paternal heirs' claim in February of 2019. He asserts that he had no knowledge of these individuals. He asserts that his lawyer advised that the paternal heirs would have to "prove their heirship and appeal the prior findings made regarding beneficiaries in the Order of Formal Proceedings within the time permitted under Michigan law". He asserts that, as he

2024 ONSC 4902 (CanLII)

heard nothing further, he assumed the claims of the paternal heirs were "abandoned". He asserts that his lawyer told him that the time for an appeal was lapsed and so he caused the distribution of $7,000,000 to the maternal heirs.

[9] The paternal heirs were not advised of the distribution.

Events in the Probate Proceeding

[10] On August 26, 2020, Mr. Casazza filed on behalf of the paternal heirs a petition to determine heirs as well as a petition to remove Mr. Raeside as the personal representative of the estate.

[11] On March 8, 2021, Mr. Casazza wrote a letter to the plaintiff enclosing a copy of the petition and advising that he represents "the entire Paternal Moiety of the estate of Vernon S Bates".

[12] Mr. Raeside was deposed by Mr. Casazza on April 12, 2021.

[13] On May 26, 2021, Mr Casazza filed an additional petition to have the paternal heirs recognized by the court. On September 7, 2021, Mr. Raeside filed his own motion to dismiss the petitions on the grounds that the request to determine heirs was not timely and the time for appeal had passed.

[14] On January 24, 2022, Judge Callaghan denied the motion to dismiss.

[15] On May 13, 2022, a bench trial respecting the petitions of the paternal heirs was heard by Judge Callaghan who ordered that Mr. Raeside be removed as personal representative of the estate and that the paternal heirs be recognized as heirs in the estate. She found that once the additional heirs were brought to Mr. Raeside's attention, he "had a duty to investigate the validity of those heirs" and to "bring the petition to redetermine the heirs". She found the duty was a fiduciary one, and Mr. Raeside breached it.

[16] The court appointed Bruce R. Nichols (not an heir) as the successor personal representative of the estate.

[17] On November 14, 2022, Mr. Casazza filed a motion for an accounting from Mr. Raeside, for an order of disgorgement and, in the alternative, an order that the court surcharge the bond. On November 3, 2023, Judge Callaghan ordered that:

1. The maternal heirs and the paternal heirs are each entitled to 50% of the estate after costs and fees.
2. Mr. Raeside has breached his fiduciary duty by distributing more than 50% of the estate to the maternal heirs and by distributing $55,000 in gifts to non-heirs.
3. Mr. Raeside is required to return to the estate, in USD, the following:
    a. $27,500 for one half of the gifts to non-heirs (the maternal heirs consented to the gifts) to be distributed to the paternal heirs forthwith;

2024 ONSC 4902 (CanLII)

b. $2,381,355 being the improper distribution to the maternal heirs; and
c. $47,500 taken by him in fees.

4. Mr. Raeside's wife, Shannon Raeside, is required to return the sum of $5,937.50 paid to her in fees.
5. All of the maternal heirs (referred to as distributees) are required to disgorge the improper distributions ($2,381,355).

[18] The order is referred to as the disgorgement order.

[19] Mr. Raeside has not complied with the order.

[20] The estate has a total value of roughly $8,600,000 USD, of which $7,000,000 has been distributed to the maternal heirs and $600,000 to the paternal heirs.

Notice of Demand for Collateral

[21] On February 1, 2023, the plaintiff wrote to Mr. Raeside advising that, because of the claim that Mr. Raeside had wrongfully distributed $3,555,000 in breach of duties owed to the paternal heirs, the plaintiff had "posted a reserve of $3,585,000 to cover a potential loss and anticipated legal expenses to be incurred defending a claim against the bond". The plaintiff demanded that, in accordance with paragraph 4 of the indemnity agreement, Mr. Raeside deposit with the plaintiff the sum of $3,585,000 in the form of cash or an irrevocable letter of credit. Mr. Raeside has not complied with the demand.

Events Following the Disgorgement Order

[22] The plaintiff sent a letter to each of the maternal heirs, including Mr Raeside, advising of the disgorgement order and demanding that they each reimburse the estate for one half of the distribution received. To the date of the hearing of the motion, no response was received from any of the heirs and none of the maternal heirs had reimbursed the estate for any amounts. Mr. Raeside has not paid the $500,000, or half of it, he personally received from the estate.

Assertions of the Defendant

[23] The defendant asserts that the terms of the bond were never explained to him, and he did not know and did not understand that there were indemnity provisions in the bond application. He said he had no understanding or expectation that he could have liability to the plaintiff.

[24] The defendant asserts that he was only advised that the bond and related documents were formalities and that if he had been aware of the indemnity clause, he would not have signed anything and would not have acted as the personal representative of the estate.

[25] The defendant was aware in February of 2019 that three persons claimed an interest in the estate as paternal heirs. He asserts that his lawyer, Mr. Wilson, told him that the time for

2024 ONSC 4902 (CanLII)

appeal of the order of formal proceedings had passed and those persons were not to be considered heirs. The defendant therefore distributed the sum of $7,000,000 to the maternal heirs.

[26] The defendant asserts that he at all times acted in a manner consistent with the advice of his legal counsel. The defendant asserts that the order requested by the plaintiff would impose a serious financial hardship on him and his spouse.

Analysis

Test on a Summary Judgment Motion

[27] In the seminal case of *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada held that the ultimate question in a motion for summary judgment is whether there is a genuine issue requiring a trial. The court held that a genuine issue requiring trial does not exist if the motion allows a judge to make the necessary findings of fact; allows the judge to apply the law to the facts; and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[28] Once the plaintiff demonstrates that there is no genuine issue requiring a trial, the burden shifts to the defendant to prove that the defence put forward has a real chance of success at trial (*Kamalanathan v. CAMH*, 2019 ONSC 56, [2019] O.J. No. 17). The court is entitled to presume that the defendant has put forth its best evidence on the motion and that, if the case were to proceed to trial, no additional evidence would be presented (*TD Waterhouse Canada Inc. v. Little*, [2009] O.J. No. 3465, and *Fisher v. Nagamuthu*, 2024 ONSC 4675, [2024] O.J. No. 3737).

[29] The indemnity agreement is clear. The plaintiff's February 1, 2023 letter advised that it had set up a reserve, and the letter includes a demand, thus triggering the contractual obligation of the defendant to deposit an equal sum of money as collateral security.

[30] In Kenneth W. Scott, R. Bruce Reynolds, *Scott and Reynolds on Surety Bonds*, (Scarborough, ON: Carswell, 1993), at s. 5:1, an indemnity agreement on a bond is explained thusly:

> Ordinarily, when a bond facility is established for a company as principal, the surety will obtain the indemnities of the principal, any related company, and the personal indemnities of the controlling shareholders in the company and their spouses. Such indemnity agreements, which are known variously as General Indemnity Agreements, Deeds of Indemnity, Indemnities, and Master Surety Agreements, provide, among other things, that the indemnitor will indemnify the surety for any loss or expense the surety incurs as a result of having issued bonds for the principal.

[31] There is a dearth of Canadian caselaw in which courts have commented on the right of a surety to demand collateral pursuant to an indemnity agreement before the surety actually

2024 ONSC 4902 (CanLII)

pays for a debt for which the principal is liable. I turn to American law. In *Fidelity and Deposit Co. of Maryland v. Bristol Steel & Iron Works Inc.*, 722 F. (2d) 1160 at 1163 (4th Cir. 1983), the following passage appears:

> There is no dispute about the normal principle that "equity generally implies a right to indemnification in favor of a surety only when the surety pays off a debt for which his principal is liable." *Com'l Ins. Co. of Newark v. Pacific-Peru Const.*, 558 F.2d 948, 953 (9th Cir.1977). But, as the court hastened to add, "[h]owever, resort to implied indemnity principles is improper when an express indemnification contract exists;" when there is such an express contract, "a surety is entitled to stand upon the letter of his contract." *Id.* at 953. There is in this case an "express indemnification contract." Accordingly, the rights of the Sureties are not to be determined by general "indemnity principles," as relied on by the Contractor, but by the "letter of [the Contractor's] contract" of indemnification. Under the "letter" of this contract, the Sureties had the right to reimbursement by the Contractor for any payment made by them in good faith "under the belief ... that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed" under the performance bond executed by the Sureties on behalf of the Contractor and this right did not depend on "whether the Sureties shall have made any payment therefor."[5]

[32] In *United States Surety Company v. Stevens Family Limited Partnership*, 905 F. Supp. (2d) 854 (Ill. Dist. Ct. 2012), the court dealt with a request for specific performance of a collateral security provision under an indemnity agreement attached to a subcontractor's bond. At pp. 859-60, the court had this to say about collateral security clauses in indemnity agreements:

> Surety bargained for, and Partnership agreed to, Surety's right to demand collateral security not because they were remarkably prescient but rather because the problem posed here is a common one. Provisions of that nature are both recognized and enforced in California.
>
> While the breach of such a collateral security provision cannot be rectified through the traditional legal remedy of monetary reimbursement (remember that a surety will not have suffered an actual loss at the point where collateralization, as opposed to reimbursement, is appropriate), California courts have employed the equitable remedy of specific performance to enable sureties to receive the benefit of their collateral-security bargains. That remedy allows courts to demand that indemnitors collateralize indemnitees on the premise that ultimately unused security must be returned. Under the Agreement's collateral security provision Surety is entitled to receive appropriate collateral security even though the pleadings do not establish that it has yet suffered an actual loss. [Citations omitted.]

2024 ONSC 4902 (CanLII)

[33] Although not binding on this court, I find the reasoning in these cases persuasive. Here, there is an express indemnification contract that requires the defendant to deposit security with the plaintiff once the plaintiff sets up a reserve to cover a liability and a demand is made. The plaintiff issued the bond in reliance on the terms of that contract. The rights of the parties under the agreement must be determined in accordance with the contract.

[34] Based on the contract, the defendant must deposit the security. There is no genuine issue for trial on the plaintiff's claim. I turn then to defences raised by the defendant.

Non Est Factum

[35] The defendant asserts the defence of *non est factum*.

[36] On his cross-examination, Mr. Raeside gave the following evidence:

- He signed the bond application on January 30, 2019.
- Mr. Raeside's wife witnessed his signature.
- When he signed the application, Mr. Raeside understood that he was applying for a $4,000,000 probate bond.
- Mr. Raeside had the opportunity to read the application before signing it.
- In the application, there is a title in large capital letters that reads "GENERAL AGREEMENT OF INDEMNITY – READ CAREFULLY".
- Mr. Raeside had the opportunity to read the general agreement of indemnity prior to signing the bond but did not.
- Mr. Raeside was represented by a Michigan lawyer, Mr. Wilson, at the time he obtained the bond.
- Mr. Raeside had the opportunity to ask Mr. Wilson questions about the application and the agreement of indemnity.
- Mr. Raeside signed the bond on February 4, 2019, and Mr. Wilson filed it with the court on his behalf.
- Mr. Raeside had the opportunity to read the bond before he signed it.
- Mr. Raeside was still represented by Mr. Wilson when he signed the bond and had the opportunity to ask him questions about it.

[37] In *Marvco Color Research Ltd v. Harris*, [1982] 2 S.C.R. 774, the plaintiff was a mortgagee seeking to foreclose on a charge executed by the respondents. The respondents executed the charge without reading it and put forth the defence of *non est factum*. Estey J., at p. 779, writing for the court, adopted the following statement from the dissenting opinion of Cartwright J. in *Prudential Trust Co. Ltd. v. Cugnet*, [1956] S.C.R. 914:

> …generally speaking, a person who executes a document without taking the trouble to read it is liable on it and cannot plead that he mistook its contents,

2024 ONSC 4902 (CanLII)

> at all events, as against a person who acting in good faith in the ordinary course of business has changed his position in reliance on such document.

[38] At p. 785 of the decision, Estey J. concluded:

> In my view, with all due respect to those who have expressed views to the contrary, the dissenting view of Cartwright J. (as he then was) in *Prudential, supra,* correctly enunciated the principles of the law of *non est factum.* In the result the defendants-respondents are barred by reason of their carelessness from pleading that their minds did not follow their hands when executing the mortgage so as to be able to plead that the mortgage is not binding upon them. The rationale of the rule is simple and clear. As between an innocent party (the appellant) and the respondents, the law must take into account the fact that the appellant was completely innocent of any negligence, carelessness or wrongdoing, whereas the respondents by their careless conduct have made it possible for the wrongdoers to inflict a loss.

[39] The defendant relies on the decision of this court in *Sutton Group-Admiral Realty Inc. v. Taborovska,* 2021 ONSC 2837, [2021] O.J. No. 2182, in which, at para. 7, the elements of the defence of *non est factum* are set out thusly:

1. The defendant must prove he was mistaken about the nature of the contract;
2. The defendant must prove that his mistake was the result of a misrepresentation by the other contracting party; and,
3. The defendant must prove that he was not careless in signing the contract.

[40] The defendant has provided no evidence that the plaintiff or anyone on its behalf misrepresented any of the terms of the bond and indemnity agreement to the defendant. In fact, on his cross examination, he said he received no advice from the plaintiff and "there was no advice from anybody". That evidence tells me that there were no representations from the plaintiff.

[41] The defendant was careless in signing the contract. He did not read it. He did not ask his lawyer any questions about it.

[42] The defendant has not met the elements of the defence.

[43] The defendant relies on the decision of this court in *Royal Bank of Canada v. Lam,* [1997] O.J. No. 2169 (Ct. J. (G.D.)), in which the Royal Bank was seeking summary judgment against the guarantors of a loan. In that case, the court found, at para. 4, that there was "a language barrier, peer pressure and possibly cultural constraints". The presiding Master found that he could not conclude that the defendants were careless in the circumstances. He found that, in those circumstances, a trial was required. That is not the case here.

[44] I find, on the evidence before me, that the defendant was careless when he signed the indemnity agreement without reading it and without asking his lawyer any questions about

2024 ONSC 4902 (CanLII)

it, even though he had the opportunity to do so. Moreover, there is no evidence of a misrepresentation by the plaintiff or anyone on its behalf. The defence of *non est factum* is not made out.

Relief from Forfeiture

[45] The defendant relies on s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides: "A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just."

[46] The defendant relies on the Ontario Court of Appeal's decision in *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363, [2011] O.J. No. 2122. In that case, the AG sought the forfeiture of properties in which police had located large sophisticated growing operations. The AG sought the remedy under the *Civil Remedies Act*, 2001, SO 2001 c. 28, s.3 that provides for a forfeiture of property that is "proceeds of unlawful activity". One of the arguments put forth by the defendants was relief from forfeiture.

[47] At paras. 87 and 90, Doherty JA., on behalf of the court, wrote:

> [87] The power to relieve from forfeiture is discretionary and fact-specific: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 490 at p. 504. The power is predicated on the existence of circumstances in which enforcing a contractual right of forfeiture, although consistent with the terms of the contract, visits an inequitable consequence on the party that breached the contract. Relief from forfeiture is particularly appropriate where the interests of the party seeking enforcement by forfeiture can be fully vindicated without resort to forfeiture. Relief from forfeiture is granted sparingly and the party seeking that relief bears the onus of making the case for it: *1497777 Ontario Inc. v. Leon's Furniture Ltd.* (2003), 2003 CanLII 50106 (ON CA), 67 O.R. (3d) 206 at paras. 67-69, 92 (C.A.).
>
> [90] The examination of the reasonableness of the breaching party's conduct lies at the heart of the relief from forfeiture analysis. A party whose conduct is not seen as reasonable cannot hope to obtain relief from forfeiture: see *Paul Revere* at p. 175; *Saskatchewan River Bungalows* at pp. 504-05.

[48] In this case, I cannot find the defendant's conduct to be reasonable. His conduct when he signed the bond application and indemnity agreement was, at best, careless. When Mr. Raeside became aware of the three putative paternal heirs, he had a fiduciary obligation to investigate the claim and to obtain a ruling from the court before distributing the estate. He did not do either of these things, and the Michigan court found that Mr. Raeside had breached his fiduciary duty. When the Michigan Probate Court ordered that all the maternal heirs disgorge the improper distributions they received, Mr. Raeside should have followed

2024 ONSC 4902 (CanLII)

that order and returned half of what he received, or $250,000, to the estate. He did not comply with the order and gave no explanation for his failure to do so.

[49] The defendant asserts that the defences of *non est factum* and relief from forfeiture require a trial. I disagree. The defendant is required to put his best foot forward on a summary judgment motion. The court hearing a summary judgment motion is entitled to assume that all relevant evidence has been filed. On the evidence before me, those defences must fail.

Disposition

[50] The motion requests an order requiring the defendant to post collateral in the amount of $3,585,000 or such other amount as this court may deem just. In my view, the appropriate amount is the total required by the disgorgement order, namely $27,500 plus $2,381,335 plus $47,500. The total is $2,456,335 USD. I do not include the amount that Shannon Raeside is required to return.

[51] Accordingly, an order shall issue in accordance with paragraph 1 of the notice of motion with the amount changed to $2,456,335 USD.

[52] In the event the parties cannot agree on costs, they may make written submissions limited to five pages, not including a costs outline and any relevant offers to settle, as follows:

1. The plaintiff within 20 days;
2. The defendant within 20 days thereafter;
3. The plaintiff may reply within 10 days thereafter.

Justice Pamela L. Hebner
Pamela L. Hebner
Justice

Released: September 5, 2024

2024 ONSC 4902 (CanLII)

CITATION: The Guarantee Company of North America v. Raeside, 2024 ONSC 4902
COURT FILE NO.: CV-23-31915
DATE: 20240905

2024 ONSC 4902 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

The Guarantee Company of North America

Plaintiff

– and –

Alan G. Raeside

Defendant

RULING ON MOTION

HEBNER J.

Released: September 5, 2024