

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Bank of Nova Scotia v. Shivjii Granite & Marble, 2011 NSSC 21

**Date:** 20110125

**Docket:** Hfx No. 294075

**Registry:** Halifax

**Between:**

The Bank of Nova Scotia

Plaintiff

v.

Shivjii Atlantic Trading Incorporated, carrying on business as  
Shivjii Granite & Marble, Ashish Janmeja, Sobina Dod Janmeja,  
Barry M. Coleman and Lamorna Jean Coleman

Defendants

Barry M. Coleman and Lamorna Jean Coleman

Plaintiffs (Counterclaim)

v.

The Bank of Nova Scotia

Defendant (Counterclaim)

**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** January 11 and 12, 2011, in Halifax, Nova Scotia

**Counsel:** Marc Dunning, Esq. and Sean Foreman, Esq., for the  
plaintiff/defendant by counterclaim  
Myrna Gillis, Esq. for the Coleman defendants/plaintiffs by  
counterclaim

**By the Court:**

[1] The Bank of Nova Scotia (the “Bank”) moves for an order for summary judgment against the defendants, Barry M. Coleman and Lamorna Jean Coleman, on both their defence and counterclaim.

[2] Rule 13 of the *Civil Procedure Rules* allows a party to move for summary judgment on pleadings (Rule 13.03) or on evidence (Rule 13.04).

[3] The Bank’s motion is on evidence and hence governed by the provisions of Rule 13.04. The rule states:

**13.04 Summary judgment on evidence**

- (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
- (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
- (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
- (4) A party who wishes to contest the motion must provide evidence in favour of the party’s claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
- (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
- (6) The motion may be made after pleadings close.

[4] In support of its’ claim, counsel for the moving party filed three affidavits of one of its’ Branch Managers, Mr. Gerry A. “Gerry” Pettipas. While not the Manager of the Branch at the time the three loans in question were taken out in 2007, Mr. Pettipas eventually took over the management of that particular Branch after the retirement of the former Branch Manager. His evidence was based on his review of

the Bank's files pertaining to these loans. Mr. Pettipas was cross-examined by counsel for Barry M. and L. Jean Coleman (henceforth Mr. & Mrs. Coleman or Mr. Coleman or Mrs. Coleman).

[5] Affidavit evidence was presented on behalf of Mr. & Mrs. Coleman. In total there were four affidavits filed, all from Mr. Coleman. Mrs. Coleman did not offer any affidavit evidence. Counsel for the Bank cross-examined Mr. Coleman on his affidavits.

[6] The Court was also presented with pre-hearing briefs along with supplementary briefs and oral submissions from both counsel.

[7] The motion was first set down for hearing on April 21, 2009. It had to be adjourned several times before it could finally be heard by me over the course of two days.

### **BACKGROUND**

[8] The Bank is seeking summary judgment for its' claim and a dismissal of the Colemans' counterclaim. The Bank has already obtained judgment against Shivjii Atlantic Trading Incorporated, c.o.b. as Shivjii Granite & Marble, (henceforth "Shivjii") and Ashish Janmeja and Sobina Dod Janmeja (henceforth the "Janmejas" or "Mr. Janmeja" and/or "Mrs. Janmeja").

[9] Shivjii and the Janmejas previously entered into a Forebearance Agreement with the Bank. In return for time to try to arrange alternate financing, Shivjii and the Janmejas consented to judgment of the full amount owed to the Bank at that time.

[10] Unfortunately Shivjii and the Janmejas were not able to secure alternate financing despite making considerable progress in paying down Shivjii's outstanding indebtedness. This, in turn, reduced the amount now being claimed by the Bank from the Colemans.

[11] Based on evidence presented at the hearing of the motion, the Bank as at February 29, 2008 sought payment as follows:

Barry M. Coleman – \$334,958.17; and  
L. Jean Coleman – \$287,917.17

As at January 11, 2011 these amounts stood at:

Barry M. Coleman – \$165,428.77; and  
L. Jean Coleman – \$118,387.77

This represents a reduction of \$169,529.40 in the amount claimed from each of the Coleman guarantors and is attributable to the accelerated payments made by, or on behalf of, Shivjii, along with the proceeds from the sale of the Janmejas' residence after payout of the first mortgage. The sale of the Janmejas' residence occurred after foreclosure on the collateral mortgage given by them to secure personal guarantees in support of Shivjii's overdraft.

[12] The Bank's financing of Shivjii's operations consisted of three separate loans. The Bank loaned Shivjii \$26,779.62, with interest payable at the Bank's prime rate plus 2.50 % per annum. The loan was made on January 26, 2007. The purpose for this loan (referred to as "The First Term Loan") was to enable Shivjii to carry out certain leasehold improvements to the premises leased to Shivjii's wholly owned subsidiary (at the time), Cangra Natural Stones Inc. ("Cangra"). This loan, along with a second term loan for \$161,355.29, dated February 26, 2007, was personally guaranteed by Mr. Coleman as well as Mrs. Janmeja. Under the provisions of the *Canada Small Business Financing Act*, S.C. 1998, c. 36 the personal guarantees were limited to 25% of the overall loan amounts. Mrs. Coleman was not required to guarantee the two term loans and consequently the Bank is only proceeding against Mr. Coleman for payment based on his 25% personal guarantee.

[13] The guarantee which the Bank seeks to enforce against Mrs. Coleman arises out of a third loan (second in sequence) given to Shivjii on or about January 26, 2007. This loan, initially for \$300,000.00, but subsequently reduced (prior to funds being advanced) to \$277,500.00 (the "overdraft loan"), was to cover Shivjii's overdraft on its operating line. It bore interest at the Bank's prime rate plus 2.25% per annum. It, too, was due on demand and was secured by a first charge collateral mortgage over

the Colemans' residential property as well as a second collateral mortgage over the Janmejas' residence. The latter property is the one referred to earlier which, after transfer by the Trustee, was sold by the Bank with all proceeds, after payment of the first mortgage, being applied to the overdraft loan.

[14] In addition to the personal guarantee of Mrs. Coleman, the Bank also obtained personal guarantees from Mr. & Mrs. Janmeja and Mr. Coleman. these guarantees for \$300,000.00 were to support the overdraft loan. These three individuals were directly involved in the operations of Shivjii and all three were officers of the company.

[15] Before obtaining the personal guarantee of Mrs. Coleman and prior to the execution of the collateral mortgage, the Bank insisted she obtain independent legal advice. Mrs. Coleman attended at the office of Ms. Tracey Kennedy, Barrister and Solicitor, on February 14, 2007 for this purpose.

[16] A Certificate of Independent Legal Advice (the "Certificate") was signed by Ms. Kennedy confirming her role in explaining the nature of the collateral mortgage document Mrs. Coleman was being asked to sign and advising her of the liability she might incur by executing it. The Certificate did not reference any personal guarantee but a copy of one, bearing the signatures of both Mr. and Mrs. Coleman along with their respective initials on each of the three pages, was attached. Mrs. Coleman's signature was witnessed by Ms. Kennedy while Mr. Coleman's was witnessed by another lawyer retained by the Bank to place the collateral mortgage as a first charge against the Coleman property.

[17] The Certificate was also signed by Mrs. Coleman acknowledging the truth of its contents and confirming that she had consulted Ms. Kennedy to advise her personally. Along with the Certificate, Ms. Kennedy also included a copy of the collateral mortgage document which had been signed by Mrs. Coleman in her presence consistent with the execution of the personal guarantee. Mr. Coleman's signature and affidavit of marital status were completed in the presence of the other lawyer.

[18] As stated previously, the guarantee signed that day bears the signatures of both Mr. & Mrs. Coleman. In cross-examination, Mr. Coleman confirmed the signatures of himself and his wife. Although he could not comment on the explanation or advice

offered to Mrs. Coleman by Ms. Kennedy, he did confirm that his wife attended at her office for that purpose.

[19] Mrs. Coleman has not presented any evidence that would challenge the nature of the advice she was given or raise any doubt as to its effectiveness. If she was left with any misunderstanding as to its content or meaning she should have indicated this to the Court in the form of an affidavit. It is incumbent on the responding parties to put their best foot forward. [Refer to **MacNeil v. Bethane**, [2006] N.S.J. No. 62; 241 N.S.R. (2d) 1, 2006 NSCA 21 (Roscoe, J.A.); Also refer to **AGC Flat Glass North America Ltd. (c.o.b. AFG Glass Centre) v. CPP Atlantic Specialty Products Inc. (c.o.b. Roofing Connection)**, [2010] N.S.J. No. 140; 2010 NSSC 108 (Bryson, J., as he was then)].

[20] The Bank maintains that any duty it might have owed to Mrs. Coleman was satisfied by insisting that she obtain independent legal advice. Counsel for the Colemans argues that there was a further duty to ensure that Mrs. Coleman fully appreciated not only the nature of her personal guarantee and the effects of the collateral mortgage she was asked to sign but also the various other banking documents related to the financial affairs of Shivjii which she was being asked to personally guarantee. There was no evidence to establish that Mrs. Coleman was even given a copy of the Bank's 'Business Banking Services Agreement' which included information respecting personal guarantees and what could constitute a default event and the various remedies open to the Bank in the event of a default. The Bank (at paragraph 15 of the Pettipas affidavit sworn on January 22, 2009 – Exhibit # 2) states that:

[T]he First Term Loan, The Overdraft and The Second Term Loan are subject to the Credit Agreement section of the Bank's "Business Banking Services Agreement.

[21] Counsel for the Colemans argued that it was incumbent on the Bank to forward a copy of this agreement to Mrs. Coleman's legal advisor as part of the package of documents sent to her to review with her client when providing independent legal advice. She suggested that the Bank had a fiduciary duty to Mrs. Coleman. She would not go so far as to suggest that the Bank owed a similar duty to Mr. Coleman.

[22] Counsel for the Bank argued that there was no fiduciary duty owed to either Mr. or Mrs. Coleman. In his submissions he provided case law that clearly defines the relationship of lender and borrower as one of contract. He further argued that if there

was any added duty it was to Mrs. Coleman only and it was fulfilled by having her obtain independent legal advice prior to signing the personal guarantee and collateral mortgage documents.

[23] Mr. Coleman was an officer of Shivjii. Through his company, TK Communications Inc., he owned 26% of the company's issued shares.

[24] Mr. Coleman has extensive business experience including previous employment in the banking sector. On cross-examination by the Bank's counsel, he admitted knowing the purpose for and the potential ramifications of signing a personal guarantee. He also understood the meaning of joint and several liability. He is clearly knowledgeable and likely fully understands the business of lending and more importantly the obligations of borrowers. Indeed, when making application for the various outstanding loans on behalf of Shivjii, he, along with Mrs. Coleman, offered their personal guarantees as security. I have no doubt that he knew exactly what he was doing and appreciated the personal exposure he might face if Shivjii was unable to meet its financial obligations. At one point, Mr. Coleman even approached the Bank after the initial loans were made to seek an increase in the company's operating line of credit. He was prepared to expose himself to increased personal liability and likely would have, if the Bank had not turned down the request.

### **LAW ON SUMMARY JUDGMENT**

[25] Rule 13.04 of the *Civil Procedure Rules* was drafted to reflect the existing case law. The only significant change from the 1972 Rules is the requirement to grant summary judgment if a statement of claim or defence fails to raise a genuine issue for trial. Rule 13.04(1) states a judge must grant the remedy if

... satisfied that evidence, or the lack of evidence, ... fails to raise a genuine issue for trial.... [See **Eikelenboom v. Holstein Assn. of Canada** (2004), 226 NSR (2d) 235 (NSCA)]

[26] There are numerous decisions from our Court, the Court of Appeal from this and other jurisdictions in Canada, as well as decisions of the Supreme Court of Canada that have weighed in on the subject of summary judgment. They look at the remedy from the perspective of both plaintiffs and defendants. The resulting test is the same no matter if the motion is advanced by the plaintiff or the defendant or, as in the case that is before me, by the plaintiff/defendant by counterclaim.

[27] In **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 (S.C.C.); Carswell Ont 3171, Iacobucci and Bastarache, J.J., stated the following at para 27:

27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para 15; *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4<sup>th</sup>) 257 (Ont. C.A.) at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) at pp. 550-51. Once the moving party has made this showing, the respondent must then “establish his claim as being one with a real chance of success.” *Hercules, supra*, at para. 15.

[28] This test was adopted by the Nova Scotia Court of Appeal in the case of **Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)**, 2007NSCA38. Justice Cromwell (as he was then) indicated at para. 8 that:

8 Summary Judgment is appropriate when a defendant shows that there is no genuine issue of material fact requiring a trial and a responding plaintiff fails to show that its claim is one with a real chance of success: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at para 27.

[29] Previously the Nova Scotia Court of Appeal dealt with a similar application brought by a defendant. In **Cook’s Oil Company Ltd. v. Parkhill Construction (1980) Ltd.**, [2005] N.S.J. No. 69, Roscoe, J.A. had this to say at paras. 9 and 10:

9 As noted by the chambers judge, this court first examined the *Rule* after it had been amended to allow summary judgment applications by defendants in *United Gulf Developments Ltd. v. Iskandar*, where the following test was approved, at ¶9:

... The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. [case references and citations omitted] Once the moving party has made this showing, the respondent must then “establish his claim as being one with a real chance of success.”



10 It is a two part test. First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[30] In the present case the burden is on the plaintiff to show there is no genuine issue of material fact requiring trial. Similarly, the plaintiff as defendant in the counterclaim bears the same burden. The second part of the test only becomes engaged if the moving party succeeds on the first part. The responding party can challenge the moving party by presenting evidence to show there are material facts in issue or to establish, on the facts that are not in dispute, that his claim or defence has a real chance of success.

**IS THIS A CASE FOR SUMMARY JUDGMENT?**

[31] The evidence presented by the Bank clearly establishes:

- (i) the existence of three separate loans;
- (ii) the validity of three personal guarantees given by Mr. Coleman to support two terms loans and a loan to cover Shivjii's operating expenses;
- (iii) the validity of the personal guarantee given by Mrs. Coleman to secure Shivjii's operating loan of \$277,500.00 (less than the initial \$300,000.00 requested by the officers of the company);
- (iv) the validity of a collateral mortgage signed by Mr. and Mrs. Coleman after Mrs. Coleman received independent legal advice regarding it and the personal guarantee;
- (v) a default on the three loans which occurred when Mr. and Mrs. Coleman gave notice to the Bank that they were withdrawing their personal guarantees and requesting a release of the collateral mortgage given to secure the operating loan;
- (vi) a valid demand for payment by the Bank giving Mr. and Mrs. Coleman proper notice;

- (vii) a failure on the part of both Mr. and Mrs. Coleman to honour the terms of their commitment to personally guarantee the outstanding indebtedness of Shivjii under the various loans. Mrs. Coleman's obligations pertain only to the balance of the operating loan whereas Mr. Coleman also bears additional liability for the 25% of the original term loan amounts based on the *Canada Small Business Financing Act, supra*.

[32] Counsel for the Colemans tried to point out a number of inconsistencies in the paperwork evidencing the loan applications and other bank documents. A second personal guarantee signed by Mrs. Coleman on the day following her meeting with Ms. Kennedy and signed in the presence of a Bank representative was also raised as an issue requiring trial. No evidence was presented from Mrs. Coleman respecting any alleged deficiency in the advice she received from her lawyer nor of any misunderstanding she might have had with respect to that advice or the nature and contents of the documents she was being asked to sign.

[33] The Bank fulfilled any duty it might have had to Mrs. Coleman by requesting that she obtain independent legal advice. It was left to Mrs. Coleman to designate a lawyer of her choosing to give her that advice. The Bank is entitled to rely on the Certificate provided by Mrs. Coleman's personal legal advisor. This is particularly so given the fact that Mrs. Coleman also signed the Certificate to acknowledge her understanding and the voluntariness with which she was signing the legal documents.

[34] In Mr. Coleman's case, I am satisfied that he, by virtue of his experience both in banking and in business generally, knew or ought to have known what the potential risks and rewards might be. His relationship with the Bank was totally contractual in nature. There is absolutely no evidence of any misrepresentation on the part of any Bank representative which would have induced him to enter into an improvident arrangement. There is no evidence to suggest the Bank has acted in a commercially unreasonable manner.

[35] The efforts made after default including the Forebearance Agreement with Shivjii and the Janmeja guarantors and the subsequent foreclosure and sale of their property and the sale of certain equipment owned by Shivjii have only served to benefit the Colemans. They owe considerably less than what they might have otherwise been asked to pay. It did not alter their agreement with the Bank and cannot be used by them to try to avoid their legal obligations.

[36] Based on the Bank's calculations (Exhibit #1) the liability of each Coleman defendant has been reduced by \$169,529.40 leaving outstanding balances as follows:

Mr. Coleman – \$165,428.77  
Mrs. Coleman – \$118,387.77

[37] The Bank has established that there are no material facts in issue requiring a trial. The Colemans have failed to show their defence has a genuine chance of success. The Bank will have judgment against Mr. Coleman for \$165,428.77 and against Mrs. Coleman for \$118,387.77 unless, within thirty (30) days of the date of release of this decision, they present written documentation to challenge these amounts. Should that occur, their outstanding indebtedness will have to be determined by way of an assessment under Rule 13.05.

[38] Regarding the Colemans' counterclaim, I am also satisfied on the basis of evidence presented that there are no triable issues that would require a trial nor have the Colemans established that their claim has a genuine chance of success. Consequently, I dismiss their counterclaim as well.

[39] I will leave it to counsel to try to reach an agreement on costs. If they are unable to agree I am prepared to accept their further written submissions within 30 days of the date of release of this decision.

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McDougall, J.