<u>SUPREME COURT OF NOVA SCOTIA</u>

Citation: *Bank of Montreal v. Behan,* 2021 NSSC 309

Date: 20211108
Docket: Hfx. No. 469714
Registry: Halifax

Between:

Bank of Montreal, one of the chartered banks of Canada

Plaintiff

v.

Trevor Michael Behan

Defendant

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	March 11, 2021 in Halifax, Nova Scotia
Written Decision:	November 8, 2021
Counsel:	Cory J. Withrow for the Plaintiff Matthew D. Gough for the Defendant

McDougall, J.

Introduction

[1] This is a motion for summary judgment on evidence pursuant to Civil Procedure Rule 13.04

[2] On October 26, 2017, the Bank of Montreal ("BMO" the "Plaintiff") commenced an action against Trevor Behan ("Mr. Behan" the "Defendant") for the payment of a debt owed by Lakeside Child Care Centre Inc. ("the Company"). Mr. Behan is the sole officer and director of the Company. The Bank's claim against him was based on a personal guarantee he gave for repayment of the debt should the Company fail to meet its obligations.

[3] Mr. Behan filed a Notice of Defence and Counterclaim on December 8, 2017. In his counter-claim, Mr. Behan asserted claims for breach of contract, tortious interference with contractual relations, negligent realization, negligent misrepresentation and equitable fraud.

[4] BMO filed a Defence to Counterclaim on December 19, 2017. On May 24, 2018, BMO moved for an order to compel Mr. Behan to provide disclosure.

[5] On March 25, 2020, BMO moved for summary judgment (on evidence) against Mr. Behan. Summary judgment is granted to BMO for the reasons that follow.

Background

[6] Mr. Behan was at all material times the sole officer and director of Lakeside Childcare Center Inc. BMO extended various credit facilities to the Company, including:

- A mortgage relating to 1440 St. Margaret's Bay Road in the original principal amount of $285, 000;
- A mortgage relating to 1434 St. Margaret's Bay Road in the original principal amount of $190, 000;
- A fixed-rate term loan in the original principal amount of $180, 000, later extended to $245, 370.34;
- A fixed-rate term loan in the original principal amount of $140, 000, later extended to $156, 184.85; and
- A fixed-rate term loan in the original principal amount of $140, 000, later extended to $156, 184.85; and
- An operating loan agreement with an original loan limit of $20, 000.

[7] On or about March 29, 2010, BMO and Mr. Behan entered into a "Guarantee for Indebtedness of an Incorporated Company" agreement, which stated:

> … the undersigned [Trevor Behan] guarantees payment to the Bank [BMO] of all present and future debts and liabilities… due or owing to the Bank from or by the Customer [Lakeside Childcare Center Inc.]…

[8] In April 2013, changes were made to the terms of the Company's indebtedness, which were summarized by BMO in a Commitment Letter that BMO sent to Mr. Behan. Pursuant to the Commitment Letter, BMO and Mr. Behan entered into a new personal guarantee agreement ("the Personal Guarantee"), which replaced the personal guarantee entered into by the parties in 2010. The 2010 personal guarantee agreement and the 2013 Personal Guarantee agreement are almost identical in substance, aside from an increased limit of liability.

[9] The 2013 Agreement provides that Mr. Behan is liable for up to $476,000.00, an increase from the $440,000.00 limit included in the 2010 agreement.

[10] In his affidavit, Mr. Behan stated that he attended the law offices of a lawyer, Craig Berryman ("Mr. Berryman"), in April 2013 for the purpose of executing various documents in his capacity as officer and director of the

Company in order to renew and/or extend the various credit facilities extended by BMO to the Company.

[11] Mr. Behan does not dispute that he signed the Personal Guarantee at that time, and that his signature was witnessed by Mr. Berryman. However, he says he does not recall signing or reviewing the Personal Guarantee, or being informed that the Personal Guarantee was a condition of extending the financing for the Company.

Issue

[12] The issue before the Court is whether summary judgment should be granted in favour of the Bank of Montreal.

Law – Summary Judgment on Evidence

[13] The parties agree that Civil Procedure Rule 13.04 governs the granting of summary judgment on evidence:

> **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.

[14] The framework to be applied on motions for summary judgment pursuant to Civil Procedure Rule 13.04 was set out by Fichaud JA, speaking for the court, in *Shannex Inc v Dora Construction Ltd,* 2016 NSCA 89 ("*Shannex*"), where he expanded upon the analysis set out in *Coady v Burton Canada Co,* 2013 NSCA 95 ("*Burton*"):

34 I interpret the amended Rule 13.04 to pose five sequential questions:

• First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]

If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.

The analysis of this question follows *Burton*'s first step.

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: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74 (N.S.C.A.), para.27, adopted by *Burton*, para.41, and see also para.87(#8).

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. [Rules 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

• Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind — whether material fact, law, or mixed fact and law.

• Third Question: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test. "Does the challenged pleading have a real chance of success?"

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

• Fourth Question: If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): Should the judge exercise the "discretion" to finally determine the issue of law?

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

…

42 Rule 13.08(1) says that a judge who dismisses the motion for summary judgment "must" schedule a hearing to consider conversion or directions. Accordingly, a dismissed motion under Rule 13.04 triggers the supplementary question:

• Fifth Question: If the motion under Rule 13.04 is dismissed, should the action be converted to an application and, if not, what directions should govern the conduct of the action?

The Evidence of the Parties

[15] BMO’s evidence in support of this motion consists of a lengthy affidavit of Martine Langlois, a representative of the Bank of Montreal. The affidavit includes certified copies of the mortgages given by the Company to BMO; copies of several fixed-term loan agreements between BMO and Mr. Behan; a copy of the Personal Guarantee that is the subject of this motion; a copy of the Guarantor’s Acknowledgement; letters from Mr. Behan’s lawyer to BMO at the time of execution of the relevant documents; a Requirement to Pay from the Canada Revenue Agency to BMO; a Notice of Intention to Enforce a Security, made by BMO to Mr. Behan; Foreclosure Actions, motions, and associated documents

relating to the sale of Mr. Behan's properties; and documents relating to the outstanding debts on Mr. Behan's loans.

[16] Mr. Behan's evidence consists of an affidavit authored by himself; emails between him and BMO; an application to refinance a number of his properties; and emails between him and a prospective buyer of one of the properties sold by BMO in collection of Mr. Behan's debts.

[17] Both parties included excerpts from the transcript of BMO's discovery of Mr. Behan on December 12, 2018.

The Position of the Parties

[18] BMO says summary judgment on the evidence should be granted, arguing that there is no genuine issue of material fact in dispute. The bank says the facts are clear that Mr. Behan obtained various debt facilities from BMO through the Company and executed a Personal Guarantee rendering him liable for present and future debts owing to BMO from the Company. It says the evidence shows that Mr. Behan was aware of his responsibilities pursuant to the Guarantee. The Bank says Mr. Behan's argument that he does not recall signing the Personal Guarantee does not have a real chance of success against BMO's claim to enforce the Personal Guarantee.

[19] Further, BMO says that Mr. Behan's counterclaims should be separated from BMO's claim for payment under the terms of the Personal Guarantee.

[20] Mr. Behan says summary judgment should not be granted because there are genuine issues of fact that require determination, and because his defence to BMO's claim has a real chance of success.

[21] Mr. Behan says he was unaware at the time of signing the Personal Guarantee that he was executing a personal guarantee that would render him liable for the BMO loans. He says he does not remember reviewing or signing the Guarantee, though he does admit that he signed it (that is, he admits that the document bears his signature). He submits that BMO should have done more to ensure that he was fully aware of the existence of the Personal Guarantee and its implications.

[22] Mr. Behan further argues that BMO acted inappropriately and in breach of its contractual duties in its dealings with him.

[23] According to Mr. Behan, both i) the allegedly conflicting evidence with respect to whether he was aware that he was signing a personal guarantee at the time of signing, and ii) his allegations of BMO's allegedly improper conduct in the course of its dealings with Mr. Behan, constitute genuine issues of material fact

which require determination at trial. He further says his defence has a real chance of success and therefore should not be dealt with by way of summary judgment.

Are there Disputes of Material Fact which Require a Trial?

[24] BMO's claim for payment pursuant to the Personal Guarantee lies in contract law. The common law recognizes three principal grounds for enforcing a promise as a contract: i) consideration, ii) a seal, and iii) reliance (*Halsbury's Laws of Canada* (online), *Contracts*, "Criteria of Enforcement: reasons for enforcing some promises" at HCO-39 (2021 Reissue)). There is no doubt that on these bases, BMO's Personal Guarantee constitutes a binding contract.

[25] However, the reason a contracting party is bound by the personal rights and duties created by contract is because they have assented to the assumption of those obligations. The conception of assent is thus necessary to bind a party in contract law (*Halsbury's, supra,* "Introduction: subject-matter of contract law" at HCO-1).

[26] BMO submits that there is no genuine issue of material fact with respect to whether Mr. Behan is bound by the Personal Guarantee for payment thereunder. Mr. Behan submits there are material facts in dispute which require a trial, both with respect to his signing of the Personal Guarantee, and with respect to BMO's allegedly improper conduct.

The Personal Guarantee

[27] Mr. Behan's counsel argues that there is conflicting evidence as to whether Mr. Behan was aware that he was executing a personal guarantee at the time of signing. He argues that while documentary evidence presented by the Plaintiff suggests Mr. Behan understood his responsibilities under the Personal Guarantee, his pleadings say his answers in discovery suggest that he did not review the document and understand its terms, thus resulting in conflicting evidence that requires a trial.

[28] Counsel refers to the following exchanges from Mr. Behan's examination for discovery:

Q Okay. Do you remember reviewing this and agreeing to this guarantee?

A No.

Q You don't recall it one way or the other? Is that fair to say?

A I don't remember.

Q You don't remember at all? Do you remember this guarantee being conditioned for Lakeside Childcare Centre Inc. obtaining a financing at any time?

A No, I don't remember a guarantee.

Q Okay.

And later:

Q You would agree with me, I think? You don't remember signing this document – the document?

A I agree I don't remember signing the document.

…

Q Okay, so we reviewed the documents. We went through the guarantee signed by you – the Acknowledge of Guarantee signed by you and your position – your evidence is that you are not subject to a guarantee for Lakeside, so all the debts and obligations. Is that correct?

A To the best of my knowledge, no.

Q Okay, and why do you say that?

A I don't recall signing any documents.

And later:

Q Okay. So, do you have any recollection of discussing with Mr. Berryman what this guarantee was; what it meant? You don't recall one way or other, is that what you're – is that what you're saying?

A I did not discuss this with him.

Q Okay. You don't have a specific recollection? I guess you don't. You don't recall discussing this guarantee with Mr. Berryman whatsoever? Is that your evidence?

A I did not discuss this guarantee…

Q With Mr. Berryman?

A … with Mr. Berryman.

Q Okay. Why not?

A I was signing it – a bunch of documents.

[29] Mr. Behan's answers from discovery are not evidence that he did not sign the Personal Guarantee or review its terms. They are evidence only that he does not remember having done so. In fact, the following exchange from Mr. Behan's discovery suggests that he accepts that he did sign the documents in 2013:

A I don't recall signing any of these documents.

Q Okay. That's one thing, you don't recall them. But you would agree that you did sign them?

A I see my signature at the end of the document, yes.

[30] An email written by Mr. Behan to Martine Langlois (BMO representative) in January 2016, and submitted into evidence by BMO, suggests that Mr. Behan did understand his liability as guarantor under the Personal Guarantee at the time of writing the email:

> Hi Martine,
>
> I understand my responsibilities as guarantor of lakesides mortgages and I will do my best to ensure they are paid. Can you reverse the $1400 line of credit payment you took back into the account ? , I will transfer funds to ensure the payment of the other loans today, Also can you give me a payout statement for the two lakeside mortgages, and is there any way the mortgages can be reduced to interest only until the properties are sold ?
>
> Best Regards,
>
> Trevor
>
> [my emphasis added]

[31] Further, Mr. Behan stated in discovery that it was typically his practice to review documents, and that he would have been informed of the "meat and potatoes" (i.e., the basics) of the documents that were the subject of his April 2013 meeting with Mr. Berryman:

> Q And you would have reviewed these documents before signing them. Correct?
>
> A I would imagine so.

Q Okay. You don't remember one way or the other, but…?

A I don't know.

Q I think you already answered this, but it's your practice that you review a document before signing it. Correct?

A This many documents?

Q Yeah.

A So, I guess I would have been informed of the meat and potatoes of the document.

[32] I see no conflicting evidence before the court with respect to Mr. Behan's liability under the Personal Guarantee. There is no dispute that Mr. Behan signed the guarantee in the presence of his lawyer and that Mr. Behan indicated that he clearly understood that he was liable as guarantor of the Company's debts at the time of his email to Martine Langlois in 2016. The fact that now, in 2021, he says he cannot specifically recall signing the document or reviewing its terms eight years ago, does not absolve him of liability under the Personal Guarantee. Nor does his claim that he does not remember signing the document or understanding its terms create a genuine issue of material fact with respect to whether he did sign the document or understand its terms when the evidence before me clearly shows that he did.

[33] While I have already found that there is no dispute of material fact that Mr. Behan signed the Personal Guarantee and understood his liability thereunder, I

would like to comment further on his claim that he did not understand the terms of the agreement at the time of signing.

[34] I will start by noting that generally, a party to a contract who conducts themselves as if they intend to be bound to the contract will be bound regardless of their subjective intentions. As stated in John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law Inc., 2020) at page 579 where the author cites Blackburn J in *Smith v Hughes* (1871), LR 6 QB 597 (Div Ct):

> If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

[35] Subjective assent is not required. It is enough that a party's actions could reasonably be understood as an expression of assent.

[36] A contracting party can rebut this conclusion by proving that they did not assent to the agreement because they were mistaken as to the nature of the agreement entered. This is essentially the defence pleaded by Mr. Behan.

[37] This argument resembles a pleaded defence of *non est factum*, a contract law doctrine meaning that the contracting party's mind "did not go with his signature" (*The Law of Contracts, supra,* at page 589). The elements of *non est factum* were

confirmed by the Court of Appeal in *Chender v Lewaskewicz*, 2007 NSCA 108, where Roscoe JA wrote for the Court:

> **54** The test for proving *non est factum* was correctly stated by Glube J, as she then was, in [*Castle Building Centers Group Ltd v Da Ros*, 95 NSR (2d) 24, 251 APR 24], at 31:
>
> There are three elements to the defence of non est factum.
>
> 1. The burden of proving *non est factum* rests with the party seeking to disown their signature. (*Saunders v. Anglia Building Society*, [1970] 3 All E.R. 961 (H.L.)). It is a heavy onus when the person is of full capacity.
>
> 2. The person who seeks to invoke the remedy must show that the document signed is radically or fundamentally different from what the person believed he was signing. (*Saunders v. Anglia*, *supra* and *Marvco Color Research Ltd. v. Harris* (1982), 141 D.L.R. (3d) 577 (S.C.C.))
>
> 3. Even if the person is successful in showing a radical or fundamental difference, the person raising the plea of *non est factum* must not be careless in taking reasonable measures to inform himself when signing the document as to the contents and effect of the document. (*Saunders*, *supra*, *Marvco*, *supra* and *Dwinell v. Custom Motors Limited* (1975), 12 N.S.R. (2d) 524 S.C.A.D.))

[38] I refer to the doctrine for the purpose of noting that the law has developed to establish that where a person argues that they were mistaken as to the nature of a contract as a means to escape liability under that contract, their defence will not succeed if they were careless in taking reasonable measures to inform themselves of the contents and effects of the contract prior to signing.

[39] If it is true that Mr. Behan did not read the Personal Guarantee and inform himself of its terms before signing the document, he acted carelessly in signing the

document and thus cannot rely on the defence that he did not understand the document's terms at the time of signing: *Marvco Color Research Ltd v Harris,* [1982] 2 SCR 774 (SCC); *Chender v Lewaskewicz*, 2007 NSCA 108; *Beaulieu v National Bank of Canada* (1984), 55 NBR (2d) 154, 144 APR 154 (NBCA).

[40] When considering the enforceability of a personal guarantee between a bank and a guarantor, courts have held that where the guarantor has obtained independent legal advice, it is less likely that they can successfully rely on a defence that "their mind did not go with their signature": *Credit Union Atlantic Ltd v Roy*, 2002 NSSC 36; *Royal Bank of Canada v 2240094 Ontario Inc,* 2013 ONSC 2947. In *Royal Bank of Canada v 2240094 Ontario Inc.*, 2013 ONSC 2947, the court wrote:

> 15 A bank is in a creditor-debtor relationship with its borrowers, and before taking a guarantee, a bank is under no obligation to ensure that a guarantor of the loan obtain independent legal advice, and a bank has no obligation to advise about the risks associated with the transaction…
>
> 16 Thus, independent legal advice is not a prerequisite for a bank to make a claim against a guarantor; however, the presence of independent legal advice is useful to a bank, because it provides a means to negate any pleas of *non est factum* or misrepresentation (also pleas of undue influence, duress, fraud, unconscionability). [emphasis added]

[41] There is evidence that Mr. Behan had independent legal advice and that he was careless in informing himself of the terms of the Personal Guarantee before signing. Even if I had not found that the evidence does not disclose a dispute as to

whether Mr. Behan understood the terms of the guarantee – which I have – I would find that he cannot rely on the defence that he was mistaken as to the document's terms, given his carelessness in informing himself of the document's terms and effects.

[42] Thus, I find that there are no material facts in dispute as to Mr. Behan's liability under the Personal Guarantee. The evidence suggests that he either knew or ought to have known of the terms and effects of the agreement.

The Counterclaim against BMO

[43] Counsel for Mr. Behan also argues that evidence of BMO's conduct that forms the basis of Mr. Behan's counterclaims represents a genuine issue of material fact with respect to BMO's claim for payment pursuant to the Personal Guarantee.

[44] As noted previously, a "material fact" is one that is essential to the claim or defence (*2420188 Nova Scotia Ltd v Hiltz*, 2011 NSCA 74 at para 27). Material facts are "important factual matters that anchor the cause of action or defence" (*Burton* at para 95).

[45] The Defendant's brief states:

> In addition to the above, and as set out in Behan's Statement of Defence, Behan further submits that during the course of its dealings with Behan, BMO was relying upon information being provided by Behan's former business partner, with whom Behan was involved in a dispute with [*sic*]. It is Behan's position that this false and/or inappropriate information provided to BMO impacted and/or affected the manner in which BMO approached and dealt with Behan and resulted in BMO breaching its contractual obligations to Behan.
>
> It is also unclear at this stage of the proceeding, what the extent of this information was, whether or not BMO relied upon that information in determining how it approached its dealings with Behan, whether or not that information prompted BMO act [*sic*] in the manner it did, or if it had any impact at all. Behan submits however, that determining whether this information being provided to BMO is a genuine material issue in dispute and therefore to dispose of this matter, at this stage, by way of summary judgment is inappropriate.

[46] Respectfully, whether BMO was relying upon information received by Mr. Behan's former business partner throughout its dealings with him is not relevant to whether Mr. Behan is bound by the Personal Guarantee that he signed with BMO to finance the Company. As established by the Court of Appeal in *Shannex*, a judge's assessment of issues of fact or mixed fact and law depends on evidence, not on pleaded allegations or speculation from the counsel table (*Shannex* at para 36).

[47] The Defendant submitted several pieces of evidence, but none that, in my view, affect the enforceability of the Personal Guarantee. As part of his affidavit, Mr. Behan submitted an email exchange between himself and Anna Graham, a representative at BMO, discussing leases related to a Mark Rosen and a company

named Leinster, as well as an email to a Mark Heavy alleging he was in breach of his fiduciary duties towards Leinster. He also submitted an email to a Michael Cook (with BMO representatives cc'd) explaining that BMO had cancelled certain of his loan accounts, and the impact of BMO's actions on his creditworthiness. He submitted an application for a mortgage loan from League Savings and Mortgage, as well as an email from Pre Choice Financial denying Mr. Behan's request for a mortgage refinance. Lastly, he submitted an email to a Jeff Jollimore, an alleged potential purchaser of one of the properties formerly owned by Mr. Behan. Defendant's counsel failed to connect any of these pieces of evidence to Mr. Behan's liability under the Personal Guarantee.

[48] I make this finding in recognition of the fact that the onus is on the moving party, here the Bank of Montreal, to prove that there is no material fact in issue; it is not upon the Defendant to prove to the court that there is a material fact in issue. However, as stated by the court in *AF McPhee Holdings Limited v Sean Sears,* 2020 NSSC 373 (*McPhee)*, a case relied upon by the Defendant, in all summary judgment cases each party must put their best foot forward. In *McPhee*, the applicant for summary judgment sought an order for payment of a personal guarantee signed by the defendant. In opposing summary judgment, the defendant presented evidence of a verbal agreement between the parties that the guarantee

would not be relied upon so long as the defendant's parent company was operating. The court found that the defendant had "advanced more than a bare allegation and [had] sworn an affidavit detailing an alleged verbal agreement which arguably affects the Guarantee, raising a misrepresentation and conditions precedent to the Guarantee" (at para 34). I further note that in *Bank of Nova Scotia v A MacKenzie's Auto Mart Inc*, 2009 NSSC 293, another case relied upon by the Defendant, the defendant also provided evidence which could impact the terms of the guarantee.

[49] The Plaintiff has led adequate evidence to prove that Mr. Behan is liable for payment under the terms of the Personal Guarantee. Mr. Behan is also required to put his "best foot forward" with respect to any evidence rebutting BMO's claim. I find that his evidence, while potentially relevant to his counterclaims, does not impact the terms of the Personal Guarantee.

[50] The Nova Scotia Court of Appeal in *Bledin v Royal Bank of Canada*, 2015 NSCA 109, considered an appeal of this court's decision to grant summary judgment in favour of the Royal Bank for payment in mortgage proceedings. The appellant argued, in part, that the bank's actions had caused her economic harm. The Court of Appeal dismissed the appeal, writing: "In any event, at its highest, this particular complaint alleging a breach of her personal economic interests is not

a valid defence to the main action for default under the mortgage, and would instead only serve as a possible basis for a counterclaim or a third party claim for damages”. So too is the case for the evidence advanced by Mr. Behan.

[51] I agree with the Bank of Montreal that where the legal requirements for summary judgment are met, and where the counterclaims can be separated from the original claim for summary judgment, a court may grant summary judgment notwithstanding the presence of the counterclaims: *First City Development Corp v Stevenson Construction Co* (1983), 48 BCLR 242, 3 DLR (4th) 505 (BCCA); Payne *v Empire Stevedoring* Co, [1995] BCWLD 2435, 36 CCEL 226 (BCSC); *Bai v MLGB E-Sports Inc,* 2018 BCSC 679; *XY Inc v IND Lifetech* Inc, 2009 BCSC 453; *Montreal Trust Co of Canada v A Reissing-Reissing Enterprise Ltd* (1995), 6 WDCP (2d) 183, 1995 CarswellOnt 4369. The Defendant is free to pursue his claims for breach of contract, tortious interference with contractual relations, negligent realization, negligent misrepresentation, and equitable fraud following this summary granting of BMO’s claim for enforcement of the Personal Guarantee.

Real Chance of Success

[52] Having found that the evidence respecting BMO’s claim for payment pursuant to the Personal Guarantee does not disclose a genuine issue of material

fact that remains in dispute and given that the claim does not require the determination of a question of law, I must grant this motion for summary judgment at this stage of my findings without further inquiry into chances of success.

Disposition

[53] The Plaintiff has satisfied me that there is no genuine issue for trial on its main claim. The Plaintiff's claim for summary judgment is granted, and the Defendant is ordered to pay the Plaintiff the amounts owing pursuant to the Personal Guarantee together with accumulating interest to the date of judgment. The Defendant is free to pursue his counterclaims against the Plaintiff.

[54] If the parties cannot agree on the amount owing pursuant to the Personal Guarantee, I invite them to file written submissions within thirty days of the date of release of this decision.

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

J.