IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Bank of Montreal v.Kincade, 2014 NSSM 50

Claim No: SCCH 420491

BETWEEN:

Name	Bank of Montreal	**Claimant**
Address	c/o Burchell's LLP 1800 – 1801 Hollis Street Halifax, NS B3J 3N4	
Phone	(902) 423-6361	

Name	Stephanie Kincade	**Defendant**
Address	c/o Nova Scotia Legal Aid 2830 Agricola Street Halifax, NS B3K 4E4	
Phone	(902) 420-3450	

Jonathan Saumier appeared for the Claimant.

Tanya Jones appeared for the Defendant.

DECISION

This matter arises from the default in payment of a Mosaik MasterCard account issued by the Claimant, Bank of Montreal to Christopher Galbraith, a bankrupt, and the Defendant, Stephanie Kincade. The claim is $11,283.25.

The facts of this case are straightforward and not in dispute. Initially, the credit card was issued to Christopher Galbraith. On June 11, 2005, a separate document entitled "Request for Additional Card" was signed by both Mr. Galbraith and Ms. Kincade ("the Request"). At the time, Mr. Galbraith and Ms. Kincade were living together and in a romantic relationship but this relationship has since ended.

The Request contained the following paragraph:

"Where a card is issued, we acknowledge that the terms and conditions of the Mosaik MasterCard Cardholder agreement bind both of us. We also agree to be jointly and severally liable, and under Quebec law, solidarily liable, which we acknowledge means together and separately, for all amounts charged to the MasterCard account." (underline mine)

A new card was issued and purchases were made on it by both parties. Mr. Galbraith subsequently experienced financial difficulties, and with the advice of the accounting/trustee firm, WBLI, submitted a proposal for creditors in 2011 and agreed to pay $326.00 per month on the account. He subsequently became in default and filed for bankruptcy. Neither party has made payments on the MasterCard since, and the bill is in arrears. For her part, Ms. Kincade submits that she did not know she was signing as a co-debtor but merely as one with credit card access privileges.

BMO is seeking the amount of the credit card bill, $11,283.25. Ms. Kincade pleads *non est factum*, a defense which effectively means she did not understand what she was signing.

The Evidence

The Request and monthly statements for the account were admitted by consent of both parties. The Defendant acknowledges the signature as hers and neither she nor her counsel tendered any evidence or raised any issue with the amount of interest charged. Both parties agree a credit card was issued to Ms. Kincade under the agreement, and I do so find. Mr. Saumier called no further evidence for the Claimant.

Ms. Jones, on behalf of the Defendant, called two witnesses.

Christopher Galbraith testified that he signed up for a Mosaik MasterCard in 2006 (a fact which was clearly in error given the date of the Request which was signed subsequently). Mr. Galbraith claims he travelled a lot for his former job and this card offered Air Miles reward miles. Mr. Galbraith suggested to Ms. Kincade that she have a card as well so she could use it to purchase groceries and other items. Mr. Galbraith advised the Defendant that the credit card would allow her to purchase items but he would be responsible for it. He recalls having a credit check performed. He told Ms. Kincade that he was advised by a friend of his that he had made a similar arrangement where her parents were primary cardholders and her name was on the account without obligation.

Under cross-examination, he testified that he declared bankruptcy on June 5, 2013.

Stephanie Kincade testified that she first discovered she was a joint holder on the credit card in the Fall of 2013, when she received a copy of a statement addressed to her and Mr. Galbraith at 2096 Brunswick Street. Mr. Galbraith had moved out in December 2012. She had not had any dealings with the Bank of Montreal before 2005 when she signed the Request. She was not aware of any credit check being performed and it did not appear on her Equifax report. She is now aware of the meaning of "joint and several" through other loan documents she currently has

in place. She testified that Mr. Galbraith completed the form and she signed it. She did not review it with the Bank. She testified that she was no longer in a relationship with Mr. Galbraith.

Under cross examination, she acknowledged having signed the document and that she "obviously missed" paragraph 3 of the Request. She simply trusted Mr. Galbraith's interpretation believing that he had spoken with the Bank.

Issue

Has Ms. Kincade been successful in establishing a defence of *non est factum*?

The Law

There are several legal principles for consideration when interpreting a contract. The general rule is as stated by the Supreme Court of Canada in *Eli Lily v. Novapharm*, [1998] 2 S.C.R. 129, where Justice Iacobucci stated the following for the majority of the Court:

"The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination....
...Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face....
...When there is no ambiguity in the wording of the document, the notion in *Consolidated-Bathurst* that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words."

However, when considering the wording of standard form agreements, in the event of ambiguity, one turns to the principle of *contra proferentum* whose purpose, as stated by Iacobucci, J. in *NovaPharm* at paragraph 53, is:

"to protect one party to a contract from deviously ambiguous or confusing drafting on the part of the other party, by interpreting any ambiguity against the drafting party."

As stated by the Nova Scotia Court of Appeal in *Ryan v. Sun Life Assurance*, 2005 NSCA 12, per Cromwell, JA (as he then was):

"Its operation depends, therefore, on a finding of ambiguity in the language to be interpreted. Ambiguity in this context means that a term in the contract is reasonably capable of more than one meaning: see for example *Chilton v. Co-operators General Insurance Co*. (1997), 143 D.L.R. (4th) 647 at 654 (Ont. C.A.)."

In my view, the document is clear in its language and intent. It is not ambiguous, the only possible defence available to Ms. Kincade is *non est factum*.

Both counsel relied on the same case, and agree that the leading case on the principle of *non est factum* in Nova Scotia is the decision of the Court of Appeal in *Lewaskewicz v Chender et al.*, 2007 NSCA 108, per Roscoe J.A., where she stated the following:

[54] The test for proving *non est factum* was correctly stated by Glube J., as she then was, in *Castle Building, supra*, 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 Limited v. Harris and 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.))

[55] The Supreme Court of Canada in *Marvco, supra,* adopted the House of Lords' decision in *Saunders, supra,* and confirmed that the plea of *non est factum* was not available to a person who was careless when the document was signed, even if the document is fundamentally different from that she thought she was signing. With respect to carelessness, Estey J. stated (at p. 785):

> In my view, with all due respect to those who have expressed views to the contrary, the dissenting view of Cartwright J. (as he then was) in *Prudential*, [1956] S.C.R. 914], correctly enunciated the principles of the law of *non est factum.* In the result the defendants-respondents are barred by reason of their carelessness from pleading that their minds did not follow their hands when executing the mortgage so as to be able to plead that the mortgage is not binding upon them. . . . . In my view, this is so for the compelling reason that in this case, and no doubt generally in similar cases, the respondent's carelessness is but another description of a state of mind into which the respondents have fallen because of their determination to assist themselves and/or a third party for whom the transaction has been entered into in the first place. Here the respondents apparently sought to attain some advantage indirectly for their daughter by assisting Johnston in his commercial venture. In the *Saunders* case, [[1971] A.C. 1004], the aunt set out to apply her property for the benefit of her nephew. <u>In both cases the carelessness took the form of a failure to determine the nature of the document the respective defendants were executing</u>. Whether the carelessness stemmed from an enthusiasm for their immediate purpose or from a confidence in the intended beneficiary to save them harmless matters not. This may explain the origin of the careless state of mind but is not a factor limiting the operation of the principle of non est factum and its application. <u>The defendants, in executing the security without the simple precaution of ascertaining its nature in fact and in law, have nonetheless taken an intended and deliberate step in signing the document and have caused it to be legally binding upon themselves</u>. In the words of *Foster v. MacKinnon*, [(1869), L.R. 4 C.P. 704], <u>this negligence, even though it may have sprung from good intentions, precludes the defendants in this circumstance from disowning the document, that is to say, from pleading that their minds did not follow their respective hands when signing the document and hence that no document in law was executed by them</u>.
>
> This principle of law is based not only upon the principle of placing the loss on the person guilty

> of carelessness, but also upon a recognition of the need for certainty and security in commerce. This has been recognized since the earliest days of the plea of *non est factum*. ...
>
> I wish only to add that the application of the principle that carelessness will disentitle a party to the document of the right to disown the document in law must depend upon the circumstances of each case. This has been said throughout the judgments written on the principle of *non est factum* from the earliest times. The magnitude and extent of the carelessness, the circumstances which may have contributed to such carelessness, and all other circumstances must be taken into account in each case before a court may determine whether estoppel shall arise in the defendant so as to prevent the raising of this defence. The policy considerations inherent in the plea of *non est factum* were well stated by Lord Wilberforce in his judgment in *Saunders, supra,* at pp. 1023-24:
>
> > ... the law ... has two conflicting objectives: relief to a signer whose consent is genuinely lacking ...; protection to innocent third parties who have acted upon an apparently regular and properly executed document. Because each of these factors may involve questions of degree or shading any rule of law must represent a compromise and must allow to the court some flexibility in application.
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> > [emphasis added in the original citation]

Findings

I have had the opportunity to observe both Mr. Galbraith and Ms. Kincade on the witness stand.

I was not impressed with Mr. Galbraith or his evidence. I am not satisfied with his explanation that he had Ms. Kincade sign the document to allow her to "buy groceries". Given the clear language of the document, he probably also knew, or could have known, that Ms. Kincade could be equally liable with him for the balance on the credit card at the time they both signed the Request. However, I am convinced he understood the impact of the joint and several liability when he subsequently signed the proposal for creditors and either declared bankruptcy or was petitioned into it. In other words, by then he clearly knew Ms. Kincade was liable for the debt.

Ms. Kincade impressed me as an intelligent and resourceful woman. She was at all times forthright and truthful. She is or was running her own business at the time of the hearing and is raising the child she has with Mr. Galbraith.

I find as a fact that Ms. Kincade did not read the document when it was presented to her by Mr. Galbraith. She was confident in the assertions of Mr. Galbraith. Unfortunately, she was required to demonstrate care in understanding what she had signed, and she did not do so. While I agree in part with Ms. Jones, the document could have been more descriptive, in my view it is sufficiently clear to enable a reasonable person to ascertain the nature of the document. Ms. Kincade chose not to read it. This satisfies the third element of the test espoused by Glube, J. (as she then was).

Mr. Saumier has referred me to the case of *Bank of Montreal v Murchison* 2013 NSSM 18, a decision of Adjudicator Richardson. It is the ethical duty of counsel to cite relevant authorities, even which are contrary to their position. Mr. Saumier has not only cited such a case, but it is an

earlier case in which he also represented the Bank. I commend him for doing so. Decisions of the Small Claims Court do not bind other Adjudicators, although they can be and often are informative. However, in my view, that case can be distinguished from the case at bar for several key reasons.

In *Murchison*, the Murchisons attended to a car dealer and signed a finance agreement for the purchase of a vehicle. The Defendant, Mrs. Murchison, did not have a driver's license and her name did not appear on the bill of sale. She was told to simply sign the financing form without being told what it was. She had no reason to believe any aspect of the purchase of the car concerned her. She thought she was witnessing her husband's signature on the bill of sale, a finding which the Adjudicator accepted. He also found the agreement difficult to read and understand. While not stating so, it does not appear the Adjudicator found any of the Defendant's misunderstanding as the result of her carelessness or that she was given any opportunity to take the reasonable measures expected of her in the cases cited above.

The instant case is different as Ms. Kincade could have read the document and make further inquiries.

Ms. Jones submits that there was no explanation from the Bank and the document was difficult to understand and misleading. With respect, I disagree. I know of no obligation in law for a lender to contact or explain the impact of a credit card agreement. There are disclosure requirements prescribed by the *Consumer Protection Act* for an initial loan or credit card but those were not raised in this instance. Furthermore, the language used in the Request was not ambiguous at all.

In the case at bar, the Request was delivered by Mr. Galbraith. Ms. Kincade was and is an educated woman. She did not take the opportunity to review the document. Had she done so, she would have read that she was jointly and severally liable with Mr. Galbraith and, as stated in the Request, that "means together and separately, for all amounts charged to the MasterCard account". As a result, the defence of *non est factum* has not been made out.

This Court and indeed, many lawyers, often see cases of co-borrowers and guarantors being called upon to pay by various lenders due to the default of the original borrower. Many thought they would not be required to as they trusted the person would make the payments and/or did not take the time to read what they were signing believing it to be something else. Unfortunately for the co-borrowers and guarantors, that is no defence. The lenders advance money or credit presuming the co-borrowers and guarantors know what they are signing and to a certain extent, the law assumes the same thing. It is critical for anyone in these circumstances to read the documents before signing.

All of that said, it is impossible not to empathize with Ms. Kincade. Any recourse against Mr. Galbraith is stayed as a result of the bankruptcy. She is effectively "stuck with the bill" due to his

actions. In spite of the outcome in this matter, I sincerely hope she is successful on the path she has chosen to get her life back in order.

Conclusion

I find the Claimant has proven its case on the balance of probabilities. The defence of *non est factum* has not been established. I find the Defendant, Stephanie Kincade, liable to the Bank of Montreal for $11,283.25.

Given the circumstances, I decline to award any further interest or costs.

Order accordingly.

Dated at Halifax, NS,
on August 5, 2014.

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)