Claim No: 370612

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Floors Plus v. Cleveland, 2012 NSSM 15

BETWEEN:

FLOORS PLUS (A DIVISION OF INSTALL-A-FLOR LTD)

Claimant

- and -

WAYNE CLEVELAND
and CAREFREE CONTRACTING LTD.

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on April 24, 2012

Decision rendered on April 26, 2012

APPEARANCES

For the Claimant	Pat Gibson, Owner
For the Defendant	Nancy Cleveland (daughter of Defendant Wayne Cleveland)

BY THE COURT:

[1] This is a claim for unpaid invoices for flooring products sold by the Claimant to the Defendants. The amount claimed of $6,754.73 is not in dispute. The only question is whether or not the Defendant Wayne Cleveland should be held legally responsible for the debt.

[2] Wayne Cleveland ("Wayne") was represented at the hearing by his daughter, Nancy Cleveland, who has been employed by her father in the Carefree Contracting business ("Carefree"). Wayne is the owner of Carefree, which has been in the business of doing restoration work on behalf of insurance companies, for example, replacing flooring after a flood. Carefree is apparently out of business at this time, and has several judgments against it that lend doubt to whether or not it has any ability to pay the Claimant's bill.

[3] The Claimant contends, however, that it has a valid claim to hold Wayne personally responsible for the debt. It bases this claim on two theories:

a. It contends that Wayne was from the outset personally "on the account" and as such is responsible; and

b. It says that Wayne verbally guaranteed payment when it appeared that Carefree was slow in paying its bills, and without that guarantee it would not have continued to supply product to Wayne and Carefree.

The names on the account

[4] The evidence of who was “on the account” is a bit unclear. There is no account opening document. Al that we see are invoices, which are made out to:

> Attn: Nancy/Wayne Clevelan
> Carefree Contracting Ltd.
> [address]

[5] The missing “d” at the end of Cleveland is a function of the fact that the invoice printer cannot print beyond a particular point. I attach no significance to this.

[6] Nancy Cleveland was surprised to see her own name on the invoices, as she did not regard herself as being personally responsible for the account. She suggests that the reason to have the individual names there was to prevent employees of Carefree ordering materials, as there had been a problem in the past with materials going missing.

[7] The word “attention” most often indicates someone to whom documents or things are to be directed, to speed things up and ensure that they reach the person whose job it is to deal with such documents or things. For example, in a larger company it might be directed to an accounts payable clerk. It would be ludicrous to suggest that such clerk became responsible for the account just because there was a notation that accounts be directed to him or her.

[8] If this were the only factor relied upon by the Claimant, I would not find that it imposed personal liability on Wayne. However, it must be regarded together with the other facts of the case.

Personal guarantee

[9] The evidence offered by Ms. Gibson was that on several occasions, Wayne was told that his account would be closed and he would no longer be allowed to order material, because Carefree was not paying its bills in a timely manner. According to Ms. Gibson, Wayne reassured her that he would make sure the Claimant was paid and that she should not be concerned. He shook her hand. On the strength of that promise, goods continued to be delivered and the account then fell into arrears.

[10] The question is: is that enough to render Wayne personally liable? I reserved my judgment after the hearing, because I wanted to think through the legal theories that might apply.

[11] Where someone alleges that a person has guaranteed the debt of another, the law has typically required that there be written evidence of such a guarantee before a court will step in and enforce the obligation. This legal principle is enshrined in the *Statute of Frauds*, R.S. c.442, a piece of legislation that dates back to seventeenth century England, and which exists in substantially the same form in most provinces of Canada and throughout the common law world. The relevant part of the current version in Nova Scotia provides as follows:

> 7 No action shall be brought .....
>
> (b) whereby to charge any person upon any special promise to answer for the debt, default or miscarriage of another person; .....
>
> unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to

> be charged therewith or by some other person thereunto by him lawfully authorized.

[12] The statute covered not only guarantees but many other kinds of agreements, most famously being contracts for the sale of land. To this day, a verbal promise to buy or sell land is unenforceable in almost all situations.

[13] However, in the case of guarantees, over the centuries, courts have shot many holes through this principle, recognizing various exceptions. Some of those exceptions include:

a. "Part performance" is the principle that where one party has fulfilled part of the bargain, in reliance on an otherwise unenforceable agreement, it should not be defeated by the technicality. This principle also recognizes that one party's part performance is powerful evidence that there was a binding contract, and not just pre-contract discussions.

b. "Novation" is a concept that when the guarantor comes forward to offer a guarantee that might be unenforceable as such, in actual fact he or she has made a new contract to be primarily liable on the same terms as the original contract. Since a contract for goods and services (as opposed to a guarantee) does not have to be in writing, the *Statute of Frauds* does not stand in the way.

c. Some cases have made a distinction between a so-called "special promise to answer for the debt, default or miscarriage of another person" - which basically points to a third-party guarantee by a seemingly disinterested party - and an indemnity where the person giving his promise is more intimately involved in the transaction. (See the BC Supreme Court case *Lindstrom Construction Ltd. v. Capozzi Enterprises Ltd.* 1992 CarswellBC 840, 50 C.L.R. 37 for a fuller history of the exceptions to the *Statute of Frauds*.)

[14] On the evidence here, which was not contradicted because Wayne was not present to testify, I believe that his promise to make sure that the Claimant

would be paid amounted to a novation, or a new contract. It is arguable, though not conclusive, that Wayne was personally responsible from the outset because of the way that the account was set up, but the later discussions leave open no question that the Claimant was looking directly to Wayne for payment, and that without his promise to pay there would have been no continuing relationship.

[15] I believe it is also established that there was part performance by the Claimant when it continued to supply product in reliance on Wayne's promises.

[16] As such, for more than one reason, the *Statute of Frauds* does not apply and the agreement to hold Wayne personally responsible is enforceable.

[17] There will accordingly be judgment for the Claimant in the amount of $6,754.73, enforceable as against both Defendants jointly and severally. The Claimant also seeks its costs to file the claim and serve the Defendants. The service costs are a bit high, because Wayne proved difficult to serve and eventually was served by substituted service. I am prepared to allow these costs, which total $586.82.

Eric K. Slone, Adjudicator