

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Nova Credit Union Ltd. v. Dunn, 2010 NSSM 55

Between:

Nova Credit Union Limited

CLAIMANT

- and -

GREGORY DELSWORTH DUNN AND PAULETTE SALLY DUNN

DEFENDANTS

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: August 31, 2010

Decision: September 7, 2010

The Claimant was self represented Gerry Latta
The Defendant was represented by Bill Scerrett

Parker:- this matter came before the Small Claims Court and concerned a personal guarantee of the defendants on a term loan for the defendant's business, Creating Dinners Inc. The amount being claimed as being in default under the loan and therefore under the guarantee was \$24,493.82.

The defendants in their defense stated "...while negotiating the business loan with the claimant they asked the claimant if the Nova Scotia Small Business Financing/Loan Guarantee will apply covering their loan if the business failed, thus avoiding risking their personal assets. They were constantly assured by the claimant the program was for that purpose and would cover 75% of the loan in case of default."

The defendants stated they "ask for but never received a copy of the Provinces Business Financing/Loan Guarantee Program Agreement. They still continue to ask for the documents, but to no avail. The claimant has not disclosed the documents or allowed the defendants to meet the officer in charge of the program at the Province.

The original capital loan was \$35,000.00 and the defendants reduce this to \$24,493.00 while in business. They also paid 1% per year to the Province of Nova Scotia to ensure the loan in case of default."

The defendants stated in their written backgrounds summary to the court that "given the implied intent of a 25% Provincial Loan Guarantee and the fact that the defendants paid yearly insurance on the loan, they feel they owe 25% of the outstanding balance-\$6123.45- which they are prepared to pay immediately".

The defendants stated they "agree they signed a personal guarantee, but with the understanding and because of oral statements from the claimant, that the small business financing/Loan Guarantee Program would cover all but 25% of the loan loss there was a defaulted."

The defendant specifically state in their Defense:

"The terms of the Small Business Financing Loan/Guarantee Program were misrepresented and never supported with documents. Assurances were given by the claimant that the loan guarantee would cover 75% of the losses if they occurred. The lender claimant was required to exercise good faith and fair dealing in their contractual

dealings with the defendants which they did not. By not disclosing the details and by not providing the defendants with the loan guarantee contract the claimant engaged in unjustified actions which unfairly led the defendants to assume they had loan assurances covering 75% of all possible loan default."

The claimant "gave oral modifications of the underlying written personal loan guarantee agreement, which was an unfair practice and bad faith and all aspects of the lending arrangement. By doing so the credit union induced a material breach of the underlying personal guarantee agreement. The principal purpose of entering into the guarantee by the defendants was frustrated by the lack of disclosure by the claimant about that 75% loan guarantee and which was a basic assumption by the defendants on which the loan was made. The loan guarantee program was used as an inducement for the defendants to borrow money from the claimant."

In summary the defendants stated the claimant in relation to the defendants,

- "Misrepresented the small business financing/loan guarantee program through oral and written communication, which breached the underlying personal guarantee agreement.
- Exercise bad faith and poor dealings in the contractual dealings by not disclosing the details of the small business financing/loan guarantee program.
- Withheld documents and information about the provincial loan/guarantee program but used it as an inducement to secure the loan."

The defendants therefore request that the Small Claims Court deny the claim of the claimant, and that the defendants immediately honour their 25% obligation of \$6123.45 to the claimant.

The Defendants rely on a brochure From the Canada Business website and from a brochure of the claimant credit union which states:

"Will I need to give personal security or guarantees to the credit union? Yes. The credit union will evaluate your loan request by following regular credit lending criteria. This will include an assessment of your personal net worth. If your application does not fit normal lending criteria, but the credit union feels your business has potential for success, the credit union can apply for a loan guarantee to offset this risk. The maximum amount of the loan guarantee supplied by Nova Scotia economic development, to offset their risk will be 75% of the value of the loan, up to a maximum of \$150,000.00"

The defendants also rely on the representations made by Gerry Latta of the claimant credit union. The defendant in their defence stated there were misrepresentations. In reviewing the evidence of Gregory Dunn he stated that Mr. Latta did not explain that it was a 75% guarantee for the credit union. He said we paid for the insurance that is the 1% and he said the credit union should be paying the 1% [to the government] not me." Mr. Dunn said in response to Mr. Latta "I think you should be more responsible for the people." Mr. Dunn said that the first time that he knew he was responsible for not 25% of the loan to the company rather the full amount of the loan was when demand for payment was made and he was told by Mr. Latta at that stage what he and his wife would be responsible to pay back pursuant to the personal guarantee they signed. He said this came as a great shock to him and he just couldn't believe it.

Mrs. Dunn who also signed the guarantee, teaches management students at Dalhousie University and she has her Masters in Business Administration. She said she has dealt with loans and guarantees in every course she studies. Mrs. Dunn said that they went to the Canadian Business Development bank and were told that because of the loan guarantee program they should contact the credit union which they did. She said she knew about the Nova Scotia loan guarantee program. She said when she met with Gerry Latta we were told not to worry about the personal guarantee, we had these

conversations. She said if anything happened Nova Scotia would cover 75% and we would owe 25% of the loan to the company. She said it was not explained it should be made clearer in the documents.

Gerry Latta told the court that he provided the defendants with a proposed credit arrangement in writing which outlined the credit arrangements for the company Creating Dinners Inc. and this was given to the defendants well in advance of any loan which was provided to them. This proposed credit arrangement outlines that guarantees and postponement of claims are required from both defendants as well as additional security. The defendants acknowledged as well as the claimant that all documentation was provided to the defendants and that they had an opportunity to contact a lawyer concerning this documentation before it was executed and they chose not to do so.

The law with respect to contractual obligations in particular written contractual obligations is clear that unless there is ambiguity within the contract, parole or verbal evidence as to what was meant concerning the specific terms and conditions the contract would not be admissible in order to change or vary the contract. However this does not include misrepresentations. If there were misrepresentations it could well indeed vitiate the contract. In this particular case it is unclear from the evidence of the defendants that the claimant's representative Gerry Latta outright clearly confirmed to them that their personal guarantees would be limited guarantees. Mr. Latta in his evidence could not recall details of any conversations he had with them with respect to the guarantee. He did say on cross examination that we discussed the documentation on several occasions and he does not remember the specific question being asked of him as to a limitation on the guarantee. He said "I am sure I did tell them the 75% was a government guarantee for the credit union. I am sure I would represent the way the loan works."

Mr. Latta is manager of commercial loans with the credit union for the last five years and has been in banking for 40 years, 28 which was with CIBC and the rest with credit union Atlantic and the current claimant in this action. He said that the claimant has 150 loans under the program and this is the first time this has come forward as it has. That may be

so but the fact that Mr. Latta has extensive experience in this area leads to the credibility of the statement that he explained the loan arrangement and securities acquired under the loan. The defendant's main argument is that it was never clearly explained to them. This is somewhat different than their stated defense in their pleadings where it is suggested there was clear misrepresentation. Further in the brochures they provided the court, clearly indicates that they are going to be signing personal guarantees in order to get the loan.

There is no evidence before me of dishonesty, bad faith or lack of good faith or a failure to disclose material facts to the defendants. Based on the documentation there was full and frank disclosure with respect to this loan and with respect to the guarantees attached to the indebtedness of the company. I also accept the fact that Mr. Latta and experience commercial lender manager did explain terms of the loan and the guarantee.

It Is Therefore Ordered that the defendants jointly and severally pay the claimant the following sums:

\$24,493.82

\$ 179.36 court costs

\$24,673.18 total

Dated at Halifax this 7th day of September

2010