IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Bank of Montreal v. Murchinson, 2013 NSSM 18

Claim: SCCH 409850
Registry: Halifax

Between:

Bank of Montreal

Claimant

v.

Gordon Kenneth Murchison and Diane M. Murchison

Defendants

Adjudicator: Augustus Richardson, QC

Heard: April 30, 2013 in Halifax, N.S.

Appearances: Jonathan J. Saunier, for the claimant
Gordon Murchison and Diane Murchison, for themselves

By the Court:

[1] On or about December 31, 2008 the claimant Bank of Montreal ("BOM") financed the purchase of a 2006 Chevrolet Equinox in the amount of $21,111.52. The purchase was by way of a Conditional Sales Contract for Consumer Purchase (the "Contract") that was entered into between the defendants Gordon K. Murchison and Diane M. Murchison (who were at the time married to each other) and Saturn of Darmouth Inc.

[2] The Contract noted that it would be assigned to the BOM. It also stated that "the Buyer" would make bi-weekly payments of $201.43 until the balance of the financed amount was paid in full. Mr Murchison signed the Contract as "Buyer" and Mrs Murchison signed the Contract as "Co-Buyer." The Contract stated that "the Buyer and Co-Buyer, if any, (called "Buyer" or "Consumer" throughout this document) hereby jointly and severally purchase from the Merchant and agree to pay for, up the terms and conditions set out below ... the following property [being the Equinox]."

[3] Payments were made by Mr Murchison under the Contract until August 10, 2011, when the first of several payments were returned NSF. BOM repossessed the Equinox in or about June 2012, at which point the amount owing was in the vicinity of $11,826.67. The vehicle was sold and an amount of $5,047.56 in total was credited towards the debt. The balance after that credit was $6,901.93: see Exhibit C1, Tab B, statements for June, July and August, 2012. BOM then commenced these proceedings against both defendants on December 3, 2012 for the balance of the debt.

[4] On February 7, 2013 BOM obtained an order for quick judgment against Mr Murchison in the total amount of $7,065.81, inclusive of costs and interest. It had proceeded against only Mr Murchison at that time because it had not been able to serve Diane Murchison.

[5] Mr Murchison then applied to the Adjudicator who had issued the quick judgment order, seeking to set aside the order on the grounds that:

a. Didn't know I had to file a defence;

b. Didn't know the court date;

c. My ex wife [Diane Murchison] signed as witness, I didn't need a co-signor.

[6] The application came on before the Adjudicator on March 21, 2013. At that time the Adjudicator noted that "Def. did not appear. It will not be set aside."

[7] In the meantime BOM re-issued its claim on February 19, 2013 so as to pursue the defendant Diane Murchison as well. The hearing was scheduled for April 30th, 2013.

[8] The defendant Diane Murchison was served. She filed a defence. In the defence she stated as follows:

> "It was not explained to me that I was co-signing. I only thought I was witnessing Ken's signature. Never contacted when this [the debt] went into arrears."

[9] The claim came on before me on April 30th, 2013. I heard from both defendants. The claimant's evidence went in by way of an affidavit of Deva Soondrum, an account manager with the BOM: Exhibit C1.

[10] Diane Murchison testified that at the time of the purchase (and still today) she did not have a license. She did not drive. The Equinox was purchased in Mr Murchison's name, and was for his use, not hers. Title to the vehicle was in his name alone. Both she and Mr Murchison testified that at the time of the purchase he was employed with a good credit history. He did not need–and they did not believe he needed–anyone to guarantee the purchase. As they both put it, Mr Murchison "didn't need a co-signor." Diane Murchison testified that at the time of the purchase the salesman had had Mr Murchison sign the Contract. The salesman then handed it over to her with the words "sign here." She thought that she was simply signing as a witness to Mr Murchison's signature. She was not told that she was signing as a co-buyer. Nor was she told that she was signing as a "co-signor" to guarantee Mr Murchison's liability as a purchaser. She was not told that she was incurring any personal liability as a result of her "signing here."

[11] The only evidence of what transpired in the salesman's office at the time the Contract was entered into came from the defendants. The BOM's evidence–the affidavit of Mr Soondrum–came from someone who had no personal (or even hearsay) knowledge of how the Contract had come into being.

[12] The BOM's basic argument was this. The defendant Diane Murchison signed the Contract. Her defence–that she thought she was only signing as a witness–is in essence a defence of *non est factum*. Such a defence requires the defendant to establish two things:

a. first, that the document the signor put their signature to was "radically or fundamentally different from what the person believed he was signing," and

b. second, the signor "must not be careless in taking reasonable measures to inform himself when signing the document as to the contents and effect of the document:" *Castle Building Centres Group Ltd v. Da Ros* (1990) 95 NSR (2d) 24, per Glube, J (as she then was) at para.31, cited in *Chender v. Lewaskewicz* 2007 NSCA 108 at para.54; see also *Toronto Dominion Bank v. 2047545 Nova Scotia Ltd* (1995) 143 NSR (2d) 27 at para.41.

[13] Counsel for the BOM submitted that the Contract was clear on its face. It was what it was, a contract for the financed purchase of an automobile. It was not "radically or fundamentally different" from what the defendant Diane Murchison thought she was signing. And even if it was, she had not taken reasonable steps to inquire as to the nature of the document she was

signing. She just signed the document. She may have been negligent in doing so, but carelessness was no defence.

[14] I am satisfied, notwithstanding the able and strenuous submissions of counsel for the BOM, that the defence of *non est factum* has been made out. I come to this conclusion for a number of reasons.

[15] First, the circumstances surrounding the execution of the Contract must be taken into account. Diane Murchison could not drive. She had no license. She did not take any title to the vehicle. The salesperson who handed the document to her *after* her husband had signed said nothing other than "sign here." On such evidence her testimony that she thought she was signing as a witness rather than as a party is credible and I accept it.

[16] Second, and on the facts as noted above, the Contract is on its face misleading. It states that Diane Murchison is a "Buyer." But, as noted, she was not. She took no title to the vehicle, which she could not drive in any event. She was not a "buyer." She was, if anything, a guarantor. But a contract for the purchase and sale of goods is fundamentally different from a guarantee. The two types of agreement are "radically and fundamentally" different in nature and scope.

[17] Third, given that the defendant Diane Murchison was led to believe that she was signing as a witness she can hardly be faulted for not noticing that she was signing as a guarantor.

[18] Fourth, I am not convinced that those who provide consumer purchase financing can rely simply on the wording of a standard form contract of adhesion, composed of small print that is difficult to read, to "prove" that the signor understands what they are signing, at least in the face of evidence to the contrary. The Contract appears on its face to be a standard form document used by the BOM in all provinces except Quebec. It is two pages long, and is printed in a tiny, condensed font that is difficult to read. (Many parts of the photocopy of the Contract entered into evidence at Tab A of Exhibit C1 and Exhibit C2 are in fact illegible.) Assuming that the tiny font could be read one is left to wonder how the BOM could believe that a consumer signing it could understand it, at least in the absence of an explanation from someone who knows and understands the document. Adult literacy in Canada is measured on a scale from one to five. Level 1 is the lowest level and Level 4/5 is the most advanced level. A person should have at least Level 3 literacy to function well in Canadian society. In 2003 45% of Nova Scotians functioned at a Literacy Level of 1 or 2: http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=31. Such evidence makes problematic any assumption that the average consumer would understand

what relationship the document purports to create, at least in a case (as here) where no attempt to explain the document was made by the person asking the consumer to sign it.

[19] The problem with such documents is highlighted by the fact that it was the salesman who asked Diane Murchison to sign the Contract. On the evidence I am satisfied that he knew (or ought to have known) that the only "buyer" (that is, the only person taking title) was Mr Murchison. If he knew that Mr Murchison's wife was being asked to co-sign the agreement as, in effect, a guarantor, he ought to have told Diane Murchison that. He ought to have explained that she was signing a document that made her–not just her husband–personally liable. He did not. Instead, he secured her signature in effect by way of a misrepresentation as to the nature of the action he was asking her to perform. The BOM is not in my view entitled to avoid the obligation that was on the salesman to advise her as to what he was asking her to do, or the result of his subsequent misrepresentation. As an assignee it is in my opinion subject to any defences that Diane Murchison could have raised against the seller.

[20] I am accordingly satisfied that the defendant Diane Murchison has made out the defence of *non est factum* and that the claim as against her must fail.

[21] If I am wrong in this conclusion, I turn to the issue of damages.

[22] The onus is on the BOM to establish its loss. On the evidence it repossessed the vehicle that secured its loan. It sold the security (the Equinox) and credited the recovery against the debt, which of course it was required to do. However, it introduced absolutely no evidence as to the circumstances of its sale of the security. There was no evidence as to the fair market value of the security, or what steps the BOM took to realise on the security. There was no evidence as to whether the sale was to a wholesale dealer (who might be expected to pay less than market price), or to a retail consumer who paid market price, or to a non-arm's length purchaser.

[23] In the absence of such evidence I was not satisfied that the BOM had established that it had acted reasonably in selling the security, or that the sale price (whatever it was) represented a fair return on that security. That being the case, the BOM failed to establish that the balance owing after it had credited the sale proceeds to the debt was reasonable or just–and hence it failed to establish just what that balance should be.

[24] Accordingly, and even if the defence of *non est factum* failed, the BOM had not established that any money was in fact owing after it had realised on its security. Its claim as against Diane Murchison must fail.

DATED at Halifax, this 15th day
of May, 2013.

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Augustus Richardson, QC
Adjudicator