

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Lukey Capital Corp.) D. Fridmar and V. Modi for the Plaintiff
)
Plaintiff)
)
- and -)
)
1000110300 ONTARIO INC., PANKAJ) A. Miller and G. Shenouda, for the
DHIR, LARA ALEXANDRA) Defendants
DUCHESNE, JESSE QUINTIN)
DUCHESNE, ERICA JEAN DIMECK LEE)
GARCIA, and SANTOS EMILIANO)
GARCIA SILVA)
Defendants)
)
)
) **HEARD:** November 21, 2024

REASONS FOR DECISION

BORDIN J.

- [1] The plaintiff moves for summary judgment on a promissory note for failure by the defendants to pay the amount owing. The plaintiff has abandoned, for the purposes of this summary judgment motion, all other causes of action in the statement of claim. The defendants submit there are genuine issues requiring a trial.
- [2] For the reasons that follow, I find that the summary judgment process allows me to make the necessary findings of fact, to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result in this case. I find that there

is no genuine issue requiring a trial with respect to the plaintiffs claim on the promissory note and the defences raised by the defendants.

- [3] The corporate defendant has been noted in default. The five individual defendants (referred to herein simply as the “defendants”) responded to the statement of claim and to the motion for summary judgment.
- [4] The defendants admit that on or about March 30, 2022 they executed a promissory note of the same date. The promissory note was for a term of three months in the principal amount of \$75,000 with interest at the rate of 14% per annum. The relevant terms of the promissory note include the following:

FOR VALUE RECEIVED, the receipt and sufficiency of which are hereby acknowledged, the undersigned, promises to pay LUKEY CAPITAL CORP. the principal amount of seventy-five thousand dollars (CAD \$75,000.00) of lawful money of Canada (the "Principal Amount"), together with interest on the amount outstanding from time to time, accruing from and including the date hereof, both before and after maturity, default, and judgment, at a rate of fourteen percent (14%). The Principal Amount and any and all accrued interest and costs, including legal costs will be paid on June 30, 2022 as one lump sum payment.

EACH OF THE UNDERSIGNED hereby waives demand, presentment, protest, notice of protest and notice of dishonour.

EACH OF THE UNDERSIGNED hereby acknowledges and agrees that the obligations and liabilities of each of the undersigned pursuant to this Promissory Note shall be joint and several.

IF ANY OF THE UNDERSIGNED defaults in any payment as required in this Promissory Note or in the performance of any of its obligations, then the unpaid principal balance and earned interest in this Promissory Note shall become

immediately due along with any collection and/or legal costs incurred as a result of said default.

- [5] The defendants acknowledge that the promissory note was secured by four properties in the Kitchener-Waterloo region. The properties are listed in the promissory note. Further the promissory note provides:

EACH OF THE UNDERSIGNED HEREBY acknowledges and agrees that LUKEY CAPITAL CORP. hereby reserves the right to, in her [sic] sole and absolute discretion and without any consent from any of the undersigned, register the loan outlined in this Promissory Note as a Charge on each of the Properties.

- [6] There is no evidence from the defendants that they did not understand the terms of the promissory note or their obligations under the promissory note. After signing the promissory note, the defendants received \$75,000 less agreed upon expenses.

- [7] The promissory note is short and concise and easy to understand. It required payment on June 30, 2022 of the principal together with interest as one lump sum. No demand was required for payment to be made. The obligations and liabilities of the defendants is joint and several. Any default in any payment as required by the promissory note or in the performance of the defendants' obligations under the promissory note would result in the unpaid principal balance and earned interest becoming immediately due along with any collection and or legal costs incurred as a result of the default.

- [8] The defendants admit that they were not able to make the required payment at the end of June 2022. Instead, beginning August 1, 2022 through November 20, 2023 the defendants paid the monthly interest due on the promissory note. The November 20, 2023 payment was for the interest accrued in October 2023. The defendants have provided a summary of the payments of \$875 per month which were made. This is the monthly amount due for interest at 14% per annum on \$75,000.

- [9] The defendants have not made any payments on the promissory note after November 20, 2023. The defendants have never repaid the principal sum advanced of \$75,000.
- [10] The plaintiff seeks judgment for the amount owing pursuant to the promissory note and three months interest to June 30, 2022 of \$77,646.58. The plaintiff seeks judgment for \$13,750.69 for outstanding interest at the promissory note rate of 14% per annum. The amounts over and above \$75,000 correlates to the monthly amount of interest at 14% per annum which remains unpaid. There is no evidence from the defendants disputing these amounts. The defendants baldly assert that the plaintiff has not accounted for the interest payments made. They provide no evidence of alternative calculations as to the amounts outstanding.
- [11] On November 14, 2023 the plaintiff registered a charge against one of the properties securing the promissory note. On December 21, 2023, the plaintiff registered a charge against an additional two properties securing the promissory note.
- [12] The plaintiff issued the statement of claim on April 17, 2024. On May 14, 2024 the plaintiff registered a caution against title to one of the properties against which it had previously registered a charge. On or about May 31, 2024 the defendants served a statement of defence. The plaintiff served this motion for summary judgment on June 1, 2024.
- [13] The defendants assert that the plaintiff has failed to provide sufficient evidence as to why a charge was registered against three of the properties. The registration of a charge in the plaintiff's sole discretion is provided for in the promissory note. No further explanation was required.
- [14] The defendants assert that the promissory note lacks a clear definition of default which creates ambiguity. I do not agree. The circumstances giving rise to default and its consequences are clearly set out in the promissory note.
- [15] The defendants assert that the promissory note terms were amended. They assert it was agreed that the defendants would provide monthly installments of the amount outstanding.

There is no evidence of an agreement as to when the principal would become due and owing. The evidence with respect to whether there was an agreement to amend the promissory note is very thin and not compelling. Taken at its highest, the evidence could indicate that the plaintiff was prepared to give the defendants time to pay the amount outstanding under the promissory note as long as the defendants continued to make monthly payments. Even if such an agreement were reached, the defendants stopped making monthly payments after November 20th 2023 and were in breach of any such amendment to the promissory note.

- [16] In December 2023 the plaintiff's representative made several requests for an update on the missing monthly payment. One of the defendants, Santos Garcia responded on January 3, 2024. His e-mail clearly acknowledges an outstanding payment is owed. He acknowledged that the defendants did not have the funds to make the monthly payments. They asked for additional time. He suggests putting the property up for sale to pay the plaintiff.
- [17] The plaintiff's representative responded on January 7, 2024 that the plaintiff had instructed its lawyer to work on preparing notices for power of sale but that in the meantime the defendants would either have to sell property or find other lenders to pay out the loan. On January 10, 2024 Mr. Santos responded that he and his partners were looking for a solution to find the funds to pay out the plaintiff. Further emails were exchanged about refinancing and timing. By March 2024 the plaintiff was still looking for an update and payment. Mr. Santos promised payment. None was made. Later in March, the defendant Lara Duchesne began communicating with the plaintiff's representative by e-mail. The defendants were now attempting to sell a property.
- [18] On March 27, 2024 the plaintiff's representative advised the defendants that she was contacting a litigation lawyer to start a claim against all defendants and the corporate defendant and commence power of sale proceedings against the three properties. The plaintiff remained willing to accept full payment of the amount outstanding. That same day, the defendant Jesse Duchesne told the plaintiff they were attempting to refinance and

acknowledged that the plaintiff may no longer want to wait. Mr. Santos also wrote to the plaintiff on March 27 saying that they would pay the plaintiff and were working with a new mortgage broker so they could pay the plaintiff.

[19] On March 28, 2024 the plaintiff's representative reiterated to the defendants that the plaintiff was seeking payment of the full amount owing, not monthly payments.

[20] After November 20, 2023 the parties never reached an agreement to amend the promissory note or to enter into a schedule of payments. They never reached an agreement on the timeline for deferring repayment. It is clear from the emails between the parties that the plaintiff was seeking payment and the defendants were trying to buy time. The defendants were unable to point to any clear terms of any amendment of the promissory note or any evidence of the amendment.

[21] The defendants assert that no demand was ever made on the promissory note. The e-mails exchanged between the parties make it clear that repayment was demanded by the plaintiff and promised by the defendants. In any event, no demand for repayment was required by the terms of the promissory note. There is no evidence that an amendment to the promissory note requiring a demand for payment was ever agreed to by the parties.

[22] The defendants allege that granting summary judgment on the promissory note will interfere with or prejudice other creditors. The defendants could not explain how this was so. The interests of prior registered encumbrancers are not impacted by a judgment on the promissory note. There is no evidence before the court of any other creditors pursuing unsecured judgments against the defendants.

[23] The defendants submit that the motion for summary judgment should be dismissed because there may be other evidence that can be uncovered with further examinations and productions that supports their position. The defendants could not point to or suggest to the court what further evidence might be available. The defendants had an opportunity to cross-examine the plaintiff's representative. They did not summons any additional witnesses to

be examined on a pending motion. The defendants are required to put their best foot forward and to lead trump or risk losing when responding to a summary judgment motion. Speculation as to evidence that might be available is not sufficient.

- [24] The defendants submit that a refusal given at the plaintiff's cross-examination or that conduct of counsel for the plaintiff at the cross-examination interfered with their ability to obtain evidence for this motion. The defendants could not point to a single piece of evidence or information they were unable to obtain. The defendants did not bring a refusals or undertakings motions.
- [25] The defendants submit that there were "concerns" about the execution of the promissory note. The only concern the defendants could point to was that the promissory note was not witnessed or commissioned by someone in the defendants' lawyer's office. The defendants say that the plaintiff's lawyer required this, although this is not clear from the evidence. The defendants could not point to a legal requirement or authority requiring a promissory note to be commissioned or witnessed in such a fashion.
- [26] The signature of the plaintiff's lawyer appears on the witness line in the promissory note. The defendants each signed the promissory note. They admit doing so. They admit that they entered into the promissory note. They made monthly payments on the promissory note. They sent correspondence to the plaintiff acknowledging the debt. In the circumstances, the fact that the promissory note was not witnessed or commissioned by someone at the defendants' lawyers' office does not invalidate the promissory note.
- [27] The defendants suggested that there was some confusion as to who was representing them. They say they were never provided with a joint retainer agreement. They submit that it is plausible that the plaintiff's lawyer was the lawyer for all the parties with respect to the promissory note. The defendants allege conflict of interest, apparently with respect to the lawyer acting for the plaintiff on the promissory note. The evidence in support of the defendants assertions is not compelling. The parties both included emails between their

respective lawyers which clearly indicate that two different lawyers or firms were communicating on behalf of the defendants and the plaintiff with respect to the transaction.

[28] Even if there was some merit to the defendants' allegations regarding representation on the promissory note, and I do not find that there is, there is no evidence that the defendants did not understand the promissory note or their obligations or did not receive legal advice they needed to understand the promissory note and their obligations thereunder. The defendants could not cogently tie this allegation regarding representation to why the plaintiff would not be entitled to judgment on the promissory note.

[29] The defendants assert that concerns have been raised regarding: (1) whether the defendants were fully aware and/or informed of the contents of the promissory note; (2) whether the defendants had been purposefully led into contracting with the plaintiff for reasons unknown; (3) whether the defendants may have been coerced into the signing of the promissory note; and (4) whether all proper procedures were followed in the execution of the promissory note, given the potential conflict of interest taking place. There is no cogent evidence supporting such assertions. For the reasons set out above, there is no merit to the defendants' position.

[30] Guided by the principles in the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7, I find that there is no genuine issue for trial. The defendants signed the promissory note. They understood their obligations under the promissory note. They failed to make the payment when it was due under the promissory note. For a period of time, they made monthly payments of interest only. Those payments stopped in November 2023. They have made no payment since that time. They acknowledged the debt. The defendants have not raised any genuine issue requiring a trial.

[31] The plaintiff is entitled to judgment as follows:

- a. A declaration that that there is a valid, binding, and enforceable promissory note between the plaintiff and the defendants 1000110300 Ontario Inc., Pankaj Dhir,

Lara Alexandra Duchesne, Jesse Quintin Duchesne, Erica Jean Dimeck Lee Garcia, and Santos Emiliano Garcia Silva which was entered into on or about March 30, 2022;

- b. A declaration that the defendants are jointly and severally liable under the promissory note;
- c. The defendants shall pay to the plaintiff the sum of \$77,646.58 with respect to the principal amount owed pursuant to the promissory note and interest for the three (3) month term of the promissory note.
- d. The defendant shall pay to the plaintiff the sum of \$13,750.69 for outstanding interest under the promissory note between July 1, 2022 to November 21, 2024 at the rate of 14% per annum pursuant to the terms of the promissory note.
- e. Post judgment interest at the promissory note rate of 14% per annum.

[32] The plaintiff is entitled to costs of the motion and the action. The plaintiff submitted a cost outline and the defendant submitted a bill of costs. Both parties had two lawyers working on the file and two lawyers who attended the motion. The plaintiff's full indemnity costs totaled \$30,614.66 inclusive of HST and disbursements of \$3,884.51. The defendants' full indemnity costs are \$44,575.17 inclusive of HST plus disbursements of \$2,462.66.

[33] The plaintiff submits it is entitled to full indemnity costs based on the terms of the promissory note which provides that the defendants agree that they shall pay any and all fees, costs, expenses or liabilities of any kind including legal fees relating to the promissory note on the same terms and conditions as outlined in the promissory note.

[34] The defendants submit that the plaintiff is entitled to costs of just under \$20,000 if the plaintiff is successful on the motion, but that if the motion for summary judgment was dismissed, the defendants should be awarded costs of \$24,000.

[35] Taking into account the factors in rule 57.01 of the *Rules of Civil Procedure*, including but not limited to, the amount of the claim, the complete success on the part of the plaintiff, the costs incurred by each of the parties, the fact that the plaintiff typically incurs more costs than the defendant in pursuing an action, what the parties might have expected to pay, as well as the terms of the promissory note, I find that it is fair and reasonable for the defendants to pay the plaintiffs costs fixed in the amount of \$27,950 inclusive of HST and disbursements. Interest on costs is payable at the *Courts of Justice Act* rate.

[36] With the consent of the plaintiff, the balance of the claims in the statement of claim are dismissed.

M. Bordin, J

Released: November 26, 2024

CITATION: Lukey Capital Corp v. 1000110300 Ontario Inc. et al, 2024 ONSC 6589

COURT FILE NO.: CV-24-644

DATE: 2024-11-26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Lukey Capital Corp

Plaintiff

- and -

1000110300 ONTARIO INC., PANKAJ DHIR, LARA
ALEXANDRA
DUCHESNE, JESSE QUINTIN DUCHESNE, ERICA
JEAN DIMECK LEE
GARCIA, and SANTOS EMILIANO GARCIA
SILVA

Defendants

REASONS FOR DECISION

Justice Bordin

Released: November 26, 2024