COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *0842729 B.C. Ltd. v. Bank of Montreal,*
2026 BCCA 96

Date: 20260206
Docket: CA50562

Between:

0842729 B.C. Ltd. (dba Bellissa Spa & Hair and Spa Bellissa & Salon) and Theresia Exner

Appellants
(Defendants)

And

Bank Of Montreal

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Fisher
The Honourable Justice Edelmann
The Honourable Justice Francis

On appeal from: An order of the Supreme Court of British Columbia, dated February 28, 2025 (*Bank of Montreal v. 0842729 BC Ltd.*, 2025 BCSC 684, Vancouver Docket S194021).

Oral Reasons for Judgment

Counsel for the Appellants:	D.S. De Zoysa
Counsel for the Respondent:	C. Chiu
Place and Date of Hearing:	Vancouver, British Columbia February 5, 2026
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2026

Summary:

The appellant challenges a summary trial decision granting judgment against her personally for loans provided to her business under the Canada Small Business Financing Program. She argues the judge erred: (i) in finding the matter suitable for summary determination; (ii) in failing to consider, or making errors of fact in considering, her defences of fraud, misrepresentation, and non est factum; and (iii) in permitting duplicative judgments. Held: appeal dismissed. The judge did not err in determining the matter was suitable for summary judgment. The record does not support the appellant's argument that there was contested evidence that would have required viva voce evidence to allow the judge to make credibility findings. The judge considered the appellant's defences, or the factors relevant to the defences, and gave a reasoned basis for rejecting them. The appellant has failed to establish any palpable and overriding error in the judge's findings. The judge did not permit double recovery: in guaranteeing her business's loans, the appellant agreed to be jointly and severally liable for their repayment.

FRANCIS J.A.:

Background

[1] The appellant, Theresia Exner, challenges an order granting judgment against Ms. Exner personally for bank loans provided to her business under the Canada Small Business Financing Program ("CSBFP"). While 0842729 B.C. Ltd. (the "Company") is named as an appellant, no order was made against it in the decision under appeal.

[2] Ms. Exner and her late husband were the owners and directors of the Company which conducted a spa and hair salon business. In July 2016 and November 2016, the respondent, Bank of Montreal ("BMO"), provided the Company two loans under the CSBFP, for which Ms. Exner and her husband signed guarantees (the "Guarantees").

[3] The business was unsuccessful, and the Company defaulted on the loans. BMO demanded payment from the Company, and later from Ms. Exner and her husband under the Guarantees. Payment was not made. BMO filed an action against the Company, Ms. Exner, and her husband. Unfortunately, Ms. Exner's husband passed away after the claim was commenced and as a result, she is the sole remaining guarantor under the Guarantees.

[4] Under the *Canada Small Business Financing Act*, S.C. 1998, c. 36, the government of Canada guarantees the loans but requires BMO to exhaust all measures to collect on unpaid amounts before seeking relief under the government's guarantee.

[5] The Company was dissolved on June 17, 2019.

[6] On February 14, 2020, Justice Winteringham (as she then was) granted summary judgment against the Company, but adjourned BMO's application for summary judgment against Ms. Exner and her husband. On August 31, 2020, Justice Voith (as he then was) dismissed BMO's application for summary judgment against Ms. Exner and her husband, finding they were not "bound to lose" if their evidence was accepted at trial. Justice Voith's reasons are indexed at 2020 BCSC 1285.

[7] On June 27, 2024, BMO applied for judgment against Ms. Exner by way of a Rule 9-7 summary trial. The summary trial judge granted judgment in favour of BMO.

[8] Ms. Exner appeals the decision of the summary trial judge. She submits he erred in determining that the matter was suitable for summary trial. She further submits he erred in dismissing her defences of fraud, misrepresentation, unconscionability, and *non est factum*. Finally, she argues that he erred by creating a duplicative judgment in granting judgment against her where judgment had already been granted against the Company.

Decision of the Summary Trial Judge

[9] The summary trial judge began by addressing Ms. Exner's argument that the matter was not suitable for summary trial since the defences she raised—misrepresentation, fraud, unconscionability and *non est factum*—required *viva voce* evidence to permit credibility assessment. The judge noted that *non est factum*, unconscionability, and fraud were not pleaded in her response to claim, and that no application had been made to add these defences, nor had any steps been taken to examine the bank representative Ms. Exner had worked with in obtaining the loan.

He highlighted that an earlier court decision had determined the loan agreements to be valid in granting summary judgment against the Company. He also considered that in examination for discovery, Ms. Exner denied having seen or understood the Guarantees, but acknowledged her signatures on the loan documents, which seemed to have been executed in conjunction with the Guarantees. The judge was satisfied that the matter could be determined by way of summary trial and exercised his discretion to proceed in this way.

[10] The judge then assessed the defences argued by Ms. Exner, including those that had not been formally pleaded. He rejected the defence of misrepresentation, finding that Ms. Exner did not point to any positive representations by BMO that a personal guarantee was not required. He noted that Ms. Exner's evidence included a document clearly stating that a guarantee from the owners was to be expected (albeit at 25% of the liability), and he found that this militated against Ms. Exner's assertion that there was to be no personal guarantee. Further, the remedy of recission Ms. Exner sought was unavailable, given that she, through her company, had benefitted from the loans and there was no way to put BMO in the position it was in prior to the loans.

[11] The judge rejected the defence of unconscionability, finding that Ms. Exner had not met the threshold for showing this, since she knew a loan was being provided and the BMO document she and her husband reviewed, which stated that a guarantee would be expected, dispelled her assertion of misrepresentation or even misunderstanding. He rejected her counsel's submission that Ms. Exner was vulnerable due to old age or a language barrier, finding these assertions to be contradicted by the evidence. He also dismissed Ms. Exner's assertion of fraud, rejecting counsel's argument that her work schedule would have prevented her from attending the bank on the day the documents were executed.

[12] The judge found BMO had established that it was entitled to judgment against Ms. Exner. He ordered that she pay BMO $281,733.36 with interest at prime plus 3% per annum to the date of judgment.

Issues on Appeal

[13] While Ms. Exner raises six grounds of appeal, there is considerable overlap in the grounds the appellant raises. In my view, the issues on the appeal can be better stated as:

a) Did the judge err in determining that the matter was suitable for summary determination?

b) Did the judge err in failing to consider the defences of fraud, misrepresentation, unconscionability, and *non est factum*, or in making palpable and overriding errors in his findings of fact relevant to these defences*?*

c) Did the judge err in permitting duplicative judgments?

Discussion

Did the judge err in determining that the matter was suitable for summary determination?

[14] A judge's decision to proceed by way of summary trial is a discretionary one. Appellate interference will only be justified if it is clear that the discretion has been wrongly exercised, in that no weight or insufficient weight has been given to relevant considerations, or it appears that the decision is clearly wrong and may result in an injustice: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 34.

[15] A summary trial is a trial. As in a conventional trial, it is incumbent on a party responding to a summary trial application to "put their best foot forward" and come to trial prepared to prove their claim or defence as the case may be: *Gichuru* at para. 32.

[16] As the summary trial judge noted, this was a claim suing on a standard form loan agreement. Summary judgment had already been granted on the enforceability of the same agreement as it pertained to the corporate defendant. Examinations for discovery of Ms. Exner had been conducted. The defendants had sworn affidavit

evidence before the court. In all the circumstances, the judge found that the case could be decided summarily in a fair and just manner.

[17] The appellant submits the judge failed to give due weight to the importance of credibility in this case because, according to their reply factum, there are "conflicts over whether Ms. Exner signed Guarantee 2 on November 25, 2016, and whether she understood the [G]uarantees". In light of this, the appellant says the judge should have declined to hear the matter summarily, since resolving this issue would require *viva voce* testimony.

[18] In her affidavit evidence, Ms. Exner does not deny signing the second guarantee on November 25, 2016. Instead, she somewhat obliquely deposes that she was occupied at work all day that day, "leaving no opportunity" to "visit the Plaintiff or any other location" to sign a guarantee that day. At her examination for discovery, she identified her signature on the second guarantee, but said that she "never went to any bank." Absent a clear denial that she signed the second guarantee, there is no basis to say that there was a conflict on the evidence on this point that needed to be resolved with live evidence at trial.

[19] As discussed in more detail below, the appellant points to no other contested evidence that would have required the judge to make credibility findings. In fact, since BMO did not tender any evidence from bank witnesses, Ms. Exner's evidence about the relevant events was uncontested.

[20] Having reviewed the materials before the Court, I am not persuaded that the judge was clearly wrong in finding that the case was suitable for summary disposition. The appellant does not point to any relevant consideration that the judge did not weigh, or weighed insufficiently, when he exercised his discretion to proceed summarily. As such, I would not accede to this ground of appeal.

Did the summary trial judge err in failing to consider the defences of fraud, misrepresentation, unconscionability, and *non est factum*?

[21] The appellant submits that the summary trial judge erred by failing to consider the defences of fraud, misrepresentation, unconscionability and *non est factum* on the technical basis that they were not pleaded in the amended response to civil claim. There is no basis for this submission. While the summary trial judge noted that these defences were not pleaded (at para. 18), he went on to consider the defences of fraud, misrepresentation, and unconscionability.

[22] While the appellant is correct in saying that the summary trial judge did not expressly address the defence of *non est factum*, it is not correct to say that he ignored this defence. To succeed on a plea of *non est factum*, the party bears the burden of demonstrating that the document they signed was fundamentally different in nature from what they believed it to be, that they signed it as a result of a misrepresentation, and that they were not careless in doing so: *1001790 BC Ltd. v. 0996530 BC Ltd.*, 2021 BCCA 321 at para. 49. The summary trial judge considered factors that would be relevant to a *non est factum* defence, including the fact that Ms. Exner signed the Guarantees without reading them. He found that in the circumstances, absent fraud or misrepresentation, Ms. Exner would not have a defence to the enforceability of the Guarantees. While not expressly referring to *non est factum*, this discussion disposed of that defence.

[23] In considering the substance of Ms. Exner's defences, the summary trial judge, made the following findings of fact:

a) Ms. Exner acknowledged her signature on the loan documents which included the Guarantees (at para. 16).

b) Ms. Exner's correspondence, discovery transcript, and her personal submissions to the court in an earlier application supported the conclusion that she is a "self-assured and healthy individual" and not the vulnerable elderly person that her counsel portrayed her to be (at para. 21).

c) The evidence did not support the submission of Ms. Exner's counsel that it was "impossible" for Ms. Exner to have attended the bank the day she signed the second guarantee (at para. 22).

d) The evidence, including her discovery evidence and her handwritten correspondence with opposing counsel, did not support the assertion that Ms. Exner struggles with the English language (at paras. 24–25).

e) Prior to signing the loan agreement, Ms. Exner and her husband reviewed a document that contained a statement that, under the *Canada Small Business Financing Act*, "the business owner is expected to provide their person guarantee in support of this borrowing" in an amount up to 25% of the total loan (at para. 28).

f) No evidence was provided by Ms. Exner that at any time BMO represented to her that a personal guarantee was not required (at para. 26).

[24] The appellant argues that the summary trial judge made a palpable and overriding error with respect to these findings of fact.

[25] With respect to the factual finding that BMO made no positive assertion that personal guarantees were not required, counsel for the appellant points to Ms. Exner's affidavits. Ms. Exner deposed that when she first met with Ms. Rice at BMO in mid-March 2016, she told Ms. Rice that she was interested in government guaranteed loans because she wanted to protect her retirement assets and was concerned about her ability to pay a loan if the business were to fail. Ms. Rice responded that she would enquire and get back to her. Some days later, Ms. Exner attended another meeting with Ms. Rice at which Ms. Rice suggested that the Company take out a loan under the CSBFP. Ms. Rice stated that the loans would be guaranteed by the government and did not mention a personal guarantee. From her uncontested evidence about these two interactions, Ms. Exner asked the summary

trial judge to conclude that BMO implied that it would not require personal guarantees on the loans.

[26] In my view, it was open to the summary trial judge to conclude on the basis of these facts—which were uncontested—that no positive representation was made by BMO to Ms. Exner that BMO would not require personal guarantees from Ms. Exner and her husband.

[27] With respect to the remaining facts found by the summary trial judge, the appellant has not pointed to any evidence that would call these findings of fact into question. Given these findings, Ms. Exner's defences of fraud, unconscionability, *non est factum*, and misrepresentation were unsupportable.

[28] I see no basis to interfere with the summary trial judge's conclusions in this regard.

Did the summary trial judge err in permitting duplicative judgments?

[29] The appellant argues that the respondent will enjoy double recovery if the judgment is allowed to stand.

[30] It does not appear that this issue was raised before the summary trial judge. However, it is not necessary to consider whether the appellant has met the required test for raising a new issue on appeal. This is because even if this argument had been raised, the trial judge would have been compelled to reject it. Under the Guarantees, Ms. Exner and her husband agreed to be jointly and severally liable for payment of the Company's loan. The Company has been dissolved and has never paid any part of the loan or the judgment against it. There is no risk of double recovery.

[31] I appreciate the difficulties Ms. Exner faces as a result of her liability under the Guarantees. However, she has not satisfied me that there is any basis on which to interfere with the summary trial judge's exercise of discretion or his findings of fact.

[32] For these reasons, I would dismiss the appeal.

[33] **FISHER J.A.**: I agree.

[34] **EDELMANN J.A.**: I agree.

[35] **FISHER J.A.**: The appeal is dismissed.

"The Honourable Justice Francis"