SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Abdulrahman v. Jereen*, 2019 NSSM 19

Date: 2019-04-29
Docket: SCCH - 468850
Registry: Halifax

Between:

Fawaz Abdulrahman

Claimant

- and -

Nazia Jereen and Sadiqur Rahman

Defendants

Adjudicator: Eric K. Slone

Heard: March 18 and April 1, 2019 in Halifax, Nova Scotia

Appearances: For the Claimant, David Barrett, counsel

For the Defendant, Sadiqur Rahman, Balraj Dosanjh, counsel

BY THE COURT:

[1] The Claimant Fawaz Abdulrahman (“Mr. Abdulrahman”) and the Defendants Nazia Jereen (“Ms. Jereen”) and Sadiqur Rahman (“Mr. Rahman”) were at the material time all foreign students studying in Halifax. Mr. Abdulrahman was from Kuwait and the two others from Bangladesh. They all met in about 2014. During the next few years they were friends, or at least friendly, and some financial entanglements arose, the character of which are to be determined in this Claim.

[2] I will examine the facts more closely later, but there are important procedural and legal features to the case that I will address first.

[3] Mr. Abdulrahman commenced this Claim on October 2, 2017, suing both Defendants for $13,570.00 which he alleged in his Claim form was a personal loan "to them," and which he says “they” refused to acknowledge. The Claimant was unrepresented at the time but retained Mr. Barrett at some point thereafter.

[4] The claim was served on both Defendants; however, it was Ms. Jereen who defended initially, represented by Ms. Dosanjh as her counsel. Ms. Jereen also counterclaimed. The gist of the defence raised was that although the Claimant had loaned her $6,000.00, that money had been repaid. She denied that the other moneys claimed had been loaned to her. She admitted that the Claimant had often paid for things such as meals and groceries, at a time when he was pursuing a romantic interest in her - an interest that was <u>not</u> reciprocated and which eventually ran its course. The counterclaim alleged that the Claimant had engaged in a campaign of harassment in an effort to try to get her to acknowledge her indebtedness, which had made her anxious and depressed to the point of disability and caused her to lose a semester at university. The damages claimed for this alleged harassment exceeded the amount of the Claim.

[5] As a hearing date of the claim approached in September 2018, counsel for the Claimant and for Ms. Jereen negotiated a settlement, which I will outline shortly. It was between the Claimant and Ms. Jereen only. At that point in the proceedings, Mr. Rahman had not yet filed a defence and the Claimant had taken no steps to obtain a Quick Judgment against him. Very shortly after the settlement between the Claimant and Ms. Jereen, Mr. Rahman retained Ms. Dosanjh as his counsel and communicated his intent to defend.

[6] The settlement between Ms. Jereen and the Claimant called for both the claim and counterclaim to be withdrawn, and for a release to be signed by Mr. Abdulrahman. No money changed hands. The release was comprehensive, releasing Ms. Jereen from any and all claims. In addition, the Claimant agreed:

> I further agree not to make any claim or take any proceedings against any other person or corporation who might claim contribution or indemnity or commence third party proceedings against the Defendant relating to the aforesaid matters.

[7] Upon Mr. Rahman surfacing with counsel, the matter eventually proceeded to the hearing before me. Mr. Rahman defends on the basis that he was never the recipient of any loans from Mr. Abdulrahman. He also argues that the release signed in favour of Ms. Jereen has the effect, in law, of releasing him from any potential liability.

[8] To consider this legal argument, it is only necessary to set out a thumbnail of the facts. Mr. Abdulrahman claims that over a period of almost two years starting in September 2014, he provided chunks of cash - usually several hundred dollars at a time, stuffed into envelopes - to help "them" pay their rent and meet other expenses. In many cases, he says that the money was actually handed to Ms. Jereen, although he intended the money to be for their joint benefit. He was vague in his evidence of how often he handed money to Mr. Rahman.

[9] He assumed (wrongly, it appears) that Ms. Jereen and Mr. Rahman were boyfriend and girlfriend, and that they had some type of joint finances. At the time these advances were allegedly being made, Ms. Jereen and Mr. Rahman were roommates, although they have since become involved romantically.

[10] Over the period of time during which money was being advanced, and for some time thereafter, he engaged in a lively text dialogue with Ms. Jereen, but almost none with Mr. Rahman. When he started to make demands for repayment, he did so exclusively upon Ms. Jereen. There are no contemporaneous documents evidencing a belief by the Claimant that money was owed to him by Mr. Rahman.

It was all about Ms. Jereen, with the exception of one particular loan of $1,000.00 to Mr. Rahman that was acknowledged and paid back.

[11] The evidence of loans directly to Mr. Rahman is paper thin. Any chance that he could succeed against Mr. Rahman would be on the basis, as he initially claimed, that the money was loaned to "them;" in other words, that the money was a loan to them jointly, and that it did not matter which one of them accepted the envelopes of cash.

[12] Implicitly, the claim is that the two Defendants were jointly and severally liable for these advances.

[13] The law is quite clear, and has been for almost two centuries, that the release of one joint debtor releases them all. In *Toronto Dominion Bank v. Higgott et al.*, 1984 CanLII 2081 (ON SC) it was stated thus:

> Where a creditor receives a part payment from a debtor who is jointly, or jointly and severally bound, and that debtor intends by that payment to secure his release from his liability to the creditor, the creditor may do one of two things. He may give the debtor a full and unqualified release of his liability for the debt. If he does so, the release operates to discharge all the other debtors: *Nicholson v. Revill* (1836), 4 Ad. & E. 675 at p. 683, 111 E.R. 941 (K.B.); *Ward v. National Bank of New Zealand, Ltd.* (1883), 8 App. Cas. 755 at p. 764 (P.C.). The rationale for this principle is that the joint guarantee of the debt was part of the consideration for the contract of each debtor: *Ward v. National Bank of New Zealand*, supra, at p. 764. To the extent that the early case of *Ex parte Gifford* (1802), 6 Ves. Jun. 805 at p. 807, 31 E.R. 1318 (Ch.), suggested that, in the case of co-sureties, the release of one co-surety did not release the others, it has been overruled by latter cases, *Nicholson v. Revill*, supra, at p. 683, *Evans v. Brembridge* (1855), 2 K. & J. 174, 69 E.R. 741 (Ch.).
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> It is true that there are some cases where a release of one joint debtor has not had the effect of releasing the others, but they are all cases where the release in question was of a right or obligation independent of and separate from the debt on which the creditor sued: see, for example, *Ex parte Good* (1877), 5 Ch. D. 46 at p. 59 (C.A.); *Re Wolmershausen* (1889), 62 L.T.N.S.

541 (Ch. D.).

> Instead of giving the joint debtor a release, the creditor may covenant with him not to sue him on the obligation. The covenant not to sue will not release the other joint debtors. The covenant does not prejudice the creditor's rights to proceed against the others for the balance: *Chitty on Contracts*, 24th ed. (1977), vol. 1, pp. 507-8, para. 1077. (Emphasis added)

[14] In a B.C. case, *Shoker v. Vollans*, 1998 CanLII 6447 (BC CA), the law was again bluntly stated, and acknowledged to be something of a "trap for the unwary:"

> [2] The reason for the rule can be readily understood in cases of joint liability. Since a joint obligation is regarded as only one obligation, the common law requires that all persons jointly liable generally must be joined as defendants, and that process be served on all of them by their creditor, before the latter may obtain judgment: see Law Reform Commission of British Columbia, Report on Shared Liability, August 1986, at 11. Consistent with the `one obligation' theory, the release of one co-debtor constitutes a release of the entire debt. Thus in *Cheetham v. Ward* (1797) 1 Bos. & P. 630, Eyre J. said:
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> > In fact there is but one duty extending to both obligors; and it was therefore pointedly put that a discharge of one, or satisfaction made by one, is a discharge of both. This puts an end to the argument that the action is not necessarily suspended as to both: for it is the effect of the suspension as to one that releases, discharges, and distinguishes the action as to both. [at 633]
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> This was echoed by Rooke J., who noted ". . . if the action be gone as to one obligor, where two have become bound, it is gone as to both. Now the obligee has it not in his power to elect to discharge one obligor without discharging the other." (at 634)
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> [3] But where the liability in question is not merely joint, but joint and several, one might have expected a different result. To

quote Glanville Williams (Joint Obligations, 1949):

> A believer in the logical consistency of English law might therefore be forgiven for supposing that a release of one joint and several covenantor would not work a release of a
> co-covenantor, for, although it would release the joint obligation, it would not release the other several ones. This, however, is not the rule. The rule is that a release of one joint and several covenantor discharges the others, in precisely the same way as with purely joint covenants.
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> The reason for this rule appears to have been an early uncertainty as to the nature of a joint and several obligation . .
> . .
>
> Whatever the reasons, the rule became settled by a series of cases that followed each other uncritically, and prevails at the present day. The rule is of the same scope as in the case of purely joint obligations; thus it applies to an accord with one as well as to a release under seal to one, but does not apply to a mere covenant not to sue. [at §63]

[4] In one of the earliest cases on the point, *North v. Wakefield* (1849) 13 Q.B. 536, the Court suggested that the rule was applied for the protection of the co-debtor (in my example, A) who obtained his release from the creditor. The other debtor (in my example, B) might thereafter pay the debt and then sue A for contribution and indemnity, thus contradicting the terms of the release. In the words of Patteson J. in *North v. Wakefield*:

> The reason why a release to one debtor releases all jointly liable is, because, unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released; but that reason does not apply where

> the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor. Neither does such a clause qualifying the release operate as a fraud on other creditors; for, as it appears on the face of the deed, all who execute that deed are aware of it and agree to it. [at 541-2; emphasis added]

> [5] Yet in many instances, the rule appears to have been a trap for the unwary that has precluded creditors from pursuing legitimate claims and provided a windfall of sorts to co-obligors who have made no effort to pay their debts. The common law responded by taking refuge in the theory that the parties' intentions should govern, and creating fine distinctions between true releases (which release the entire debt) and covenants not to sue (which preserve the creditor's rights against the co-debtor): see for example, *Bogart v. Robertson* (1905) 11 O.L.R. 295 (Ont. C.A.), *Canadian Imperial Bank of Commerce v. Vopni* 1978 CanLII 1993 (MB QB), [1978] 4 W.W.R. 76 (Man. Q.B.), *Heitman Financial Services Ltd. v. Towncliffe Property Ltd.* (1981) 1981 CanLII 1778 (ON SC), 35 O.R. (2d) 189 (Ont. H.C.); and *Avco Financial Services Ltd. v. Doyle* (1979) 65 A.P.R. 34 (P.E.I.S.C.). (emphasis added)

[15] Against this jurisprudential backdrop, the Claimant is faced with the fact that he gave a full and final release to one (alleged) joint debtor, and in so doing he released the debt in its entirety.

[16] The legal bar to any recovery is only compounded by the fact that he gave the additional covenant "*not to make any claim or take any proceedings against any other person or corporation who might claim contribution or indemnity or commence third party proceedings against the Defendant relating to the aforesaid matters."* This is a clause that is not present in every release. It was presumably bargained for by Ms. Jereen.

[17] The purpose for such a clause is that a joint debtor may face a cross claim, or separate claim, for indemnity, which (if it occurred) would frustrate in whole or in part the releasee's desire to be free of claims from any direction. It is a well- known equitable principle that joint debtors may face claims for contribution and indemnity. As was stated in *Lafrentz v. M & L Leasing*, 2000

ABQB 714 (CanLII):

> [29] There is, however, an equitable right to contribution among joint debtors. As noted by Glanville Williams in Joint Obligations [citation omitted] joint and several debtors who are liable in solidum have, subject to an agreement to the contrary, a right to contribution among themselves spread equally among them. If a debtor pays more than his equal share, he has a right to contribution in respect of the excess. ....

[18] If the claim against Mr. Rahman were to be allowed, and if it succeeded, there is nothing to prevent Mr. Rahman from seeking contribution or indemnity against Ms. Jereen, such as by claiming that he did not receive the benefit of all of the money.

[19] As such, by agreeing to the additional clause that he did, the Claimant must be found to have renounced any right to sue Mr. Rahman. Even so, the release of the joint debtor already had that effect. So, Mr. Abdulrahman is doubly out of luck.

The facts

[20] In case I am wrong on the law, I want to make clear my view of the facts.

[21] The Claimant's story that he continued to make bulk payments toward the Defendants' rent and other expenses, is hard to believe. The Claimant admitted that he was naive, and I can accept this. I can also believe that he was goodhearted and was trying to ingratiate himself to people that he considered his friends. But it makes no sense that he would continue to support these two friends for almost two years, accepting (as he said) flimsy excuses that their personal sources of money from overseas were delayed or unavailable, and accepting vague promises to pay him back "when they could."

[22] There is virtually no documentary support for the alleged loans. The Claimant obtained printouts from his father's bank account in Kuwait, which show multiple withdrawals of cash from ATM's in Halifax, which money he says that he gave to the Defendants as loans. These entries in themselves do not prove anything beyond the fact that he withdrew money, which could have been for any reason.

[23] What appears most likely to me is that the Claimant had an interest in Ms. Jereen, and that he tried to use money as a means to gain her affections, ultimately without success. It is a reasonable inference that he may have had to explain to his family why he had withdrawn all of this money, and that the story was floated that these were loans rather than gifts.

[24] The evidence of Mr. Rahman was that at the relevant times, he was a roommate of Ms. Jereen and that the Claimant became part of their group of friends. He described Mr. Abdulrahman as generous to a fault, always insisting that he pay for things, such as dinners when they were all out together. He admits that at one time he did borrow $1,000.00 from Mr. Abdulrahman, which he paid back. He denied categorically borrowing money for rent, or receiving money intended for Ms. Jereen. He also testified that at no time prior to the claim being made against him, did the Claimant ever allege that money had been loaned to him. All references in the documents are to alleged loans to Ms. Jereen.

[25] Ms. Jereen testified at length, and somewhat emotionally, and denied that money was ever lent to her. She testified that she had her own sources of money from her family, and that she did not need to borrow money from Mr. Abdulrahman. She produced documents that support her contention that she was receiving money from her family in Bangladesh.

[26] On a straight contest of credibility, I found Mr. Rahman to be more credible than Mr. Abdulrahman, mostly because there were no unexplained inconsistencies in his evidence. It is of course possible that Mr. Abdulrahman's version of the events is true, but it strikes me as too improbable to accept.

[27] In all of the circumstances, I find that the claim of a loan to Mr. Rahman, or to Mr. Rahman and Ms. Jereen jointly, has not been established.

[28] For all of the above reasons, the claim must be dismissed.

Eric K. Slone, Adjudicator