

CITATION: 9919805 Canada Inc. v. JYR Investment Management Inc., 2024 ONSC 3506
COURT FILE NO.: CV-22-00675179-0000
DATE: 2024-06-19

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
9919805 CANADA INC.) Ryan M. Kerr for the Plaintiff
Plaintiff)
– and –)
)
JYR Investment Management Inc., JYR) Letitia Lee for the Defendants
Real Capital Mortgage Investment)
Corporation, Darui Sun, Ruixa Li,)
Jiaqin Mi)
Defendants)
)
) **HEARD:** June 12, 2024

2024 ONSC 3506 (CanLII)

REASONS FOR DECISION

COLIN STEVENSON J.

Introduction

[1] The plaintiff borrowed \$4,200,000.00 from the defendants (who will be collectively referred to as the lenders) on February 23, 2018 and provided security, which included a collateral mortgage against the property known as 7810 McCowan Road, Markham as well as guarantees from Alex Rust, a principal of the plaintiff and some of his family members.

[2] The plaintiff was late repaying the loan which originally came due on August 23, 2018. It was eventually repaid with interest and fees on December 6, 2019.

[3] The plaintiff claims that it had to pay the lenders \$304,500 more than was owed to discharge the mortgage. The plaintiff paid these extra monies under protest. The plaintiff claims this sum as damages for breach of contract or based on unjust enrichment. The plaintiff also claims additional damages of \$101,510.30 for interest which it paid to a third-party lender because it had to borrow the \$304,500 to make the payment and obtain the discharge of the mortgage.

[4] The lenders have counterclaimed for damages arising from the plaintiff's breach of the original loan agreement. They say that the plaintiff's late repayment meant they lost reinvestment opportunities elsewhere, and they also claim unpaid costs and fees.

[5] The plaintiff has brought this motion for summary judgment on its claim as well as for dismissal of the counterclaim.

The Original Financing

[6] The loan was made pursuant to a commitment letter dated February 10, 2018 between the lenders and a nominee for the plaintiff. The related mortgage was to have a nominal principal amount of \$4,600,000.00, in second place on title behind a “vendor take back” \$4,500,000.00 mortgage. The loans secured by these mortgages and related security facilitated the plaintiff’s purchase of 7810 McCowan Road, Markham. The plaintiff’s principal Alex Rust is a real estate agent. This was his first real estate development project.

[7] The terms of the loan commitment also provided:

- a. The mortgage would have a 6-month term i.e., repayment by a date which was set as August 23, 2018.
- b. Interest at 1.25% per month.
- c. 2% lender fee (\$83,000.00).
- d. 1.5% broker fee (\$63,000.00).
- e. All of the interest as well as the lender/broker fees would be deducted from the first advance;
- f. A commitment fee of \$20,000.
- g. The solicitors for the lenders were Levy Zavet PC (Jeff Levy).
- h. the borrower had to pay all costs, charges and expenses, including administration and legal fees, incurred by the lenders in connection with any extension or renewal (p.9-(c)).
- i. all additions to or amendments of or any termination of this commitment had to be in writing and signed by the parties (p.12 para. 4 (b)).
- j. an administration fee of \$2500 plus an additional fee equivalent to three months interest as a bonus and not a penalty in the event of any default proceedings (p.16 Sch. A).
- k. if monies remained unpaid on the Balance Due Date then that sum would bear interest at 21% per annum and the lenders would also be paid an amount equivalent to the original Commitment Fee or Lender’s Fee, “as the case may be” (sic) (p.16 Sch. A).
- l. in the event of legal proceedings to realize upon the security the lenders were entitled to an administrative/management fee of 2% of the appraised real estate value (p.17 Sch. A).

[8] The loan was funded in accordance with this commitment. The lenders’ lawyer, Jeff Levy, also acted for the plaintiff on the mortgage (although the plaintiff also had another lawyer on the transaction). Mr. Levy’s report included a trust ledger statement showing that \$147,000 on account of the lender/broker fees and \$315,000 on account of the prepaid 6 months’ interest had been properly withheld (i.e., not advanced to the plaintiff). Thus, the plaintiff received \$3,709,024.46 on closing, rather than \$4,200,000 after accounting for these and other smaller deductions which were all permitted by the commitment letter.

The first renewal agreement

[9] The loan was not repaid on the maturity date (Balance Due Date) of August 23, 2018.

[10] At Mr. Rust's request on behalf of the plaintiff, the parties entered into a written renewal agreement on September 25, 2018. This provided for:

- a. An extension of the maturity date to November 23, 2018 or arguably (more likely) December 15, 2018.
- b. A 1% renewal fee of \$42,000.00.
- c. A default extension fee of \$26,250.00.
- d. Prepayment of the interest (which was still 1.25% per month) but if interest was not prepaid then the plaintiff must also pay an additional one month's interest (\$52,500) "as penalty".
- e. The other terms of the Mortgage continued to apply.

[11] This renewal agreement was signed by the Guarantors (as defined in the loan commitment agreement).

[12] The interest was not paid in advance or at all, and the balance of the monies were not repaid on the maturity date of either November 23, 2018 or December 15, 2018.

[13] No written agreement to extend or renew the loan was signed after this document dated September 25, 2018.

The alleged first oral agreement to renew

[14] Mr. Chen was the lenders' representative. He says that in January 2019 the plaintiff's representative, Mr. Rust, asked him for more time to repay the loan and for the lenders not to exercise their power of sale. Mr. Rust told Mr. Chen that the plaintiff was trying to sell the property and later showed him some offers to purchase the property.

[15] Mr. Chen says that he and Mr. Rust orally agreed in January 2019 to a renewal of the mortgage on the same terms and conditions as the September 25, 2018 renewal agreement. i.e., a 3-month term which would presumably have ended in March 2019 although no specific due date was discussed. Mr. Chen says this oral agreement included a term that the plaintiff would pay the same fees and penalties specified in the September 25, 2018 agreement.

[16] Mr. Chen says he felt comfortable not having a written renewal agreement because he thought a sale was imminent. Mr. Chen says he would have preferred a written agreement but that he was persuaded by Mr. Rust that they need not bother with one, to save legal fees. Mr. Chen wanted the loan repaid quickly but he was also concerned that if the lenders exercised their power of sale under the mortgage, they might not recover all their loan.

[17] Mr. Chen says he trusted Mr. Rust. Mr. Chen admits he did not discuss the renewal with the Guarantors other than Mr. Rust but he says that he thought that Mr. Rust was speaking on behalf of the guarantors. There were no witnesses to the conversation. There are no relevant emails in the January 2019 timeframe which deal with this issue.

[18] The plaintiff paid the lenders \$100,000 on February 22, 2019, \$150,000 on or about March 22, 2019 and another \$150,000 on or about May 8, 2019.

[19] I note that if the mortgage had been renewed for another 3 months (not that the first extension was exactly 3 months) that period would presumably have run from December 15, 2018 to March 15, 2019. However, Mr. Chen says the next oral extension was not discussed or agreed until June 2019.

[20] On April 29, 2019 Mr. Rust did email Mr. Chen saying he “needed to get this Mortgage renewed” so he could continue with the process of selling this and another property. It is uncontested that Mr. Chen did agree to refinance another property controlled by Mr. Rust at this time. In a reply email Mr. Chen said that he had “tried my best to help you. but you should live on your own by the end. you do need to quickly “cut your arm” for the cash follow to rescue your whole boy.” (sic). There is no mention in these, or any other emails, that the mortgage had already been extended for 3 months or for any other period. Instead, the discussion was focussed on the continuing default and the need for the plaintiff to refinance as soon as possible.

[21] Both the lenders and the plaintiff were under economic pressure. Neither wanted a forced sale but the first mortgagee (the VTB mortgage) was threatening to sell the subject property under power of sale. Neither the lenders nor the plaintiff thought that was in their best economic interests. The plaintiff was actively pursuing other refinancing options. The lenders wanted the plaintiff to re-finance and pay them out. The lenders agreed not to take enforcement measures.

[22] The monies had still not been repaid by June 15, 2019 (which is another 3 months after March 15, 2019), although as noted above the plaintiff had paid \$100,000 on account on February 22, 2019, \$150,000 on March 22, 2019 and another \$150,000 on May 22, 2019. These payments effectively paid the interest that was accumulating on the outstanding debt in the relevant period.

The second alleged oral agreement to renew

[23] Mr. Chen maintains that around June 2019 he and Mr. Rust entered a further, oral, renewal agreement for the mortgage. Supposedly this was again on the same terms and conditions as the first written renewal agreement. This oral renewal is said to have occurred in the same general time frame as a separate \$1,200,000 mortgage financing which is not relevant other than to help fix the time of this oral extension. The other financing occurred in May 2019 because that financing was the source of the May 22, 2019 payment of \$150,000 on account.

[24] The lenders argue that they wouldn’t have entered into the separate May 2019 financing if they hadn’t concurrently reached an extension agreement on the subject mortgage. Nonetheless, there are no emails or documents or witnesses linking the two loans, other than the fact that \$150,000 from the other financing was applied to the subject mortgage debt. So, if Mr. Chen’s recollection is accurate the loan and mortgage maturity date on the subject mortgage was extended

in late May 2019 for another 3 months, but if that means 3 months after the expiry of the first oral extension which would have matured around March 15, 2019, presumably the extension only ran to around June 15, 2019.

[25] Thus, if there had been a third renewal (i.e., the original September 25, 2018 written renewal for 3 months plus two subsequent oral renewals of 3 months each) presumably the final mortgage due date would have been around June 15, 2019, although no precise date was ever specified. It is material to my decision below that there was little point in the second oral renewal in late May 2019 because all it did was extend the due date to June 15, 2019.

[26] Nothing was repaid on or about that date.

[27] On July 29, 2019, at Mr. Rust's request, Mr. Chen emailed him the details of what Mr. Chen said was outstanding for the periods of August 23, 2018- March 22, 2019 (8 months) and March 23, 2019- July 30, 2019 (just over 4 months). These periods do not match the alleged oral extension periods. Nor do the fees/penalty which were claimed in that email match for each of the two periods nor do they match the fees/penalty provided in the September 25, 2018 written agreement.

[28] For the first of these oral extension periods the lenders demanded a default fee of \$26,250 and a renewal fee of \$84,000. There is no mention of an interest penalty. For the second period the lenders do not mention a default fee but demanded a renewal fee of \$42,000 and a penalty of \$52,500.

[29] Mr. Rust replied merely that he would review Mr. Chen's July 29, 2019 summary. There are no emails or documents which show how this was resolved, but nothing was repaid at this time.

[30] Mr. Rust says he told Mr. Chen his numbers in this email were inaccurate, and that Mr. Chen simply disagreed with him.

[31] Mr. Chen says he understood that Mr. Rust had accepted these numbers which he says were accurate and consistent with their oral agreements.

The December 6, 2019 Refinancing and Payout

[32] The loan had still not been repaid by the end of November 2019. By this time, however, the plaintiff was making real progress in arranging alternative financing. On December 4, 2019 Mr. Rust met with Mr. Chen to discuss the lenders' latest discharge statement, dated around November 26, 2019. It was Mr. Rust's position after reviewing this document that the lenders were overcharging the plaintiff by approximately \$300,000 and he said this was causing him difficulties in refinancing. Mr. Rust and his wife, Yi Wang, who also attended that meeting, implored Mr. Chen to reduce his demands.

[33] Mr. Rust says that Mr. Chen purported to justify his numbers by relying on an automatic renewal clause he stated was in the September 25, 2018 renewal agreement and that Mr. Chen was surprised when he could not find such a clause. Even though he could not identify any applicable

contractual term, according to Mr. Rust, Mr. Chen then said that the fees were implied in the automatic renewals and refused to lower his demands.

[34] The plaintiff's repayment and refinancing finally closed on December 6, 2019 and the plaintiff paid the full sum demanded by the lenders in order to obtain the mortgage discharge. The plaintiff's lawyer, Yash Mehrotra, wrote a letter the same day saying that the overpayment was being made under protest and on a "without prejudice" basis with respect to any amounts paid on account of interest and penalties. Mr. Chen says he did not see that letter, which was copied to the lenders' lawyer, Jeff Levy. It is worth noting that Yash Mehrotra and Jeff Levy are both lawyers in the same law firm, Levy Zavet.

[35] The plaintiff says that it ended up paying a third-party lender \$101,510.30 for a loan and the associated interest to cover the additional \$304,500 it paid under protest to the lenders. This loan was part of the overall \$8,000,000 loan (at 14% interest) used to re-pay the lenders.

Procedural History

[36] The plaintiff sued the lenders on January 14, 2022 claiming damages for breach of contract and unjust enrichment. The lenders' counterclaim dated September 9, 2022 claims \$400,000 for damages for the plaintiff's default in its loan obligations and \$40,000 for damages for "all cost and fees of the defaulted mortgage".

[37] The lenders argue that summary judgment is not appropriate and all issues should proceed to trial. They rely not only on the issue of the oral renewal agreements but also the issue of the double payment of the broker's fee. The lenders maintain that the lawyers from Levy Zavet must testify on both issues, although they admit the lawyers did not witness the renewal discussions. They also suggest the Guarantors should testify, although they also admit none of them witnessed the renewal discussions and had nothing to do with the broker fee.

[38] In its September 9, 2022 Statement of Defence the lenders did not allege any oral renewal agreements. In para. 24 of the Defence the lenders said they were not relying on the proposition that the loan automatically renewed (as the plaintiff had understood the lenders' position to be). The lenders said the maturity date "lapsed on August 23, 2018 and November 23, 2018". The Defence claimed that an "Over-Holding Fee" became payable pursuant to the terms of the original loan agreement and the renewal agreement.

[39] Mr. Chen's evidence about oral renewal agreements, summarized above, appeared for the first time in his February 26, 2024 affidavit in this summary judgment motion.

[40] The lenders did not rely on their claim for an Over-holding fee on this motion (presumably this claim in para. 24 of their Statement of Defence is a reference to the 21% fee which appears in Schedule A to the loan commitment letter, and which would have been challenged by the plaintiff for offending s. 8 of the Interest Act R.S.C., 1985, c.1-15). Nor did the lenders rely on any of the other fee and penalty clauses in the original loan commitment letter. They do rely on the two fees and one penalty that were charged (and paid) by virtue of the September 25, 2018 written renewal agreement i.e., the 1% renewal fee of \$42,000; default extension fee of \$25,000 and \$52,500 (one

month's interest) as a "penalty". The lenders say the same fees and penalty must be paid for each of the two subsequent oral extensions.

[41] The lenders filed no evidence in support of their counterclaim for damages for lost re-investment opportunities and unpaid fees.

Other Witnesses

[42] The lenders suggested that the motion for summary judgment should be dismissed because the Guarantors should be required to testify at a trial "in support of the crucial elements of the loan and the subsequent renewals". There is nothing to this argument. It is conceded the Guarantors were not privy to the alleged oral renewal discussions. The crucial elements of the loan are documented in writing as summarized above. Furthermore, there was nothing to prevent the lenders examining the Guarantors on this motion if they had any material evidence. This is also true of the Levy Zavet lawyers who were not involved in the alleged oral renewals in any event.

Summary Judgment

[43] Rule 20.01 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 ("Rules") provides the basis on which the court may grant summary judgment. Subrule 20.04 (2)(a) provides that summary judgment must be granted if there is no genuine issue requiring a trial.

[44] The concept of proportionality underpins this issue. The motion judge should use the summary judgment process if it appears it will be cheaper and faster than a full trial while maintaining confidence in a fair and just outcome. *Hyrniak v. Mauldin*, 2014 SCC 7, at paras. 49-50 and *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200 at paras. 14-15 and 32-24. In short, is the added expense and delay associated with a trial necessary to ensure a fair process and just adjudication of the issues?

[45] A full appreciation of the evidence and the issues is not a prerequisite. The motion judge must, however, be confident that they can find the necessary facts and apply the relevant legal principles based on the record before the court. *Sweda Farms* at paras. 14 and 32; *Hryniak* at paras. 33, 49-50, 56-57 and 60.

[46] The expansion of the Court's fact-finding powers under rule 20.04 (2.1) enables the court to weigh evidence, evaluate credibility and draw reasonable inferences from the evidence. *Hryniak* at paras. 44-45. Nonetheless, in determining this motion, I must apply the analytical approach set out by the Court of Appeal in *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98 at para 24:

- (a) First, the motion judge should determine if there is a genuine issue requiring a trial based only on the evidence before her, without using the enhanced fact-finding powers under rule 20.04 (2.1); and
- (b) Second, if there appears to be a genuine issue requiring a trial, the motion judge should determine if the need for a trial can be avoided by using the enhanced powers under Rule 20.04 (2.1) - which allow one to weigh evidence, evaluate the credibility

of a deponent, and draw any reasonable inference from the evidence-and under Rule 20.04 (2.2) to order that oral evidence be presented by one or more parties.

[47] The responding parties must put their “best foot forward.” Responding parties should lead “trump” i.e., their best evidence on the summary judgment motion. They cannot rely on the possibility that more favourable facts may merge at trial. Thus, the motion judge can assume that the responding parties have compiled a record that contains all the evidence they would present at trial in the absence of any good explanation why some material evidence can only be produced later. *Larman v. Mount Sinai Hospital*, 2014 ONCA 923 at para. 3-4.

Are there genuine issues which require a trial?

(a) The Broker Fee

[48] The evidence is clear that the plaintiff agreed to pay a \$63,000 broker fee and that it was deducted from the original \$4,200,000 principal amount of the loan in August 2018. This sum was properly held back by the lenders’ lawyers, Levy Zavet. The lenders say that the lawyers have never accounted to them for that sum. The lenders call the broker fee a “missing payment” and therefore added it to the outstanding balance of the mortgage to be paid by the plaintiff when they provided a discharge statement in December 2019. At that time the plaintiff objected, saying that it did not have to pay this fee because it had already paid in August 2018. Mr. Chen in his responding affidavit said that Levy Zavet had kept the broker’s fee or at least that the lenders had not received it. There is no evidence of any broker making a claim for it.

[49] Ultimately it is clear that:

- i. Mr. Chen doesn’t know what happened to the original \$63,000;
- ii. Levy Zavet withheld the \$63,000 on behalf of the lenders (presumably to pay the broker);
- iii. the loan advanced to the plaintiff in August 2018 was short \$63,000. This amount would otherwise have been lent to it but was withheld to pay the broker’s fee; and
- iv. the lenders had no right to charge the plaintiff for this sum a second time when the loan was repaid on December 6, 2019.

[50] The lenders also argued that, having paid the monies on closing on December 6, 2019, the plaintiff can not sue for repayment of this sum after the fact. The lenders say the December 6, 2019 letter protesting this payment and the other fees does not provide a legal basis for the plaintiff’s claim. They also maintain there was nothing unconscionable about the situation in December 2019 and the plaintiff was not “squeezed” by the lenders as Mr. Rust has alleged.

[51] I find that the lenders had no basis for demanding the \$63,000 on closing and their demand was an anticipatory breach of contract. The fact that the plaintiff paid the money again on closing

does not change that fact. The plaintiff could have sued in December 2019 and the closing might have been delayed. The financial consequences for everyone would likely have been much worse if the plaintiff had refused to close or had withheld the money (in the latter case the lenders would not have given the mortgage discharge). Instead, the plaintiff mitigated its damages by paying the money under protest. The fact that the plaintiff protested simply shows consistency. A protest was not a prerequisite to a viable claim. The plaintiff is entitled to \$63,000 as damages for breach of contract by the lenders.

[52] In the alternative the lenders have been unjustly enriched and must repay the money by way of restitution. The plaintiff has suffered a detriment by paying the lenders \$63,000 when it did not need to do so, other than for the practical reason of obtaining a mortgage discharge. The lenders have derived a benefit in the same amount. There is no juristic reason for the payment given that the broker fee had already been paid when the loan was initially advanced.

[53] There is no genuine issue about the broker's fee which requires a trial. There are no credibility issues and no material facts in dispute. The evidence of the lawyers from Levy Zavet is not needed to determine the liability between the plaintiff and the lenders. The lenders may have an issue with Levy Zavet's accounting, but that does not involve the plaintiff. In any event, the lenders could readily have cross examined the lawyer(s) as witnesses on the pending motion if they thought the lawyer(s) could have contributed something more than copies of the closing documents, such as the trust ledger statement which was before the court. There is nothing to suggest that would have been worthwhile in this action.

(b) The Other Fees and Penalty

[54] The plaintiff's December 6, 2019 repayment also included an alleged overpayment of \$241,500 which is made up of two amounts of \$120,750 demanded by the lenders in respect of fees and penalties for each of the two oral renewal agreements. Each of those payments comprised a default extension fee of \$26,500, a renewal fee of \$42,000 and a penalty of 1 month's interest of \$52,500.

[55] These same three components had been paid in respect of the first written renewal agreement of September 25, 2018 and no issue had been or is taken with that payment based on the written agreement. Consequently, I am not being asked to determine the validity of that first payment which was expressly set out in the first renewal agreement (e.g., I have not been asked to deal with whether a penalty was properly payable). The issue I must determine is whether the same sums are payable in respect of the oral renewal agreements in January 2019 and June (or May) 2019. The lenders say the plaintiff agreed to renewals on the same terms as in the September 25, 2018 written agreement, with the result, they say, that the same fees and penalties became payable for each renewal.

[56] I find there is no genuine issue which requires a trial to determine whether these monies were payable. They were not. The lenders argued that there are serious credibility issues and factual disputes with respect to the oral renewal agreements, but for the following reasons a trial is not necessary to conclude that the fees and penalty (totalling \$241,500) were not payable. They

must be repaid as damages for breach of contract or by way of restitution based on unjust enrichment. The reasons are:

1. The loan commitment agreement requires additions to or amendments of or any termination to be in writing and signed by the parties;
2. the lenders (according to Mr. Chen) understood that putting such matters in writing was prudent but he says they chose not to do so. Even if one can debate whether the parties might lawfully agree to orally waive a requirement that renewals (i.e., amendments or additions) be in writing, there is nothing to support any waiver here;
3. the *Statute of Frauds* requires any such agreements to be in writing;
4. Mr. Chen's late blooming position of oral agreements is inconsistent with:
 - a. The lenders' Statement of Defence which did not mention any oral renewal agreement but purported to justify the fees and penalty on the basis of the Overholding clause;
 - b. Mr. Rust's April 29, 2019 email which ambiguously talks about the need to get "this Mortgage renewed" but does not refer to any existing renewal or any details of the terms of a renewal;
 - c. His own July 29, 2019 email in which he does not refer to any agreement by the plaintiff to pay the fees claimed--instead he refers to two different calculations of fees and penalty for two periods, which periods themselves are inconsistent with the alleged 3 month renewal terms;
 - d. his failure to send any emails confirming or even referring to the alleged oral agreements;
 - e. although corroboration is not required, nonetheless it is odd that no-one witnessed either of the alleged discussions or could even attest to hearing about them before the loan was repaid;
 - f. the parties had already amended the loan agreement once in writing (September 25, 2018) and there is no good reason why further renewals could not have been documented;
 - g. the Guarantors were not asked to approve the oral renewals and did not confirm their agreement, as they had done in writing on the September 25, 2018 renewal.

[57] The lenders argue that the oral renewal agreements are evidenced by the fact that they were partially performed when the plaintiff paid the three sums totalling \$400,000 discussed above. This is also the basis for their explanation why the *Statute of Frauds* does not preclude their claim.

[58] These payments were certainly payments on account of the loan, but they are consistent with the plaintiff keeping up interest payments even though the loan was in default, so that the total debt remained around \$4,200,000. The interim payments ensured forbearance by the lenders but there is nothing to suggest they were payments on account of fees or penalties, and they are at best ambiguous with respect to whether there was a renewal arrangement or just a forbearance arrangement. Consequently, I find that these payments do not provide any probative evidence of the partial performance of an oral agreement to pay the fees and penalties which were demanded and paid on closing.

[59] For the first three reasons above I find for the plaintiff on this summary judgment motion without using my additional fact-finding powers under rule 20.04 (2.1). But in the alternative, even if those points were not compelling, I would still grant summary judgment on this issue for the reasons set out in para. 4 above, relying on powers under rule 20.04 (2.1). I do not find Mr. Chen's allegations of oral renewal agreements incorporating the fees and penalty to be credible and I do not accept that there was any oral agreement by the plaintiff to pay these fees and penalty. Mr. Chen and Mr. Rust undoubtedly discussed and agreed on forbearance arrangements, but the discussion did not include any agreement on fees and penalty.

[60] Consequently, on this issue I grant summary judgment to the plaintiff for \$241,500. There is nothing to the lenders' argument that the claim is statute barred. The Covid era regulations extended the limitation period and the claim was started within the requisite period.

Additional Damages

[61] I do not award the plaintiff additional damages for the higher rate of interest it paid to borrow additional funds in December 2019. The plaintiff was engaged in a sophisticated real estate development. The plaintiff was involved in a complicated financial situation of its own making. It arranged an \$8,000,000 loan facility with a third-party to solve its financial problems. It can not visit on the lenders its decision to incur higher interest rates based on its own choice of financial arrangements. This is particularly true in circumstances where the plaintiff had been in default under the mortgage for many months and the lenders had facilitated the plaintiff by forbearing on enforcement.

Counterclaim

[62] The plaintiff also seeks summary dismissal of the lenders' counterclaim for damages arising from the late repayment of the loan and outstanding fees. Although the plaintiff suggested the counterclaim is precluded by the limitation period, I dismiss the counterclaim because there is simply no evidence that the lenders suffered any losses that were not compensated by virtue of the accumulated interest that was paid for the period of default. There is no compelling evidence of any lost re-investment opportunities.

[63] As for unpaid fees, none have been identified other than those which I have disallowed above. The lenders did not argue that they are owed any fees based on the other contractual terms I summarized at the outset. The lenders did make a reference in passing in para. 81 of its factum to "overholding fees" but this was not explained and seems to be merely a reference to the fees

which I have disallowed when I granted the plaintiff's motion above. Any overholding fees would have been strongly opposed on the basis of s.8 of the *Interest Act* but the issue was not argued by the lenders.

Conclusion

[64] In summary the plaintiff's motion for summary judgment is granted for a total of \$304,500.00 plus prejudgment interest in accordance with the *Courts of Justice Act* from December 6, 2019. The counterclaim is dismissed.

[65] The plaintiff shall file a bill of costs and costs outline in accordance with subrules 57.01(5) and (6), not exceeding 3 pages in length within 7 days of the date of these reasons. This shall deal with both this motion as well as the costs of the action. Any rule 49 offers should also be attached as additional permitted pages.

[66] The defendants shall provide their written response, also limited to 3 pages plus any rule 49 offers, within 7 days of the date of the plaintiff's costs submissions.

[67] There shall be no right of reply on the issue of costs.

Stevenson, J.

Released: June 19, 2024

CITATION: 9919805 Canada Inc. v. JYR Investment Management Inc., 2024 ONSC 3506
COURT FILE NO.: CV-22-00675179-0000
DATE: 2024-06-19

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

9919805 CANADA INC.

Plaintiff

– and –

JYR Investment Management Inc., JYR Real Capital
Mortgage Investment Corporation, Darui Sun, Ruixa Li,
Jiaqin Mi

Defendants

REASONS FOR JUDGMENT

Stevenson J.

Released: June 19, 2024