SUPREME COURT OF NOVA SCOTIA
Citation: *Woodill v. Barker*, 2022 NSSC 351

Date: 20221202
Docket: Hfx No. 498500
Registry: Halifax

Between:

Gregory Charles Woodill and Mary Ann Woodill

Applicants

and

Derek E. Barker Thomas Martin, Daniel Mason, Almon Billiards & Social Club Limited and No Limit Painting and Cleaners Limited

Respondents

DECISION

Judge:	The Honourable Justice Glen G. McDougall
Heard:	March 24, 2022, in Halifax, Nova Scotia
Written:	December 2, 2022
Counsel:	Andrew Christofi, for the Applicants Derek E. Barker, Self-Represented Daniel Mason, Self-Represented

By the Court:

Introduction

[1] The Applicants – Gregory Charles Woodill and Mary Ann Woodill – filed a Notice of Application in Court on June 15, 2020, seeking an order for the repayment of unpaid business loans.

[2] A Notice of Contest was filed on behalf of the Respondents on October 23, 2020. The Respondents were represented by legal counsel at that time.

Background

[3] By the time the matter went to trial, the Respondent – Derek E. Barker – acted for himself and as agent for Almon Billiards & Social Club Limited ("Almon Billiards"). Mr. Barker informed the Court that he is an officer of Almon Billiards and has authority to act on its behalf.

[4] The Respondent – Daniel Mason – appeared at the hearing of the application on his own behalf and as agent for No Limit Painting and Cleaners Limited ("No Limit Painting"). Mr. Mason, similar to Mr. Barker, informed the Court that he is an officer of No Limit Painting and has the authority to act on its behalf.

[5] The other individual Respondent – Thomas Martin – did not appear at the hearing nor was anyone there to act on his behalf.

[6] Counsel for the Applicants provided Nova Scotia Registry of Joint Stock Companies print-outs that listed Thomas J. Martin and Derek E. Barker as directors and officers of Almon Billiards. A similar print-out for No Limit Painting listed Daniel Mason as its sole director and officer.

Facts

[7] The material facts, for the most part, are as contained in the joint affidavit of Greg and Mary Woodill filed on October 20, 2020. The relevant portions of the affidavit are reproduced here:

> 5. We lent the respondents money as a business loan for the billiards club which used to be located at 3200 Kempt Road, Halifax. Unfortunately the business failed and it ceased to operation sometime in November or December 2019.

6. On or about March 23, 2017, we entered into a loan agreement with Mason and Martin for the total amount of $70,000.00 principal with interest at four per cent (4.00%) thereon per annum calculated yearly not in advance (the "First Loan" at **Exhibit "C"**).

7. The loan funds on the First Loan were advanced to the borrowers (**Exhibit "D"**).

8. The borrowers made a total of seven (7) payments on the First Loan (**Exhibit "E"**).

9. At no time during the term of the First Loan did we declare or demand upon the borrowers or any of them that the principal amount and interest owing thereon was immediately due and payable.

10. On or about July 31, 2018, we and Barker, Martin & Mason signed an acknowledgement of the principal and interest owing under the First Loan (**Exhibit "F"**).

11. On or about August 9, 2018, we entered into a loan agreement with Almon Billiards, No Limit Painting & Martin for the total amount of $56,000.00 principal with interest at eight per cent (8.00%) thereon (the "Second Loan" at **Exhibit "G"**).

12. The loan funds on the Second Loan were advanced to the borrowers or their assignee (**Exhibit "H"**).

13. The borrowers made a total of twenty-seven (27) payments on the Second Loan (**"Exhibit "I"**).

14. At no time during the term of the Second Loan did we declare or demand upon the borrowers of any of them that the principal amount and interest owing thereon was immediately due and payable.

15. On or about February 6, 2020, we directed counsel to deliver a written demand upon the respondents for the repayment of the outstanding principal, interest and costs owing under the First Loan and the Second Loan (**"Exhibit "J"**).

16. To date, the respondents have not made any additional payment on the First Loan or the Second Loan.

17. Summaries of the amount owing on both loans is contained at **Exhibit "K"**. The total amount owing on account of principal is $89,834.00.

[8] A revised spreadsheet was filed (at the Court's request) by counsel for the Applicant on March 25, 2022. It confirmed that the outstanding principal and interest to March 23, 2022 stood at $88,630.05. I accept this as an accurate accounting of the amount of principal and interest owing as of that date.

[9] The three individual Respondents – including Thomas Martin even though he did not file an affidavit nor did he attend the hearing – were provided with a copy of the revised spreadsheet. They were given 14 calendar days to respond should they

have any objections to the calculation of outstanding principal and interest as presented by Applicants' counsel. Nothing was filed by them. And, as previously stated, I accept the accuracy of the calculations as presented.

[10] In addition to filing affidavit evidence, both Gregory Woodill and Mary Woodill were each cross-examined by Mr. Martin and Mr. Barker. They succeeded in establishing that the Woodills were presented with an opportunity of removing certain inventory including pool/billiard tables, televisions, kitchen appliances, a juke box, and some pool cues, racks, and pool balls which had been pledged as security for the outstanding loans. A quantity of these items were actually loaded onto a moving truck and then returned to the premises (referred to as "Railbirds") when Mr. and Mrs. Woodill refused to sign a waiver for any damage that might result from overloading the vehicle. A few days later, the landlord seized the premises and presumably the inventory and assets that were left behind due to the business's default in the payment of rent. It was later discovered that Almon Billiards had pledged most of these assets to a leasing company without informing the Woodills. All that the Applicants were able to collect were some pool cues, racks, and some pool balls. No estimate of their value was offered at trial. It would not likely amount to much and I attribute only a minimal value $100.00 to these items.

[11] Both Daniel Mason and Derek Barker testified at the hearing. Prior to the date of the hearing they had each filed an unsworn letter which they adopted as evidence at trial. They were cross-examined on these documents by counsel for the Applicants.

[12] Mr. Mason acknowledged the first loan for $70,000.00 provided to him and Thomas Martin on March 23, 2017, by Greg and Mary Woodill. A "Loan Agreement" evidencing this was attached to the joint affidavit of Greg and Mary Woodill. It bears the signatures of both Mr. Mason and Mr. Martin. Mr. Mason confirmed his and Mr. Martin's respective signatures during cross-examination by counsel for the Applicants.

[13] A second "Loan Agreement", dated August 9, 2018, was also tendered in evidence. The lenders were, once again, Greg and Mary Woodill. The borrowers were listed as:

> Almon Billiards Social Club, No Limit Painting Company, and Thomas Martin of Halifax, Nova Scotia

[14] The amount of new money advanced was $56,000.00 The amount still owing on the first loan - $41,455.00. – was added to this for a total of $97,455.00. The second loan agreement called for a higher rate of interest. It was increased from 4% to 8% per annum. It also pledged as security various assets including televisions, furniture, kitchen appliances, tables and chairs, pool/billiard/foosball/bumper pool/ping pong tables, pool balls, etcetera. As stated earlier, most of these items had been previously assigned to a leasing company for security by Almon Billiards & Social Club Limited. As such they were of no value as security for the repayment of monies owed to the Woodills.

[15] The second loan agreement was signed by Thomas Martin in his personal capacity as well as on behalf of No Limit Painting Company. Presumably this was intended to be No Limit Painting and Cleaners Limited even though Thomas Martin was not listed as either an officer or director of this company. According to the records obtained from the Registry of Joint Stock Companies, the sole officer and director of No Limit Painting was Daniel Mason. Mr. Martin had no authority to bind No Limit Painting to any responsibility for the repayment of this combined loan.

[16] As an officer and director of Almon Billiards & Social Club Limited, Mr. Barker had, at least ostensibly, the authority to bind that company to the repayment of the outstanding balance of the first loan as well as the repayment of the new monies advanced under the second loan together with interest at 8% per annum.

[17] Another very important piece of evidence provided as an attachment to the Woodills' joint affidavit is a copy of an email from Greg Woodill to macken1000@hotmail.com. It is dated July 31, 2018, just prior to the date on the second Loan Agreement on August 9, 2018. A copy of this email is reproduced here as it was presented to the Court:

Greg Woodill

From: Greg Woodill <gwoodill@eastlink.ca>
Sent: July 31, 2018 4:20 PM
To: macken1000@hotmail.com
Cc: marywoodill@eastlink.ca
Subject: --re--Mary/Greg Woodill guarantee

---This note dated July 31/2018 states that all inventory belonging to Almon Billiards (RailBirds location on 3200 Kempt Rd) that includes all Tables/accessories---Lighting---TV's----Jutebox accessories ---kitchen equipment---poker tables—chairs and etc. will now be owned by Greg/Mary Woodill until the new loan of $56,000 plus the $46,000 loan(still outstanding) plus the 8% interest annually is paid in full. Therefore none of the existing inventory is to be sold unless signed over by Greg /Mary Woodill.
The new structured loan to be paid in 36 installments beginning Sept 01/2018.--
Signed:
Greg/Mary Woodill
Thomas Martin
Derek Barker
Dan Mason

[18] When questioned about this by counsel for the Applicants during cross-examination, Mr. Mason denied having signed the document. He further pointed out that all the signatures are next to typed names but the signature purporting to be his was next to a printed version of his name. I accept that Mr. Mason might not recall having signed this document but I do not believe him when he denies having done so. A comparison of his signature on this document with his signature on the first Loan Agreement appears to be quite similar, indeed virtually identical. I find that the individual Respondents, namely Thomas Martin, Derek Barker, and Dan Mason all signed acknowledging their individual and joint responsibility for the repayment of the combined loans.

[19] Mr. Barker and Mr. Mason attempted to deflect the responsibility for the loans to another company that they were shareholders of, along with Mr. Woodill. That company, Railbirds Billiards Inc. ("Railbirds"), was 40% owned by Derek Barker; 40% owned by Dan Mason; and, 20% owned by Gregory Woodill. There is reference to this company in the Notice of Contest filed on behalf of the Respondents.

[20] Any efforts on the part of Mr. Barker and Mr. Mason to attribute responsibility for the repayment of the loans given to them and the other named companies by Mr. and Mrs. Woodill are for naught. The acknowledgement of the two loans and the obligations to repay them, with interest, never involved Railbirds nor was there any attempt to draw Railbirds into the litigation by way of a Third Party Claim as provided for in Civil Procedure Rule 5.12. To attempt to deflect blame to a company that was not a party to either of the loans, either as a principal borrower, co-borrower, or guarantor, and, which was not added as a Third Party to the litigation, cannot and does not provide a valid defence to the legitimate claims of the lenders.

[21] Mr. Barker suggested the failure of Almon Billiards to remain viable generated losses to the other investors so why should the Woodills not suffer losses as well. This fails to recognize that the Woodills did not simply invest in the business, they loaned money to help it succeed. They protected themselves by entering into loan agreements requiring the borrowers to repay the loans along with interest. The borrowers are now responsible for the repayment of the outstanding principal and interest owing.

Analysis and Decision

[22] Mr. Christofi's memorandum of law argues that the debt outstanding is supported by the various agreements signed by the parties based on the accounting supplied by the Woodills. He further submits that the email signed by Messrs.

Barker, Martin, and Mason dated July 31, 2018, makes Mr. Barker jointly and severally liable for the outstanding obligations of the primary borrowers – Martin and Mason – under the First Loan either by novation or guarantee. He cites the Nova Scotia Court of Appeal decision in *Adelaide Capital Corporation v. Offshore Leasing Inc.*, 1996 NSCA 24, in support of his clients' position. In the decision, the Court stated:

> This Court recently considered the principles involved in novation in **Newfoundland Capital Corporation Limited v. the Maritime Life Assurance Company Limited** (C.A. No. 118601, dated January 10, 1996). In that decision, the court relied on the decision of **National Trust Company v. Mead et al**, 1990 CanLII 73 (SCC), [1990] 2 S.C.R. 410 where Wilson, J., for the court described novation and set out the test for determining if novation has occurred at p. 427 as follows:
>
> > A novation is a trilateral agreement by which an existing contract is extinguished and a new contract brought into being in its place. Indeed, for an agreement to effect a valid novation the appropriate consideration is the discharge of the original debt in return for a promise to perform some obligation. The assent of the beneficiary (the creditor or mortgagee) of those obligations to the discharge and substitution is crucial. This is because the effect of novation is that the creditor may no longer look to the original party if the obligations under the substituted contract are not subsequently met as promised.
> >
> > Because assent is the crux of novation it is obvious that novation may not be forced upon an unwilling creditor and, in the absence of express agreement, the court should be loath to find novation unless the circumstances are really compelling. Thus, while the court may look at the surrounding circumstances, including the conduct of the parties, in order to determine whether a novation has occurred, the burden of establishing novation is not easily met. The courts have established a three-part test for determining if novation has occurred. It is set out in **Poison v. Wulffsohn** (1890), 2 B.C.R. 39 as follows:
> >
> > 1. The new debtor must assume the complete liability;
> > 2. The creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor; and
> > 3. The creditor must accept the new contract in full satisfaction and substitution for the old contract.

[23] Mr. Christofi further argues that the signed email establishes that Mr. Barker assumed complete liability for repayment along with the two primary borrowers of the First Loan. He also points out that the Woodills accepted Mr. Barker as a

principal debtor and accepted the signed document in full satisfaction and substitution of the first loan.

[24] In the alternative, the Applicants say the signed email implies that Mr. Barker became a surety for the outstanding obligations of the primary borrowers on the first loan. Mr. Christofi cites the case of *Toronto-Dominion Bank v. Poli Holdings Ltd.*, 1999 CarswellOnt 1250, in support of this argument. At para. 27, Kozak, J., of the Ontario Court of Justice (General Division) had this to say:

> A guarantee is a contractual obligation undertaken by a person known as a surety or guarantor in which that person promises that a second person, known as the principal, will perform a contract or fulfil some other obligation and, if the principal fails to do so, the surety will do so for the principal. (Campbell v. McIsaac (1873) 9 N.S.R. 287.)

[25] Justice Kozak refers to an 1873 decision of the Nova Scotia Court of Appeal as authority for his decision. A decision that has obviously stood the test of time.

Conclusion

[26] I find that based on the two signed Loan Agreements and the acknowledgement of responsibility for the unpaid balance of the first loan and the repayment of the monies advanced under the second loan (as contained in the signed email of July 31, 2018) the amount claimed by the Applicants - $88,630.05 as of March 23, 2022 – is owed jointly and severally by Derek E. Barker, Thomas Martin, Daniel Mason, and Almon Billiards & Social Club Limited. I attribute no liability to the other corporate Respondent – No Limit Painting and Cleaners Limited – and as a result, the Applicants claims against that company are dismissed. There should be a credit of $100.00 for the assets retained by Mr. and Mrs. Woodill from the failed business.

[27] The Applicants are entitled to interest on the outstanding principle at the rate of 8% per annum on the outstanding balance of the entire loan from March 23, 2022 to the date of this decision and thereafter at the rate set out in the Interest on Judgments Act, R.S.N.S., 1989, c. 233 (being five percent per annum as per section 5).

[28] The successful Applicants shall also have their costs based on Tariff C together with disbursements to be taxed. I would ask their counsel to submit a Bill of Costs for my approval.

McDougall, J.