SUPREME COURT OF NOVA SCOTIA
Citation: Bank of Montreal v. Partington, 2012 NSSC 7

Date: 20120105
Docket: Hfx No. 327073
Registry: Halifax

Between:

Bank of Montreal, one of the chartered Banks of Canada — Plaintiff

and

Peter Partington and Sarah Ann Partington — Defendants

and

BWS Fisheries Limited and Blair Shaw
a.k.a. Blair William Shaw — Third Parties

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: October 20, 2011

Counsel: Jason T. Cooke, for the plaintiff

Rubin Dexter, for the defendants

Moir, J.:

[1] *Introduction*. The Bank of Montreal sued Peter Partington and Sarah Partington for foreclosure and sale of their home and nearby parcels of land in Shelburne County. They had signed guarantees of the debts owed by Blair Shaw and BWS Fisheries Limited to the bank, and they had secured the guarantees with a mortgage on their home and other nearby parcels.

[2] The Partingtons filed a defence, made a counterclaim against the bank, and took third party proceedings against BWS Fisheries and its principal, Blair Shaw. Mr. Shaw made an assignment in bankruptcy.

[3] The defence alleges that the bank misrepresented the state of its primary security for the BWS Fisheries debts and the misrepresentation induced the signing of the guarantee and the mortgage. The counterclaim alleges that the misrepresentation is actionable.

[4] The bank moved for summary judgment. It is said to be partial because, at this time, the bank proposes to base the foreclosure only on the BWS Fisheries debt and to restrict it to some of the mortgaged lands.

[5] *Proof of Plaintiff's Claim*. The bank filed the affidavits of a bank official, Mr. John Houston, and of counsel.

[6] Those affidavits establish that Mr. Shaw and BWS Fisheries applied to the bank for loans to pay off a debt to a credit union, pay off a loan made by a bank customer, Wm. R. Murphy Fisheries Ltd., to BWS, and to cover tax liabilities resulting from the transfer of fishing licences. The affidavits prove that in February of 2006 the Partingtons signed guarantees of the debts of Mr. Shaw to a limit of $294,000 and of BWS Fisheries to a limit of $81,000. They prove the collateral mortgage on the home and nearby parcels.

[7] The debts were in default by March of 2010, and the bank made demand on the Partingtons. The affidavits establish that Mr. Shaw owed the bank a little over $219,000 and BWS, $66,000. The affidavits prove the exact debt and title to the mortgaged lands.

[8] In short, the Bank of Montreal has clearly proved its claim.

[9] *Evidence in Defence*. The Partingtons are the mother and father of Kristina Shaw, who was the spouse of Blair Shaw when the Bank of Montreal loans were made. They married in 1997, separated in 2007, and are now divorced.

[10] The Partingtons filed their own affidavits and one of Ms. Shaw. I heard the cross-examination of each of these witnesses. The bank also filed a rebuttal affidavit by Mr. Houston.

[11] It appears that Mr. Shaw purchased BWS Fisheries and fishing licences from his father in September of 2002 for $400,000. The purchase was financed by Coastal Credit Union in Yarmouth. The Partingtons guaranteed the loan for their son-in-law.

[12] Among the licences was a valuable District 34 lobster fishing licence held by Mr. Shaw in trust for BWS. (Licences are not issued to corporations.)

[13] The Partingtons' evidence is that their son-in-law approached them in late 2005 for assistance with transferring his business from the Credit Union to the Yarmouth branch of the Bank of Montreal. He told them that the replacement financing would be set up as a $81,000 loan to BWS Fisheries and a $294,000 loan to Mr. Shaw personally.

[14] Mr. Shaw told his parents-in-law that the bank required their guarantee, and it also required collateral security in their home and other properties at Pleasant Point in Shelburne County.

[15] There were no direct communications between the Partingtons and the bank until after the guarantee and the mortgage were signed. The Shaws and the Partingtons went to a lawyer's office in Yarmouth on February 2, 2006. The documents were waiting for them. The lawyer explained the effects of the guarantee and the mortgage. He gave independent legal advice. Then he saw to the execution of the documents.

[16] Both Mr. Partington and Ms. Partington swear that they understood what they were doing when they signed the guarantee and the collateral mortgage. However, the transaction did not end there.

[17] The Partingtons, their daughter, and their son-in-law went to the bank. Mr. Partington carried the guarantee and the mortgage with him.

[18] The affidavits of Mr. Partington, Ms. Partington, and Ms. Shaw each contain the same evidence about what happened at the bank. The parties met with loan officer Robert MacLeod. Mr. Partington said that he told Mr. MacLeod that Mr. Partington and his wife had executed the guarantee and mortgage, but he required two assurances before he handed them over.

[19] Firstly, the Partingtons wanted to be assured that the loans were only to take out the credit union debt. In effect, that their exposure would be no greater than before.

[20] The second assurance had to do with the lobster fishing licence. Mr. Partington had retired from his employment with the Department of Fisheries and

Oceans. He explained when cross-examined that these events occurred before *Saulnier v. Royal Bank of Canada*, [2008] S.C.J. 60. In those times, banks would not lend solely on the security of a fishing licence. So, he was not surprised that the bank wanted the collateral mortgage as well as the guarantee.

[21] According to the affidavits, the second assurance the Partingtons required was "that upon any sale of the lobster licence by Shaw the Bank was in the position that the loan would be fully repaid".

[22] According to the affidavits, Mr. MacLeod gave both assurances. The loan "was only to pay out the existing loan from Coastal" and "the Bank was in a secured position to have the loan fully paid out upon any sale of the lobster licence by Shaw". In cross-examination, Mr. Partington said that he had understood that the Bank of Montreal was in a secured position if Mr. Shaw sold the licence, and therefore the bank had a way to get paid from the sale proceeds.

[23] In fact, the loans retired debt owed to another company, and tax liabilities, as well as the credit union loan. Also, Mr. Shaw sold the lobster licence and the proceeds were not applied to the bank loan.

[24] *Issue*. The only issue is whether the defendants have established the second branch applicable on motions for summary judgment. Is there a genuine issue as to material facts that requires a trial?

[25] *Determination*. Evidence was presented from the bank's files tending to show that Mr. MacLeod knew the loan was to cover more debt than what was owed to the credit union and that the bank did not call for security of any kind in the lobster licence. If Mr. MacLeod gave the assurances that the Partingtons and their daughter say he did, it seems he knowingly deceived them.

[26] Defendants' counsel objected, rightly I think, that this is hearsay of a kind not permitted on a motion (see Rules 22.15 and 39.02). I think there is a second reason why the evidence does not support the bank's position.

[27] A trial judge may have to find what was actually said by Mr. MacLeod and take into account the likelihood of his being deceptive. However, we do not make findings of credibility or weigh the evidence on a motion for summary judgment.

[28] Counsel for the bank argues that the evidence does not put the defendants' best foot forward. It amounts to simple assertions rather than facts as discussed at para. 13 of *AGC Flat Glass North America Ltd. v. CCP Atlantic Specialty Products Inc.*, 2010 NSSC 108 and para. 25 of *Maritime Travel Inc. v. Boyle*, 2010 NSSC 260.

[29] I disagree. The defendants have provided evidence tending to prove representations made by the bank, evidence tending to prove reliance, and evidence tending to prove that the representations were false.

[30] The bank also seeks to apply the *Statute of Frauds* and an exclusive agreement clause in the guarantee, which includes "no representations have been made to the undersigned".

[31] I do not think the *Statute of Frauds* applies. That statute avoids a parol transfer of land. It does not prevent a person from avoiding a deed by proving an underlying parol misrepresentation.

[32] On the exclusive agreement clause, Mr. Dexter referred me to *Bauer v. Bank of Montreal*, [1980] S.C.J. 46. That case concerned the common clause in bank guarantees by which the guarantor contracts out of suretyship defences. However, Justice McIntyre also had to deal with an argument about contracts induced by misrepresentation.

[33] At para. 14, Justice McIntyre wrote:

> Various authorities were cited for the proposition that a contract induced by misrepresentation or by an oral representation, inconsistent with the form of the written contract, would not stand and could not bind the party to whom the representation had been made.

And at para. 15, he wrote:

> No quarrel can be made with the general proposition advanced on this point by the appellant. To succeed, however, this argument must rest upon a finding of some misrepresentation by the bank, innocent or not, or on some oral representation inconsistent with the written document which caused a misimpression in the guarantor's mind, or upon some omission on the part of the bank manager to explain the contents of the document which induced the guarantor to enter into the guarantee upon a misunderstanding as to its nature.

Justice McIntyre found that there was no evidence to support the required finding.

[34] There is a problem with a term contracting out of misrepresentations that does not arise with a term contracting out of suretyship defences. The misrepresentation avoids the contract of which the term is part.

[35] A parol misrepresentation defence withstood summary judgment in *Bank of Nova Scotia v. Zackheim*, [1983] O.J. 3258 (C.A.). It was followed by this court in *Canadian Imperial Bank of Commerce v. Dorey*, [1991] N.S.J. 434 (S.C.), which rejected summary judgment against a guarantor who had some evidence of a misrepresentation by the bank that induced the guarantee.

[36] In addition to *Zackheim* and *Dorey*, Mr. Dexter referred me to *Bank of Montreal v. Intracom Investments Ltd.*, [1983] N.B.J. 208 and *Business Development Bank of Canada v. Turack*, [2005] O.J. 1128.

[37] The reasons in these decisions sometimes seem more concerned with the parol evidence rule than with an exclusive agreement clause. In *Zackheim*, a master had refused summary judgment on a guarantee said to have been induced by misrepresentation, the Divisional Court reversed based on the parol evidence rule, but the reasons of the Ontario Court of Appeal applied equally to an exclusive

agreement clause and the parol evidence rule. *Dorey* concentrated on the parol evidence rule.

[38] In both cases, the guarantees included strongly worded exclusive agreement clauses, "none of the parties shall be bound by any misrepresentation … not embodied herein" in *Zackheim* and "There are no representations … other than as contained herein" in *Dorey*.

[39] Both an exclusive agreement clause and the parol evidence rule are confronted by the same problem in cases of guarantees, or other contracts, induced by misrepresentation. The clause contracts out of the misrepresentation and the rule blocks proof of an oral misrepresentation, but each depends on proof of a contract. Neither has any operation if the written contract "would not stand" or "could not bind", using the words chosen by Justice McIntyre.

[40] When the subject is understood in that way, we see that misrepresentations inducing a contract are not exceptions to the parol evidence rule or to the application of an exclusive agreement clause. They are beyond the reach of the rule and the clause, both of which depend on the validity of the contract.

[41] Mr. Cooke argues that this case is different than the others because the written contract was made first and the alleged misrepresentation came after.

[42] The guarantee and the mortgage were not delivered when they were executed. They were delivered after the alleged misrepresentations. Those facts, and the evidence about the events that day, leave it open to a trial judge to find that contracting was not limited to the moment of execution.

[43] *Disposition*. The plaintiff has proved its claim clearly, but the defendants have established that there is a genuine issue for trial. Therefore, I will dismiss the motion for summary judgment.

[44] *Directions under Rule 13.07.* This Rule is often ignored, but I do not think it should be. I am prepared to give directions based on counsel's agreement, or correspondence, or a telephone conference. I request counsel contact my office to advise how they wish to proceed.

[45] I suggest that we consider the following possibilities:

- A direction that the only issue for trial is whether the guarantee and mortgage are invalid because they were induced by material misrepresentation.

- The guarantee, mortgage, loan accounting, and abstracts of title may be introduced at trial without proof.

- The defendants will present their case first.

- There will be no discovery of the plaintiffs, but their affidavits and a transcript of their testimony may be used in a like manner as a discovery transcript.

I am, however, open to any of the other kinds of directions suggested by Rule 13.07(2) and anything that counsel might suggest.

[46] *Conclusions*. I will grant an order dismissing the motion for summary judgment and giving directions under Rule 13.07. The order may provide for costs payable to the defendants now in the amount of $1500 plus disbursements. Defendants' counsel, the defendants, and their witness are entitled to reasonable costs of having to travel to Halifax.

J.