

- [2] The corporate defendant is the borrower and the individual defendant, Ms. Khan, is alleged to be the guarantor of the loan. The corporate defendant did not defend the claim. Only Ms. Khan filed a statement of defence.
- [3] The plaintiff served the motion on the defendants on December 7, 2023. The defendants filed no responding materials until after the commencement of motions court. At 10:11 a.m. on the morning of the motion Ms. Khan uploaded a short affidavit to CaseLines.
- [4] Plaintiff counsel had not seen the affidavit until it was drawn to her attention when the motion was called. After reviewing the affidavit, the plaintiff took no position as to the admissibility of the affidavit. The affidavit of Ms. Khan was admitted.
- [5] Plaintiff counsel has the burden of establishing that there is no genuine issue for trial. It has been said repeatedly that each side must put its best foot forward on a motion for summary judgment. A party cannot sit back and hope for the possibility that more favourable facts may develop at trial. Numerous cases have reiterated that the responding party must lead trump or risk losing.

The Plaintiff's Evidence

- [6] The plaintiff's evidence establishes:
1. the terms of the loan agreement;
 2. that the borrower defaulted on the loan and demand for payment of the loan was made upon the defendants on June 2, 2023;
 3. that the statement of claim was issued on July 7, 2023;
 4. that Ms. Khan filed a statement of defence on or about August 10, 2023;
 5. that Ms. Khan was informed in July 2023 that she should send a proposed repayment plan for the plaintiff's consideration. One was never received by the plaintiff;
 6. that Ms. Khan was advised of the documentation required by the plaintiff to consider a settlement or payment plan and was provided with ample opportunity to address the debt, but Ms. Khan did not do so; and
 7. the amount owing on the loan and the applicable interest rate.

The Loan Agreement

- [7] The loan agreement is six pages long. The sixth page is the signature page. Ms. Khan signed the loan agreement twice and dated it June 23, 2023. Immediately above the first signature on page 6 of the agreement it states:

SIGNATURES ARE REQUIRED FROM THE BUSINESS AND BUSINESS OWNER(S) EVEN WHEN THE SAME PERSON IS SIGNING IN MORE THAN ONE CAPACITY

WE, THE UNDERSIGNED, HEREBY AGREE TO THE CONDITIONS SET FORTH ABOVE AND CONFIRM THE ACCURACY OF THE DECLARATIONS ABOVE.

- [8] Immediately below the first signature is the following:

Guarantee

The Guarantors, if any, are unconditionally liable on a joint and several basis/solidarily to perform all of the obligations of the Borrower and to repay the full amount of the Loan together with accrued interest, plus any fees and costs incurred by BDC in collecting the Loan debt. The Guarantors' obligations will not be reduced, discharged or delayed as a result of any failure by BDC to seek or exhaust its recourse against the Borrower, including any other Guarantor.

Acknowledgement and Waiver

I ACKNOWLEDGE AND CONFIRM THAT I HAVE READ AND UNDERSTOOD THE NATURE OF AND ALL CONSEQUENCES ASSOCIATED WITH THE EXECUTION AND DELIVERY OF THE GUARANTEE GRANTED BY ME TO AND IN FAVOUR OF BDC, WITH RESPECT TO THE LOAN. I FURTHER ACKNOWLEDGE AND CONFIRM THAT I HAVE EITHER OBTAINED INDEPENDENT LEGAL ADVICE IN CONNECTION WITH THE EXECUTION AND DELIVERY OF THE GUARANTEE OR VOLUNTARILY DETERMINED NOT TO SEEK SUCH INDEPENDENT LEGAL ADVICE.

- [9] The obligations of the guarantor are clearly set out in these paragraphs which are immediately above the signature line for the guarantor.

[10] Below these paragraphs is Ms. Khan's name typed above a line, beneath which it states, "Name of Guarantor". Beside that is Ms. Khan's signature. Below her signature it reads "Signature of Guarantor".

Ms. Khan's Defence and Affidavit

[11] Ms. Khan's statement of defence is brief. In it she denies all allegations in the statement of claim. She pleads that the damages claimed are excessive, remote or unrecoverable at law. She pleads that she was led to believe that she was not personally responsible for the loan and that she called the plaintiff before signing the loan agreement and was told that the corporation was borrowing the money and it would not affect her personally. She believed what she was told and signed the document.

[12] Ms. Khan's affidavit is brief. It states:

2. I am currently 60 years old. Other than a car lease, I have never taken out a loan.

3. In or about March 2020, my physiotherapy clinic was struggling because of the peak of Covid.

4. To ensure that my business did not fail, I inquired with the BDC about a business loan.

5. I filled an application for a loan with the BDC in March 2020.

6. When it came time to sign the loan agreement in June 2020, I noticed that there were two different spots for me to sign. This confused me, so I called the Contact Client Centre at 1- 888-463-6232. This number was listed on the loan agreement itself. This phone call took place either on June 22 or June 23, 2020 but before I signed the loan agreement.

7. I asked the agent, a woman, why there were two places to sign and why I had to sign this. The agent replied that by signing as a guarantor, I was simply guaranteeing that this was in fact my corporation. The agent confirmed that the loan was for the corporation.

8. I explained to the agent that I was concerned because businesses were closing and I was afraid of my business failing and what would happen to

me with this loan. The agent replied that I was not personally responsible for the loan and specifically advised that BDC would not go after my home, car, cottage, or boat.

9. On the basis of this representation, I signed the loan agreement. I would not have signed the loan agreement if it meant that, in the event of a default, the BDC could pursue my personal assets.

10. It was especially important that my personal assets not be at risk [sic] because my only major asset is my parents' home, which is currently in my name.

Oral Evidence (Mini Trial)

- [13] After hearing submissions from the plaintiff, I heard submissions from Ms. Khan. Ms. Khan took no issue with the amount claimed as owing on the loan by the plaintiff or that it was due and owing by the corporate defendant. Ms. Khan did not dispute the loan documents or that she signed them.
- [14] Ms. Khan's position is that the only issue is whether representations had been made to her with respect to the nature of the loan and guarantee. She says that her defence rests on her assertion that a representative of the plaintiff made a representation to her that she would not be personally liable on the loan and that the entire case rested on her credibility. Ms. Khan urged that she should be given the opportunity to give *viva voce* evidence so that I could assess her credibility. The plaintiff did not object to this process.
- [15] As set out in *Hryniak v. Mauldin*, 2014 SCC 7, paragraph 66, a judge should first determine if there is a genuine issue requiring trial based only on the evidence before the judge, without using the fact-finding powers in *Rules* 20.04(2.1) and (2.2). If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the powers under *Rules* 20.04(2.1) and (2.2). A judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

- [16] The decision to use either the expanded fact-finding powers or to call oral evidence is discretionary. The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action: *Hyriniak*, at para. 68.
- [17] Having read the plaintiff's materials, Ms. Khan's affidavit, and heard submissions, it was apparent that I could not determine if there was a genuine issue requiring trial with respect to Ms. Khan's defence that representations were made to her that she would not be personally liable on the loan based only on the evidence before me. As suggested by Ms. Khan, this turned on Ms. Khan's credibility. The plaintiff also conceded that there was no evidence from the plaintiff as to the circumstances of the execution of the loan documents by Ms. Khan.
- [18] I determined that the use of the expanded powers in *Rules* 20.04(2.1) and (2.2) would avoid the need for a trial and was not against the interests of justice. Ms. Khan wanted to testify and proposed to testify at the summary judgment motion. The plaintiff did not object and confirmed it was prepared to proceed with *viva voce* evidence and cross-examination of Ms. Khan on the motion. No time limitations were imposed on the examination of Ms. Khan. Ms. Khan would be examined by her own counsel and could supplement her affidavit as she deemed necessary. The evidence concerning her allegation that a representation had been made to her would be given and the plaintiff could cross-examine Ms. Khan. In my view, proceeding in this manner, where there was a single issue to be determined, would lead to a fair and just result and would serve the goals of timeliness, affordability and proportionality in light of the issues in the litigation.

Ms. Khan's Viva Voce Evidence and Credibility

- [19] Ms. Khan was examined by her counsel. She was then cross-examined by plaintiff counsel. She was given the opportunity for re-examination, but her counsel did not ask her any questions.
- [20] In chief, Ms. Khan reiterated her affidavit evidence and supplemented it.
- [21] Ms. Khan ran a physiotherapy clinic. She attended university but did not obtain a degree. She conceded she has no issues with reading and writing in English. She had no difficulty understanding the questions asked of her and spoke at length. She testified that she understood the difference between her own personal

liability and the liability of the corporation. She conceded that she read the loan agreement. Ms. Khan's own evidence indicates that she needed the loan.

- [22] For a number of reasons, I do not find Ms. Khan's evidence credible.
- [23] Ms. Khan was evasive in cross-examination and failed to answer important questions.
- [24] Ms. Khan denied that she understood that she was liable as guarantor when she read the loan agreement. She said she was confused which is why she called the number on the first page of the loan agreement to speak to a representative of the plaintiff.
- [25] She testified that she called to ask the plaintiff why her name was on the guarantee. She said a number of times that she was confused or that she needed clarity, but, despite being asked several times, she would not, or could not, explain what was confusing about the language of the loan document immediately above her signature as guarantor.
- [26] Ms. Khan said in cross-examination that she called the number to ask about the whole contract. This is not consistent with her other evidence about why she called.
- [27] Several times Ms. Khan said she would never have signed the loan as a guarantor if she knew it would put her parents' home on the line. This appeared to be very important to her. However, this is not in her August 10, 2023, statement of defence. Given its importance, it is surprising that she did not include it even though she took the time to include that the damages claimed are excessive, remote or unrecoverable.
- [28] I find that this allegation arose after the plaintiff served its materials indicating that the defendant owns 58 The Fairways, Markham with a potential value of \$2 million and no mortgage on the property.
- [29] The plaintiff's materials disclose a number of emails written by Ms. Khan to the plaintiff and its lawyers. In those emails she offers reasons for her issues with the

loan. The defendant's position that she would not have entered into the loan as guarantor if it would put her parent's property at risk is not mentioned in the emails.

- [30] The plaintiff asserts that the Markham property belongs to her parents. Nothing other than her statement is offered to support this. In a November 3, 2023 email, Ms. Khan advised the plaintiff that she did not have any savings, RRSPs, TFSA, life insurance or any other investments that she could access for funds and that she lived in her parents' house. The plaintiff conducted a search and learned that Ms. Khan was the registered owner of the Markham property and advised Ms. Khan of this on November 6, 2023. On November 10, 2023, Ms. Khan responded and alleged for the first time that the Markham property belonged to her parents.
- [31] The evidence shows that the Markham property had been transferred back and forth between Ms. Khan and Sabiha Khan and Mohammed Razdar Khan. However, the property has been in Ms. Khan's name since May 2017. Further, the application submitted by Ms. Khan in March 2020 when applying for the loan indicates she lives at the Markham property and lists the value of a residential property in the amount of \$1,160,500 as an asset. No other property is listed in her application that could be owned by Ms. Khan.
- [32] In her affidavit, Ms. Khan deposes that "In or about March 2020, my physiotherapy clinic was struggling because of the peak of Covid." I take judicial notice that Ontario declared a state of emergency because of Covid on March 17, 2020. The application for the loan was signed by Ms. Khan a week later, on March 23, 2020. As noted, she declared in the application that she had assets in the form of real estate of \$1,160,500.
- [33] To explain why she did not provide the plaintiff with an updated personal net worth statement after the claim was issued, Ms. Khan testified that she was traumatized because of the plaintiff seeking to enforce the loan and the alleged misrepresentation, and that as a result she has yet to sign a single form. No medical documentation was provided by Ms. Khan. The emails contained in the plaintiff's motion materials indicate that Ms. Khan had no difficulty advocating for herself. The record discloses that as early as September 6, 2023, Ms. Khan advised the plaintiff that she had forwarded the required Statement of Personal

Affairs to Pro Bono for their instructions. Further, she signed an affidavit for this motion. I do not accept her explanation.

- [34] Ms. Khan took no notes of the call with the plaintiff representative wherein the alleged representations were made. She did not record a name for the individual. She did not make or request any changes to the language of the loan and the guarantee before she signed the loan agreement. Ms. Khan is not unsophisticated. She operated a physiotherapy business. She has been to university. Given the alleged importance of ensuring she was not a guarantor to her entering into the loan agreement, this is surprising and strains credulity.
- [35] Although the statement of defence pleads that she called the plaintiff before signing the agreement, unlike her affidavit, she does not plead a date for the call. Given the proximity of the defence to the events and the importance of this defence to her case, it is surprising that she did not include this detail in her defence.
- [36] I do not accept Ms. Khan's evidence that she would not have signed the loan if it would expose the Markham property. I do not accept that the Markham property belongs to anyone other than Ms. Khan. I do not accept Ms. Khan's evidence that she was told that she would not be liable on the guarantee. I find that Ms. Khan knew that the loan agreement required her to guarantee the loan and she signed the loan and guarantee with the knowledge that she was guaranteeing the loan.

Summary Judgment is Appropriate

- [37] I am guided by the principles on a summary judgment motion set out in *Hryniak*.
- [38] The summary judgment process has provided the necessary evidence to fairly and justly adjudicate the dispute and is timely, affordable and proportionate, especially given the amount in issue and the single issue defence raised.
- [39] The evidence allows me to reach a fair and just determination of the action on the merits. It allows me to make the necessary findings of fact and apply the law to the facts to resolve the dispute. A summary judgment motion is a proportionate, more expeditious and less expensive means to achieve a just result in this action.

[40] I am satisfied that this is an appropriate case for summary judgment. The plaintiff has established that there is no genuine issue requiring a trial. The evidence establishes the indebtedness of the defendants, the liability of both defendants, the amounts owing by the defendants, that Ms. Khan read, understood and signed the guarantee and is bound by it, and that the amounts claimed by the plaintiff are due and owing by the defendants and have not been paid the defendants.

Judgment

[41] The defendants, 2332197 Ontario Inc. and Samina Khan, shall pay to the plaintiff the sum of \$57,838.58 owing as of November 10, 2023, plus pre-judgment interest at the rate of 7.55% per annum from November 11, 2023, to the date of judgment.

Costs

[42] The parties are encouraged to resolve the issue of costs. If they are unable to do so, they may submit a bill of costs and make written submissions consisting of not more than two double-spaced pages in length, together with any relevant offers to settle and excerpts of any legal authorities referenced, according to the following timetable:

1. The plaintiff shall serve its costs submissions, if any, by no later than February 12, 2024.
2. The defendants shall serve their costs submissions, if any, by no later than February 23, 2024.

[43] All submissions are to be filed with the judicial assistants in Hamilton and uploaded to CaseLines by end of day February 23, 2024.

[44] If no submissions or written consent to a reasonable extension are received by the court by February 23, 2024, the matter of costs will be deemed to have been settled.

M. Bordin, J.

Released: January 30, 2024

CITATION: Business Development Bank of Canada v. 2332197 Ontario Inc. and Khan,
2024 ONSC 659
COURT FILE NO.: CV-23-82167
DATE: 2024-01-30

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Business Development Bank of Canada

Plaintiff by Counterclaim

- and -

2332197 Ontario Inc. and Samina Khan

Defendants by Counterclaim

REASONS FOR JUDGMENT

M. Bordin, J.

Released: January 30, 2024