CITATION: Di Martino v. Montana, 2018 ONSC 6964
COURT FILE NO.: CV-17-567680
DATE: 20181121

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Damiano Di Martino, Plaintiff/Moving Party

AND:

Giuseppe Montana a.k.a. Joe Montana, a.k.a., John Montana and Calogera Montana, Defendants/Respondents

BEFORE: H. McArthur J.

COUNSEL: D. Morawetz, for the Plaintiff/Moving Party

T. De Bartolo, for the Defendants/Respondents

HEARD: September 19, 2018

ENDORSEMENT

H. MCARTHUR J.:

Introduction

[1] The plaintiff, Damiano Di Martino, is seeking summary judgment against the defendants, Giuseppe Montana and Calogera Montana, in the amount of $240,000.

[2] This matter arises from a written agreement (the agreement) entered into between Mr. Di Martino and Mr. Montana. The agreement had two distinct components. First, the agreement provided that Mr. Montana would lend Mr. Di Martino $324,000, interest free, to be repaid within seven days. Second, the agreement provided that Mr. Di Martino would lend Mr. Montana $250,000, interest free, by February 1, 2016. Mr. Montana would then have six months to repay Mr. Di Martino.

[3] The agreement provided that "In the event this note shall be in default and placed for collection, then the undersigned agree to pay all reasonable lawyer's fees and costs of collection." The note also provided that "Payments not made within five (5) days of due date shall be subject to a late charge of 20% of said payment."

[4] Mr. Di Martino was unable to lend Mr. Montana the $250,000 by February 1 as agreed. As a result, Mr. Montana had to borrow money (with interest) from other sources. On June 23, 2016 Mr. Di Martino finally provided Mr. Montana with the money. Mr. Montana deposited the money lent to him by Mr. Di Martino into the bank account of his mother, Calogera Montana.

[5] Because of his delay in lending the money, on June 23, 2016 Mr. Di Martino also agreed to pay Mr. Montana $10,000 to cover the interest charges that Mr. Montana had incurred because he had to borrow other money while waiting for Mr. Di Martino to provide his interest free loan. The $10,000 was to be offset against the $250,000 that Mr. Montana had to repay Mr. Di Martino, which repayment was owed on December 23, 2016. Mr. Di Martino believed that meant that Mr. Montana would repay him $240,000.

[6] In December 2016, Mr. Montana advised Mr. Di Martino that he would only repay him $185,000 and presented him with two bank drafts totaling that amount. Mr. Montana explained that in addition to the $10,000 deduction for interest payments that had been agreed upon in June, he was also deducting $5,000 for "collection, legal and administrative expenses". Moreover, he was also deducting $50,000, which represented a 20% "Penalty". Mr. Di Martino would not take the bank drafts and took the position that Mr. Montana owed him $240,000. As result, he brought the action against Mr. Montana.

[7] For the reasons set out below, I find that Mr. Di Martino should be granted summary judgment in his favour. There is no genuine issue requiring a trial. Mr. Montana is obligated to repay Mr. Di Martino $240,000. Ms. Montana is also jointly liable, as she was unjustly enriched.

[8] I propose to briefly address the general framework for summary judgment motions before turning to my analysis of the issues raised.

General Framework for Summary Judgment Motions

[9] Rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that the court shall grant summary judgment if satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. In *Hryniak v. Mauldin*, 2014 SCC 7, at para. 49, Karakatsanis J. explained that there will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the court to make the necessary findings of fact, (2) allows the court to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[10] In considering a motion for summary judgment, the court should first determine if there is a genuine issue requiring a trial based only on the evidence in the motion record. There will be no genuine need for trial if there is sufficient evidence to fairly and justly adjudicate the dispute and summary judgment would be a timely, affordable and proportionate procedure.

[11] If there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the fact-finding powers under rr. 20.04(2.1) and (2.2). Their use will not be against the interests of justice if it will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[12] Both sides agree that this case is one that can be appropriately resolved by way of summary judgment. There are very few facts in dispute and the case largely turns on the interpretation of the agreement.

Analysis

1) Issue One: Does the late payment clause in the agreement apply to the $250,000 loan from Mr. Di Martino to Mr. Montana?

[13] The agreement entered into between Mr. Di Martino and Mr. Montana was somewhat unusual. There were two distinct things provided for in the agreement. First, Mr. Montana was to loan Mr. Di Martino $324,000, interest free. That loan was to be repaid within seven days. Second, Mr. Di Martino was to lend Mr. Montana $250,000 by February 1, 2016. That loan was to be repaid within six months.

[14] As set out above, the agreement provided that "Payments not made within five (5) days of due date shall be subject to a late charge of 20% of said payment."

[15] Mr. Di Martino argues that the late payment clause only applied with respect to the repayment of the $324,000 loan made by Mr. Montano to Mr. Di Martino. The provision of the $250,000 loan that Mr. Di Martino agreed to advance on February 1, 2016, he argues, was not covered by late payment clause. I agree.

[16] Mr. Montana drafted the agreement. Unfortunately, it is far from clear. Among other things, it is unclear whether the late payment clause attaches to the provision of the loan that was to be made by Mr. Di Martino. Looking at the clause in the context of the agreement as a whole, in my view the clause was not meant to apply to the provision of the loan that was to be advanced by Mr. Di Martino. To the extent that the clause arguably could be read as applying to the provision of the loan, it is ambiguous. It is trite law that if there is any ambiguity in the agreement, such ambiguity is to be resolved against Mr. Montana rather than Mr. Di Martino: John D. McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at p. 766.

[17] Moreover, the conclusion that the late payment clause did not attach to the provision of the loan that was to be made by Mr. Di Martino in February 2016 is bolstered by the actions that the parties took subsequently. When Mr. Di Martino finally loaned Mr. Montana the money in June 2016, the parties entered into a new agreement. This agreement provided that Mr. Di Martino owed Mr. Montana $10,000 for the interest charges he had incurred by borrowing money pending the loan from Mr. Di Martino. If the late payment clause applied to the loan the Mr. Di Martino was to make, there would have been no reason for a new or further agreement. That is, if advancing the loan more than five days after February 1, 2016 meant that Mr. Di Martino would have to pay a penalty of $50,000, why would he also agree to pay Mr. Montana an additional $10,000? In my view, he would not.

The late payment clause did not apply to the provision of the loan that was to be advanced by Mr. Di Martino to Mr. Montana.

2) Issue Two: Was Mr. Montana entitled to deduct $5,000 from his repayment?

[18] Mr. Montana also argues that he should be able to deduct $5,000 from the amount he must repay Mr. Di Martino because there was an agreement that "In the event this note shall be

in default and placed for collection, then the undersigned agree to pay all reasonable lawyer's fees and costs of collection".

[19] The difficulty with this position is that the agreement was never placed for collection. Moreover, Mr. Montana was unable to point to any fees he expended in trying to get Mr. Di Martino to loan him the $250,000. While Mr. Montana said he had gas and phone expenses he failed to quantify such expenses. In oral submissions, the position that $5,000 should be deducted from the money owed to Mr. Martino was not strongly pressed. In my view, for good reason. Mr. Montana was clearly not entitled to deduct $5,000 from the money that he owed to Mr. Di Martino.

3) Issue Three: Is Ms. Montana jointly liable to Mr. Di Martino because she was unjustly enriched?

[20] There is no dispute that the $250,000 provided by Mr. Di Martino to Mr. Montana was deposited directly into the bank account of Ms. Montana. The money was to be used for her benefit in order to address her tax liabilities. Mr. Di Martino argues that she was unjustly enriched and is thus jointly liable with Mr. Montana.

[21] Ms. Montana counters that Mr. Montana had bank drafts ready to give to Mr. Di Martino and he refused to take the bank drafts. It is unclear to me, however, how the fact that Mr. Montana had bank drafts impacts on an assessment of whether Ms. Montana was unjustly enriched.

[22] The test to establish unjust enrichment is well established: (i) an enrichment to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of a juristic reason for enrichment: *Moreira v. Ontario Lottery and Gaming Corp*, 2013 ONCA 121, at para. 94.

[23] Ms. Montana was enriched, as she received the loan provided by Mr. Di Martino. Mr. Di Martino clearly suffered a corresponding deprivation. Ms. Montana did not enter into a contract with Mr. Di Martino and had no juristic reason for the enrichment. Ms. Montana was unjustly enriched. Thus, Ms. Montana is jointly liable with Mr. Montana to Mr. Di Martino in the amount of $240,000.

Conclusion

[24] The evidence filed on the motion allows me to make the necessary findings of fact and apply the law to those facts. There is no genuine issue requiring a trial. The late payment clause in the agreement did not attach to the loan that was to be made by Mr. Di Martino to Mr. Montana. To the extent that the clause could be interpreted as applying to that loan, it is ambiguous. Mr. Montana drafted the agreement and any ambiguity must be resolved in favour of Mr. Di Martino. Thus, Mr. Montana was not entitled to deduct $50,000 from the money that he had to repay Mr. Di Martino. Moreover, Mr. Montana was not entitled to deduct $5,000 from the money that he had to repay Mr. Di Martino, as the matter never went to collections. Finally, Ms. Montana was unjustly enriched as she received the money from Mr. Di Martino and had no juristic reason for such enrichment. She is jointly liable with Mr. Montana to pay Mr. Di Martino $240,000.

[25] Mr. Di Martino is seeking prejudgment interest in the amount of 10%. Considering the totality of the evidence on the motion, I am not persuaded that this rate is warranted. Prejudgment interest will be in accordance with the *Courts of Justice Act*, R.R.O. 1990, Reg. 194.

Costs

[26] I encourage the parties to see if they can agree on costs. If the parties are unable to agree on costs, the plaintiff shall serve and file with my office written costs submissions within 15 days. The defendants shall serve and file with my office any responding costs submissions within 15 days thereafter. The written submissions shall not exceed three pages in length, excluding the Costs Outline

Justice Heather McArthur

Date: November 21, 2018