

SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian Imperial Bank of Commerce v. Zaynluke Restaurant Ltd.*
2023 NSSC 407

Date: 20231213

Docket: 510859

Registry: Kentville

Between:

Canadian Imperial Bank of Commerce

Plaintiff

v.

Zaynluke Restaurant Ltd., Seifeldin M. Elgebeily aka Seif Elgebeily, and
Hossameldin Elgebeily aka Sam Elgebeily

Defendants

Judge: The Honourable Justice Gail L. Gatchalian

Heard: December 7 and 13th, 2023, in Kentville, Nova Scotia

Counsel: Michael A. Currey, for the Plaintiff
Duncan H. MacEachern, for the Defendants

Introduction

[1] This is a motion for summary judgment on the pleadings, or, alternatively, on the evidence, brought by the Plaintiff, Canadian Imperial Bank of Commerce (“CIBC”). CIBC advanced funds to the Defendant Zaynlake Restaurant Ltd. pursuant to a credit agreement. The Defendants Seifeldin (“Seif”) Elgebeily and Hossameldin (“Sam”) Elgebeily, directors and officers of Zaynlake, signed the credit agreement on behalf of Zaynlake. The funds were advanced to Zaynlake for the purpose of operating a restaurant pursuant a franchise agreement with Mezza Franchising Limited. The individual Defendants signed guarantees. The credit agreement and guarantees were payable on demand. Mezza terminated the franchise agreement. Because the Defendants were no longer operating the restaurant, CIBC demanded payment of the funds in full. The Defendants have not repaid the funds. CIBC filed a Notice of Action for Debt against the Defendants. The Defendants filed a defence. The Defendants state that: (1) they wanted to continue making regular payments on the debt but CIBC refused to accept those regular payments, (2) they have offered to make a lump sum payment of \$100,000 and to continue making regular payments but CIBC did not accept their offer, and (3) CIBC breached of its duty of good faith contractual performance by attempting to sell the assets of the Defendants to Mezza for below market value.

Summary Judgment on the Pleadings

The Test

[2] The test for summary judgment on the pleadings under Civil Procedure Rule 13.03 is that the pleading discloses no basis for a defence [13.03(1)(a)], or the defence is clearly unsustainable when the pleading is read on its own [13.03(1)(c)]: see the decision of the Honourable Justice Gregory Warner *Murphy v. Murphy*, 2009 NSSC 138 at para.26. The question is: assuming the facts stated in the pleadings can be proved, is it plain and obvious that the statement of defence discloses no basis for a defence? Only if the defence is certain to fail because it contains a radical defect should it be struck: *ibid*, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. The defence must appear to be either “certain to fail” or “absolutely unsustainable” for it to be struck: see *Walsh v. Atlantic Lottery Corp. Inc.*, 2015 NSCA 16 at para.9.

The Pleadings

[3] In the Notice of Action for Debt and Statement of Claim, CIBC claims that:

- CIBC advanced \$350,000 to Zaynlake pursuant to a Canada Small Business Financing Loan credit agreement (the “Credit Agreement”), at an interest rate equal to CIBC’s prime rate plus 3% per year calculated on the daily balance of the loan and due monthly.

- The Credit Agreement provided that it was an event of default if Zaynluke ceased to carry on in the normal course of its business.
- Seif Elgebeily signed two guarantees, promising to pay the indebtedness of Zaynluke to CIBC on demand.
- Sam Elgebeily signed two guarantees, promising to pay the indebtedness of Zaynluke to CIBC on demand.
- In or about April of 2021, the Defendants defaulted on their agreements with CIBC.
- In letters dated April 21, 2021, CIBC demanded that the Defendants make arrangements for payment of their indebtedness to CIBC.
- The Defendants have failed to pay their indebtedness in breach of their contracts with CIBC.
- As of October 27, 2021, the amount owing, including incurred interest, was \$288,293.79.
- The Defendants owe CIBC the sum of \$288,293.79 plus interest.

[4] In their Statement of Defence, the Defendants deny the allegations and state, in part, that:

- Zaynluke operated a restaurant in Truro, Nova Scotia, pursuant to a franchise agreement with Mezza Franchising Limited.
- Mezza terminated the franchise agreement.
- The Defendants tried to make payments on the debt and keep the loan in good standing until the franchise dispute with Mezza was resolved by arbitration or litigation.
- CIBC refused to accept payments from the Defendants.
- CIBC took the position that the termination of the franchise agreement constituted a default.

- CIBC has been in negotiations with Mezza for the purchase of the secured assets at below market value.
- The Defendants have offered to pay CIBC a lump sum payment towards the debt in the amount of \$100,000, with title to remain vested in CIBC pending conclusion of the litigation with Mezza.
- CIBC's attempt to dispose of assets below market value to Mezza constitutes a breach of a contractual duty of fairness and CIBC's fiduciary obligations to the Defendants.
- The Defendants want the court to order CIBC to accept their payments on the loan and allow them to continue to make monthly payments towards the debt.
- The Defendants want the court to order CIBC to cease the intended disposition of the assets pending the conclusion of the arbitration and action between the Defendants and Mezza.

[5] The balance of the Statement of Defence contains allegations against Mezza.

Mezza is not a party to this litigation.

[6] The assertions in the Statement of Defence about the Defendants' attempts and wish to continue to make regular payments on the loan, their settlement offer, and the attempt by CIBC to sell the secured assets are immaterial to the claim made by CIBC. These assertions, which I must assume to be true, will not affect the outcome.

[7] In their Statement of Defence, the Defendants do not deny that:

- Zaynlake is a party to the credit agreement with CIBC, pursuant to which CIBC advanced funds in the amount of \$350,000.

- The individual defendants are parties to guarantees with CIBC, pursuant to which they promised to pay the indebtedness of Zaynluke.
- The Defendants defaulted on their agreements with CIBC.
- CIBC demanded payment of the funds from the Defendants.
- The Defendants have not repaid the funds.
- The Defendants are in breach of their agreements with CIBC.

[8] It is plain and obvious that the Statement of Defence discloses no basis for a defence to the claim of CIBC. The defence is certain to fail and is absolutely unsustainable. The defence must be struck and summary judgment will issue in favour of the Plaintiff.

Summary Judgment on the Evidence

[9] As CIBC requested summary judgment on the evidence in the alternative, I will address this request.

[10] In a motion for summary judgment on the evidence:

1. The first question to ask is whether there is a genuine issue of material fact, either pure or mixed with a question of law. If the answer is “yes,” the motion fails.

A “material fact” is one that would affect the result. A dispute about an incidental fact, i.e. one that would not affect the outcome, will not derail a summary judgment motion.

- CIBC has the onus to show by evidence that there is no genuine issue of material fact. But my assessment is based on all the evidence from any source.
2. If the answer is “no,” the second question is whether there is a question of law, either pure or mixed with a question of fact, that requires determination.
 3. If the answer to questions 1 and 2 are both “no,” summary judgment must issue.
 4. If there is no genuine issue of material fact, but there is a question of law, the third question is whether the claim has a real chance of success. The Defendants must show a real chance of success. If they fail to show a real chance of success, summary judgment issues to dismiss their defence.
 6. If the answer to this third question is yes, leaving only an issue of law with a real chance of success, the fourth question is whether I should exercise the discretion to finally determine the issue of law.
 7. In a motion for summary judgment on the evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented: Civil Procedure Rule 13.04(4). A party who wishes to contest the motion must provide evidence in favour of the party’s claim or defence: Civil Procedure Rule 13.04(5).
 8. Each party is expected to put their “best foot forward” with evidence and legal submissions on all these questions, including the “genuine issue of material fact”, issue of law, and “real chance of success” questions: Rules 13.04(4) and (5).

See *Civil Procedure Rule 13.04* and *Shannex Inc. v Dora Construction Ltd.*, 2016 NSCA 89 at paras.34 and 36.

[11] I have already reviewed the pleadings. In order to determine whether summary judgment should issue, I will now consider the evidence.

The Evidence of CIBC

[12] CIBC relied on the affidavit of Jo-Ann Mitchell, Senior Account Manager of Special Loans. In her Affidavit, Ms. Mitchell described the agreements entered into by CIBC and the Defendants, and attached copies of the Credit Application form, the Credit Agreement, the guarantees, and the demand letters. Ms. Mitchell also attached the security agreements entered into by the individual Defendants.

Credit Application Form

[13] In the Credit Application form executed by Seif and Sam Elgebeily on behalf of Zaynlake on August 12, 2019, the nature of the business was described as Mezza-Lebanese Restaurant and the purpose of the credit was described as to open a restaurant.

Credit Agreement

[14] Seif and Sam Elgebeily executed the Credit Agreement on behalf of Zaynlake on August 12, 2019. The Credit Agreement provides, in part, as follows:

- The loan amount provided by CIBC to Zaynluke was \$350,000, at an interest rate of the CIBC prime rate plus 3% per year.
- The terms and conditions in the CIBC “Small Business Credit Terms and Conditions” booklet (the “Booklet”) form part of the Credit Agreement.

[15] The Booklet referred to in the Credit Agreement provides as follows at section 6:

6. *How we may demand payment.* It is important to us that the Business succeeds. ***We may, however, at our discretion, without notice, demand immediate repayment of any outstanding amount under any Credit.*** We may also, at any time, and for any reason, cancel the unused portion of any Credit. ***Each Credit is payable on demand unless otherwise advised by us, notwithstanding that it may be payable by regularly Scheduled Payments. If we demand payment, the Business will immediately repay us the capital liabilities in full.***

[Emphasis added]

Guarantees

[16] Seif Elgebeily executed a Guarantee in relation to the Customer, Zaynluke, on August 12, 2019, which states in part as follows:

2. ***Guarantee*** I guarantee payment to CIBC of all the Customer’s debts. My liability under this Guarantee is:

...

(b) x limited to the principal sum of CDN \$350,000 plus interest and expenses in accordance with Section 5.

...

5. ***Payment on demand. I will immediately pay CIBC on demand:***

a) the amount (and in the currency) of the Customer's debts (but if Section 2(b) applies, subject to that limitation) plus any expenses (thin including all legal fees and disbursements) incurred by CIBC in enforcing any of CIBC's rights under this Guarantee; and

b) Interest (Including interest on overdue interest, compounded monthly) on unpaid amounts due under this Guarantee calculated from the date on which those amounts were originally demanded until payment in full, both before and after judgement, at the rates (and in the currency) applicable to the corresponding Customers Debts.

[emphasis in bold and italics added]

[17] Sam Elgebeily executed a Guarantee in relation to the Customer, Zaynluke, on August 12, 2019, which states in part as follows:

2. ***Guarantee*** I guarantee payment to CIBC of all the Customer's debts. My liability under this Guarantee is:

...

(b) x limited to the principal sum of CDN \$350,000 plus interest and expenses in accordance with Section 5.

...

5. ***Payment on demand. I will immediately pay CIBC on demand:***

a) the amount (and in the currency) of the Customer's debts (but if Section 2(b) applies, subject to that limitation) plus any expenses (thin including all legal fees and disbursements) incurred by CIBC in enforcing any of CIBC's rights under this Guarantee; and

b) Interest (Including interest on overdue interest, compounded monthly) on unpaid amounts due under this Guarantee calculated from the date on which those amounts were originally demanded until payment in full, both before and after judgement, at the rates (and in the currency) applicable to the corresponding Customers Debts.

[emphasis in bold and italics added]

[18] Both Seif and Sam Elgebeily executed a CIBC Small Business Credit Agreement and Guarantee, with respect to the business Zaynluke, on October 25, 2019, which states as follows at paragraph four on page 4:

“Each of the Guarantors agree to the following:

My obligation to CIBC to pay the liabilities of the Business owing to CIBC is unlimited, absolute and unconditional and will not be reduced for any reason... (Emphasis added).

Security Agreements

[19] Seif and Sam Elgebeily also executed, on behalf of Zaynluke, two Security Agreements on August 12, 2019. The first grants a security interest in favour of CIBC in specific personal property of Zaynluke. The second grants a security interest in favour of CIBC in all personal property of the Zaynluke.

[20] Section 10 of both Security Agreements contain events of default, including the following in section 10(1)(d):

(d) the Customer ceases or threatens to cease to carry on in the normal course the Customers business or any material part thereof;

Demand for Payment

[21] In her Affidavit, Ms. Mitchell confirmed that CIBC demanded that Zaynluke, Seif Elgebeily and Sam Elgebeily pay the indebtedness of Zaynluke to CIBC pursuant to the Credit Agreement, and she attached to her affidavit copies of demand letters dated April 21, 2021 and sent by Gowling WLG, counsel for CIBC, to each Defendant. The letter to Zaynluke warned that unless arrangements for payment were “received by our office” by May 6, 2021, CIBC would commence litigation to recover payment in full. The letters to the individual Defendants warned that if they did not make satisfactory arrangements “with our office” immediately to have the indebtedness paid, CIBC would commence litigation against them.

[22] Ms. Mitchell confirmed, in her affidavit, that the indebtedness has not been repaid. She stated that, as of October 27, 2021, the amount owing on the Credit Agreement, including interest, was \$288,293.79.

[23] Ms. Mitchell was cross-examined on her Affidavit. In her cross-examination, she confirmed that, when Mezza terminated the franchise agreement with Zaynluke, CIBC demanded that the Defendants repay the loan in full because the company had ceased to operate the restaurant.

Evidence of the Defendants

[24] In response to the motion for summary judgment, the Defendants filed three affidavits: an affidavit of their legal counsel, Duncan H. MacEachern, an initial affidavit of Sam Elgebeily and a supplemental affidavit of Sam Elgebeily.

[25] In a decision delivered orally on September 22, 2023, I struck all but four paragraphs, and a portion of two paragraphs, of the 31 paragraphs in Mr. MacEachern's affidavit. I struck all but paragraphs 1-3 and paragraph 16, bullets 1, 2, 13 and 15 of the initial affidavit of Sam Elgebeily.

[26] Paragraphs 1, 2, and 3 of the Affidavit of Mr. MacEachern are not substantive. In those portions of the Affidavit, Mr. MacEachern states that:

- The Defendants are currently involved in litigation regarding a franchise dispute with Mezza.
- There is no dispute that on March 10th, 2021, there was a termination of two franchise agreements by Mezza.
- On October 27th, 2021, correspondence was directed by counsel for CIBC indicating the Plaintiffs would proceed with litigation.

[27] In the remaining paragraphs of Sam Eligibility's Affidavit, he says that:

- Mezza terminated its franchise agreement with Zaynluke on March 10, 2021.
- In June of 2021, CIBC refused to accept payments on the loans.

[28] In the supplemental affidavit of Sam Elgebeily, he says that:

- In June of 2021, CIBC refused to accept payments on the loan.
- He continued to try to make payments on the loan but their bank representative, Jenna Gerrow of CIBC, said that CIBC had closed their business account, preventing them from making such payments.
- ***No arrangements were ever made for the payment of the debt as CIBC failed to communicate a payment plan or manner of payment method.***

[emphasis added]

[29] During the hearing of the motion for summary judgment, CIBC moved to strike the supplemental affidavit of Sam Elgebeily on the basis of: (1) hearsay, as the affidavit referred to communications from the local branch representative of CIBC to Sam Elgebeily, and (2) irrelevance. I dismissed the motion to strike, with reasons to follow. My reasons for dismissing the motion to strike this affidavit are two-fold:

1. The references to communications from the local CIBC branch representative fell within an exception to the hearsay rule as they were statements of an employee of a party that appeared to fall within the scope of her employment.
2. The assertions that the Defendants were prevented from making payments on the loan because their business accounts were closed appeared to be relevant at the time the motion to strike was made.

[30] It became clear during the hearing that Sam Elgebeily attempted to mislead the court by asserting in his affidavit that “[n]o arrangements were ever made for the payment of the debt as CIBC failed to communicate a payment plan or manner of payment method.” First, during the hearing, counsel for the Defendants confirmed that his clients had never attempted to pay the debt in full but rather had simply tried, unilaterally, to continue to make regular loan payments. Second, it is clear from the demand letters, attached to the Affidavit of Ms. Mitchell, that CIBC had directed the Defendants to make arrangements with Gowling to pay the debt in full.

Genuine Issue of Material Fact?

[31] Counsel for CIBC argued that the Credit Agreement is comprised of the Credit Agreement itself, the Additional Terms appended to the Credit Agreement, the Booklet, and the guarantees. He argued that the Security Agreements do not form part of the Credit Agreement. Ms. Mitchell agreed with this assertion. It is only in the Security Agreements that we see reference to the customer ceasing to carry on the customer’s business in the normal course as an event of default. However, counsel for CIBC readily conceded that the debt was payable on demand under the terms of the Credit Agreement and the guarantees, that is, that CIBC could demand payment of the debt in full at any time and for any reason. In this

case, CIBC had a reason: Zaynlake had ceased to operate the Mezza restaurant because Mezza had terminated the franchise agreement. Counsel for CIBC made much of the fact that the Statement of Claim erroneously claimed that it was an event of default under the Credit Agreement if Zaynlake ceased to carry on in the normal course of business. But CIBC also pleads that the debt was payable on demand under the guarantees signed by the individual Defendants, that all three Defendants defaulted on their agreements with CIBC under the Credit Agreement and the guarantees, that CIBC demanded payment and that the Defendants have failed to pay their indebtedness.

[32] Therefore, the facts material to the claim of CIBC against the Defendants, for the purpose of the motion for summary judgment on the evidence, are as follows:

- Zaynlake is a party to a Credit Agreement with CIBC, pursuant to which CIBC advanced funds in the amount of \$350,000.
- The individual defendants are parties to guarantees with CIBC, pursuant to which they promised to pay the indebtedness of Zaynlake.
- Pursuant to the terms of the Credit Agreement and the guarantees, the debt is payable on demand.
- CIBC demanded payment of the funds from the Defendants.
- The Defendants have not repaid the funds.

[33] The Defendants do not dispute the above-noted material facts.

[34] The Defendants assert that the following facts are in dispute, and that these facts are material:

- CIBC was not entitled to refuse to accept the regular loan payments that the Defendants wanted to make.
- CIBC's attempts to sell the secured assets at below market value were a breach of the duty of good faith contractual performance.
- There is a dispute about whether the security agreements form part of the Credit Agreement.
- There is a dispute about the meaning of "security" versus "General Security."
- The evidence of Mr. Elgebeilly was that he only spent about 10 minutes reviewing and signing the loan documents, and therefore he did not have an opportunity to read them.

[35] None of these facts allegedly in dispute are material. They would not affect the outcome of the claim. With respect to the last point, the Statement of Defence does not say anything about the amount of time that Mr. Elgebeilly had to review and sign the documents.

Question of Law?

[36] There is no question of law to be determined. There is no dispute about the interpretation or application of the relevant terms of the Credit Agreement or Guarantees. The undisputed facts establish that the Defendants are in breach of their contracts with CIBC, as the debt is payable on demand under the terms of the

Credit Agreement and the guarantees, CIBC demanded payment, and the Defendants acknowledge that they have not repaid the loan.

[37] Summary judgment on the evidence must issue in favour of CIBC.

New Claim of Breach of Duty of Good Faith Contractual Performance Related to CIBC Refusal to Accept Regular Payments on the Loan

[38] The Defendants advanced a new argument in their brief and in oral argument: that CIBC breached its duty of good faith contractual performance in exercising its discretion to call in the loan rather than accept regular payments on the loan. The Defendants say that the exercise of discretion was in bad faith because there is no evidence that the Defendants are not able to pay the loan as originally agreed, in regular payments, with the final payment being due in 2029. Counsel for the Defendants acknowledged that the Statement of Defence does not assert that CIBC's decision to demand payment of the debt was a breach of the duty of good faith contractual performance, but says that the court can rely on the evidence adduced at the motion for summary judgment. This claim was not plead and is therefore not material.

Defendants' Request for Discovery

[39] In their brief and in oral argument on the summary judgment motion, the Defendants requested “an opportunity” to engage in discoveries in order to explore possible communications between CIBC and Mezza. Civil Procedure Rule 13.04(6) grants a judge who hears a motion for summary judgment on evidence the discretion to adjourn the hearing of the motion for any just purpose, including to permit necessary disclosure, production or discovery. It would not be just to allow the request of the Defendants to conduct discoveries. The Defendants have failed to establish the relevance of communications between CIBC and Mezza to this proceeding.

Conclusion

[40] Summary judgment must issue in favour of CIBC. The Statement of Defence is set aside.

[41] CIBC is entitled to its costs. Counsel for CIBC addressed the amount of costs in oral argument. Counsel for the Defendants did not. If the parties cannot agree on the amount of costs, I will receive written submissions from CIBC within two weeks of this decision, and from the Defendants within two weeks of receipt of CIBC’s submissions.

[42] Order accordingly. Counsel for CIBC is to prepare the draft order.

Gatchalian, J.