

1998

S.H. No. 146654C

**IN THE SUPREME COURT OF NOVA SCOTIA**

**BETWEEN:**

**BLACK BUSINESS INITIATIVE SOCIETY**

**Plaintiff**

**- and -**

**VELDA GRANT**

**Defendant**

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**DECISION**

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**HEARD:** at Halifax, Nova Scotia, before the Honourable Justice  
Gordon A. Tidman, September 5, 6, 2000

**DECISION:** December 28, 2000

**COUNSEL:** Mr. W.W. Watts, solicitor for the plaintiff  
Mr. Donald L. Shewfelt, solicitor for the defendant

**Tidman, J.:**

[1] The plaintiff claims repayment of a loan advance. The defendant counterclaims for loss incurred as a result of the plaintiff's failure to disburse the full proceeds of an agreed upon loan.

**Circumstances:**

[2] The plaintiff, Black Business Initiative Society, is an organization that, *inter alia*, assists black small business persons. The defendant, Velda Grant, sought from the defendant a small loan to assist her in establishing a restaurant and food take-out business from her home. The defendant intended to convert part of her home to house the business and applied to the plaintiff for a \$14,000.00 loan to assist in doing so. By letter to the defendant dated August 12, 1997, the plaintiff authorized the loan of \$14,000.00. The loan was to be advanced in progress payments and, when fully advanced the loan was to be paid out by the TD Bank. The plaintiff was then to repay the TD Bank in monthly installments with the loan guaranteed by the plaintiff.

[3] An agreement setting out the loan terms was executed by the parties on October 7, 1997. Added to the agreement were terms and conditions of the loan.

[4] The plaintiff made a first advance of \$9,047.70 against invoices for building materials used in the house conversion process. The plaintiff refused to advance the balance of the loan on the grounds that the defendant had defaulted on her obligations under the loan agreement and claimed repayment of the funds already advanced. The defendant denied that she defaulted under the terms of the loan agreement and refused to repay the advances. The defendant counterclaims for damages for income allegedly lost by the delay in opening her business establishment caused by the plaintiff's refusal to advance the balance of the loan. She also claims exemplary damages for the plaintiff's failure to advance the total loan, alleging that the plaintiff acted in bad faith.

**The Plaintiff's Claim:**

[5] The plaintiff claims that the defendant breached the terms of the loan agreement by:

- (1) failing to provide serial numbers of the equipment that the defendant had agreed to mortgage as security for the loan;
- (2) failing to obtain a reliable bookkeeper; and
- (3) failing to take part in the plaintiff's business training program.

[6] The plaintiff contends that any one of the three alleged breaches entitles it to call for the return of the loan proceeds advanced.

[7] The defendant denies that she agreed to provide her prior owned property as security for the loan.

**The Loan Agreement:**

[8] Clause 14 of the loan agreement provides, in part:

14. Default remedies

If the default event occurs, we are entitled to demand that you immediately pay back the full amount you owe us. As well, we are entitled to realize on any security by you under these terms and conditions and any client agreement you enter into with BBI. We are not required to take any action, however, and any delay or failure to do so does not release your loan.

Realize includes the right to take possession, sell or lease, seize and keep the asset which is secured. BBI may choose how we want to realize.

...

[9] Clause 13 of the addended terms and conditions provides, in part:

We have the right to demand immediate payment of the entire amount if any of the following events happen. These events are called default events: ... you fail to observe or perform any provision of these terms and conditions, the client agreement or any other agreement with us. ...

[10] The clause dealing with loan security is set out on page 3 of the client agreement. It reads in full:

If the loan is made, you have:

- > authorized us to register and file the security, if necessary, and obtain evidence that satisfies us about the priority of our security.
  
- > authorized us to sell the asset which is the security given for the loan, or to realize on it in any way that is authorized by applicable law, if you default on any payment or other loan under the client agreement.

[11] The Client Agreement at page 3 contains a clause headed "Security" . In the clause three categories of security are described, viz, General Security, Inventory

and Equipment or Goods. Opposite each category is a box for the insertion of the initials of the borrower. Immediately following a description of the "Equipment or Goods" categories under these headings of description are described in turn - Large Kitchen Fridge, Grill with oven with hood vent and Deep Fryer. The block spaces headed Serial Number are blank. In the three blocks headed Value, the following figures were inserted, \$800.00, \$5,000.00 and \$1,100.00. The defendant placed her initials only in the first block describing "General Security" and not in the block headed "Equipment or goods".

[12] Mr. Southwell says it was an oversight that the defendant did not initial the clause entitled "Equipment or goods", but it was intended that she do so, since the equipment was described and valued.

[13] The letter of offer dated August 12, 1997 from the plaintiff to the defendant informed the defendant that she had been approved for the loan and of the terms and conditions of the approval. They included:

3. Mrs. Grant is to obtain a reliable bookkeeper or a staff member with accounting knowledge.

4. Mrs. Grant is expected to take part in the BBI training program.

[14] The defendant signed as accepting the terms and conditions contained in the letter of offer.

[15] I accept the plaintiff's submission that the letter of offer dated August 12, 1997 is "any other document" contemplated by Clause 13 of the client agreement terms and conditions and the parties are therefore bound by those terms.

[16] I find that the following documents constituted and set out the terms of the loan agreement:

1. Letter of offer - August 12, 1997 (Exhibit 1, Tab 7)
2. Client agreement (Exhibit 1, Tab 8)
3. Client agreement terms and conditions (Exhibit 1, Tab 9)
4. BBI client agreement (Exhibit 1, Tab 10)

**The Evidence:**

[17] Rustum Southwell, the Executive Director and Idy Fashoranti, the Controller of the plaintiff both had dealings with the loan application of the defendant and both gave evidence.

[18] Luke Jefferies, at the time of the loan, was a regional manager of the plaintiff. He dealt personally with the defendant in relation to the loan, doing site inspections, recommending loan advances, and generally ensuring that the plaintiff complied with the loan conditions. Mr. Jefferies left the employ of the plaintiff during the loan processing and was replaced in the field by Sheldon States who continued the plaintiff's dealings with the defendant during the balance of the loan processing. Both Messrs. Jefferies and States are no longer employed by the plaintiff and did not give evidence.

[19] In evidence by agreement are written or electronic communications which profess to be authored by Messrs. Jefferies and States. Copies of those communications are contained in a common exhibit book entered into evidence at the outset of the trial by agreement of the parties. I indicated to counsel that I would use the exhibits introduced as evidence by agreement of the parties unless a party objected to my use of the evidence during deliberations. No such objection was made. Consequently, I shall consider the communications apparently authorized by Jefferies and States as being, in fact, authored by those parties.



[20] After the initial advance of \$9,047.70 Mr. Jefferies wrote to the defendant by letter dated December 10, 1997. By that letter he indicated that before disbursement of the remaining proceeds of the loan she was to fulfill, *inter alia*, the following conditions:

- (1) Obtain a reliable bookkeeper or staff member with accounting skills,
- (2) Take part in the BBI training program,
- (3) Provide serial numbers of her assets and equipment.

[21] The defendant did not respond to that letter, nor did she comply with any of its conditions. By e-mail dated December 16, 1997 to Rustum Southwell, Mr. Jefferies expressed concerns about Mrs. Grant. He stated:

Based on a recent discussion with Velda Grant and my site inspection on December 15/97 I have a number of concerns about reservations regarding the project.

Recent developments

I visited my client and the site on Dec 15/97.

The equipment that was to act as security is missing. The owner indicates that the equipment is being upgraded to electric from propane. She indicates that the equipment will be returned when floor is completed. I asked the client for the company and contact of the equipment provider for verification and process propose. Client advised me that it is none of our business. I reminded the client

that she agreed to use the equipment as security for the loan. She said that all that matters is that she had it and it is really none of our concern. The client went on to state that if we are giving her the loan we should not worry about it.

I indicated to the client that a number of terms and conditions were still outstanding. I explained what had to be done to obtain the final disbursement of funds. Client indicated that we were asking for too much and was not if she would bother to address the outstanding issues. I again stated that she had agreed to the terms and fully understood them previous to the loan. She told me that she might just forget about the rest of her money it might not be worth it to keep running over to us and begging us for the loan.

In hind sight I believe I policed the loan to the limit of my ability while recognizing and utilizing the processes and systems as they exist today. However I now feel that the client has managed to manipulate us by taking advantage of our faith and trust. I have my reservation about the client's truthfulness and desire to be in business.

After reviewing of the progress and current state of the property and most importantly the client's attitude and comments I recommend the following:

- Do not disburse any more funds until every term and condition has been met
  
- Impose a deadline in which the terms are met and loan is disbursed so loan repayment can begin (as no repayment plan has been outlined yet).
  
- Look at alternative security source of security as equipment might be gone?

[22] On December 17, 1997, Ms. Fashoranti wrote to the defendant. She referred to Mr. Jefferies' letter of December 10 and informed her that the equipment was not available for inspection when the site inspection was done by

Mr. Jefferies. She again set out the three requirements regarding bookkeeping services, BBI training program and the equipment serial numbers. She also informed the defendant that if the requirements were not met by December 31, 1997 that such would constitute a default and the loan proceeds already advanced would become immediately repayable.

[23] By letter dated December 18, 1997 the defendant wrote to Mr. Southwell asking for a meeting with him. In the letter she complained of rude treatment by Mr. Jefferies and advised that Mr. Jefferies was delaying the loan process. She also complained that he was requiring her to have a bookkeeper in relation to the business which insinuated to her that she was not capable of conducting her own business affairs. However, when the defendant gave evidence at trial she did not complain about the treatment she received from Mr. Jefferies, but rather indicated that he was only doing what he was told by Mr. Southwell.

[24] As a result of the defendant's request for a meeting Mr. Southwell and Ms. Fashoranti met with her on December 21, 1997. The final outcome of that meeting is not clear from the evidence, but Ms. Fashoranti says that the defendant told her that she had engaged a bookkeeper and gave the bookkeeper's name to Ms.

Fashoranti. When Ms. Fashoranti called to confirm the engagement of a bookkeeper the named person said he was so engaged. At the December 21st meeting the defendant was questioned about the equipment security which was missing from her property and she responded that it was being converted from gas to electric. Mrs. Fashoranti understood that the dealer had only one piece of equipment for conversion, although the defendant had more than one piece of equipment which was to be pledged as security for the loan.

[25] By letter dated January 8, 1998 Ms. Fashoranti again wrote to the defendant setting out the three requirements that had still not been met. She again warned the defendant that if the requirements were not met the initial cash advance would become immediately repayable.

[26] The defendant did not respond to that letter and by letter dated January 16, 1998 Ms. Fashoranti wrote to the defendant demanding repayment of the loan advance of \$9,047.70.

**Issue:**

[27] **Is the plaintiff entitled to repayment of the loan advance?**

**Decision:**

[28] The plaintiff is entitled to succeed. I am satisfied that the defendant violated the terms of the agreement, generally, by failing to co-operate in the loan processing and, specifically, by:

- (1) failing to obtain a bookkeeper, and
- (2) failing to provide serial numbers of the equipment.

**Bookkeeper:**

[29] At trial the defendant says that she contacted three persons in an attempt to engage a bookkeeper, including Mr. Raymond Sheppard. Mr. Sheppard gave evidence confirming that he had agreed to do the defendant's bookkeeping. Unfortunately, however, the defendant did not obtain a bookkeeper until after the loan was called. This, in my view, was the most important condition of the loan. A review of the material considered by the BBI Board of Management prior to loan approval, particularly those contained in Tabs 2-6 of Exhibit 1, indicate that

the Board was concerned about the defendant's lack of management skills and was reluctant to grant the loan. Tab 4 of Exhibit 1 contains a report of one Gary Martin dated February 14, 1997 entitled "Report of Activities, Mrs. Velda Grant, Owner Velda's Restaurant" which was submitted to Mr. Southwell as part of the loan application. The first sentence of the second paragraph under the heading "General Remarks" on page 2 Mr. Martin states "Velda Grant has the technical skills of cooking, but will need assistance in the management of the business". It was obviously for that reason the Board made the loan conditional on the defendant obtaining that type of expertise. The defendant not only made no effort to obtain a bookkeeper prior to the loan being called, but by her letter of December 18, 1997 said she was insulted by that requirement and was capable of running her own business.

**Security:**

[30] The client agreement did, in fact, describe the equipment to be given as security although the block space entitled "Initials" opposite "Equipment and goods" in the agreement was not initialled by the defendant. The agreement signed by Ms. Grant clearly indicates that the equipment was to be taken as

security for the loan. As well, it was pointed out to her on several occasions that the clause was part of the agreement and serial numbers were required by BBI. The failure to initial the specific clause was on oversight and cannot be considered as an indication that the parties did not intend to include that clause since the client agreement containing the clause was signed by the defendant. As well, it was pointed out to Ms. Grant on several occasions that the agreement contained that clause and serial numbers were required by BBI. Ms. Grant failed to provide that necessary information.


**BBI Training Courses:**

[31] It is not clear whether or when the defendant made efforts to attend BBI training courses. It may be that, again, she responded to this requirement after the loan was called. I would not have found for the plaintiff had this been the only alleged violation of the agreement even though the defendant may not have attempted to take those training sessions until after her default under the agreement. I am not satisfied that the plaintiff provided sufficient and specific information to the defendant as to when and where such training sessions were to be held nor that she was required to attend such specified sessions.

[32] The Plaintiff shall have judgment for the sum of \$9,047.70.

[33] The defendant's counterclaim is dismissed.

[34] The plaintiff shall be entitled to party and party costs under Tariff "A" Scale 3 based on an amount involved of 49,047.70. It does not appear that much additional work was entailed in defending the counterclaim so I would not award costs on the defendant's counterclaim.



J.