SUPREME COURT OF NOVA SCOTIA

Citation: *Bank of Montreal v. Comvest Commercial Real Estate Inc.*, 2023 NSSC 180

Date: 20230608
Docket: Hfx No. 517534
Registry: Halifax

Between:

Bank of Montreal

Plaintiff

v.

Comvest Commercial Real Estate Inc., Annapolis Management, Inc., Ruby LLP and Steven Caryi

Defendants

Decision

Judge:	The Honourable Justice Peter Rosinski
Heard:	June 2, 2023, in Halifax, Nova Scotia
Counsel:	Stephen Kingston, for the Plaintiff Peter McVey, K.C., for the Defendants

By the Court:

Introduction

1 - The Notice of Action

[1] Bank of Montreal ("BMO") filed a statement of claim on September 1, 2022, in which it alleged that:

1. having lent money to the defendant, Comvest Commercial Real Estate Inc. ("Comvest"), "Comvest is in default of its obligations to the Bank pursuant to the 2021 Letter of Agreement";
2. on July 16, 2021, both Annapolis Management, Inc. ("Annapolis") and Ruby LLP ("Ruby"), "executed a Guarantee pursuant to which [they] promised to make payment on demand of all debts and obligations owed by Comvest to the Bank to a maximum amount of $508,275 plus interest, costs, charges, and expenses"; and
3. Mr. Steven Caryi in his personal capacity also executed an identical Guarantee.

[2] BMO further alleges that on April 27, 2022, it made a demand for payment upon each of the three Defendants without result.

[3] On October 31, 2022, the Defendants filed a Notice of Defence, which included the following statements:

> 5 With reference to paragraphs 5 and 6 of the Statement of Claim [the Letter of Agreement and the amounts lent] [Comvest] pleads duress when the previous Letter of Agreement dated January 22, 2019 was amended by Letter of Agreement dated May 6, 2021;
>
> 6 With reference to paragraphs 9 and 10 of the Statement of Claim the Defendants [Annapolis and Ruby and Caryi] plead:
>
> a. Duress
>
> b. The absence of consideration, and
>
> c. Deny the guarantees give rise to joint and several liability, further pleading *contra proferentum* in this regard.

[4] According to the filing dates of the pleadings, the deadline for the parties to mutually provide disclosure as required by *Civil Procedure Rules* ("CPR") 15.03 (CPR 38.11 – 45 days after the pleadings close, which they did on October 31, 2022), was January 9, 2023.

2 - The motions herein

[5] On **January 23, 2023** the Plaintiff filed a motion, as amended March 1, 2023, for "an order for **summary judgment** against the Defendants [on evidence] … [and] for an order striking out the joint Defence … as an abuse of process …", presently adjourned without a date set.

[6] On **March 31, 2023**, the Plaintiff filed an Amended Notice of Motion "for an Order for Directions pursuant to **CPR 15.07** as regards what disclosure of documents is required to be completed by the Plaintiff in advance of the hearing of its Motion for Summary Judgment and/or an Order striking out the joint Defence herein."

[7] In support of both these motions, BMO relies upon the affidavit of Anna Graham sworn January 27, 2023.

[8] BMO also relies upon the affidavit of Milad Saikali, Senior Account Manager employed with the Special Accounts Management Unit of BMO for Eastern Canada.

[9] The Defendants have filed only the affidavit of Jennifer McCall sworn May 2, 2023.

[10] As a legal assistant, she confirms that on February 24, 2023, she sent a letter authored by Mr. McVey, counsel for the Defendants, to the attention of Stephen Kingston, counsel for the Plaintiff.

[11] That letter reads in part:

> We write seeking disclosure of documents in the above noted matter, or delay of the hearing of the summary judgment motion, if timely documentary disclosure cannot be completed.
>
> …
>
> As you know, pleadings closed on October 31, 2022, and the presumptive date for disclosure of documents under rule 15.03(1) passed on January 9, 2023.
>
> I requested documents from our client, followed up and have not received and reviewed his documents. We hope to disclose an ADD by the end of next week.
>
> We request your client's ADD as soon as possible and not later than March 10, 2023, so we can review same before replying to the Motion filed January 23, 2023. [Initially scheduled for April 3, 2023].
>
> …

[12] Referring to the Demand Letter of March 2, 2022, Exhibit "L" of Ms. Graham's affidavit, Mr. McVey references the contents of the second page of that letter as follows:

> The Bank's been in discussions and email correspondences with the Borrower over the course of the last seven months. During this period the Bank has requested documentation and information outlined in the Letter of Agreement under terms and conditions, reporting requirements, including and without limitation, the following information:
>
> > 1-Notice to Reader Financial Statements for the Borrower for the year ending June 30, 2021, to be accompanied by Notice of Assessment and Corporate Income Tax Return;
> >
> > 2-updated personal financial statement for Steve Caryi, with Social Security Number;
> >
> > 3-quarterly statements for the Borrower for quarters ending September 30, 2021 and December 30, 2021;
> >
> > 4-satisfactory evidence that all taxes (including, without limitation, GST, HST, sales tax, withholdings, etc.) have been paid up to date. This information, which is past due, is required so that the Bank can properly review and assess the financial position and creditworthiness of the Borrower.

> The Borrower is in default of its obligations to the Bank in providing the requested information and failed to cooperate with the Bank's efforts.
>
> [My underlining added]

[13] Mr. McVey continued in his letter:

> We also write today under Rule 14.09(1) requesting disclosure of the following undisclosed documents within 15 days under the Rule – i.e. March 20, 2023:
>
> **a.** All Plaintiff records or notes from discussions, and copies of all written or electronic correspondence including letters and email sent or received by the Plaintiff, as described above in the following terms:
>
> > 'The Bank has been in discussions and email correspondences with the Borrower over the course of the last 7 months'.
>
> **b.** All Plaintiff requests for documentation and information as described above in the following terms:
>
> > 'During this period [i.e., the 7 months referenced in the previous sentence] the Bank has requested documentation and information outlined in the Letter of Agreement under Terms and Conditions, Reporting Requirements.
>
> **c.** All notes or records from conversations, as well as letters (including enclosures) and email including attachments) originating from the Plaintiff in making requests for documentation from the Borrower for each of the following, as well as copies of any Borrower responses or information provided in response to these requests from the Lender:
>
> > 1-Notice to Reader Financial Statements for the Borrower for the year ending June 30, 2021 to be accompanied by Notice of Assessment in Corporate Income Tax Return
> >
> > 2-Updated Personal Financial Statement for Steve Caryi and Social Security Number
> >
> > 3-Quarterly statements for the Borrower for quarters ending September 30, 2021 and December 30, 2021
> >
> > 4-Satisfactory evidence at all Taxes (including without limitation, GST, HST, sales tax, withholdings etc.) Have been paid up to date

> 5. Any other request made and captured by the phrase 'including and without limitation', that precedes items 1–4, in the Demand Letter.
>
> **d.** If not already captured by and included in the demands above lettered a, b, and c, in this letter, to produce copies of all written communications including letters with any enclosures, and emails with any attachments, exchanged between the Plaintiff representative Mike Olson, Senior Relationship Manager, BMO Canadian Commercial Banking, and Defendant representatives Steve Caryi and/or Affaf El-Jakl of Comvest Commercial Real Estate Inc., Annapolis Management Inc., and/or Ruby LLP, between November 30, 2020 and commencement of the Action on September 1, 2022.
>
> We believe the above documents are material to both the Action and the Motion for Summary Judgment, as the Demand and alleged default underlying both are premised on the factual accuracy of what is stated in the March 2, 2022 demand letter following alleged default, which specifically references conversations, requests and communications not themselves put in evidence by the Motion Affidavit as filed.
>
> The Defendant has not admitted default and these underlying facts are all in issue.
>
> These requests are made under Part 5 of the Nova Scotia Civil Procedure Rules, Disclosure and Discovery, each of which provides a specified timeframe for completion.
>
> If the Plaintiff is unable to complete disclosure by Affidavit Disclosing Documents by March 10, 2023, and provide a full response to the Demand to Produce by March 20, 2023, we ask that the Motion for Summary Judgment be rescheduled by agreement to a new date, which can be set now, but must be following full documentary disclosure.
>
> [My underlining added]

[14] Mr. McVey specifically referenced the outstanding disclosure items as including the following ("targeted disclosure") referenced in paragraph 6 of the affidavit of Mr. Saikali:

> 4-I assisted in making arrangements for copies of the Bank's documentation as regards the Defendant Comvest… and its related company BSL Holdings Limited… to be forwarded to the Bank's legal counsel Stephen Kingston
>
> …

> 6- The materials provided to Mr. Kingston include:
>
> …
>
> (v) Internal communications within the Bank regarding administration of the credit facilities for Comvest and for BSL; and
>
> (vi) Communications between the Bank and the Companies, between the Bank and the Companies' legal counsel, between the Bank and the Companies' accountant, and between the Bank and the Defendant Steven Caryi.

The Motion before the court – CPR 15.07

[15] The Bank relies upon CPR 15.07, which reads:

> (1) A judge may give directions for disclosure of documents, and the directions prevail over this Rule 15.
>
> (2) A judge may not give directions limiting disclosure or production of a relevant document, unless the presumption and Rule 14.08 of Rule 14 – Disclosure and Discovery in general, is rebutted.

[16] BMO seeks to receive the Court's approval to not be required, before the summary judgment motion, to make the disclosure the Defendants seek at this time. It acknowledges that it has the burden to rebut the presumption of full disclosure per CPR 14.08 (5), and that the two issues to be determined are:

1. **has the Bank rebutted the presumption for full disclosure?**

2. **what, if any, additional disclosure should be required from the Bank in advance of the hearing of the motion for summary judgment on evidence/striking the Defence as an abuse of process?**

[17] Although a number of authorities were cited, including:

1. *MacNeil v. Nova Scotia (Attorney General)*, 2010 NSSC 138;
2. *Quadrangle Holdings ltd. v. Coady Estate*, 2016 NSSC 106;
3. *Halifax (Regional Municipality) v. Casey*, 2011 NSSC 267 and 2011 NSCA 69;
4. *Can-Euro Investments Limited v. Coles*, 2012 NSSC 247;
5. *Halifax (Regional Municipality Pension Committee) v. State Street Global Advisors Ltd.*, 2011 NSSC 355; 2011 NSSC 477, and 2012 NSSC 399;

each case must be decided based on its own unique circumstances, with the application of the relevant legal principles thereto.

Analysis

[18] The Bank's motion before me is that it:

> Moves for an order for directions pursuant to CPR 15.07 as regards what disclosure of documents is required to be completed by the Plaintiff in advance of the hearing of its motion for summary judgment and/or an order striking out the joint defence herein.

[19] At its core, the Bank's allegation of default in relation to the loan is rooted in its claim that the Defendants have not provided information that they are required

to produce pursuant to the loan agreement, and which has specifically been sought by the Bank.

[20] The Bank says these are material matters, as they go to the continued credit-worthiness of the Defendants, and there has been no specific evidence presented to the contrary.

[21] I keep in mind that the Bank says that the Defendants are bound by the strict terms of a May 11, 2022, Forbearance Agreement, and consequently it significantly restricts the ambit of live issues on the Motion for Summary Judgment.

[22] While full disclosure by all parties was presumed to have taken place by January 9, 2023, and such full disclosure of relevant material is presumed "necessary for justice in a proceeding", the Defendants say that full disclosure has not yet been provided by the Plaintiff – the Plaintiff has not provided all the disclosure it is obligated to provide, or even the "targeted disclosure" that the Defendant has requested.

[23] The Defendants say they require this disclosure before the Summary Judgment on Evidence motion is heard, so they may put their "best foot forward" at that motion.

[24] The Defendants say that there is "highly relevant evidence" in the Plaintiff's possession, and that this evidence "lies behind [the Bank's] unilateral actions under the loan contract" (p. 1 brief).

[25] A summary judgment on evidence motion can be made as soon as pleadings close – CPR 13.05(1) - but full disclosure is not required until 45 days after pleadings close and is not uncommonly incomplete even at that time.

[26] While it is not always *necessary* that there be *full* disclosure before a Summary Judgment on Evidence motion (e.g., Chipman J in *Quadrangle*, *supra,* at paragraph 24), in my opinion:

1. the parties must have an opportunity to present their evidence at the Summary Judgment on Evidence Motion in a manner that permits a motions judge to make a "just" determination about whether Summary Judgment should be granted, and

2. the court must bear in mind that the summary judgment motion could terminate the proceeding in favour of one of the parties.

[27] If I am satisfied that, generally speaking, there is a real possibility that the Bank has disclosable, yet undisclosed-to-date, documents, electronic information, and other things in its possession or custody/control - CPR 15.02, as I am satisfied

here, then I must go on to consider, pursuant to CPR 14.08(3) if the Bank has established that the disclosure the Defendants seek is unnecessarily costly, burdensome, and will delay the proceeding when considered in light of its:

1. likely probative value; and

2. the importance of the issues in the proceeding to the parties.

[28] Here the burden is on the Bank.

[29] The Bank takes the position that the Defendants are all effectively in breach of the Credit Agreement and Forbearance Agreement, insofar as them not providing the information, required by their agreeing to those obligations, and specifically sought by the Bank.[1]

[30] However, the failure to provide information to the Bank, while important in its own right, arguably requires a more contextual examination by the Court of the merit of the Borrower's and Guarantors' positions before a default is established, in contrast to simply demonstrating a default in payments.

[31] The evidence suggests that "the preparation of an Affidavit Disclosing Documents using the documents in [Mr. Kingston's] possession would take several

[1] BMO fairly notes that the Defendants will need to amend their Defence to account for their argued position in this motion vis-à-vis the claimed unreasonableness of the demands made to the Defendants for the provision of information by BMO.

weeks and would likely involve fees and disbursements in excess of $5000" (para. 7 Saikali affidavit).

[32] Thus, at this early stage in the proceeding, with a pending Motion for Summary Judgment on Evidence that could terminate the proceeding in favour of the Bank, the Court should be particularly cautious before:

1. assessing the likely probative value of the disclosure sought as inconsequential; and
2. assessing the Defendants' legal position regarding the importance of the disclosure in issue as unpersuasive.

[33] While I do so reluctantly, as in my opinion it is likely that the disclosure sought from the Bank may well be inconsequential,[2] nevertheless, I am satisfied that it is in the interests of justice to accept the Defendant's "targeted disclosure" position, as set out in the Saikali affidavit (paragraph 6, items (v) and (vi)), that is:

1. Internal communications within the Bank regarding administration of the credit facilities for Comvest and for BSL (BSL Holdings Limited)

[2] I bear in mind that: the Defendants say the "targeted disclosure" is relevant to the "essential dispute", which is the reasonableness of the Bank's demands for the provision of information which triggers the default claimed; and BMO says that the Defendants' claim that the additional disclosure is required to explore the reasonableness of the grounds for BMO's demands to them, overlooks the payment default admitted in the Forbearance Agreement (p. 4/items 1-7) and that no amendment of their pleadings has been made to support their "unreasonableness of demands for information" position, nor does it address the breach otherwise of the provisions of the Forbearance Agreement.

2. Communications between the Bank and the companies, between the bank and the company's legal counsel, between the Bank and the company's accountant, and between the Bank and the Defendant Stephen Caryi.

[34] I will sign an Order to that effect once presented (consented as to form) by the Defendants.

[35] The appearance in General Chambers was lengthier than the norm and consumed approximately 40 minutes.

[36] The Bank argues that a proper costs award would be $500 plus HST ($575) inclusive of disbursements; whereas the Defendants argue a proper award would be $250 plus HST ($287.50).

[37] I conclude that $500 is the appropriate amount (inclusive of disbursements and HST).

Rosinski, J.