CITATION: Zmenak v. LCM, 2023 ONSC 5953
COURT FILE NO.: CV-21-77085
DATE: 2023/10/24

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
EMIL STEVEN ZMENAK	)	G. Graham and C. Van Vliet, for the Plaintiff
	)	
Plaintiff/Defendant by Counterclaim	)	
	)	
- and -	)	
	)	
LCM DISTRIBUTION SERVICES INC.	)	K. Clark and M. Munoz, for the Defendant
	)	
Defendant/Plaintiff by Counterclaim	)	
	)	
	)	**HEARD:** October 6, 2023

A. J. GOODMAN J.:

REASONS FOR SUMMARY JUDGMENT

INTRODUCTION:

[1] Offer, acceptance and consideration. An agreement in writing with no dispute as to who are the proper parties. A simple contract law case, or is it?

[2] The moving party plaintiff, Emil Zmenak (“Zmenak”), seeks summary judgment in respect of the repayment of a Loan Agreement (“the Agreement”) signed and executed on March 25, 2021.

[3] Emile Zmenak (“Emile”) is the plaintiff’s son and the principal of Urbania. His common law spouse is Jingxin “Cici” Zhou, (“Zhou”).

[4] The defendant, LCM Distribution Service Inc. (“LCM”) disputes the relief being sought and argues that this is neither a simple nor a suitable case for partial summary judgment. The terms and conditions of the loan agreement are in dispute, in terms of the parties to the loan, forbearance and repayment terms.

[5] LCM has issued a counterclaim against Zmenak, Emile, Zhou, and Wood Trader International Limited, 8246858 Canada Inc.

THE FACTS:

[6] Zmenak is an 86-year-old retired businessman who has spent most of his life arranging financing for those looking to enter the housing market and purchase their own home. He is not, and never has been, a business associate, or indeed even an acquaintance, of LCM or any of its officers or directors. In fact, since meeting the principal of LCM on March 25, 2021, Zmenak has had no contact with any other representative of the defendant.

[7] Stephen Malizia, (“Malizia”) is the principal of LCM, an Ontario corporation based in Burlington involved in the third-party logistics business. Malizia occupies multiple roles within LCM, including president, secretary, and treasurer; he is also the company’s only shareholder. In January 2021, Malizia inquired about the

possibility of LCM acquiring a short-term loan from the plaintiff, through Zmenak's son, Emile.

[8] On March 25, 2021, both parties entered into the Agreement. On that same day, LCM received the agreed-upon funds of $250,000.

[9] The Agreement specifies the following: 1) the principal amount loaned and the interest on that principal (clause 1); 2) the term for which the loan was to run (clause 2); 3) what was to happen if LCM defaulted (clauses 3-5); 4) various guarantees as to the amount of interest (clause 6); and 5) a description of the loan's security (clauses 7-8). The agreement was not drafted with the assistance of legal counsel.

[10] The Agreement provided a two-fold default mechanism if LCM failed to perform any of its obligations: 1) that if at any time the borrower defaulted, the lender, could declare the principal due and owing, upon which the interest on the remaining balance would increase from 2% per month to 2.5% per month (or 24% per year to 30% per year); and 2) that ten days after the declaration of default, LCM was to provide security, being four specific containers of high quality flooring, to Zmenak. Apparently, the loan in dispute was used to finance a wood flooring arrangement, or partnership/joint venture between LCM and Urbania.

[11] It is alleged that Emile, convinced his father to loan funds to the partnership (through LCM) to remedy the cash flow issue, and allow finished wood product to be manufactured and released from Vietnam, landed and sold. Apparently, Urbania and LCM entered into an unwritten business arrangement. Urbania was to sell the finished wood flooring. LCM was to provide logistics. Both parties were supposed to provide financing for the business, although only LCM did so.

[12] Lumber was sourced from Kentucky, shipped to Vietnam for conversion to finished product, and shipped back to North America for sale. LCM invested over $2,000,000 into the business. This business had cash flow issues in March, 2021. As it owed funds to other parties including Wood Trader, it needed to get wood product released in order to sell it and pay back the various sources of finance.

[13] On landing of the wood product, LCM claims that it was told by Emile not to repay the loan owing to Zmenak. Instead, LCM was convinced to re-invest the fund from the wood sales into more wood product that Emile claimed was “pre-sold”. It is alleged that due to Emile’s representations, LCM believed that Zmenak was aware of this use of loaned funds, and had agreed to forbear on the repayment of the principal, pending the sale of this new batch of wood product. A high rate of interest was to be paid, and four installments were, in fact, paid. Nevertheless, on August 25, LCM failed to pay any interest. Consequently, Zmenak sent a notice of default to LCM.

[14] The relationship between LCM and Urbania broke down shortly thereafter, with Urbania, Emile, Wood Trader and/or Emile’s spouse Zhou, allegedly absconding with the landed wood product. LCM was cut off from financial reporting in respect of the flooring business on or about this time. Several hundred thousand dollars of wood product is unaccounted for and its whereabouts and status is known to the defendants by Counterclaim. According to LCM, Zmenak agreed to forbear from enforcing his rights under the terms of the loan agreement until these wood products were sold. In exchange, LCM agreed to continue making interest payments at a higher interest rate.

Positions of the Parties:

[15] The plaintiff says that this case is a simple one: the parties entered into a valid loan agreement; the plaintiff advanced the proper funds; and the plaintiff called the loan according to the Loan Agreement's terms. The principal of the loan has been due and owing for over two years. Interest is outstanding. The Agreement also specified security for the loan, which has not been given over to the plaintiff.

[16] The Agreement's terms, outlining the promises and conditions attached to the $250 000, confirm the short-term nature of the deal. For example, the second clause of the Loan Agreement states, "[t]his Loan will be repaid in full on May 25, 2021," a date only two months after the parties signed the Loan Agreement. Furthermore, Malizia admits that he knew and expected the loan to be short-term, and he gave verbal assurances to Zmenak that the money going to LCM was only to be used for a short period of time and was a "short- term loan".

[17] The plaintiff contends that, like the default provisions, the guaranteed interest clause had two parts. First, it ensured that regardless of when the loan was repaid, Zmenak would receive two interest payments of $5000 in the months of April and May. Second, it provided a penalty should LCM not repay the loan within the two-month term – that the interest would increase from 24% per annum to 30% per annum.

[18] The plaintiff disputes the defendant's assertions that the Agreement was not representative of the arrangement between the parties. The plaintiff disputes the defendant's allegations that the Agreement itself does not represent the parties to whom Zmenak made the loan. The plaintiff disputes that defendant's position that the loan was to a wider group of parties, including companies operated by Emile and Zhou. The plain words of the Agreement say that the loan was between

Zmenak and LCM. Furthermore, the defendant contends that the Agreement was amended through other verbal agreements made between LCM and Zmenak, although no record of these alleged agreements exists, no record of any consideration for these agreements exists, and the plaintiff denies that he ever entered into such agreements.

[19] The plaintiff says that the terms of the Agreement are clear and precise and that in and of itself demonstrates that there is no genuine issue for trial.

[20] The defendant responds that this is not a suitable case for partial summary judgment given the diametrically opposed evidence of the parties and the credibility issues that result therefrom. It was always understood as between Urbania and LCM that the funds loaned to LCM were owed jointly to Zmenak. On several occasions, LCM proposed to pay Zmenak's loan with proceeds of wood sales, but Emile disagreed and suggested purchasing more wood product. Based on these actions and representations, LCM believed that Zmenak consented to this arrangement. LCM's position is that Emile was an agent for Zmenak, and as such, Emile's representations bind the plaintiff. Emile was present at the time of the signing of the Agreement and was complicit in its formation.

[21] It is not disputed that the loan was secured with wood product. This wood product was diverted from delivery to LCM and is now in the hands of Emile and his common law spouse. The defendants say that the proceeds of sale of that product should have been used and were intended by LCM to be used to pay back the loan. The defendant submits that the plaintiff agreed to forbear on calling the loan until after these products were diverted and such timing is suspect. Any proceeds of their sale will not be determined until trial and this wood product could

have been (and potentially still could be) used as security for Zmenak's loan, were it not for the actions of the other defendants by counterclaim representations.

[22] The defendant submits that the plaintiff has not provided adequate justification for summary judgment. The plaintiff relies on unsubstantiated or incomplete evidence and there is a great deal of uncertainty proffered by the plaintiff that requires a full examination of the evidence at trial.

LEGAL PRINCIPLES:

[23] In the seminal case of *Hryniak v Maudlin* 2014 SCC 7, the Supreme Court of Canada overturned the "full appreciation" test promoted by the Ontario Court of Appeal in summary judgment matters. The Supreme Court held that there will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. A trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[24] *Rule* 20.04(2.1) provides:

> (2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

[25] In summary judgment matters, a motions judge may evaluate the credibility of a deponent and draw any reasonable inference from the evidence. As the Supreme Court endorsed at paras. 44 and 45 of *Hryniak*:

[26] The powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences. These new fact-finding powers are discretionary and are presumptively available; they may be exercised unless it is in the interest of justice for them to be exercised only at a trial. Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

[27] Contracts should be interpreted in a common sense manner that considers the circumstances surrounding their creation and the intent of the parties to the contract. Generally, the circumstances surrounding any given agreement can never overwhelm the words of that agreement. Rather, evidence of the surrounding circumstances is generally used to determine the meaning of the written words of the agreement instead of overriding them. This is especially prevalent in cases involving commercial transactions and with individuals who are sophisticated.

ANALYSIS:

[28] In his factum, the plaintiff says that the court assumes that the parties have put their best foot forward and that the evidence necessary to determine the motion is before it. Based on the record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits. That is entirely correct.

[29] While not determinative of the motion, I observe that various formalities of the loan document are omitted. The Agreement was not witnessed by unrelated individuals, and it was not “sealed” as was required by the document itself. The

motion was brought before discoveries and the ability of the defendant to fully canvass the issues that arose from the cross-examinations on the affidavit.

[30] The defendant submits that the security referenced in the agreement was certain batches of Urbania-branded wood product. At the time the loan was executed, the record suggests that Zmenak knew that his security was on Urbania-branded goods, but he denies that he was providing a loan to his son's business. While this version may seem inconsistent with the simple description of the security as set out in the Agreement, Zmenak's cross-examination on this issue, relating to the true borrower of the funds (whether LCM or LCM/Urbania), was routinely interrupted by his counsel on numerous occasions when this question was being discussed. On this limited record, it appears that Zmenak's evidence on this important issue is not complete.

[31] Of significance, given the issues in this motion, the plaintiff did not put forward any evidence from Emile on the critical issues of any representations made by the latter to LCM, whether they would bind the lender and the reference to the security as stipulated. In my view, Emile's evidence would also be key to the dispute in this case including as to why the proceeds of the sales of certain wood products were not used to pay back Zmenak, as had been the original plan, and whether this was or was with the plaintiff's acquiescence. Where the security is, and what was done with it, and what happened to the proceeds, all apparently lie within the knowledge of Emile and/or Zhou.

[32] Frankly, I am left in a quandary regarding Emile's apparent involvement in respect of the underlying basis for the loan arrangements between the parties, which has not been addressed by the plaintiff's evidence.

[33] I agree with the defendants that there was no reason that Emile could not have put in an affidavit rebutting LCM's evidence. Currently, the absence of evidence from Emile and the lack of any discovery at this stage of the proceedings prevents LCM from being able to establish the facts. While not wanting to descend into the abyss of speculation, it may be that an inference could be made that this was because the evidence would have supported LCM's position.

[34] It is true that LCM does not dispute that it entered into the Agreement. However, LCM contends that the loan document was modified by oral agreements, notwithstanding that the Agreement itself did not permit such amendments. Notwithstanding, there appeared to be a live question related to some oral modifications to the Agreement in relation to an alleged forbearance period.

[35] As mentioned, LCM has brought a counterclaim against Zmenak, Urbania, Wood Trader, Emile and Zhou. The defendant asks seeks not to require repayment of the loan until its various claims against the other parties are satisfied. As against the other defendants to the counterclaim, LCM seeks damages for breach of contract, unjust enrichment and *quantum meruit*, and breach of fiduciary duties.

[36] Partial summary judgment should not be granted when the answer to the questions before the court "are inextricably connected to the dealings that took place" with the remaining parties, since "[o]one simply cannot separate those dealings into discrete compartments and pretend that a determination of one does not have any impact on the others": *Mason v. Perras Mongenais*, 2018 ONCA 97, at paras. 37-38.

[37] The advisability of partial summary judgment must be considered in the context of the "litigation as a whole: *Baywood Homes Partnership v. Haditaghi,* 2014 ONCA 450, 120 O.R. (3d) 438, at para. 35.

[38] In my experience, the Court of Appeal of Ontario has frowned upon relief being granted for partial summary judgment motions. Partial summary judgment "should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main actions and that may be dealt with expeditiously and in a cost effective manner" given the risks involved with partial summary judgment which include (a) delay and the possibility of an appeal (b) expense, (c) increased judicial resources for "judges, who already face a significant responsibility addressing the increase in summary judgment motions", and (d) the "likely" less expansive record on the motion than would be available.: See *Singh v. RBC Insurance Agency Ltd*., 2020 ONSC 182 at para. 25. *Mason* at paras. 37-38, *Baywood Homes* at paras. 33-37. Indeed, the motions court should not make summary determinations if doing so "risks inconsistent findings and substantive injustice": *Baywood Homes*, at paras. 36-37.

[39] For the purposes of this motion, I must disagree with the plaintiff's assertion that this motion does nothing to prevent LCM from proceeding with its claims against the aforementioned named parties in a separate proceeding.

[40] In my view, the questions before this court are inextricably connected to the dealings that occurred on March 25, 2021. It is more than just claiming the validity of an agreement on its face and an assertion of repayment rights. There will inevitably be a fact-finding exercise at trial regarding the misrepresentations or liability if any, of Urbania, Emile, and others for the loan and the status of the

security for the loan, which could result in diametrically-opposed findings of fact and determinations of law.

[41] In sum, the record before me does not permit a fulsome determination of the issues. In my opinion, this will require complex fact-finding at trial with *viva voce* evidence, to ascertain liability, the relationship between all of the parties, the representations made, if any, and the tracing of the proceeds or the security stipulated in the Agreement.

[42] Moreover, LCM may have a viable counterclaim. Partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact. I find that it may not be in the interests of justice to grant summary judgment.

CONCLUSION:

[43] For all of the aforementioned reasons, I am persuaded by the defendant that there is a genuine issue requiring a trial. The motion for summary judgment is dismissed.

[44] If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed three pages in length, (not including any Bill of Costs or Offers to Settle). The defendant shall file its costs submissions within 15 days of the date of this judgment. The plaintiff shall file his costs submissions within 15 days of the receipt of the defendant's materials. The defendant may file a brief reply within five days thereafter. If submissions are not received by December 1, 2023, the file will be closed and the issue of costs considered settled.

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A. J. Goodman J.

Date: October 24, 2023

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COURT FILE NO.:CV-21-77085
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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

EMIL STEVEN ZMENAK

Plaintiff

- and -

LCM DISTRIBUTION SERVICES INC.

Defendant

REASONS FOR SUMMARY JUDGMENT

A.J. Goodman J.

DATED: October 24, 2023