IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *GE Canada Equipment Financing G.P. v. 3068485 Nova Scotia Ltd.*, 2006 NSSC 378

Date: 20061218
Docket: SH 264303
Registry: Halifax

Between:

GE Canada Equipment Financing G.P.

Plaintiff

v.

3068485 Nova Scotia Limited, DRL Coachlines Limited, DRL Vacations Limited and Ruth Roberts-Tetford

Defendants

Judge:	The Honourable Justice M. Heather Robertson
Heard:	September 27, 2006, in Halifax, Nova Scotia
Written Decision:	December 18, 2006
Counsel:	David G. Coles, Q.C. and Jill Graydon, Articled Clerk, for the plaintiff Jason P. Gavras, for the defendants

Robertson, J.:

[1] GE Canada Equipment Financing G.P. (“GE”) seeks summary judgment against the defendant Ruth Roberts-Tetford in the amount of $633,514.44 representing the balance of the monies owing to the plaintiff with respect to a loan originally made to DRL Vacations Limited (“DRL Vacations”) and personally guaranteed by her.

[2] GE had earlier secured summary judgment against the defendants DRL Vacations and 3068485 Nova Scotia Limited (“3068485") a guarantor, for these monies owing. This order for summary judgment was granted by me on August 1, 2006.

[3] GE did not succeed in securing an order for summary judgment against the defendant DRL Coachlines Limited (“DRL Coachlines”), as per my decision dated December 15, 2006.

THE AGREEMENTS:

[4] GE Canada is a business name registered by 3072427 Nova Scotia Company registered under the laws of Nova Scotia with its registered office in Halifax. Bruce Rutherford is the Senior Manager - Atlantic Canada for GE. His affidavit dated August 24, 2006, sets out the details of and appends the security documentation as between GE and the defendants.

[5] By agreement dated February 6, 2003, DRL Vacations borrowed the amount of $5,923,000.00 at an interest rate of 6.9% from GE Canada to purchase 95 international conventional passenger school buses. This Equipment Loan and Security Agreement dated February 6, 2003 (the “Loan Agreement”) is attached to the Exhibit of Bruce Rutherford at Exhibit “A.” The serial number of the 95 school buses, “the security interest” are appended to the agreement as Schedule “A”, although the Schedule mistakenly references 72 passenger buses. The borrowing resolution of DRL Vacations of the same date is found at Exhibit “B” to the Rutherford affidavit. It is executed by Ruth Roberts-Tetford as President of the Company.

[6] 3068485, DRL Coachlines and Ruth Roberts-Tetford all signed separate guarantees, guaranteeing the indebtedness of DRL Vacations to GE Canada. Ms.

Roberts-Tetford's guarantee is found at Exhibit "C" to the affidavit of Bruce Rutherford. It is dated February 6, 2003.

[7] Subsequently, all of the defendants, 3068485, DRL Coachlines, DRL Vacations and Ruth Roberts-Tetford entered into a Supplemental Equipment Loan and Security Agreement ("Supplemental Agreement") with the plaintiff dated March 23, 2005. The parties acknowledged at that time that the total balance outstanding plus interest was $3,770,592.59 and that the interest rate applicable was 7.15% on the outstanding balance. This document is found at Exhibit "D" of the affidavit of Bruce Rutherford. Ruth Roberts-Tetford signed this document as Guarantor in her personal capacity. It references the original Equipment Loan and Security Agreement. It does not reference the sale of school buses or list in an appendices the serial numbers of the remaining equipment that forms the security interest of the Supplemental Agreement

[8] Following that, on August 29, 2005 an Amended Supplemental Equipment Loan and Security Agreement was entered into by all the parties (the "Amended Supplemental Agreement") wherein it was acknowledged that the balance outstanding plus unpaid accrued interest was $1,418,153.36 with no change in interest rate. A copy of the Amended Supplemental Loan and Security Agreement is found at Exhibit "E" of the affidavit of Bruce Rutherford. Ms. Roberts-Tetford signed this document as a Guarantor. Again, there is no reference to the sale of the school buses, the security interest, or an identification of the buses by serial number in an appendices.

[9] In January of 2006, GE Canada agreed to release its security interest in all the school buses so that they might be sold by DRL Vacations for the amount of $877,800.00. The parties then entered into an agreement entitled Acknowledgement and Agreement dated the ____ day of January, 2006 found at Exhibit "F" of the affidavit of Bruce Rutherford.

[10] This document contains various recitals.

[11] The first recital references the Agreement to finance the purchase of 72 passenger school buses. Counsel agree that this reference is in error and should again read 95 buses.

[12] The second recital references the original Equipment Loan and Security Agreement dated February 6, 2003 and the two subsequent Supplemental Equipment Loan and Security Agreements dated March 23, 2005 and August 29, 2005.

[13] Recital number three references the separate guarantees executed by the defendants.

[14] Recital number four says as follows:

> The Buses are to be sold by DRL and the proceeds from the sale in the amount of $877,800.00 (the “Proceeds”) will be insufficient to satisfy DRL’s indebtedness to GE under the Agreement.

[15] This document further sets out that DRL Vacations and the Guarantors would remain liable to the plaintiff for the balance of the indebtedness in the amount of $633,514.44 plus costs of $2,000.00. This amount was to be paid on or before 12:00 noon on Monday, January 30, 2006 and that if not repaid in full on that date, the loan would be deemed to be in default and GE Canada would be entitled to take such further action as it deemed appropriate. The signator to this Agreement on behalf of the three companies is Javis Roberts. Ms. Roberts-Tetford's signature to this acknowledgement appears on a single page bearing the same document number in the lower left-hand corner as the earlier corporate signature page. A copy of GE's release is found at Exhibit "G". The balance of the loan was not paid by the deadline of January 30, 2006.

PLEADINGS:

[16] On March 30, 2006, GE Canada sued DRL Vacations, 3068485, DRL Coachlines and Ms. Roberts-Tetford jointly and severally for special damages in the amount of $633,514.44, representing the balance of the loan owing to GE Canada, special damages in the amount of $2,000.00, representing costs pursuant to the Agreements, interest on all damages, and costs.

[17] On April 25, 2006, Javis Roberts filed defences on behalf of 3068485, DRL Coachlines and DRL Vacations and Ms. Roberts-Tetford. He described himself as "an officer for these (corporate) defendants."

[18] The nature of the joint defence filed contains a standard denial and alleges that the plaintiff either innocently or negligently misrepresented the nature of the documents to be executed and in doing so induced the defendants to execute Guarantees and that the defendants did not understand that they were executing Guarantees and were pressured by the plaintiff into signing Guarantees. They further allege the underlying security documents were invalid and not properly executed and that the plaintiff breached a "duty to inquire" by failing to advise the defendants to retain independent legal advice.

[19] On June 14, 2006, an amended defence on behalf of Ms. Roberts-Tetford and DRL Coachlines was filed by their counsel Jason Gavras.

[20] The nature of the defence carries a standard denial and alleges that Ms. Roberts-Tetford is the sole shareholder of DRL Coachlines and was resident in Newfoundland at all material times when the security documents were executed. She pleads that she was never advised by GE of the nature and meaning of the documents she signed, the terms of the documents, nor was she advised to seek independent legal advice. She says that she only received the final "signing" page of the security documents by facsimile in Newfoundland and was not provided with the full document to review prior to signing. She pleads *non est factum* and further says that there was no fresh consideration at all flowing to her in return for signing the documents and that they are not therefore legally binding. And further, Roberts-Tetford says that she only learned of the nature of the Guarantee documents upon being sued in the action.

LAW AND ARGUMENT:

[21] The parties agree that the test for summary judgment is well settled. The onus is on the applicant to show there is "no genuine issue of material fact requiring trial." Once the applicant has discharged this burden the defendant must demonstrate that it has *bone fide* defence and a real chance of success at trial.

[22] It is the plaintiff's position that there is no factual issue requiring trial, as Ms. Roberts-Tetford signed an absolute and unconditional and continuing Guarantee of the indebtedness of DRL Vacations on February 6, 2003.

[23] Further, Mr. Coles submits that in her evidence before the court, she acknowledged having received this document in its entirety and understood the nature of her continuing Guarantee.

[24] The Guarantee document also provided that the obligation should not be released or limited in any way and that GE may grant time, renewals, extensions, releases, waivers and discharges or substitutions or amend any of the financial instruments without affecting the liability of the Guarantor.

[25] In particular, he relies on the clauses of the agreement that establish that the guarantor remains obliged even in the event of further agreements, documents, modifications, extensions or renewals. The Guarantee also provides that it shall be enforceable even in the face of any failure on the part of GE. The document provided that the guarantor waived notice of acceptance of the guarantee and of the extension or continuation of the obligation and waived receipt of any financing change statements.

[26] Both counsel agree that the effect of Clause 2.1 of the Guarantee is to make Ruth Roberts-Tetford a principal obligor/debtor.

> 2.1. Guarantee
>
> The Guarantor hereby irrevocably and unconditionally guarantees and covenants with GE as principal debtor of GE and not merely as surety, that the Obligor will duly and punctually perform all of the obligations, and pay or cause to be paid to GE ...

[27] Counsel for Ms. Roberts-Tetford says there are arguable issues of fact requiring trial. Specifically he acknowledges that Ms. Roberts-Tetford signed the Guarantee of February 6, 2003. However, he submits that GE requested her signature on the Supplemental Equipment Loan and Security Agreements (Exhibits "E" and "F" to the affidavit of Bruce Rutherford) without telling her of the sale of 55 buses, which was so obviously a material change to the underlying security. They argue she was entitled to notice as a principal debtor and guarantor.

[28] Ms. Roberts-Tetford in her evidence expressed some confusion as to whether she had actually seen these Supplemental Security Agreements, although she agreed that her initials found on each page of the Agreement dated August 29,

2005 (Exhibit “F”), obviously indicates she was in possession of that document, even if she did not read it.

[29] The Guarantor’s clause of the Supplemental Agreements state:

> The undersigned guarantor(s) or surety(s) of the Client respecting the Original Contract, acknowledge(s) receipt of a copy of this Supplemental Equipment Loan and Security Agreement, accept(s) all the amendments and supplements to the Original Contract and confirm(s) that the execution, delivery and performance of the Equipment Loan and Security Agreement in no way discharges, limits, modifies, amends or novates its (their) joint and several obligations under the Original Contract, all of which remain in full force and effect.

[30] In light of the defendant’s position that GE had an obligation to notify Ms. Roberts-Tetford as a principal debtor and guarantor of the sale of the underlying security interest, the time of the sale of the buses is of some significance.

[31] The original loan of February 2003 was in the amount of $5,923,000.00 and was made so that DRL Vacations could purchase 95 school buses.

[32] These buses were sold over a period of time apparently to reduce the indebtedness of DRL Vacations to GE.

[33] I rely on the evidence of Bruce Rutherford as to the timing of the sale of these buses.

[34] He indicated to the court that 50 buses were sold in early 2005 and that this corresponds with the Supplemental Loan and Equipment Agreement dated March 23, 2005, showing the indebtedness reduce to $3,770,592.59.

[35] Mr. Rutherford testified that the believed another 10 buses were sold by mid 2005 and that by August 2005 there remained only 35 buses to coincide with the Supplemental Loan and Security Agreement dated August 25, 2005, wherein the debt had then been reduced to $1,418,153.36. He indicated that a major portion of the funds from the sale of the buses went to retire the debt to GE. This would be consisted with the supplemental equipment loan balances.

[36] By January 2006, when the Acknowledgment and Agreement was prepared by GE most of the fleet of buses had been sold. That Agreement references for the first time the sale of school buses. In Clause 4 it states:

> The Buses are to be sold by DRL and the proceeds from the sale in the amount of $877,800.00 (the "Proceeds") will be insufficient to satisfy DRL's indebtedness to GE under the agreement.

[37] I take note from Mr. Rutherford's evidence that the final 35 buses when sold for $877,800.00 left the outstanding balance of $633,514.44 and upon default of payment of this sum GE made the demand upon the defendant Ms. Roberts-Tetford.

[38] Mr. Rutherford also testified that he never had any direct communication with Ms. Roberts-Tetford. He testified he had not sent her any documentation and was told that the lawyer sent it to her. He testified that the only direct communication that GE had with her was when he sent demand letters dated January 26, 2006 to her after DRL Vacations defaulted on the balance of the loan.

[39] Ms. Roberts-Tetford testified that she was not aware of the sale of buses by DRL Vacations.

[40] The defendant relies on a line of authorities, which relieve the guarantor of its obligation for the principal debt, where there has been significant change to the underlying security without notice to the guarantor or surety.

[41] In *Manulife Bank of Canada v. Conlin* S.C.C. 1996 CarswellOnt 3941; 6 R.P.R. (3d) 1, 30 O.R. (3d) 577 (note), 94 O.A.C. 161, 203 N.R. 81; [1996] 3 S.C.R. 415, 139 D.L.R. (4th) 426, 30 B.L.R. (2d) 1, the guarantor fell into that class of accommodation sureties where a mortgage contract had been altered by the creditor and the principal debtor without notice to the surety, in the absence of an express agreement to the contrary; the renewal agreement could not therefore be enforced against the guarantor in the circumstance. The guarantor spouse had signed the original mortgage document, but after separation from her spouse had no knowledge of the renewal.

> Per Cory J. (La Forest, Sopinka and Major JJ. concurring) The principle that a guarantor will be released from liability on a guarantee in circumstances where

> the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor has been established for a long time. The basis for the rule is that any material change in the principal contract will result in an alteration of the surety's risk. While a surety can contract out of the protection provided by the common law or equity to the guarantor, such contracting out must be clear. Whether a surety remains liable is to be determined by an interpretation of the contract between the parties, the intention of the parties, and all of the circumstances surrounding the transaction. If there is any ambiguity in the guarantee, the document should be construed in accordance with the contra proferentem rule. As a favoured creditor, a surety's obligation should be strictly enforced. The guarantor in this case was not a compensated surety, and fell within the class of "accommodation sureties." Any doubt or ambiguity was to be strictly interpreted, and resolved in favour of the guarantor.

[42] The court addressed the issue of the guarantor as a principal debtor in para. 19:

> In Canadian Imperial Bank of Commerce v. Patel (1990), 72 O.R. (2d) 109 (H.C.), at p. 119, it was held that a principal debtor clause converts a guarantor into a full-fledged principal debtor. I agree with this conclusion. If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. This conclusion does not require recourse to equitable rules regarding material variation of contracts of surety. It is simply apparent from the contract that a principal debtor must have notice of material changes and consent to them. Of course, a guarantor who, by virtue of a principal debtor clause, has a right to notice of material changes, may, by the terms of the contract, waive these rights. However, in the absence of a clear waiver of these rights, such a guarantor must be given notice of the material changes and, if he is to be bound, consent to them.

[43] In *Johns-Manville Canada Inc. v. John Carlo Ltd.,* 1983 CarswellOnt 182; 46 C.B.R. (N.S.) 177, (sub nom. *Citadel General Assurance Co. v. Johns-Manville Canada Inc.)* [1983] 1 S.C.R. 513, 1 C.C.L.I. 55, 1 C.L.R. 169, 147 D.L.R. (3d) 593, 47 N.R. 280, [1983] I.L.R. 1-1661, a distinction between accommodation sureties and compensated sureties was made. A material variation to the terms of the guarantee without notice to the accommodation surety discharged them from liability. The Court adopted the *strictissimi juris* construction of the surety contract.

[44] The defendant further relied on *Canadian Imperial Bank of Commerce v. Patel,* 1990 CarswellOnt 913, 66 DLR (4th) 720, 72 O.R. (2d) 109, wherein guarantors were determined to be principal debtors pursuant to the interpretation of the bank's security documents.

[45] In *Guinness Tower Holdings v. Extranc Technologies Ltd.*, 2004 CarswellBC 591, 2004 BCSC 367, 21 R.P.R. (4th) 155, [2004] B.C.W.L.D. 819, material changes to a lease agreement made without the knowledge or consent of the guarantor were found to be significant changes material to risk, relieving the guarantor of liability. At para. 19 the court addressed the issue of the guarantee clause which provided that the guarantor would be bound by "any amendments to the lease."

> If the change is material, i.e. it increases the risk to the guarantor, he must be given notice unless he has specifically contracted for the particular provision. For example, if the lease provided that the rent would be $25,000 per year and would be increased to $35,000 after five years, the guarantor would be bound because he had notice. The clause in this guarantee provided that the guarantor would be bound by "any amendment to the lease". In spite of such a clause, equity will relieve the guarantor of his obligation where the material changes have been made unless he consents. If the changes are minor and ones which a compensation guarantor would reasonably anticipate, he may continue to be bound. The changes here go too far.

[46] In that case, the lease amendment disallowed the training of ESL (English as a Second Language) students on the premises, a change that was significant and material to the risk.

[47] In *Toronto Dominion Bank v. Calderbank*, 1983 CarswellBC 335, 49 B.C.L.R. 168, (*sub nom. Toronto Dominion v. Rooke*) 24 B.L.R. 124, 3 DLR (4th) 715, similarly found that a non disclosure by the plaintiff bank amounted to a misrepresentation and voided the guarantee.

[48] Each of these cases rest on their facts. The plaintiff's counsel has argued that these cases can be distinguished from the circumstances of this case because Ms. Roberts-Tetford contracted out of any requirement for notice.

[49] The defendant's view is that the exculpatory clauses contained in the guarantee cannot be interpreted against this defendant in the circumstances of this case because of the sale of the school buses without notice to her.

[50] I am troubled by the sequence of events that occurred after August 2005. DRL Vacations ceased to make any further payments to GE and were in default when GE prepared a document (the Acknowledgement and Agreement). The "proceeds" of sale referenced in the Agreement is the first indication that the fleet of buses has been sold and is released by GE under the *Personal Property Security Act* for Nova Scotia and Newfoundland. The proceeds in the amount of $877,800.00 is not explained and does not reflect an accounting of the sale of the fleet of buses throughout 2005. Yet, Ms. Roberts-Tetford was for the first time as principal debtor and guarantor being asked to acquiesce to these arrangements.

[51] As we know from Mr. Rutherford's evidence all but 35 buses had been sold and were the only security interest remaining.

[52] I am also troubled by GE's failure to communicate directly with Ms. Roberts-Tetford during 2005 when these events were unfolding.

[53] A defendant should not be denied the right to trial unless it is very clear that there are no issues of material fact requiring trial and that no *bona fide* defence has been presented. The court recognizes that there is a low threshold in establishing an arguable issue for trial.

[54] I am persuaded by Mr. Gavras' argument and by the evidence before me that there are arguable issues concerning material change and alteration of the surety's risk and the requirements of notice to the guarantor of these changes, that may effect the nature or enforceability of the defendant's original guarantee.

[55] In the result, the application is dismissed. The plaintiff has not made the case for summary judgment at this time.

Justice M. Heather Robertson