SUPREME COURT OF NOVA SCOTIA
Citation: Fierro v. Sinclair, 2012 NSSC 429

Date: 20121220
Docket: Hfx No. 375245
Registry: Halifax

Between:

Steven Fierro

Plaintiff

v.

James Sinclair

Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: June 20 and 27, 2012, in Halifax, Nova Scotia

Final Written Submissions: Plaintiff: July 13, 2012
Defendant: July 5, 2012

Counsel: Christa M. Brothers and Ian Breneman, for the plaintiff
Peter C. Rumscheidt and Daniel McMillan, for the defendant

By the Court:

INTRODUCTION

[1] This motion arises out of an action for debt. The plaintiff seeks summary judgment on the evidence, arguing that the defendant raises no genuine issues for trial in his statement of defence. For the reasons that follow, I will grant the motion and allow the plaintiff's claim.

SUMMARY OF UNDISPUTED FACTS

[2] Both the plaintiff and the defendant gave evidence. Where their testimonies conflict, I am unable on this motion to make any determination of fact. However, some facts are not disputed and those that are relevant are set out below. As well, neither party questioned the veracity of the e-mail correspondence attached to either affidavit although the defendant has alleged that some of it was taken out of context.

[3] The defendant in this action, James Sinclair, was the chief executive officer of Visual Spirit Inc. ("VSI"). VSI was federally incorporated in 2002 in order to establish the VSI Media Fund which was intended to be a fifty-million dollar fund to finance the creation, development, and distribution of a number of film, television, and theatrical productions. VSI was dissolved on March 12, 2007, but was revived on June 6, 2012. The defendant also appears to have been affiliated with several other corporations over the relevant time period but they are not as material to the present motion.

[4] At some point in 2003, the plaintiff in this action, Steven Fierro, became acquainted with Mr. Sinclair and over the course of the next few years transferred large sums of money to help finance Mr. Sinclair's projects. The precise nature, terms, and conditions of these agreements at the time are disputed but both parties agree that Mr. Fierro wired to Mr. Sinclair or to Mr. Sinclair's corporations the following sums of money on the following dates (in US currency):

$150,000	March 29, 2004
$150,000	June 1, 2004
$300,000	June 11, 2004
$ 50,000	October 25, 2006
$250,000	June 4, 2007

[5] Neither Mr. Sinclair nor any corporation affiliated with Mr. Sinclair have ever made any payments to Mr. Fierro although at various points in this timeline Mr. Sinclair has executed promissory notes. The latest was signed on June 14, 2010 but is dated June 4, 2007. In it he promises to repay Mr. Fierro all $900,000 by December 4, 2007, with interest at a rate of 8%.

[6] Mr. Fierro eventually sought to enforce this latest promissory note through this action for debt against Mr. Sinclair which was filed on January 25, 2012. Mr. Fierro now moves for summary judgment on the evidence.

LAW OF SUMMARY JUDGMENT ON THE EVIDENCE

[7] Rule 13.04 governs motions for summary judgment on the evidence, and it provides as follows:

> 13.04(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.

[8] As stated in rule 13.04(1), the overarching question in this motion is whether Mr. Sinclair's statement of defence raises a genuine issue for trial. The applicable steps and legal principles to answer that question were set out by Justice Bryson in **AFG Glass Centre** v. **Roofing Connection**, 2010 NSSC 108, 289 NSR (2d) 290:

> (1) The plaintiff must show that, on uncontroverted facts, it is entitled, as a matter of law, to succeed; that is to say, that there is no fact material to the cause of action that is in issue;

> (2) The burden then shifts to the defendant to show evidence that the defence has a real prospect of success; that is to say that there is a genuine issue of fact material to the claim or defence, that must be decided before the case can be determined on its merits;
>
> (3) The responding party must put "its best foot forward" or risk losing. This requires more than a simple assertion, but requires evidence, [*United Gulf Developments Limited v Iskandar*, 2004 NSCA 35, 222 NSR (2d) 137];
>
> (4) If material facts are not in dispute, the court has an obligation to apply the law to those facts and decide the matter, [*Eikelenboom v Holstein Canada*, 2004 NSCA 103, 226 NSR (2d) 235].

I accept this as a correct statement of the law and would qualify it only by further emphasizing that the analysis is strictly sequential; the burden will shift to the defendant to establish a positive defence if and only if the plaintiff establishes that no facts material to the cause of action are in dispute: **2420188 Nova Scotia Ltd.** v. **Hiltz**, 2011 NSCA 74 at para. 28, 307 NSR (2d) 89, per Fichaud, JA. That said, the evidence of both parties is relevant at both stages of the analysis. As started in paragraph 25 of **Hiltz**: "whether there is a disputed issue of material fact involves a comparison of both parties' evidence and positions. A dispute by definition engages more than one party."

[9] A disputed fact is not capable of raising an arguable issue unless it is material to the disposition of the case. Further, rule 13.04(4) must be kept in mind: As Justice Bryson put it at paragraph 14 of **AFG Glass Centre**, *supra*, "a responding party cannot be coy about its true position. A vague assertion of factual disputes will not do. "Rather, both sides must present actual evidence of the facts they seek to rely on. Once the parties have presented conflicting evidence on an issue of material fact, however, then that "will likely be enough to meet the low threshold of raising an arguable issue, and will thereby be enough to dismiss an application for summary judgment" (**Young** v. **Meery**, 2009 NSCA 47 at para. 22, 277 NSR (2d) 49).

[10] That said, it is appropriate to interpret valid promissory notes on a motion for summary judgment (see e.g. **Wilson** v. **BMO Nesbitt Burns**, 2011 NSSC 373). Indeed, in **Amica Mature Lifestyles Inc**. v. **Brett**, 2005 NSCA 25, the Court of Appeal explicitly stated at paragraph 11 that:

> Promissory notes are generally treated as cash. Where there is no dispute as to the validity of the note itself, in an action between the original parties to the note, the Court has a discretion whether to award summary judgment notwithstanding the assertion of a set-off or the filing of a counterclaim.

While that case was decided under the old rules, I find that it is applicable here as well.

ISSUES

1. Has Mr. Fierro established with evidence that there are no material facts in dispute?

    a. Is Mr. Fierro entitled to succeed on the action for debt?

        i. Is Mr. Sinclair personally liable under the promissory note?
        ii. Is it material to determine whether Mr. Fierro originally believed that the promissory note was enforceable?
        iii. Is it material to determine whether the funds were originally advanced as equity or debt?

    b. If not, is Mr. Fierro entitled to succeed on an action for the tort of breach of warranty of authority?

2. If so, has Mr. Sinclair refuted that by showing that his defence has a real prospect of success?

ANALYSIS

Stage 1: Has Mr. Fierro established with evidence that there are no disputes of material facts requiring trial?

[11] Mr. Fierro argues that the undisputed facts before this Court entitle him to succeed in his action for debt. In the alternative, he argues that he would succeed on an action for the tort of breach of warranty of authority as well although that was not pled. I will address these claims in turn.

a. Is Mr. Fierro entitled to succeed on the action for debt?

[12] Mr. Fierro seeks judgment on a promissory note dated June 4, 2007. Mr. Fierro submits at paragraph 34 of his pre-trial brief that it meets the definition of a promissory note in the *Bills of Exchange Act*, RSC 1985, c B-4, s. 176 (see also ss. 186(1), 26(d)), and nothing in Mr. Sinclair's defence impeaches its validity. Indeed, Mr. Sinclair admits that he drafted and signed it. However, he asserts that it does not bind him in his personal capacity. He states at paragraph 6 of his statement of defence that:

> This party denies that the Promissory Note created any personal liability from this party to the Plaintiff. Rather, to the extent any indebtedness was created by the Note in favour of the Plaintiff (which is not admitted) such indebtedness is owed to the Plaintiff by other entities including Visual Spirit Inc., a body corporate.

[13] Elaborating on this, he states that all the funds were directed to corporations and that none were received by him personally.

[14] If Mr. Sinclair is correct that the promissory note does not make him personally liable then Mr. Fierro would not be entitled to succeed against him. As such, the onus is on Mr. Fierro to present evidence that shows Mr. Sinclair is personally liable.

[15] In that regard, Mr. Fierro attached as Exhibit "X" to his affidavit a copy of the promissory note dated June 4, 2007 and signed June 14, 2010. The relevant portions of the promissory note are as follows:

> PROMISSORY NOTE
>
> PRINCIPAL AMOUNT: USD$900,000.00 DUE: December 4th, 2007
>
> MADE AT the City of Toronto, Canada, this 4th day of June, 2007.
>
> FOR VALUE RECEIVED, and in consideration of a lender's fee of USD$2.00 (the "FEE") the undersigned joint and severally promise to pay Steven Fierro ("FIERRO"), the principal amount of nine hundred thousand dollars ($900,000.00) of lawful money of the United States, together with interest on the amount outstanding, accruing from and including the dates hereof, both before and after maturity, default and judgment, at a rate per annum of 8.0% adjusted daily, on the amount outstanding at the end of such day and compounded monthly. The principal

sum shall be paid in one (1) installment in the amount of nine hundred thousand dollars ($900,000.00) which is due and payable on December 4th, 2007. The FEE is noted as paid in full prior to June 4th, 2007.

[…]

INTEREST shall be accrued from the dates on which the advances were made below, contributing to the principal amount of nine hundred thousand dollars ($900,000.00) of lawful money of the United States.

$150,000	March 29, 2004
$150,000	June 1, 2004
$300,000	June 11, 2004
$50,000	October 25th, 2006
$250,000	June 4th, 2007

THIS PROMISSORY NOTE, inclusive of EXHIBIT "A", supersedes all other notes and agreements between FIERRO and THE UNDERSIGNED.

THIS PROMISSORY NOTE is made pursuant to and shall be governed by and construed in accordance with the laws of the Province of Ontario in Canada.

JAMES R. SINCLAIR June 14, 2010_____

James R. Sinclair Date

President, Visual Spirit Inc.

[16] Exhibit "A" is a preferential option allowing Mr. Fierro "to convert all or part of the [Promissory Note] into the [VSI] Media Fund at a 20% discount," and it was signed by Mr. Sinclair on the same date. It too has a clause that it should be construed in accordance with the laws of Ontario but neither party has directed me to any Ontario law which would affect the disposition of this action.

i. Is Mr. Sinclair personally liable on the face of the promissory note?

[17] As mentioned above, the fact that this note was signed by Mr. Sinclair on June 14, 2010 is not contested nor is its validity. Instead, Mr. Sinclair argues that he signed it in his capacity as president of Visual Spirit Inc. and therefore only the corporation is liable and not him personally. This is supported by the fact that his title and the company name is directly below his name. Moreover, he notes that no money was ever transferred to him directly. Indeed, the wire transfer receipts, attached as exhibits to Mr. Fierro's affidavit, show that the first three transfers were sent to VSI (Exhibits "B", "F", & "I"), the fourth transfer was sent to IYOUWE Inc. (Exhibit "T"), and the last transfer was sent to Wake Media (Exhibit "W").

[18] On the other hand, Mr. Fierro points out that the first clause reads that: "the undersigned *joint and severally* promise to pay Steven Fierro," which, in his submission, can only mean that the document was intended to bind both VSI and Mr. Sinclair as his is the only signature on the document. To the extent that it is ambiguous, Mr. Fierro submits that it should be interpreted in his favour since Mr. Sinclair is the one who drafted the note and, as confirmed in cross-examination, Mr. Fierro had no input on the language whatsoever.

[19] Mr. Sinclair admits that he drafted the note but he testifies at paragraphs 25(v) and 25(xxviii) of his affidavit that all promissory notes were drafted without the assistance of a lawyer and that he did not know what "joint and several" meant. He testifies that he did not intend to become personally liable. The plaintiff disputes this arguing that Mr. Sinclair cannot disown his own signature without showing that the document is radically different from what he believed he signed and that he did not sign it carelessly which he has not done: **Gardin** v. **J & B Kozma Enterprises Ltd.** (1997), 159 NSR (2d) 144; **Castle Building Centres Group Ltd.** v. **Da Ros** (1990), 95 NSR (2d) 24 (SCTD), aff'd (1990), 97 NSR (2d) 270 (SCAD).

[20] I agree with the plaintiff's position; the term "joint and severally promise" unambiguously manifests an intention that both Mr. Sinclair and VSI should be liable. Whatever Mr. Sinclair's subjective intention, it cannot displace the objective meaning of the note. For the same reason, it is irrelevant that the money was directed to the corporations and not Mr. Sinclair's personal accounts and, in any event, all funds were solicited by Mr. Sinclair. Although Mr. Sinclair seems to suggest at paragraph

20 of his brief that a separate personal guarantee would need to be drawn up in order to bind Mr. Sinclair, the legislation plainly does not require that. Section 179(1) of the *Bills of Exchange Act, supra*, states that:

> 179 (1) A note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor.

[21] In Maurice Megrah & Frank R. Ryder, Byles on Bills of Exchange, 24th ed (London, UK: Sweet & Maxwell, 1979), the authors commented on an identical provision of the UK Act that a "joint and several note, though on one piece of paper, comprises, in reality and in legal effect, several notes." As such, there is no need for a separate personal guarantee to bind Mr. Sinclair and its absence does not raise any genuine issue for trial.

[22] Further, Mr. Sinclair cannot escape the language he drafted simply by asserting that he did not know what it meant. Documents do not need to be drafted by a lawyer to have legal effect and Mr. Sinclair admits that he signed the promissory note. Moreover, he has not presented any evidence that would allow him to escape the consequences of that signature under the test in **Castle Building Centres**, *supra*. Indeed, he chose to draft and sign a $900,000.00 promissory note without the assistance of a lawyer. While perhaps imprudent it was nonetheless something he could do if he wanted to. Moreover, I doubt that he truly did not intend to bind himself. By his own admission in an e-mail to Mr. Fierro on October 25, 2010, Mr. Sinclair said that: "[t]he promissory note to you is from me and my company, Visual Spirit, so that I owe you the funds" (Mr. Fierro's affidavit, Exhibit "CC"). While Mr. Sinclair testifies in his affidavit that "[m]y reference to 'me' was meant as a reference to VSI – my company," it makes no sense that he meant to repeat "my company" while adding "so that ***I*** (emphasis added) owe you the funds."

[23] In any event, Mr. Sinclair's subjective intention is irrelevant and the promissory note unambiguously indicates that Mr. Sinclair is personally liable.

ii. Is it material to determine whether Mr. Fierro originally believed that the promissory note was unenforceable?

[24] Mr. Sinclair also submits that the promissory note should not be given effect since Mr. Fierro did not originally believe that it was enforceable. To support his argument, he submits an email that Mr. Fierro sent to him on June 21, 2010, in which

Mr. Fierro doubts the veracity of the promissory note on the basis that it is "an expired promissory note with an expired company." Relying on this letter in his brief at paragraph 29, Mr. Sinclair submits that "even in 2010 Fierro conceded that the most recent promissory note (which covers the entire loaned amount) was worthless." Put another way, Mr. Sinclair is arguing that this is evidence that Mr. Fierro rejected the note and may not have believed that the note bound Mr. Sinclair personally and, as such, the note should not have any effect. Mr. Fierro contested this interpretation of his e-mail in cross-examination, but in any event, this submission ignores the fact that a promissory note does not depend on the understanding of the recipient for its legal effect. Promissory notes are generally treated as cash and they have legal effect whether or not the recipient is aware that they do just as bank notes have legal effect whether or not the recipient is aware that they do. As such, any potential dispute as to Mr. Fierro's subjective understanding of the promissory note's value is immaterial and does not constitute a genuine issue for trial.

iii. Is it material to determine whether the funds were originally advanced as equity or debt?

[25] Finally, Mr. Sinclair submits that it is arguable that some of these payments were intended to be investments. For instance, he points to Exhibit "L" of Mr. Fierro's affidavit, which contains an e-mail that Mr. Fierro sent to Mr. Sinclair on April 19, 2005, in which Mr. Fierro wrote:

> Regarding my invested sum […] I can't remember exactly but I remember intending to have only $300K or 10% of my net worth invested across the board? As we never got around to formalizing where the money would be allocated I was not sure how much would go where. The other $300[K] was more to help you with cash flow, but I will want to think about keeping it all in.

[26] Shortly thereafter, in another e-mail sent on May 5, 2005, Mr. Fierro indicated that he "wanted to discuss keeping $300K in and where to spread it" and that he wanted "to discuss the structure of the investment and its details" (Mr. Sinclair's Affidavit, Exhibit "A"). Mr. Sinclair swears at paragraph 25(xi) of his affidavit that Mr. Fierro did decide to invest $300,000 but Mr. Sinclair provides no documentary evidence of this discussion, nor does he provide any documents to show that Mr. Fierro ever held shares in any of his corporations. Indeed, almost one year after these investment discussions, Mr. Sinclair provided a promissory note promising to repay the entire $600,000 with interest by December 25, 2006 (Exhibit "O") which suggests

strongly that it remained debt. Moreover, the e-mail correspondence attached to Mr. Fierro's affidavit show that when Mr. Fierro began demanding repayment on the loans, Mr. Sinclair never protests that the payments were supposed to be investments or deny that Mr. Fierro was entitled to repayment (e.g. Mr. Fierro's affidavit, Exhibits "L", "N", "Y", "AA", "BB", & "CC"). The fact that some of the promissory notes contained a preferential option to convert the debt into equity means nothing without evidence that the option was exercised. In my view, the plaintiff has met the burden to show that these payments were debt and Mr. Sinclair has provided nothing more than a vague assertion to the contrary.

[27] Moreover, even if Mr. Sinclair had satisfied his evidential burden in this regard, it would be irrelevant since the precise circumstances in which the transfers of money were made and the attendant agreements are ultimately immaterial. The notice of action for debt rightly focusses only on the satisfaction of the most recent promissory note which itself provides that "THIS PROMISSORY NOTE, inclusive of EXHIBIT "A", *supersedes all other notes and agreements* between FIERRO and THE UNDERSIGNED" (**emphasis added**). Since Mr. Sinclair drafted and signed this promissory note, he cannot rely on the terms or conditions of previous agreements to escape his obligations. Moreover, promissory notes are, by their very nature, unconditional. In this case, the June 14, 2010 promissory note very clearly indicates that the transactions were debt and that they were to be paid back with interest by a specific deadline. As such, the precise terms of any previous agreements are irrelevant to the determination of this action.

[28] In the result, I find that Mr. Fierro has established that there is no fact, material to the cause of action in issue and that he is therefore entitled to succeed.

b. In the alternative, is Mr. Fierro entitled to succeed on an action for a breach of warranty of authority?

[29] As an alternative argument, Mr. Fierro points out that VSI was actually dissolved on March 12, 2007 approximately three months before the note was dated and three years before the note was signed (Mr. Fierro's affidavit, Exhibit "U"; Exhibit 2). As such, Mr. Fierro argues that even if I did not decide that the promissory note disclosed that Mr. Sinclair was personally liable, Mr. Sinclair would still be liable in tort for breach of warranty of authority for purporting to sign on behalf of a non-existent company. Mr. Sinclair responded by arguing that such an

allegation was not contained within the pleadings, that Mr. Fierro has not proven all the elements of that cause of action, and that any personal liability in tort was cured by the revival of the company on June 6, 2012.

[30] While this is an interesting issue, I have already decided that the effect of the promissory note was to make Mr. Sinclair personally liable to Mr. Fierro. As such, there is no reason to decide this alternative ground and I decline to do so.

Stage 2: Has Mr. Sinclair presented any evidence that his defence has a real prospect of success?

[31] Mr. Sinclair did not assert any positive defences in his pleadings. He chose instead to primarily deny the assertions of Mr. Fierro. In his pre-trial brief at paragraph 30, Mr. Sinclair's only submission as to this stage is that "there is no evidence of a written personal guarantee." This merely reiterates his submission that the plaintiff has not proved that Mr. Sinclair is personally liable under the note, which I have already rejected. As such, there is no further work to be done at this stage and it does not affect my determination of the motion at the first stage.

DISPOSITION

[32] The plaintiff has satisfied me that there is no genuine issue for trial and the defendant has failed to show that he has any defence with a real prospect of success. As a result, I grant the plaintiff's motion for summary judgment and allow his claim. I order that Mr. Sinclair pay to Mr. Fierro the principal amount of USD$900,000, along with pre-judgment interest accruing according to the terms in the June 14, 2010 promissory note and running until the date of this decision. Thereafter, interest will accrue on the debt at a rate of 5% per annum pursuant to section 2(1) of the *Interest on Judgments Act*, R.S.N.S. 1989, c. 233.

[33] If the parties cannot agree on costs, I invite them to file written submissions within thirty days the date of release of this decision.

McDougall, J.