Bank of Montreal v. *Camillus Engineering, et al*, 2004 NWTSC 44

Date: 2004 07 15
Docket: S001-CV-2002000362

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BANK OF MONTREAL

Plaintiff

- and -

CAMILLUS ENGINEERING CONSULTANTS LTD.
and CAMILLUS C. MARIANAYAGAM

Defendants

MEMORANDUM OF JUDGMENT

[1] The Plaintiff has applied for summary judgment against the Defendants pursuant to Rule 174(1).

[2] The Plaintiff's claim against the corporate Defendant ("CECL") is based on a line of credit as set out in a First Bank Operating Agreement ("FBOA") dated November 20, 1997. The claim against the Defendant Camillus C. Marianayagam is based on a personal guarantee dated November 4, 1997 with a maximum limit of $100,000.00. The Plaintiff says that demand was made under the FBOA and the personal guarantee in October 2002 and that as at January 26, 2004 the sum of $73,544.95 is owing jointly and separately by the Defendants.

[3] The Defendants acknowledge that CECL owes the sum of $64,553.00. However, it is their position that the November 20, 1997 FBOA was cancelled by the Plaintiff on September 30, 1999 and that a new credit facility took its place as set out in a Commitment Letter dated October 26, 1999. The Defendants take the position that the only personal guarantee that survived the cancellation of the November 20, 1997 FBOA was a joint guarantee given by Mr. Marianayagam and his wife, which had a maximum limit of $42,000.00. The Defendants say further that the joint guarantee, which was

secured by a Memorandum of Charging Lands on their residence, was paid out on sale of the residence.

[4] The Defendants have filed an affidavit, as required by Rule 176(1), to which are attached a number of documents which appear to indicate that the line of credit was paid out, or was at a zero balance, by July 21, 1999. Due to concerns arising from a change in the risk factor associated with CECL's business, the Plaintiff advised CECL that its line of credit would be cancelled effective September 30, 1999. CECL "appealed" that decision through various processes internal to the Plaintiff, requesting that the line of credit continue, but the September 30 deadline was confirmed. By letter dated September 14, 1999, the Plaintiff's Office of the Ombudsman advised CECL that the situation would be reviewed. There is no evidence before me as to the result of that review. In October 1999, there was correspondence between CECL and the Plaintiff's local branch about an application for a $50,000.00 line of credit with Mr. Marianayagam's house as collateral. I have already referred to the Commitment Letter reflecting that line of credit. There are also a number of "Amendment Agreements" from October 26, 1999 and following that date, which purport to amend the original November 1997 FBOA. The Defendants claim that these Amendment Agreements were drawn up and signed in error and do not reflect the true situation - that there was a completely new lending arrangement after September 30, 1999.

[5] The test on a summary judgment application is whether there is a genuine issue for trial. In *923087 N.W.T. Ltd.* v. *Anderson Mills Ltd.*, [1997] N.W.T.R. 212 (S.C.), Vertes J. observed that subrule 176(1) contemplates that a complete evidentiary record will be before the judge hearing the motion and that the parties must put their "best foot forward" at that time (p.222).

[6] The Defendants have put forward some evidence from which it might be inferred that the 1997 FBOA was cancelled and a new line of credit arrangement entered into, with only the $42,000.00 guarantee carried over as security. It is by no means certain that the inference would be drawn. The subsequent Amending Agreements suggest that the November 1997 FBOA was continued. The Plaintiff asks me to draw the inference that it was continued, in part because the Defendants have not produced any document which specifically shows it to have been cancelled. The Plaintiff also points out that the same account used under the FBOA was referred to in the Amending Agreements.

[7] What inferences should or should not be drawn are in part a matter of interpretation of the documents. The Defendants have also put forward some letters reflecting the discussions had between them and a manager at the local branch about the

arrangements made in October 1999. The Plaintiff has put forward no information about those discussions or what the understanding was or the status of the FBOA as at September 30, 1999, the date on which the Plaintiff had said in correspondence the line of credit would be cancelled.

[8] The Plaintiff did not provide any evidence from the manager at the local branch who dealt with CECL and entered into the arrangements for the $50,000.00 line of credit in October 1999. In order to put its best foot forward, it would seem to me that the Plaintiff must provide evidence about those arrangements and what, if any, steps were taken to cancel the line of credit on September 30, 1999 and enter into a new arrangement.

[9] The affidavit relied on by the Plaintiff regarding the issue of cancellation merely says that the Plaintiff does not make it a practice to cancel a FBOA unless the subject loan is repaid in full. The affidavit says that was never the case for CECL. It also asserts that if the $100,000.00 guarantee had been cancelled, it would have been returned to the guarantor, yet the Plaintiff still has it. This is really evidence of general practice from which an inference may (or may not) be drawn.

[10] The Plaintiff also relies on an affidavit of an account manager, not the individual who dealt directly with the Defendants, and in particular a letter attached to the affidavit, which it submits shows that CECL continued to use the line of credit under the 1997 FBOA after September 30, 1999. The letter in question, however, is from the account manager to counsel and is described in the affidavit as a “spreadsheet indicating the amount owing”. It does not constitute sworn evidence of use of the line of credit.

[11] The Defendants have raised the issue as to whether there was a second line of credit arrangement, secured only by the $42,000.00 guarantee. Although they may very well be unsuccessful at trial, in my view they have put forward sufficient evidence to raise a triable issue as to exactly what the credit arrangements were on and after September 30, 1999. The Plaintiff has not put forward sufficient evidence to persuade me that there is no genuine issue for trial, or that the inferences the Plaintiff asks be drawn are the only inferences that can or should be drawn from the evidence before me on this application.

[12] Based on the admission by CECL that it does owe $64,553.00, the Plaintiff will have judgment against CECL only in that amount. Whether CECL owes more than that and whether Mr. Marianyagam is liable for any of it on the guarantee relied on by the Plaintiff are also issues for trial.

[13] The Defendants sought a declaration for a stay of execution of judgment pending resolution of the litigation in action no. CV 2003000077. However, counsel for the Plaintiff advised that the Plaintiff is no longer a party to that litigation. In any event, no basis for a stay has been established.

[14] In the circumstances, costs will be left to the trial judge.

Dated this 15th day of July 2004.

V.A. Schuler,
J.S.C.

Counsel for the Plaintiff: Douglas G. McNiven

Appearing on behalf of himself
and the Defendant Camillus
Engineering Consultants Ltd.: Camillus C. Marianayagam

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER
