CITATION: The Toronto-Dominion Bank v. 6300847 Canada Inc., 2025 ONSC 3441
COURT FILE NO.: CV-24-00003020-0000
DATE: 20250609

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Toronto-Dominion Bank, Plaintiff

AND:

6300847 Canada Inc. and Esmaeil Safaverdi, Defendants

BEFORE: Justice Conlan

COUNSEL: J. Butson, for the Plaintiff

E. Mehrabi, for the Defendant

HEARD: June 9, 2025, in-person

ENDORSEMENT ON MOTION FOR SUMMARY JUDGMENT

The Motion

[1] The Plaintiff, The Toronto-Dominion Bank ("TD"), moves for summary judgment against the individual Defendant, Esmaeil Safaverdi ("Safaverdi"), in the principal amount of about $58,000.00, on account of two credit facilities – (i) a line of credit in the amount of $40,000.00 ("LOC") and (ii) a Visa business card with a credit limit of $10,000.00 ("Visa").

[2] Safaverdi was at all material times the sole shareholder of the corporate Defendant, 6300847 Canada Inc. ("630"), operating as a restaurant business. 630 has not defended the action and is not a part of the within motion.

The Result

[3] For the reasons that follow, TD's motion for summary judgment is dismissed. I find that TD has not met its onus, on a balance of probabilities, to demonstrate that there is no genuine issue requiring a trial.

[4] On costs, Safaverdi is presumptively entitled to some costs. If they cannot be resolved between the parties, then this Court will receive written submissions. Each submission shall be strictly limited to two pages in length, excluding necessary attachments. Safaverdi shall serve, file, and upload to Case Center his written submissions on costs by 4:00 p.m. on Friday, June 27, 2025. TD shall do the same by 4:00 p.m. on July 9, 2025. No reply is permitted.

The Law of Summary Judgment

[5] The burden of proof is on TD. As the moving party, TD must demonstrate on a balance of probabilities that there is no genuine issue requiring a trial – Rule 20.04(2)(a) of the *Rules of Civil Procedure.*

[6] In making that determination, this Court may weigh the evidence, evaluate credibility, and draw reasonable inferences. Alternatively, this Court could find that it is in the interests of justice for such powers to be exercised only at a trial – Rule 20.04(2.1) of the *Rules of Civil Procedure*. That is my finding in this case.

[7] The general principles that are applicable on this motion were set out by this Court at paragraph 29 of its decision in *CIBC Investor Services Inc. v. Chan*, 2024 ONSC 1628, referring to the decisions in *Oliver et al v. Herold et al*, 2021 ONSC 376 and *Zaky v. 2285771* Ontario Inc., 2020 ONSC 4380.

> [29] In *Oliver et al v. Herold et al*, 2021 ONSC 376, Harper J. stated the following at paragraphs 12 and 13, referring to the decision in *Zaky v. 2285771 Ontario Inc.*, 2020 ONSC 4380.
>
> > [12] In *Zaky v. 2285771 Ontario Inc.*, 2020 ONSC 4380 (CanLII), Conlan, J. reviewed the principles to guide the court when considering summary judgments. I agree with his review that commences at para.13:

[13] The following principles may be gleaned from a careful review of the leading decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7.

[14] First, it is the principle of proportionality that ought to drive the Court's decision on a request for summary judgment. There will be no genuine issue requiring a trial when the judge hearing the motion is able to reach a fair and just determination on the merits.

[15] Second, what does that mean – a fair and just determination on the merits? It means (i) that the judge hearing the motion is able to make the necessary findings of fact, (ii) is able to apply the law to the facts, and (iii) the process employed to do those things is a proportionate, more expeditious and less expensive means to achieve a just result (as compared to a trial).

[16] The judge must be able to have confidence in the conclusions reached on the motion, otherwise, the case ought to proceed to trial

[17] Third, the judge hearing the motion should follow a two-stage procedure. Initially, consider only the evidence filed without regard to the expanded powers. Then, afterwards, if there appears to be a genuine issue requiring a trial, the judge may (but does not have to) weigh the evidence, evaluate credibility and draw reasonable inferences

[18] Fourth, there is certainly a culture shift that was signalled by the decision of the Supreme Court of Canada referred to above. The Courts have been encouraged to, wherever possible, deal with matters expeditiously. Cases should proceed to trial only if they really have to. The summary judgment process can, where employed properly, increase access to affordable and timely

> justice. A trial should no longer be viewed as the default procedure
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> [13] *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial.

The Law on *non est factum*

[8] As the only substantive issue raised by Safaverdi is the defence of *non est factum*, it is important for the reader to have an understanding of the nature of that defence. In that regard, I borrow from the very thorough decision of Justice Glustein in *Royal Bank of Canada v. 2414973 Ontario Limited*, 2020 ONSC 6047, at paragraphs 86 through 107.

> [86] The definition of the *non est factum* defence is set out by Justice H.J. Williams in *The Toronto-Dominion Bank v. Fares*, 2018 ONSC 6512, at para. 33:
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> > The defence of *non est factum* is available to someone who, as a result of misrepresentation, has signed a document without understanding its nature and character and who has not been careless in doing so: *Marvco Colour Research Ltd. v. Harris*, 1982 CanLII 63 (SCC), [1982] 2 S.C.R. 774.
>
> [87] In the present case, there is evidence that requires a trial to determine whether Balalaey's *non est factum* defence will succeed.
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> [88] RBC filed no evidence from Fini as to the circumstances of the signing of the Impugned Guarantee. Leung stated on cross-examination that he did not know if Fini still worked for RBC. Leung had no knowledge of the circumstances of the signing of the Impugned Guarantee.

[89] The only evidence about the signing of the Impugned Guarantee is from Balalaey. His evidence is not contested on this motion.

[90] Balalaey stated that Fini represented that Balalaey and Bezkool were required to personally guarantee only 25% of the $350,000 under the SBFL Agreement,[7] *i.e.* $87,500, and Balalaey and Bezkool were required to personally guarantee the full $15,000 under the VISA Agreement.

[91] The 25% SBFL Guarantee was also consistent with the $50,000 guarantee that Balalaey was asked to provide for the $200,000 small business financing loan provided by RBC to 189,[8] with those documents being signed concurrently with the Tandis documents on October 27, 2014.

[92] Balalaey's evidence is that at the October 27, 2014 meeting, Fini then showed Balalaey and Bezkool the SBFL and VISA Agreements, which were consistent with the representations Fini had made about the scope of the personal guarantees being limited to $87,500 and $15,000.

[93] Further, as I note above, Balalaey's evidence is (quoted *verbatim*):

> (i) After seeing the SBFL Agreement and the Visa[9] Agreement, Fini put various documents in front of us to sign;
>
> (ii) Relying on what Fini told us and looking at both the SBFL Agreement and the VISA Agreement, we signed all the documents at RBC bank in front of Fini. At no time were we told or given the opportunity to seek independent legal advice;
>
> (iii) At no time was I made aware of the fact that I was signing any other guarantees in addition to the guarantees under the SBFL Agreement for $87,500.00 and the Visa Agreement for $15,000.00; and
>
> (iv) I relied on the content of the SBFL and Visa Agreements and the representations made by Fini. As evidenced in the documents

> noted above, it was shown to Bezkool and me that the extent of our personal liabilities was $102,500.00.

[94] Consequently, Balalaey's uncontested evidence is that "[a]t no time was I made aware of the fact that I was signing any other guarantees in addition to the guarantees under the SBFL Agreement for $87,500.00, and the Visa Agreement for $15,000.00".

[95] Further, RBC's evidence establishes that Balalaey signed 13 documents at the October 27, 2014 meeting, in relation to both the Tandis and 189 loan obligations.

[96] The above evidence, if accepted at trial, could support a finding that "as a result of misrepresentation, [Balalaey] signed a document without understanding its nature and character and … has not been careless in doing so": *Fares*, at para. 33.

[97] RBC relies on the "entire agreement" or "non-representation" clause at section 3 of the Guarantees. RBC submits that as in *Fares*, Balalaey cannot ask the court to rely upon a representation or ask the court to permit parol evidence when the words of the Impugned Guarantee establish that Balalaey provided the $200,000 additional guarantee. I do not agree.

[98] In the present case, Balalaey does not rely on a representation to modify the terms of a guarantee that he understood he was signing. Such a position would be prohibited based on the entire agreement clause: *Fares*, at para. 30. It was in that context that Justice H.J. Williams did not accept the *non est factum* defence in *Fares*. She held, at para. 33:

> Fares and Bakhos understood that they were personally guaranteeing TD's loan to 7865210; they say that they did not appreciate that their guarantees that [*sic*] were unlimited.

[99] Consequently, Balalaey's position is not akin to what occurred in *Fares*, when the guarantors sought to rely upon a representation that was not included in the contract.

[100] By submitting that he did not understand that he was signing the Impugned Guarantee due to the misrepresentations of Fini, Balalaey is relying on the *non est*

factum defence. While an entire agreement clause would prevent a guarantor from submitting that the amount of the guarantee signed was represented to be a lower amount (as in *Fares*), such a non-representation clause does not preclude a *non est factum* defence.

[101] Consequently, if Balalaey's evidence is accepted at trial, he can rely on the *non est factum* defence to submit that (i) Fini represented that only the SBFL and VISA Guarantees were required, for a total of $102,500, and (ii) as such, Balalaey did not understand that he was signing the Impugned Guarantee for an additional $200,000 and was not "careless" in so doing, regardless of the "entire agreement" or "no representation" clause.

[102] If RBC's position on the "entire agreement" clause was accepted, a defendant would be bound by a contract which contained such a clause, even if the defendant had no knowledge of the contract and was not careless in signing it. Such a position would vitiate the *non est factum* defence, and would be inconsistent with the case law.

[103] RBC further submits that Balalaey cannot rely on the lack of independent legal advice as a basis to support his *non est factum* defence. RBC relies on case law that holds independent legal advice is not required if the guarantor is an officer or director of the corporation receiving the loan: *Meridian Credit Union Limited v. 2428128 Ontario Limited*, 2017 ONSC 4578, 73 B.L.R. (5th) 262, at paras. 23-24.

[104] However, in *Meridian Credit*, the guarantor was seeking to have the guarantee invalidated because he did not have independent legal advice when signing it. In the present case, Balalaey does not submit that the Impugned Guarantee is not valid because he did not receive independent legal advice. Instead, the lack of independent legal advice is relevant to whether Balalaey was given the opportunity to review the document with counsel who could have identified that the Impugned Guarantee was included amongst the 13 agreements that Fini put before Balalaey for signing on October 27, 2014. That issue is relevant to whether Balalaey was "careless" in signing the Impugned Guarantee, which is a factor in a *non est factum* defence.

[105] Finally, RBC submits that Balalaey cannot rely on a *non est factum* defence since a failure to read a contract before signing is not a legally acceptable basis for refusing to accept its terms. RBC relies on the decision in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 1997 CanLII 4452 (ON CA), 34 O.R. (3d) 1 (C.A.), in which the court held the onus was on the plaintiff to review the contract, and as such, the plaintiff was bound to the contract despite his failure to read it and understand the contract's limitation of liability clause: at paras. 31-33.

[106] However, the *non est factum* defence exists to protect those who (not carelessly) sign a contract without understanding its nature and character, as a result of a misrepresentation. There is no issue of misrepresentation in *Fraser Jewellers*. Otherwise, RBC's position would result in the elimination of the *non est factum* defence simply because a person signs an agreement without coercion or pressure, even when based on a misrepresentation. That result is not contemplated by *Fraser Jewellers*. The *non est factum* defence remains available to those defendants who sign a contract without understanding its nature and character (without being careless).

[107] Consequently, in the present case, there is a genuine issue requiring trial for the *non est factum* defence. The trial judge will need to determine, based on the credibility of the witnesses and the documentary evidence at trial, whether (i) Balalaey did not understand that he was signing the Impugned Guarantee because of Fini's alleged misrepresentation; and (ii) Balalaey was not careless in signing the Impugned Guarantee.

The Law as Applied to our Facts

[9] Like Justice Glustein concluded at paragraph 87 of *2414973, supra*, I find that, in our case, there is evidence that requires a trial to determine whether Safaverdi's *non est factum* defence will succeed. That evidence comes in two forms.

[10] First, there is the unchallenged evidence of Safaverdi. There was no out-of-court examination conducted of Safaverdi. There is no direct evidence from anyone at TD who ever dealt with Safaverdi. There is no reply evidence that has been filed by TD.

[11] In a lengthy affidavit, among other things, Safaverdi deposes (i) that he is unable to read or write English fluently; (ii) that he has trouble reading difficult or complex documents in English and requires those to be translated for him (it is worth observing that his affidavit includes an interpreter declaration signed by someone who is proficient in both the English and Farsi languages); (iii) that he did not have legal representation when he dealt with TD for either of the two credit facilities at issue; (iv) that he was never told by anyone at TD that he was personally guaranteeing any indebtedness on the part of 630; (v) that he never understood that he was personally guaranteeing any such indebtedness; and that, (vi) based on what he was told by the TD representatives that he dealt with for both of the credit facilities at issue, he understood that he was signing the documents on behalf of 630.

[12] Second, the evidence of Safaverdi is corroborated in part by the documents themselves. Not in whole but in part. At a minimum, the documents are unclear, in my opinion.

[13] For example, the LOC Agreement lists 630 as the sole "customer". The customer is described as a "corporation", 630. The face of the document is clear that Safaverdi signed it on behalf of 630 – in other words, to bind 630 – as "President" of 630.

[14] Further, the Visa Agreement lists 630 as the sole "business" holding the business credit card. Safaverdi signed the document under section 2, immediately below the following words: *"The Business Borrower (Business) and the Individual Borrower(s)…are requesting and are liable for all TD Credit Card(s) issued under the Terms and Conditions of the following pages of this Application…This Application must be signed below both (i) on behalf of the Business Borrower and (ii) by the Individual Borrower(s) who will be jointly and severally liable with the Business Borrower for all obligations…"*.

[15] In my view, that Visa Agreement contains ambiguous language. Safaverdi signed it once; was he signing it on behalf of the "Business Borrower", 630, or both on behalf of

the Business Borrower, 630, and himself as the “Individual Borrower”? I do not know. I am unable to safely determine that on the evidentiary record filed.

[16] In a similar case, *Royal Bank of Canada v. Aleksander Mijailovic, Tatjana Mijailovic, and 7915381 Canada Inc*., 2018 ONSC 6798, which case (like ours) was brought under the simplified procedure and (also like ours) did not involve out-of-court examinations on the affidavit evidence filed, Justice Speyer concluded as follows at paragraph 31, which conclusion is apt in our case.

> [31] The foregoing review of the evidence compels me to conclude that the evidence does not permit me to fairly and justly adjudicate this dispute. There are significantly divergent accounts, in the affidavits filed, to the extent that they contain admissible evidence, of how the respondents came to sign the documents that the plaintiffs rely on to evidence their purported guarantees. The materials filed on this motion do not permit me to confidently find the facts necessary to assess the respondents’ defence of *non est factum*, arising from alleged misrepresentation of the nature of the documents by RBC’s representative, Mathur, during the November 13, 2013 meeting. That determination requires an assessment of the credibility and reliability of witnesses that cannot be resolved on the basis of the record.

[17] In addition, the document titled “TD Canada Trust Small Business Banking Guarantee”, which appears to be a personal guarantee that was signed by Safaverdi, makes no mention of either the LOC or the Visa credit card, whether by name, or number, or amount, or date of issuance or application, or general description, or otherwise. It is ostensibly an unlimited personal guarantee, signed by Safaverdi years after the Visa Agreement was signed, that is both retrospective and continuing, in relation to all debts owed by 630. In my view, whether Safaverdi is bound by that personal guarantee with regard to these two credit facilities is a genuine issue that requires a trial.

[18] The fact that Mr. Butson, counsel for TD, ably points to other aspects of the documentation that may serve to support the notion that Safaverdi validly contracted to

personally guarantee these two credit facilities does not change my view but, rather, only serves to reinforce the point that the documents are ambiguous. They are capable of different interpretations, all reasonable, and only a trial can result in a safe determination as to which interpretation ought to prevail.

Conclusion

[19] For the aforementioned reasons, TD's motion for summary judgment against Safaverdi is dismissed. The *non est factum* defence is not a spurious one. On the evidence filed, it is genuine. It requires a trial in order to be fairly and justly adjudicated.

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Conlan J.

Dated this 9th day of June, 2025