SUPREME COURT OF NOVA SCOTIA
Citation: *A.F. MacPhee Holdings Limited v. Sears*, 2020 NSSC 373

Date: 20201217
Docket: *Halifax*, No. 491963
Registry: Halifax

Between:

A. F. MacPhee Holdings Limited

Applicant

v.

Sean Sears

Respondent

Summary Judgment Decision

Judge:	The Honourable Justice Christa M. Brothers
Heard:	December 7, 2020, in Halifax, Nova Scotia
Counsel:	Tim Hill, Q.C., for the Applicant John O'Neill, for the Respondent

By the Court:

Overview

[1] When the parties provide differing accounts of contractual negotiations and alleged verbal agreements, and these constitute material facts at issue, the Court cannot grant summary judgment. In the face of conflicting affidavit evidence, the parties must have issues of credibility addressed at a trial. Where the allegations include conditions precedent to a contract and misrepresentation, the parol evidence rule can not be invoked on a summary judgment motion to preclude that evidence from raising a material fact for determination at a trial.

Background

[2] The plaintiff, A.F. MacPhee Holdings Limited ("MacPhee Holdings") seeks an order for summary judgment on evidence in relation to a personal guarantee signed by the defendant, Sean Sears ("Sears"). MacPhee Holdings made a demand revolving loan ("loan") to Petite Riviere Investments Limited ("PRI") for a maximum of $130,000.00. Pursuant to the written agreement ("term sheet"), the loan was to be repaid within six months with interest at 2% per annum, paid quarterly. The term sheet also included an agreement that PRI would execute a promissory note for the amount borrowed. On September 21, 2018, PRI executed a promissory note for $130,000.00. The promissory note included a March 31, 2019, repayment deadline, with interest at 2% per annum to be paid quarterly.

[3] MacPhee Holdings sought a guarantee from Sears, who is the President, Secretary, and sole Director of PRI. On September 21, 2018, the parties entered into a written agreement (the "Guarantee") whereby Sears agreed to guarantee repayment of the loan and indemnify MacPhee Holdings.

[4] The Guarantee included the following sections:

> AND WHEREAS as a condition of making the Loan, the Lender has required that the undersigned, Sean Sears [herein called the "Guarantor"] guarantee repayment of the Loan and indemnify the Lender on the terms set out herein:
>
> NOW THEREFORE this agreement witnesses that in consideration of the Lender making the Loan to the Borrower and other good and valuable consideration the

receipt and sufficiency of which is hereby acknowledged, the Guarantor agrees as follows:

…

(b) to unconditionally guarantee full performance and discharge by the Borrower of all the obligations of the Borrower under the provisions of the Mortgage, the General Security Agreement and the Promissory Note at the times and in the manner therein provided:

…

(d) that the Lender shall not be obligated to proceed against the Borrower or any other person liable for the Indebtedness or to enforce or exhaust any security before proceeding to enforce the obligations of the Guarantor herein set out and that enforcement of such obligations may take place before, after or contemporaneously with enforcement of any debt or obligation of the Borrower or any other person liable for the Indebtedness or enforcement of any security for any such debt or obligation;

(e) that the Lender may grant any extension of time for payment, increase the rate of interest payable under the Mortgage, renew or extend the term of the Mortgage, make amendments, whether material or immaterial, to the Mortgage, the General Security Agreement or Promissory Note and terms of repayment of same, remove the whole or any part of the mortgaged premises or other security from the Mortgage or otherwise deal with the Borrower, all without in any way releasing the Guarantor from his covenant hereunder;

…

(g) that the Lender, as it sees fit, may grant time, renewals, extensions, indulgences, releases and discharges to, may take securities from and give the same and all existing securities up to, and abstain from taking securities from or perfecting securities of, and may compromise, compound, and accept compositions from, and may otherwise deal with, the Borrower and all other persons liable upon any collateral or other security which the Lender may at any time hold, without notice to the Guarantor(s) and without changing or in any way affecting the undertaking of the Guarantor(s) hereunder;

…

(n) that this Guarantee and Indemnity constitutes the entire agreement between the Lender and the Guarantor with respect to the subject matter hereof and cancels and supersedes any prior understandings and agreements between such parties with respect thereto; there are no representations, warranties, terms, conditions, undertakings or collateral agreements, expressed, implied or statutory, between such parties other than as expressly set forth in this Guarantee.

[5] As is evidenced by certification on the final page of the guarantee, Mr. Auld provided independent legal advice to Sears. As a result of this documentation, MacPhee Holdings contends that there are no material facts in issue and summary judgment should be granted with regards to this Guarantee. MacPhee Holdings argues that the Guarantee is a signed agreement that clearly holds Sears liable for the debts of the company.

[6] This is seemingly a straightforward matter concerning a debt with an executed personal guarantee. Sears acknowledges he signed the Guarantee. Sears does not dispute that he agreed, in writing, to guarantee PRI's loan and to indemnify MacPhee Holdings. However, when Sears' evidence is reviewed, it is clear this matter is not as simple as it appears at first blush. Mr. Sears' claim, boiled down to its simplest, is that there was a verbal agreement between the parties that the Guarantee would not be called upon as long as Petite Riviere Winery (PRW) was operating. PRI is a holding company for PRW.

Evidence

[7] Sears swore an affidavit on October 2, 2020 ("Sears Affidavit"). The applicant cross-examined him on this affidavit. In this affidavit, Sears provides a detailed background of his various corporate interests. He is the President, Secretary, and Director of PRI and the Secretary and Director of Petite Riviere Vineyards Inc. ("PRV"). He is also the President and Secretary of Wines of LaHave Inc ("WLI"). WLI is the holding company for Ciderhouse International Inc. ("Ciderhouse"), and Shipbuilders Cider Ltd. ("Shipbuilders"). On cross-examination, Sears acknowledged he was an experienced businessman. He acknowledged that the debt has not been paid. He agreed that PRI is in default of its first mortgage. In addition, as of the date of the hearing, Sears agreed that PRI did not have the funds to pay the mortgage or the MacPhee Holdings debt.

[8] In response to some questions on cross-examination, Sears said that the guarantee he was asked to sign is unusual in that he is not the sole owner of the company. Sears is taking on an additional burden. He testified that he did not mind signing the Guarantee given that PRW has approximately $1.5 million in assets, including real property. He testified he told Mr. Allen F. MacPhee ("MacPhee") that he could not sign a guarantee and give MacPhee the power to call on the Guarantee while the company was operating. He said there was an agreement that the Guarantee would only be called on if the company was no longer operating. The company is still operating.

[9] Sears deposes that prior to the loan and signing of the Guarantee at issue in this motion, MacPhee invested $250,000.00 in WLI through MacPhee Holdings in June 2018. Sears deposes that this was part of a planned round of equity capital financing and MacPhee was the first investor.

[10] In his affidavit, Sears runs through the gentlemen's meetings and conversations concerning ratchet clauses in share purchase agreements, bridge financings, security for financings, and the understandings with regards to the documentation they were signing. Sears says in July 2018, he met again with MacPhee concerning the operation of the business and MacPhee expressed additional interest in a further investment. A further meeting occurred in August 2018 about bridge financing for Ciderhouse. PRI would provide the security given its assets.

[11] Sears says a Term Sheet was brought to him by Ross Landers ("Landers"), who worked for MacPhee Holdings, to finalize the loan. One of Sears' stated concerns as expressed to MacPhee was as follows:

> 23. In September, we further discussed the terms of the loan. I asked for the meeting because the requirement for a personal guarantee created possible disclosure issues for any new investors. I read the Term Sheet to require a standard unconditional personal guarantee. I stated, and MacPhee agreed, that future investors could not be exposed to the risk of MacPhee attempting to collect the guarantee from me directly while the company was operating because such a risk would materially change the risk of the investment for other third-party investors. MacPhee agreed with this assessment. We agreed that if MacPhee agreed not to enforce the guarantee while PRV remained in operation that would resolve my disclosure concerns and I could sign the guarantee

[12] Sears says these discussions pre-dated the signing of the Guarantee.

[13] Additionally, the following paragraphs of the Sears Affidavit are of relevance with regards to the Guarantee:

> 13. WLI owns 100% of PRV.
>
> …
>
> 24. The funding discussions and negotiations between MacPhee and me were facilitated in part by MacPhee's accountant and adviser, Ross Landers, ("Landers"). Landers assisted MacPhee and MacPhee Holdings in the papering of the documentation required to support the loan and guarantee made between MacPhee and me on behalf of MacPhee Holdings and PRI.

…

29. I executed a personal guarantee in favour of MacPhee Holdings on September 21, 2018. The terms of the guarantee included:

> . (n) that this Guarantee and Indemnity constitutes the entire agreement between the Lender and the Guarantor with respect to the subject matter hereof and cancels and supersedes any prior understandings and agreements between such parties with respect thereto: there are no representations, warranties, terms, conditions, undertakings or collateral agreements, expressed, implied or statutory, between such parties other than as expressly set forth in the guarantee;

…

30. In late October or early November, I met with MacPhee. Attached to my Affidavit as Exhibit "6" is a true copy of the "Nov/18 Meeting with AL" agenda. I am unsure if the "Nov 18" date reflects the day I prepared the agenda, the day I planned to meet MacPhee, or the day I met him.

31. The purpose of the meeting was to:

. Provide MacPhee with an update on the business and partnerships

. Financing

. Ratchet

. Other

32. The Agenda reads:

3) a. 2-yr full ratchet from date of investment approved

b. Subject to final agreement on the use of the guarantee

33. I told MacPhee that we could amend our earlier agreement. The Board had agreed to provide him with a 2-year full ratchet from the date of his original investment. We discussed the guarantee again and agreed to add two more conditions on the use of the guarantee. The two new conditions were that if I became insolvent, or the debt of PRI exceeded 75% of its asset value. MacPhee made notes on the agreement in the meeting on the documentation that I had brought to the meeting and those papers remained on MacPhee's desk when Sears left the meeting. When we finished, Mr. MacPhee was his regular friendly self, and he commented, he like the hard assets of the security provided and that he would only pursue the guarantee if he experienced a loss.

[14] Landers swore an affidavit on January 24, 2020, deposing that he acted as a consultant for MacPhee Holdings in all matters relevant to this action. Landers confirms that on September 12, 2018, MacPhee Holdings made a demand revolving

loan to PRI for $130,000.00 to be repaid in six months with interest at 2% per annum to be paid quarterly. Landers attaches to his affidavit a copy of the financing term sheet. The term sheet includes a term that PRI would execute a promissory note. PRI did execute such a note on September 21, 2018. Said note provides that the loan was to be repaid by March 31, 2019. In addition, the term sheet includes a term that the loan would be personally guaranteed by Sears. Attached to the affidavit, and agreed to by Sears, is an executed personal guarantee by Sears signed on September 21, 2018.

[15] The term sheet attached to the Landers affidavit at exhibit B includes provision for security of the loan. The second stipulated security in the term sheet is as follows:

> 2. Personal Guarantee:
>
> - Guarantee and postponement of claim for $150,000 from Sean Sears.

[16] PRV continues to operate to this day.

[17] MacPhee swore an affidavit on October 6, 2020. In part he states at para 8:

> I have no recollection or record of any meeting with Sears as described in paragraphs 31 to 33 of the Sears Affidavit, and I never agreed to modify in any way the terms of the guarantee in issue in this proceeding.

[18] The affidavit evidence reveals a disagreement between the parties concerning the negotiation and alleged agreements concerning the Guarantee.

Positions of the Parties

[19] Sears says the evidence concerning the alleged verbal agreement reached prior to the Guarantee being signed raises a material fact that can only be determined at trial.

[20] Sears argues that there are material facts in issue with regards to the parties' understanding and agreement concerning the plaintiff's ability to act on the Guarantee. Sears says there were conditions placed on the use of the Guarantee that were verbally agreed to by the parties but not reduced to writing. Sears relies on these alleged verbal agreements as a defence to MacPhee Holdings' attempt to call on the Guarantee and to this summary judgment motion. Sears argues this alleged verbal agreement amounts to a misrepresentation by MacPhee and should be

examined at trial when considering the Guarantee including the entire agreement clause in the Guarantee.

[21] While Sears does not dispute that he agreed in writing to guarantee PRI's loan and indemnify MacPhee Holdings, he disputes when the plaintiff can act on the Guarantee and what the Plaintiff agreed to in that regard. He argues there was a condition precedent to him entering into the Guarantee and that there was a material misrepresentation that resulted in him signing this Guarantee.

[22] Sears argues that the Guarantee and its wording can not oust a claim for misrepresentation.

[23] The plaintiff argues that the position taken by the defendant flies in the face of the written agreement. MacPhee Holdings argues that the parol evidence rule does not permit the court to go behind the clear wording of the written agreement to locate a supposed additional verbal condition on the Guarantee. The plaintiff argues that the defence only raises one issue, that is a condition precedent to entering the agreement. The plaintiff argues, that Sears is a sophisticated businessman who signed a clear guarantee and should be held to his agreement. The condition of entering the agreement, the plaintiff argues, flies in the face of the clear wording of the agreement and is in violation of the parol evidence rule.

[24] The plaintiff argues if summary judgment can not be granted in this case, the rule is in effect gutted. The plaintiff argues, "a guarantee, is a guarantee, is a guarantee".

Issues

1. Are there material facts, on their own or mixed with a question of law, in dispute and requiring a trial; and,
2. If not, is the law in dispute? If so, should this Honourable Court exercise its discretion to determine a question on this motion for summary judgment on evidence?

Law and Analysis

[25] This motion is brought pursuant to Rule 13.04, which states:

> 13.04 Summary judgment on evidence in an action

> (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> >
> > (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) 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.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> > (a) determine a question of law, if there is no genuine issue of material fact for trial;
> >
> > (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[26] The Nova Scotia Court of Appeal recently restated the law of summary judgment pursuant to Rule 13.04 in *SystemCare Cleaning and Restoration v. Kaehler*, 2019 NSCA 29:

> 34 In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to Rule 13.04 (paras. [34] through [42]):
>
> > 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
> >
> > 2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

> 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
>
> 4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?
>
> 5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

35 With respect to the first question, Justice Fichaud noted "a 'material fact' is one that would affect the result. A dispute about an incidental fact – *i.e*. one that would not affect the outcome – will not derail a summary judgment motion" (para. [34]). And further:

> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes.

[27] Rule 13.04 makes an order for summary judgment mandatory only if, after hearing the evidence, the court is satisfied that neither the material facts nor the law is in dispute. If there is an issue of law that remains, the court has the discretion to determine the question of law at the time of the hearing of the summary judgment motion.

[28] I must first look at whether there is a genuine material issue of fact. The plaintiff has the onus of satisfying me that summary judgment is a proper question for determination. The plaintiff bears the burden of showing there is no genuine issue of material fact for trial. If the plaintiff fails, the motion for summary judgment must be dismissed.

[29] In reviewing this matter, I have regard to *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61, where the court stated:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.
>
> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.

> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:
>
> > [87] . . .
> >
> > 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
> >
> > 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

Material Fact in Issue

[30] Is there a material fact in dispute in relation to these claims? A material fact has been defined by various decisions in this province, including *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74 (N.S. C.A.), where the court stated:

> [27] The disputed fact under Stage 1 must be "material", *ie.* essential to the claim or defence. A dispute over an incidental fact will not derail a summary judgment motion at Stage 1.

[31] Further, in *Coady v. Burton Co*., 2013 NSCA 95, Saunders, J.A., described material facts as "important factual matters that anchor the cause of action or defence". In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, Fichaud, J.A., described a "material of fact" as "one that would affect the result".

[32] To summarize, a material fact is essential to the claim or defence. It is important in that it anchors a cause of action or defence. A material fact will affect the result of an action.

[33] MacPhee Holdings relies on several cases in support of their position on this motion. The first is *Royal Bank of Canada v. 3255177 Nova Scotia Limited*, 2018 NSSC 181. In that case, the bank sought summary judgment on a claim against the defendant company and guarantors, who had agreed to jointly and severally guarantee the obligations of the debtor company to RBC. The liability of the individual defendants was discussed. There were three guarantors. The first guarantor provided a blanket denial in his pleadings and chose not to appear to oppose the motion. He provided no substantive challenge to the material facts. The second individual defendant was the subject of a notice of stay of proceedings issued by her trustee in bankruptcy. While her pleading advanced a bare allegation of undue influence, it did not explain this allegation in any detail and the individual defendant did not lead any evidence to oppose the motion. The third and final individual

defendant, who signed a guarantee, opposed the proceeding with a blanket denial that she guaranteed any obligations of the debtor company. She also claimed that undue influence was exerted upon her by her stepfather, who was the general manager of the debtor company. She also plead a lack of independent legal advice. This individual defendant did attend the motion, swore an affidavit and was cross-examined. The court concluded that the individual defendant failed to present any evidence to show any genuine issue of material fact requiring trial or any question of law requiring determination.

[34] It is clear that the onus is on the moving party, here MacPhee Holdings, to prove that there is no material fact in issue. It is not upon the defendant to show the court that there is a material fact in issue requiring trial. Here however, as in all summary judgment cases, each party must put their best foot forward. Sears has done so and has demonstrated there exist material facts in issue. Sears has advanced more than a bare allegation and has sworn an affidavit detailing an alleged verbal agreement which arguably affects the Guarantee, raising a misrepresentation and conditions precedent to the Guarantee. Consequently, the case before me is factually distinguishable from *RBC, supra*.

Parol Evidence

[35] MacPhee Holdings relies on *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515, arguing that any evidence relating to the alleged verbal agreement is not evidence raising a material fact in issue as it is not proper evidence to be heard and admitted at this motion in relation to a written agreement. I disagree.

[36] In *Hawrish,* the appellant signed a guarantee in favour of the respondent bank to cover existing as well as future indebtedness of the company. At trial, the court admitted oral evidence of an assurance which the guarantor said he had received from the assistant manager of the bank that the guarantee was to cover only existing indebtedness, and that he would be released from his guarantee when the bank received a joint guarantee from the directors of the company. The bank obtained a joint guarantee, but brought an action against the guarantor for the full amount of the guarantee. The oral agreement alleged by the appellant to have been independent of and collateral to the main contract was not determined to be independent of it in the sense in which that word has been interpreted. The oral agreement was in direct contradiction to the provisions of the written guarantee. As such, the court found that the oral evidence of the agreement should not have been admitted.

[37] Here we have a Guarantee which says in section (n) that it is the entire agreement between the parties. We then have the Sears Affidavit which says that the Guarantee is subject to a verbal agreement which places conditions upon its use. Sears claims a misrepresentation was made inducing him to sign the Guarantee which he thought assured him the Guarantee would not be called upon unless certain conditions, including PRW ceasing operations, were met.

[38] The next decision relied upon by MacPhee Holdings is *Winnipeg (City of) Samborski Environmental Ltd.*, 2018 MBQB 198. In this decision, the court referenced various other decisions and principles of contract interpretation. At paragraph 14 the court said:

> The parol evidence rule precludes the admission of evidence outside the words of the written contract that would add to, subtract from, vary or contradict a contract that has been wholly reduced to writing. The parol evidence rule does not preclude evidence of surrounding circumstances or evidence that the written agreement does not represent the whole agreement or that there is a collateral agreement. ... Further, while surrounding circumstances can be relied upon in the interpretive process, courts cannot use them to deviate from the text such that a new agreement is effectively created. See *Sattva Capital Corp.*

[39] I do not accept that the plaintiff can prevent the admission of these alleged discussions and oral agreements on this motion.

[40] MacPhee argues none of the evidence given by Sears about an alleged verbal agreement can possibly constitute material facts in dispute because the evidence is not admissible due to the parol evidence rule. However, the case law indicates that nothing bars the receipt of parol evidence when a party alleges that he was induced to enter a written contract by misrepresentation, as explained by Justice Moir in *Bank of Montreal v. Partington,* 2012 NSSC 7.

[41] In *Bank of Montreal v. Partington*, *supra*, the Bank sued the individual defendants seeking to foreclose on their property. They had allegedly signed guarantees of debts owed by another and a company. The defendants argued that the bank misrepresented the state of its primary security and this induced the signing of the guarantee. The bank sought summary judgment. The bank filed affidavits which demonstrated that the individual defendants had signed guarantees of the debts. The debts were in default. The bank had made a demand on the individual defendants. In short, the bank had proved its claim. The individual defendants filed their own affidavits, indicating that they signed guarantees to assist their son-in-law, who was seeking replacement financing from another banking institution. The

individual defendants did not speak to the bank, but went to a lawyers office where the guarantees were waiting for them and a lawyer explained the effects of the guarantee and mortgage. They executed the documents. The individual defendants then went to the bank. They met with the loan officer. The individual defendants sought assurances from the loan officer they wanted to be assured that the loans were only to take out the credit union debt and that their exposure would be no greater than before. The second assurance required was that upon any sale of the lobster license the bank was in the position that the loan would be fully repaid. As it turned out the loans retired debt owed to another company and one of the individual defendants sold the lobster license, but the proceeds were not applied to the bank loan.

[42] The court also was asked by the bank to find that given the exclusive agreement clause there was no way in which to accept evidence of these assurances or verbal agreements. Justice Moir made the following statements in rejecting this argument:

> 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. No. 3258 (Ont. C.A.). It was followed by this court in *Canadian Imperial Bank of Commerce v. Dorey*, [1991] N.S.J. No. 434 (N.S. T.D.), 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. No. 208 (N.B. C.A.) and *Business Development Bank of Canada v. Turack*, [2005] O.J. No. 1128 (Ont. S.C.J.).
>
> 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.

[43] I follow the analytical pathway articulated by Moir, J. above *in Bank of Montreal v. Partington, supra*.

[44] Furthermore, *Sattva Capital Corp v. Creston Moly Corp*, 2014 SCC 53, sets forth the approach to contractual interpretation and the parole evidence rule. This case does not support the plaintiff's position. In *Sattva*, Rothstein J. reviewed the parol evidence rule. He said:

> 59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and *Hall*, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (*Hall*, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd*., 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, at paras. 54-59, per Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd*., 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316, at pp. 341-42, per Sopinka J.).

[45] Justice Rothstein explained the shift away from the approach of contract interpretation, under which interpretation of the written document was always a question of law:

> 46 The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract -- often referred to as the factual matrix -- when interpreting a written contract (*Hall*, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference

> between questions of law and questions of mixed fact and law provided *in Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.
>
> 47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27 per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65 per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

[46] The court explained that the words of the contract must be interpreted considering the factual matrix:

> 49 As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen and Southam*. Questions of law "are questions about what the correct legal test is" (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties -- a fact specific goal -- through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).
>
> 50 With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation

> are applied to the words of the written contract, considered in light of the factual matrix.

[47] The court emphasized the importance of determining the parties' objective intent in interpreting a contract:

> 55 Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare.

[48] While the parties' objective intent must be determined, and the surrounding circumstances considered, Rothstein J. explained that the surrounding circumstances cannot overwhelm the words of the agreement. The court further explained that the surrounding circumstances must consist only of objective evidence of the background facts at the time the contract was executed:

> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement... The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract ... While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement...
>
> 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract …, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[49] Importantly, the court determined that the parol evidence rule does not preclude the admission of evidence of surrounding circumstances:

> 60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.
>
> 61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it... For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

[50] The parol evidence rule does not preclude evidence of a misrepresentation or conditions precedent or other surrounding circumstances.

[51] The plaintiff says that there is no evidence to support Sears' assertion that a condition was negotiated and left out of the contract before signing or that the contract was altered by a verbal or oral agreement. However, there is evidence contained in the Sears Affidavit as well as the attachment of alleged agendas for meetings concerning the Guarantee. This evidence is evidence of surrounding circumstances that is the purview of the trial judge to weigh and consider as she sees legally appropriate. It is not for me to weigh or to refuse to admit at this stage.

[52] The Sears Affidavit contains evidence that in September 2018 Sears and allegedly MacPhee further discussed the terms of the loan. Sears requested a meeting because Sears was of the view that the requirement for a personal guarantee created possible disclosure issues for any new investors. Sears read the Term Sheet to require a standard unconditional personal guarantee. Sears stated, and the evidence of Sears is that MacPhee agreed, that future investors could not be exposed to the risk of MacPhee attempting to collect on the Guarantee from Sears while the company was operating because such a risk would materially change the risk of the investment for other third-party investors. Sears claims in his Affidavit that MacPhee agreed with this assessment. Sears states in his affidavit that he and MacPhee reached an agreement that if MacPhee agreed not to enforce the Guarantee while PRV remained in operation that this would resolve Sears' disclosure concerns. Sears says that MacPhee agreed that PRV would need to cease operating or become

insolvent before he could enforce the guarantee. This is disputed in the MacPhee affidavit.

[53] Sears maintains in his affidavit that in late October or early November 2018 he again met with MacPhee. He is unsure if the November 2018 date reflects the day he prepared the agenda, the day he planned to meet MacPhee, or the day he met him.

[54] The purpose of the meeting was fourfold to provide MacPhee with an update on the following items:

- Provide MacPhee with an update on the business partnerships
- Financing
- Ratchet
- Other

[55] Sears says that it was a condition of the loan, Guarantee and his obligations thereunder as negotiated between him and MacPhee, that MacPhee Holdings would neither act upon nor seek recourse against the defendant through the Guarantee unless PRV had ceased operations. This agreement is not set forth in the Guarantee or another document. This is an alleged verbal agreement between Sears and MacPhee.

[56] The MacPhee Affidavit says that Landers, acted as a consultant for MacPhee Holdings and negotiated the Loan and the Guarantee. MacPhee denies having any recollection or record of any meeting with Sears as described by Sears in his affidavit at paragraphs 31 - 33. MacPhee denies ever agreeing to modify in any way the terms of the guarantee in issue in this proceeding. In fact, MacPhee deposes in his affidavit that Landers acted for MacPhee Holdings in the negotiation of the terms of the loan and the accompanying Guarantee and that he himself had no involvement.

[57] There is conflicting evidence between MacPhee and Sears concerning whether a meeting took place, whether there was a misrepresentation and, whether there was a verbal agreement that was entered into prior to the signed Guarantee. Whether there was a misrepresentation, a condition precedent to the Guarantee or a verbal agreement was entered into by the parties are surrounding circumstances to be considered in interpreting the Guarantee. These are material facts in issue affecting this matter.

[58] Sears claims that since the men had a verbal agreement that while PRV operated the Guarantee would not be called upon, then MacPhee can not now enforce the Guarantee. Sears says there is a material fact in issue and that is the existence of the verbal agreement and the effect it has on the guarantee. Therefore, there is a material fact in issue as to whether the plaintiff can act on this Guarantee at this time.

[59] There is conflicting evidence. That conflict must be resolved at trial through a weighing of evidence and determination of credibility, which can not be done by me in this motion.

Costs

[60] I heard from both parties concerning their position on costs. Both agreed the quantum should be assessed in the range between $750.00 - $1,000.00 based on this being a matter subject to Tariff C which took more than an hour but less than a half of a day.

[61] In the circumstance, I award the defendant $1,000.00 in any event of the cause.

Conclusion

[62] Civil Procedure Rule 13.08 indicates the next steps after a failed motion for summary judgment on the evidence. I am mindful that the rule requires a judge who dismisses a motion for summary judgment to take certain steps as soon as is practical after dismissal. I ask the parties to provide submissions within 30 days as to their respective positions on next steps as per Rule 13.08 (2).

Brothers, J.