CITATION: Lexfund V Ferro, 2015 ONSC 3749
COURT FILE NO.: C-629-10
DATE: 2015/06/10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Lexfund Inc.	)	
Plaintiff	)	Louis-Pierre Gregoire and Alexandra Rosu - Counsel for the Plaintiff
– and –	)	
Lucio Anthony Ferro (aka Lou Ferro) and Ferro & Company	)	
Defendant	)	Jillian Van Allen - Counsel for the Defendant
	)	**HEARD:** June 8 & 9, 2015

Corrected decision: Spelling of counsel's name, Alexandra Rosu, corrected on June 16, 2015.

THE HONOURABLE JUSTICE JAMES W. SLOAN

[1] This is an unfortunate case on many levels. The defendant Mr. Ferro is a senior member of the Hamilton bar. He has serious medical problems, recently made an assignment into bankruptcy and finds himself as a defendant in this and at least one other lawsuit brought by the plaintiff for several million dollars.

[2] In all of the actions brought by the plaintiff, their claim is for the return of money which they loaned to the defendant in his practice as a personal injury lawyer and in essence was to be used to pay for plaintiff's disbursements such as expert reports.

[3] There is a separate loan for each client of Mr. Ferro's, for whom Mr. Ferro sought funding. Each loan was between the plaintiff and Mr. Ferro personally.

[4] Each loan was the subject of a separate loan agreement.

[5] The sections of the loan agreements that the court has to deal with are the same for all six of the loans which are encompassed by this action.

[6] A summary judgment motion was brought before Justice Hambly on September 21, 2012.

[7] Justice Hambly gave Summary Judgment on two loans known as Badini and Bell. Another loan known as Petit was subsequently paid. The only matter outstanding on those three loans is the issue of costs.

[8] Justice Hambly further ordered that the loans known as Fraser, Bilotta and Ryckman would proceed to the trial of an issue.

[9] The issue that Justice Hambly ordered to be tried, was the meaning of "transfer of the client's file" in the loan contracts.

Fraser

[10] Ferro signed the Fraser loan agreement on November 15, 2006.

[11] It is Ferro's position that he retained the law firm of Howie, Sachs and Henry **on May 18, 2010,** to assist him to prosecute these actions and they filed a Notice of Change of Solicitor. Ferro states that he has an agreement with Howie, Sachs and Henry to protect his account.

[12] The amount owing on the loan as of June 15, 2015 will be $110,478.26.

[13] In the Fraser matter, the loan was made on the basis of three actions which were commenced in **1998, 2000 and 2004.**

Bilotta

[14] Ferro signed the Bilotta loan agreement on March 7, 2015.

[15] The client changed lawyers to Aylesworth LLP on **February 2, 2010**.

[16] Upon Aylesworth agreeing to protect his account, Ferro sent them his file, but later upon instructions from Bilotta, Aylesworth withdrew their undertaking and commenced an action against Ferro.

[17] The amount outstanding on a loan as of June 15, 2015 will be $103,579.69.

[18] In the Bilotta matter, the loan was made on the basis of an action commenced in **2003**.

Ryckman

[19] Ferro signed the Ryckman loan agreement on September 15, 2007.

[20] At the direction of his client, Ferro sent his file to a new lawyer on **December 23, 2009**.

[21] At the end of the litigation and after doing some inter-firm accounting (because Ferro owed money for past services to the new lawyer), the new lawyer sent Ferro $9,624.18 which he paid to the plaintiff.

[22] The amount that will be owing as of June 15, 2015 will be $29,796.51.

[23] Although the handwriting on the Ryckman loan document with respect to when the actions were commenced is difficult to read, it appears that there were two actions likely commenced in **1999 and 2005**.

Loan Contracts

[24] With respect to the Fraser, Bilotta and Ryckman loans, the youngest action would now have been in the court system for 10 years, the oldest action for 17 years and the events that precipitated these actions would have taken place even earlier.

[25] The germane parts of the contracts for all six of the loans which are the subject matter of this lawsuit and in particular the Fraser, Bilotta and Ryckman loans are all the same. In the event that the paragraph numbering is different in any of the contracts, I will be referring to the paragraph numbering in the Fraser contract.

[26] Each individual loan agreement refers to a client and the Court file number or numbers.

[27] The defendant Ferro, is referred to as the "Borrower" in each contract.

[28] There are three whereas clauses which set out for the purpose for the loan. They read in part:

> "Whereas the ***borrower is a law firm*** that represents an injured client who has commenced legal proceedings (the "Proceedings") in respect of which the client expect to obtain … a monetary payment…"
>
> "And whereas the borrower requires and will in the future require financial assistance in order ***to fund disbursements*** in connection with these proceedings;"

[29] Maturity date is defined as:

> "…the settlement date following the resolution of proceedings (or any one of the proceedings where there are interrelated proceedings) by way of a final judgment or order, or settlement. However, ***where the client replaces the borrower***, the settlement date shall be that following the ***transfer of the client's file*** by the borrower to the replacement lawyer and law firm."

[30] Settlement date is defined as:

> "the 15th day of a calendar month or, if such day is not a business day, on the following business day"

[31] Paragraph 1.6 under the title Entire Agreement states:

> "this agreement constitutes the entire agreement between the parties with respect to the subject matter and supersedes all prior negotiations, undertakings, representations and understandings, including without limitation, any term sheets.

[32] Under the heading **Article II – Line of Credit** paragraph 2.6 reads:

> "Repayment of Loan; Limited Recourse, The Obligations shall be repaid in full on the maturity date. Any amounts that are not so repaid shall bear interest, including interest on capitalized interest as provided for in this agreement until the settlement date following the repayment in full of all amounts outstanding hereunder. ***Except where the client's file has been transferred by the borrower to a new lawyer or law firm***, recourse of the lender against the borrower for payment of the obligations shall be limited to the recoverable disbursements and fees and the amounts payable thereunder. Provided that this limitation on the lender's rights to enforce the loan evidenced hereby shall in no way be construed (a) to limit or prevent the lender from commencing proceedings against the borrower to the extent necessary to fully enforce and execute against the security, (b) to limit the exercise of the lender's rights under, or the enforcement of, this agreement, or (c) to limit recourse in any way by the lender against any other person in respect of the obligations."

[33] Paragraph 3.1(h) under the heading representations, warranties and covenants of the borrower reads:

> "the borrower hereby agrees that the proceedings shall be conducted **by the borrower.** Should the client wish to replace the borrower, the borrower shall notify the lender in writing of such an intent as well as provide the names of the proposed replacement lawyer and law firm and shall notify the lender forth with upon the client's file being transferred to a replacement lawyer or law firm."

[34] In paragraph 4.1(d) under the heading Events of Default it clearly states that an event of default occurs when:

> "the borrower has failed to notify the lender that the client has replaced the borrower with another lawyer and law firm and or that the borrower has transferred to client's file to another lawyer or law firm."

[35] Under paragraph 4.2 where there is the occurrence of an event of default, "the lender may (but shall not be obligated to) declare all obligations to be immediately due and payable…"

[36] It is obvious that the plaintiff would want to be able to control which lawyer or law firm was prosecuting the file. That would undoubtedly be part of their risk assessment when authorizing the loan.

[37] (Where text has been underlined, bolded and italicized it has been done by me)

[38] The defence raises the following points:

[39] There are three ways in which a file might leave the defendant's office. One would be if the defendant terminated a client, the second would be if the client terminated the defendant and the third would be if the defendant retained counsel to assist with the file/trial.

[40] If I understand the defence correctly, they argue firstly, that all of the amount owing would only be due in the event that the defendant terminated his client.

[41] The defendant argues that the word transfer is not defined in the contract and is therefore ambiguous and such ambiguity should be resolved in favour of the defendant.

[42] The defendant secondly argues that if the loans aren't resolved, that the plaintiff is precluded from asking for payment because he interprets a side agreement that he has with the plaintiff as stating that he does not have to pay back the loan if an action is settled for $50,000 or less.

[43] I will deal with the second issue raised by the defence first.

[44] The issue of a claim being resolved for less than $50,000 is set out in an email exchange which is attached at Tab 1B of Exhibit 4. On September 30, 2006, Ms. Provencher sent an email to Mr. Ferro during the negotiation stage of the loan contracts.

[45] In her email she stated: "We agree that, where a 1st party claim and/or a 2nd party claim is settled before the tort claim for an aggregate of $50,000 or less, we will not insist on the payment of the loan, but this is conditional on your providing either a new assessment that meets our underwriting criteria for approval of loans or confirmation that the assessment or originally provided remains valid."

[46] On a plain reading of the email, the defendant is incorrect that the loan does not have to be repaid if the settlement is less than $50,000.

[47] All the agreement states is that where there are multiple claims and one of the claims settles early for less than $50,000 and **providing certain conditions are met** the plaintiff **may not insist** on the loan being paid back **at that time**. To state it another way the repayment of the loan may be deferred at the option of the plaintiff.

[48] There is no evidence before this court, that Mr. Ferro complied with this agreement by providing either a new assessment or confirmation that the originals assessment remain valid.

[49] Because Mr. Ferro did not comply with the agreement as set out in the email, he could not and did not, receive approval from the plaintiff that repayment of any of the loans would be deferred.

[50] In any event, the Limited Recourse Feature of the loans does not apply where there is a transfer of the client file to another lawyer.

[51] The court can come to no other conclusion than to draw a negative inference from the lack of material supplied by Mr. Ferro to the effect, that such material was not supplied because it would not be helpful to him.

[52] Therefore this aspect of his defence must fail.

[53] With respect to Mr. Ferro's first line of defence, that there is an ambiguity in the word "transfer" in the agreement and in particular paragraph 2.6, I disagree.

[54] The plaintiff's written submissions quote definitions of the word "transfer" from both Black's Law dictionary and the Oxford English dictionary. In my reasons, I rely on the definition of transfer as a verb in Black's Law dictionary which defines transfer as "to convey or remove them from one place or one person to another".

[55] This agreement was negotiated between two sophisticated parties.

[56] With respect to the Bilotta and Ryckman loans, it makes no difference whether the clients left Mr. Ferro or Mr. Ferro asked them to leave. The files **were transferred** to other lawyers.

[57] The possibility of a client leaving Mr. Ferro because they were unhappy or Mr. Ferro asking the client to leave because he was unhappy, was canvassed in emails between the plaintiff and the defendant prior to the agreement being signed.

[58] Notwithstanding these email exchanges, Mr. Ferro was satisfied with the loan contracts as presented and modified, and executed several of them.

[59] In an email dated September 7, 2006 from Ms. Provencher to Mr. Ferro, when asked what happens when a client moves his or her file to another law firm she states **"the lender will require payment of the loan in full immediately if the file is moved to another firm".** This could not be clearer!

[60] In response, Mr. Ferro replies "we lose about 1 – 2 clients a year and in most cases we send them away.... **However, if the loan file moves we would pay the loan and chase the client ourselves."**

[61] Therefore there is no doubt in the courts mind that Mr. Ferro was well aware and agreed, that if a client left his office the outstanding amount of the loan would then become due and he would be liable to pay it.

[62] With respect to the Fraser loan, it is Mr. Ferro's position that this file was not transferred to Howie, Sachs and Henry but rather, they were retained as counsel. He further argues that the plaintiff was aware that he used other law firms from time to time as counsel.

[63] Whether or not the plaintiffs were aware of how Mr. Ferro operated some of his files does not change the terms of the contract.

[64] In this case, the firm of Howie, Sachs and Henry filed a notice of change of solicitor effectively telling the world that they now represented Mr. Fraser and that Mr. Ferro did not.

[65] The only evidence to suggest that there was some type of the counsel/working relationship between Howie, Sachs and Henry and Mr. Ferro are bald statements in Mr. Ferro's affidavit.

[66] The Fraser file is the one that shows three lawsuits commenced in 1998 to 2000 and 2004. Nowhere in Mr. Ferro's material is there any evidence as to where these files stand at the present date.

[67] It is extremely difficult to imagine that none of personal injury files that have been active for between 11 and 17 years have not been resolved.

[68] As it has done earlier in these reasons, the court has no choice but to draw a negative inference against Mr. Ferro where he wilfully neglects or refuses to bring forth evidence that should be easily available to him.

[69] There is no evidence whatsoever from Howie, Sachs and Henry to confirm or deny how they had taken over the Fraser file. There is no agreement or letters attached to Mr. Ferro's affidavit to shed any light on whether or not Mr. Ferro retained any control over the Fraser file whatsoever.

[70] Both the act of Howie, Sachs and Henry filing a notice of change of solicitor and Mr. Ferro's statement that they will protect his account are indicia of the file having been totally transferred to the new lawyers.

[71] Based on the totality of the evidence, and also the lack of evidence from Mr. Ferro, I find Mr. Ferro's position throughout to be disingenuous and an extremely sad commentary on how a senior member of the bar dealt with a corporation that he sought out and contracted with to allow him to carry on his personal injury practice.

[72] As a result of my reasons the plaintiff shall have judgment against the defendant as follows:

> A. the defendants shall pay to the plaintiff the amount of $110,478.26 on the Fraser loan which bears interest at the rate of 19.5% compounded monthly or the effective annual rate of 21.34% commencing June 15, 2015
>
> B. the defendant shall pay to the plaintiff the amount of $103,579.69 old on the Bilotta loan, which bears interest at 19.5% compounded monthly or the effective annual rate of 21.34% commencing June 15, 2015
>
> C. the defendant shall pay to the plaintiff the amount of $29,796.51 owned on the Reichman loans, which bear interest at the rate of 21% compounded monthly or the effective annual rate of 23.14% commencing June 15, 2015
>
> D. the defendant's counterclaim is hereby dismissed
>
> E. the defendants shall pay the plaintiff costs for bringing this action to enforce its 6 loans.

[73] If the parties are unable to agree on costs, Mr. Gregoire shall forward his **brief** submissions on costs to me by June 16, 2015. Ms. Van Allen shall forward her **brief** response to me by June 22, 2015. Mr. Gregoire shall then forward his reply, if any, to me by June 24. Cost submissions may be sent to my attention by email, care of Kitchener.Superior.Court@ontario.ca

James W. Sloan

Released: June 10, 2015

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SUPERIOR COURT OF JUSTICE

BETWEEN:

Lexfund Inc.

Plaintiff

– and –

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Defendant

REASONS FOR JUDGMENT

J.W. Sloan

Released: June 10, 2015