
CANADA / JUDGMENT

Century Services Inc. v. LeRoy

2014 BCSC 702

COURT

Supreme Court of British Columbia

DECIDED

24 April 2014

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2014 BCSC 702 Century Services Inc. v. LeRoy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Century Services Inc. v. LeRoy,

2014 BCSC 702

Date: 20140424

Docket: S12043

Registry: Duncan

Between:

Century Services Inc.

Plaintiff

And

Cynthia Rebecca Delores LeRoy

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

Tina Mihoc

Counsel for the Defendant:

Andrew G. LaCroix

Place and Dates of Hearing:

Victoria, B.C.

February 20-21, 2014

Place and Date of Judgment:

Duncan, B.C.

April 24, 2014

Introduction

- [1] The parties have brought various cross-applications:
- (a) the defendant seeks the Court's leave, after the fact, of the defendant's filing of an amended defence pleading, its Response to Civil Claim;
 - (b) the defendant seeks an order requiring production of documents from the plaintiff, relating to loan files between the plaintiff and other debtors, which relate to the plaintiff's practice of billing debtors for the time of the plaintiff's employees;
 - (c) the plaintiff brings an application to strike and for summary judgment against parts of the defendant's proposed Response to Civil Claim, namely, those parts alleging fraudulent misrepresentation;
 - (d) the plaintiff also seeks, in the alternative, an order for production of documents and particulars from the defendant related to the allegations of fraud and fraudulent misrepresentation.

Background

- [2] The defendant, Mrs. LeRoy, provided a limited recourse guarantee and a mortgage on her family home as security for a loan made by the plaintiff to Ted LeRoy Trucking Ltd. ("TLT") in March 2008, the latter of which was pursuant to a Loan Agreement made March 26, 2008. TLT is a company engaged in the logging industry, the principal of which is Mrs. LeRoy's husband, Ted LeRoy.
- [3] The guarantee and mortgage was security for the plaintiff's loan to TLT of \$14,250,000 and a \$725,000 commitment fee, at an interest rate of 24% per annum.
- [4] The defendant's liability under the guarantee and mortgage was limited to \$2 million plus interest and costs.

- [5] It was a term of the Loan Agreement to TLT that the borrower, TLT, would pay certain reasonable out-of-pocket costs and expenses incurred by the lender, the plaintiff. This term was contained in the following language:

9.11 Expenses and Indemnity

All statements, reports, certificates, opinions, appraisals and other documents or information required to be furnished to the Lender by the Borrower under this Agreement shall be supplied without cost to the Lender. The Borrower shall pay on demand all reasonable out-of-pocket costs and expenses of the Lender (including without limitation, expenses of counsel and professional advisors or consultants for the Lender), incurred in connection with:

- (i) the Lender's acquisition of the RBC Security and the RBC indebtedness;
- (ii) the preparation, negotiation, execution, delivery, administration, periodic review, modification or amendment of the Credit Documents;
- (iii) the Lender's participation in the CCAA Proceedings and all legal advice and attendances in respect thereof;
- (iv) any enforcement of the Credit Documents;
- (v) obtaining advice as to its rights and responsibilities in connection with the Loan and the Credit Documents;
- (vi) reviewing, inspecting and appraising the collateral that is the subject of the Security in connection with the enforcement of its rights under the Security; and
- (vii) any other matters relating to the Loan and the Credit Documents.

[Emphasis added.]

- [6] The terms of the guarantee provided by the defendant included:

6.1 The Guarantor shall pay to Century on demand all reasonable costs and expenses (including legal fees and expenses on a solicitor and his own client basis) which may be incurred by Century in the negotiation, preparation and execution of this Guarantee, the preservation of the Guarantor Obligations and the enforcement by Century of any of its rights and powers under this Guarantee. (the "Guarantee Costs Clause").

- [7] The original Statement of Claim in this matter was filed by the plaintiff on April 6, 2010. In that document, the plaintiff pleads:
- (a) the Loan Agreement between the plaintiff and TLT included the term that TLT agreed to pay on demand all reasonable out-of-pocket costs and expenses of the plaintiff [para. 7];
 - (b) that the defendant unconditionally guaranteed to the plaintiff the payment of TLT liabilities under the TLT Loan Agreement [para. 9(a)];

- (c) that on September 3, 2008, TLT defaulted under the loan agreement [para. 18];
 - (d) on the same day, September 3, 2008, the plaintiff made a demand to TLT for payment of the debt, and appointed a receiver over TLT;
 - (e) on September 23, 2008, the plaintiff made a demand to the defendant for payment under her guarantee and mortgage [para. 22]; and
 - (f) the defendant failed to pay in response to that demand [para. 23].
- [8] In the Statement of Claim, the plaintiff sought the standard relief to enforce the mortgage against the defendant's property as well as other relief.
- [9] Counsel for the defendant advised the Court that he received the Statement of Claim just before commencing his vacation, and that when he asked counsel for the plaintiff for an extension of time to file a defence, this ordinarily reasonable concession was not given. Thus, on behalf of the defendant he filed a simple pro forma defence, simply denying all of the allegations, on April 7, 2010.
- [10] This submission was not disputed and as such, falls into the category of background information the court can take as established based on the submissions of counsel without the need for an affidavit.
- [11] The relevance of this is that the Rules of Court, B.C. Reg. 221/90, allow a party to file an amended pleading once without leave of the court: former Rule 24(1) (new Rule 6-1(1)(a)). After that, leave is required. The defendant points out that the current application for what amounts to leave to file an amended defence pleading would be unnecessary were it not for the fact that the defendant was originally put in the position described above.
- [12] The defendant filed an Amended Statement of Defence on May 14, 2010. The initial defence did not dispute that the defendant had entered into the guarantee and mortgage but alleged, in essence, that the plaintiff was in de facto control of liquidating the assets of TLT and failed to take reasonable measures to obtain adequate value for the assets, for which the defendant pleaded the principle of set-off and equitable set-off.
- [13] The amount the plaintiff is claiming as owing after realization on TLT's assets is approximately \$2.8 million.
- [14] Both the Statement of Claim and Statement of Defence were filed under former Rules of Court.
- [15] Since then, the Rules of Court have changed and so too has the form of these types of pleadings.
- [16] In accordance with the new Supreme Court Civil Rules, B.C. Reg. 221/90, the plaintiff converted its claim into the new forms by filing a Notice of Civil Claim on December 14, 2012.

- [17] The defendant then filed a Response to Civil Claim on February 8, 2013, as it was permitted to do under the new Supreme Court Civil Rules.
- [18] Because the Response to Civil Claim raises two issues that might otherwise require leave of the Court had an application been brought to file a Further Amended Statement of Defence, the defendant seeks the leave of the Court in relation to these two new aspects of the Response to Civil Claim.
- [19] The two new issues raised by the Response to Civil Claim are as follows.
- [20] In the Amended Statement of Defence filed May 14, 2010, the defendant pleaded at para. 16:
- Subject to the Defendant's claim for equitable set-off in this action, the Defendant states that, pursuant to the Guarantee, she became obliged to pay Century a portion of the debt secured by the GSA when TLT went into default.
- [21] The Response to Civil Claim removes the equivalent of para. 16. The plaintiff argues that this is tantamount to a withdrawal of an admission and opposes this change. The defendant accepts that it is withdrawal of an admission but submits that leave should be granted to allow this.
- [22] The second issue is that the Response to Civil Claim advances an additional defence.
- [23] The additional defence raised in the Response to Civil Claim alleges that the plaintiff fraudulently padded its expenses charged to debtors. The allegation is that the plaintiff did so by billing debtors for the time allegedly spent by the plaintiff's salaried employees.
- [24] The Response to Civil Claim alleges that this was a previous practice of the plaintiff that it knew about at the time it entered into the guarantee, that the representation by the plaintiff to the defendant that the Loan Agreement was the basis for liability was therefore a fraudulent misrepresentation, and had the plaintiff known about the plaintiff's practice to bill debtors for false expenses attributed to the work of its employees, she would not have entered into the guarantee.
- [25] Specifically, the Response to Civil Claim pleads in Part 1, Response to Notice of Civil Claim Facts:
27. The Defendant further states that Century's normal business practice, prior to and after the Defendant entered into the Guarantee, was to fraudulently pad its expenses by charging debtors expenses which Century did not incur. In particular, Century bills debtors for false expenses attributed to the work of its employees (the "Fraudulent Practice").
28. In the present case, the Fraudulent Practice resulted in billing TLT for no less than \$95,375.00 in non-incurred expenses associated with the time of Tammy Kemp and Gene Harmeson.

30. The Defendant states that, had she known of the Fraudulent Practice, she would not have entered into the Guarantee contract.

[26] The Response to Civil Claim further pleads in Part 3, the Legal Basis, as follows:

Fraudulent Misrepresentation

1. Century had actual knowledge at all material times of the Fraudulent Practices and did not inform the Defendant of them. The Defendant says that Century's failure to disclose the Fraudulent Practices and its representation to the Defendant and the act of proffering the Loan Agreement as the basis for any liability in the future constitutes a fraudulent misrepresentation which vitiates the Guarantee.

[27] The basis for the defendant's application for production of other loan files is because of the above new allegations that the plaintiff engaged in systemic fraudulent billing of employee time as expenses to debtors.

[28] The plaintiff argues that there is no proper basis pleaded for a claim of fraudulent misrepresentation, and seeks to strike or seeks summary judgment dismissing paras. 27, 28 and 30 of Part 1 and para. 1 of Part 3 of the Response to Civil Claim (the "Fraudulent Misrepresentation Allegations"). The plaintiff's notice of application incorrectly refers to paras. 27, 28 and 30 of Part 2 of the Response to Civil Claim, but it is clear that the plaintiff meant to refer to Part 1. If successful, the plaintiff's position would also be the basis for refusing the defendant's application for production of other loan files.

[29] In the alternative, the plaintiff seeks an order requiring the defendant to produce documents in support of the Fraudulent Misrepresentation Allegations, and to provide "exhaustive" particulars of these allegations.

[30] The defendant submits that its claim is properly pleaded.

[31] The defendant says the evidence of the plaintiff's practice of billing "expenses" to debtors that were in fact inflated charges based on the plaintiff's own employees' time, only came to light after discovery, which was after the Amended Statement of Defence was filed.

Defendant's Evidence in Support of Fraudulent Misrepresentation Allegations

[32] The evidence the defendant relies on to support the Fraudulent Misrepresentation Allegations, is as follows:

(a) the term of the Loan Agreement, set out above, which refer to the borrower being responsible to pay "all reasonable out-of-pocket costs and expenses of the Lender... incurred", and then gives examples of some of these types of costs and expenses, none of which include "capitalizing" the internal overhead costs of paying the wages of employees of the plaintiff and converting the time of these employees to chargeable billable rates with a built-in profit margin for the plaintiff;

- (b) evidence of a former employee of the plaintiff, Tammy Kemp, given on examination for discovery. As counsel for the defendant was questioning her to obtain an explanation of some of the more oblique charges added to TLT's loan account, she admitted that:
 - i. some of the charges were "capitalization" of time recorded by employees of the plaintiff, herself and Gene Harmeson;
 - ii. her time was charged to the loan account at \$375 per hour; Mr. Harmeson's time was charged to the loan account at \$250 per hour;
 - iii. she did not know if invoices had ever been created identifying these charges;
 - iv. she admitted that Mr. Harmeson's role, during the liquidation of TLT's assets, was to be on-site to "protect" the plaintiff's interest, meaning protect the plaintiff's security;
- (c) affidavit evidence of Rod Hudson, the Chief Financial Officer of the plaintiff, made February 3, 2014, in which he admits:
 - i. at its discretion, the plaintiff sometimes charges debtors, who have defaulted on their loans and gone into receivership, an hourly rate for the time invested by [the plaintiff's] employees in "assisting in the realization of a debtor's assets";
 - ii. the plaintiff "will not bother capitalizing time to a file (i.e. charging time to a file) when it is obvious from the outset of the receivership" that the plaintiff will suffer a significant shortfall after realization of the debtors assets. The reason not to do so is that is no chance of recovery. When there is a chance that the plaintiff will have "full recovery", in the sense that there is enough value in the assets, then the plaintiff "does capitalize the time" in the hope to recover these additional charges against the debtor's assets;
 - iii. the plaintiff has its own business reasons for wanting to use its employees to assist with realization of a debtor's assets during a receivership, namely, to keep an eye on the assets and to "maximize" recovery;
 - iv. it is "likely" that there is a "commercially reasonable profit margin made" by the plaintiff from the billable rates it charges to debtor's accounts for its employee's time although this profit margin is not explained further;
 - v. both Ms. Kemp and Mr. Harmeson were assigned billable rates of \$375 per hour and \$250 per hour respectively to charge their time to TLT's loan account once "it became obvious" that TLT was going to go into receivership;
 - vi. there are no invoices in respect of these employees' time charges; and,
 - vii. the plaintiff does not have a standard way in which it maintains or records time spent by employees that is "capitalized to the file";

- (d) the Affidavit of Ted LeRoy, sworn February 12, 2014, in which he attaches documents which have been produced by the plaintiff as its internal record of the "capitalization" requests charged to the loan account of TLT, totalling \$95,375.00. These documents appear to be based on time records of the two employees of the plaintiff, Tammy Kemp and Gene Harmeson. These time records have not been produced. The documents that have been produced by the plaintiff do not contain much information as to what work the employees were purportedly doing which justified these charges to TLT's loan account, and whether or not the work was duplicative of work the receiver was doing, but the work is stated to be under the "reserve code" of "PC (Preservation)". One of the sheets contains a handwritten note "Income to Vancouver (appraisal division)". Also attached as a document maintained by the plaintiff was a "monthly balance sheet" for the "monthly fee computation" for the TLT loan. While this balance sheet showed monthly amounts owing it did not break out as a separate item or identify the fact that employees were charging to the account fees in relation to their time. In other words, the charges that the plaintiff made to TLT's loan account for employee time appear to have been embedded in loan account statements and not clearly identified.

Issues

[33] I consider it most efficient to determine the issues in the following order:

- (a) Is the removal from the Response to Civil Claim of the equivalent of para. 16 of the Amended Statement of Defence a withdrawal of an admission, and if so, should leave to do so be granted or denied?
- (b) Should the Court permit the defendant to plead the Fraudulent Misrepresentation Allegations, or grant the plaintiff's application to strike or dismiss them?
- (c) Should the Court grant the applications for production of documents and, or, particulars?

Withdrawal of an Admission

- [34] As I have just set out, in para. 16 of the Amended Statement of Defence, the defendant pleading accepted that, subject to her claim for equitable set-off, "pursuant to the Guarantee, she became obliged to pay Century a portion of the debt" when TLT went into default under the Loan Agreement between TLT and the plaintiff.
- [35] The plaintiff submits that the above pleading was an admission that the guarantee was a valid and binding document, pursuant to which the defendant had a liability.
- [36] Now the defendant alleges in the Response to Civil Claim that the guarantee is "vitiating" based on the Fraudulent Misrepresentation Allegations.

[37] The plaintiff submits that this change in position is an attempt to withdraw an admission, that it does not consent to the withdrawal, and that the leave of the Court is therefore necessary pursuant to Rule 7-7(5) and ought not to be granted.

[38] Rule 7-7(5) provides:

- (5) A party is not entitled to withdraw
 - (a) an admission made in response to a notice to admit,
 - (b) a deemed admission under subrule (2), or
 - (c) an admission made in a pleading, petition or response to petition

except by consent or with leave of the court.

[39] The defendant does not contest that para. 16 of the Amended Statement of Defence was in part an admission, but submits that leave should be granted to withdraw it because:

- (a) the admission was made without knowledge of the facts, as the information about the plaintiff's practice of charging expenses to TLT's account based on employee time was not learned until later, in the course of discovery in the action;
- (b) this information was only in the control of the plaintiff, had never been disclosed to the defendant, and could not have been known by the defendant at the time the admission was made;
- (c) the admission relates to the validity of the guarantee, which is an issue of mixed fact and law;
- (d) the validity of the guarantee is a triable issue;
- (e) there is no real prejudice to the plaintiff if the admission is withdrawn but serious prejudice to the defendant if it is unable to withdraw the admission; and,
- (f) it is in the interests of justice to allow the admission to be withdrawn.

[40] The parties seem to agree that the above factors are relevant factors to be considered by the Court when considering whether or not to grant leave to withdraw an admission, as is delay in bringing the application, as set out in a number of authorities including: *Hamilton v. Ahmed*, 1999 CanLII 7029 (B.C.S.C.), a decision of Master Horn in which at para. 11 he summarized the principles arising from the authorities; *Hurn v. McLellan*, 2011 BCSC 447 at paras. 28-33; *Bath v. Pettipas*, 2005 BCSC 1032 at para. 30.

[41] No argument is advanced here that there has been undue delay. The issue of the plaintiff's billing of employee time as expenses against loan accounts only came to light after the initial Amended Statement of Defence was filed.

[42] The validity of the guarantee is a question of mixed fact and law.

- [43] There is no real additional prejudice to the plaintiff if the withdrawal of the admission is allowed, such as the loss of evidence or witnesses. The question of whether the defendant had any net liability under the guarantee was always going to be an issue between the parties.
- [44] I will assume for the moment, subject to the analysis below when dealing with the summary judgment application, that there is a triable issue on the question of whether or not the guarantee is valid, based on the allegations now sought to be advanced by the defendant to the effect that the plaintiff had a practice of billing debtors for false expenses which practice it did not disclose to the defendant.
- [45] In my view, it is important to keep in mind the observations of our Court of Appeal in *La v. Le* (1993), 78 B.C.L.R. (2d) 322 (B.C.C.A.) at para. 10:

It is to be remembered, of course, that if the courts do not permit admissions to be withdrawn when new facts are unexpectedly brought to light thereafter, parties will inevitably be discouraged from making what seem at the time to be proper admissions, to the considerable disadvantage of litigants and the administration of justice generally.

- [46] Here, the repercussions of not allowing the plaintiff to withdraw her admission are significant: she could suffer a large liability in excess of the \$2 million range and lose her family home.
- [47] Subject to the plaintiff's position that there is no triable issue on the new allegations of fraudulent misrepresentation, which I will address below, I find that the administration of justice generally would not be served by denying the defendant the ability to withdraw her admission as to the validity of the guarantee. In the circumstances of this case, where she did not discover evidence that supports a defence that the guarantee is invalid until after her pleading was filed, and the evidence was solely in the control and knowledge of the plaintiff, I consider it in the interests of justice to allow the plaintiff to withdraw her admission. This will allow the true issues between the parties to be determined on the merits.

The Fraudulent Misrepresentation Allegations

- [48] The defendant seeks the Court's permission to plead the Fraudulent Misrepresentation Allegations, as though this was an application to amend; the plaintiff seeks summary judgment pursuant to Rule 9-6, dismissing that aspect of the defence based on the allegations of fraudulent misrepresentation. The plaintiff also frames this as seeking an order striking the Fraudulent Misrepresentation Allegations.
- [49] The law is well established that parties will be permitted to liberally amend their pleadings so that the true issues are before the court, and this includes taking into account new evidence learned in the course of discovery. However, the amendments must disclose a reasonable claim or defence. Thus the same test applies as applies to applications to strike a pleading as disclosing no reasonable claim or defence. This may be established on the basis

of the pleadings, without the necessity of evidence. In this regard, see *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982), 30 B.C.L.R. (2d) 45 (S.C.).

[50] The plaintiff advances four arguments:

- (a) the defendant has failed to plead the elements of fraudulent misrepresentation, and so the Fraudulent Misrepresentation Allegations should be dismissed pursuant to Rule 9-6, which allows the Court to grant summary judgment dismissing a defence where the defending party has not shown there is a genuine issue for trial;
- (b) the Fraudulent Misrepresentation Allegations must be dismissed because they are bound to fail as a matter of law, relying on the summary judgment rule, Rule 9-6, and the rule for striking pleadings where it is plain and obvious that it disclose no reasonable defence, Rule 9-5(1)(a);
- (c) the defendant has not supported the Fraudulent Misrepresentation Allegations by admissible evidence and so has not shown there is a genuine issue for trial, again relying on the summary judgment rule, Rule 9-6(3)(b);
- (d) the Fraudulent Misrepresentation Allegations are scandalous, frivolous or vexatious, justifying striking them pursuant to the Rule applicable to striking pleadings, Rule 9-5(1)(b)-(d).

[51] There is much repetition in the plaintiff's arguments.

[52] There are really two points advanced by the plaintiff overall: first, that the necessary elements of fraudulent misrepresentation are not pleaded by the defendant, and therefore these allegations cannot stand and leave to plead them must not be granted or they must be dismissed or struck; and, that the defendant has not provided evidence in support of the Fraudulent Misrepresentation Allegations sufficient to raise a triable issue, and so these aspects of the defence must be dismissed.

[53] I will deal with these two arguments in turn.

Have the Elements of Fraudulent Misrepresentation Been Plead?

[54] The plaintiff says that the elements of a claim in fraudulent misrepresentation have not been pleaded by the defendant, and thus, as a matter of law, the Fraudulent Misrepresentation Allegations must fail. The plaintiff relies on Rule 9-5(1)(a) as well as one ground for summary dismissal of a claim under Rule 9-6.

[55] The law is clear that before a pleaded claim will be struck on the basis that it does not raise a viable cause of action, it must be plain and obvious that, read generously, it discloses no cause of action or has no reasonable prospect of success, assuming the facts as pleaded are true: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17-21.

[56] The elements of a cause of action in fraudulent misrepresentation are:

- (a) the making of a false representation to the party alleging the wrong;
- (b) made either:
 - i. knowing it to be untrue,
 - ii. without belief in its truth,
 - iii. or reckless as to whether it be true or false;
- (c) the false representation caused the complaining party to act and to suffer a loss.

Bruno Appliance and Furniture, Inc. v. Hryniak, 2014 SCC 8 at paras. 18-21.

[57] Our Court of Appeal also states that an element of fraudulent misrepresentation is that the representing party intended the victim to act on the representation: *Islip v. Coldmatic Refrigeration of Canada Ltd.*, 2002 BCCA 255 at para. 4. If the representation is reckless, it is not necessary that there be an intention to deceive, just a wanton disregard as to whether or not it will deceive: *WS Leasing Ltd. v. Platinum Equipment Ltd.*, 2012 BCSC 558 at para. 33.

[58] As I read the Response to Civil Claim, and all natural inferences arising from it, the defendant's theory underlying the Fraudulent Misrepresentation Allegations in the pleading is as follows:

- (a) the plaintiff made a representation to the defendant that the basis for her liability to it under the guarantee would be the liability of TLT under the Loan Agreement, and this was false;
- (b) the plaintiff knew the representation was false because the plaintiff had a practice of billing debtors for expenses when the expenses were not actually incurred by the plaintiff, thereby increasing debtors' liabilities beyond that which had been agreed to by the debtors under their loan documentation. This was the plaintiff's practice of charging debtors for expenses attributed to the work of its employees;
- (c) the plaintiff intended the defendant to act on the representations in the Loan Agreement by signing the loan guarantee;
- (d) the false representation caused the plaintiff to enter into the guarantee, and to thereby suffer damages as a result, her liability under the guarantee.

[59] The plaintiff understands that the above theory is what is intended by the defendant's Fraudulent Misrepresentation Allegations, as was made clear to me from the plaintiff's own submissions and the content of its Notice of Application filed February 4, 2014.

[60] Nevertheless, the plaintiff argues that the material elements of the claim in fraudulent misrepresentation are not properly pleaded.

[61] The plaintiff submits that the essence of the defendant's allegations is a misrepresentation by omission. As such, the plaintiff submits that the defendant needs to and has failed to plead that either: the plaintiff took active steps to conceal the alleged fraudulent billing practice from her; or, someone made a false statement to the defendant, misleading her, to which the plaintiff knowingly stood by in silence. In this regard, the plaintiff relies on *Sidhu Estate v. Bains* (1996), 25 B.C.L.R. (3d) 41 (C.A.) at paras. 30-31.

[62] The plaintiff also submits at para. 43 of its Notice of Application that:

The Defendant does not plead that Century had knowledge of what interpretation or understanding she had under the [Guarantee] or the Loan Agreement to pay for employees' time as a result of a receivership. Nor, does she plead that Century took active steps to conceal its alleged Fraudulent Practice from her.

[63] The plaintiff's submission attempts to characterize the plaintiff's impugned practice of billing debtors for expenses attributable to the plaintiff's own employees as simply a matter of contract interpretation. That may be the plaintiff's position, but the defendant is entitled to allege it went beyond this. I will come back to this point.

[64] The defendant disagrees that the theory of her allegations is misrepresentation by omission. The theory of her allegation is that a positive representation was made in the loan documents that the debtor's liability would be as set out in those documents, and so too, consequently, would be the guarantor's liability.

[65] I agree with the defendant that the theory of the defendant's allegations is one based on affirmative misrepresentation: that the liability would be as set out in the loan documents.

[66] The plaintiff's argument would turn every misrepresentation into an omission where the party making the representation did not at the same time tell the opposite party that the representation was false.

[67] In my view all of the elements of fraudulent misrepresentation can be inferred from the defendant's pleading, although perhaps it is not set out as well as it could be. For example, the present pleading includes some of the material facts in Part 3, the Legal Basis, namely, the fact that the representation was in the Loan Agreement. This aspect of the facts should be pleaded in Part 1. Likewise, it can be inferred from the pleading that the defendant alleges that the plaintiff intended the representations in the loan documents to induce the plaintiff to sign the guarantee, but it would be preferable if this were made express.

[68] There is an abundance of case authority stressing that parties ought not to be driven from the opportunity to advance a case on the merits because of technical deficiencies in the pleading, where otherwise the intent to advance a proper cause of action is evident or can be inferred. For example, see *International Taoist Church of Canada v. Ching Chung Taoist Assn. of Hong Kong*, 2011 BCCA 149 at paras. 27-28.

[69] I conclude that it is not plain and obvious that the Fraudulent Misrepresentation Allegations in the defendant's Response to Civil Claim are bound to fail. However, the Response to Civil Claim should be amended to more clearly plead the allegations, and I grant leave to the defendant to do so as her counsel may advise. At the same time, the defendant has leave to amend para. 20 of Part 1 of the Response to Civil Claim, which contains an editing or drafting error. While this was not the subject of the present application the error was pointed out in the course of the hearing.

Is There Evidence to Raise a Triable Issue of Fraudulent Misrepresentation?

[70] The next prong of the plaintiff's argument is that there is no evidence from the defendant sufficient to raise a triable issue on the Fraudulent Misrepresentation Allegations.

[71] The plaintiff relies on the summary judgment Rule, Rule 9-6.

[72] The plaintiff submitted that the summary judgment application should be determined on the basis of the existing pleadings, without considering any ability of the defendant to amend.

[73] In *Wong v. Wilson*, 2013 BCSC 1465, the Court refused to consider the answering parties' proposed amendments and proposed addition of new parties on the summary judgment application. However, this was because Madam Justice L.A. Warren specifically found that to do so in the circumstances of that case would be unfair to the parties who brought the summary judgment application, the defendants. It is important to note that in that case the plaintiffs' pleadings were "convoluted and confusing" (at para. 17) with several material deficiencies (at para. 21). After receiving the defendants' summary judgment application, the plaintiffs had not applied to amend the pleadings and add the additional parties.

[74] In the case at bar, the defendant brought its application for approval of the Response to Civil Claim first, before the summary judgment application. Normally a party is given substantial liberty to plead the party's case, and it is not uncommon on an application to approve amendments for a court to hear the other side's criticisms of the pleading and to then allow the applying party further opportunity to amend. While it is not recommended that a party take several attempts to plead a case properly it is also not entirely uncommon for a party's claims to evolve as a greater understanding of the evidence becomes known and after a greater appreciation is gained of the legal issues. Substantial liberty is given to parties to amend their pleadings in order to ultimately allow for a fair determination of a case on the merits, rather than for defeat of a claim based on mere technicalities.

[75] The circumstances of this case are very different than in *Wong*. Here the plaintiff decided to answer the defendant's application to obtain approval of its amended pleading by bringing an application for summary judgment. Here, the defendant is trying to frame a defence based on information in the hands of the plaintiff. In such circumstances, it would be unfair to deny the defendant the normally liberal approach taken to amendments of pleadings, simply because of the plaintiff's strategy of answering the defendant's application with a

summary judgment application.

[76] There is old authority for the proposition that a defendant should be allowed to amend its pleading to avoid technical defeat on a summary application, see *Helman v. Brown*, [1966] B.C.J. No. 48 (C.A.).

[77] Thus, I will consider the summary judgment application on the basis of the analysis of the defendant's pleadings I have already undertaken.

[78] The plaintiff and defendant appear to agree on the applicable test under the summary judgment Rule, which is variously stated as:

- (a) the applicant must show that the responding party's claim or defence is "bound to fail", or, put another way, it is "manifestly clear" that it raises "no bona fide triable issue" or "no genuine issue for trial";
- (b) this can be shown by:
 - i. illustrating that the responding party has not pleaded the material facts necessary to support an element of the cause of action; or,
 - ii. illustrating that the only genuine issue is an issue of law to be determined in the applicant's favour; or,
 - iii. illustrating that there is no evidence to support a necessary element of the responding party's case;
- (c) however, the court is not to engage in a weighing of evidence or choose between conflicting versions of events on a summary judgment application; and,
- (d) inferences of fact are to be viewed most favourably to the responding party.

Atha v. Thompson, 2008 BCSC 1075 at paras. 27-28; *Haghdust v. British Columbia Lottery Corp.*, 2011 BCSC 1627 [Haghdust] at paras. 13-18.

[79] I have already ruled that the defendant has sufficiently pleaded the material facts to support the Fraudulent Misrepresentation Allegations although the pleading may be improved with amendments.

[80] It likewise cannot be said that the only genuine issue here is an issue of law.

[81] I turn then to the argument by the plaintiff that the defendant has no evidence to support the necessary elements of fraudulent misrepresentation.

[82] I pause to note that the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 [Hryniak] had occasion to comment on the Ontario "summary judgment" rule, Rule 20 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. There the Court emphasized a robust approach to fact-finding on summary judgment applications, as a tool to increase access to justice.

- [83] However, the Ontario rule is materially different from the rule in British Columbia.
- [84] In British Columbia, it is the summary trial rule, Rule 9-7, which allows the court to make findings of fact on conflicting evidence.
- [85] In Ontario, there is no summary trial rule, but the Ontario rule goes further than the summary judgment rule in British Columbia, and allows the court to assess and weigh conflicting evidence, and even to hear viva voce evidence. In effect the Ontario process is a hybrid of British Columbia's summary judgment and summary trial processes.
- [86] The summary judgment rule in Ontario raises the question of whether or not there is a "genuine issue requiring a trial" [emphasis added], which involves weighing whether in the interests of justice the matter can be determined on the summary judgment application, with the fact-finding tools available, or whether the interests of justice require the broader fact-finding tools of a trial.
- [87] In contrast, the summary judgment procedure in British Columbia is distinct from the summary trial procedure, and does not permit the weighing of evidence. In short, in British Columbia, the summary judgment rule remains one where the court's role is simply to determine whether there is a "genuine issue for trial", meaning whether there is an issue to be tried. If there is a triable issue, the court is not to resolve the issue on the application but rather, is to dismiss the application.
- [88] The parties in British Columbia prepare for a summary judgment application on the above basis, and so do not file materials in support of a resolution of triable issues. It would therefore not be in the interests of justice to determine conflicts on the evidence on a summary judgment application in British Columbia.
- [89] Interestingly, however, the Supreme Court of Canada in Hryniak did comment on an aspect of these summary applications which does resonate in British Columbia and on this application in particular. In British Columbia, the courts often caution against granting summary judgment or summary trial on only a portion of a party's claim, giving rise to a problem aptly described by Madam Justice Southin as litigating in slices: see *Coquitlam School District No. 43 v. Clement*, 1999 BCCA 164 at para. 45; *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138 at para. 7. The problem with applications for determination of only part of a claim or defence is that they can give rise to multiple appeals within one action, they risk findings being made without the court being aware of the full factual context, and they risk inconsistent findings at later stages of the litigation.
- [90] A similar caution was mentioned in Hryniak at para. 60, albeit in the context of proceeding with a claim against one of several parties only:

The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial

summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

[91] In *Haghdust*, the Court held at para. 18 that the summary judgment rule could not be used to determine issues of law that might otherwise be germane to a proceeding but which fall short of allowing a court to pronounce judgment on all or part of a claim.

[92] Here, the fact that the plaintiff seeks summary judgment of only a portion of the defendant's defence is problematic and could complicate the hearing of the rest of the action.

[93] Leaving that problem aside, the real question on this summary judgment application to which the parties before me focussed their submissions is whether or not there is evidence that raises a triable issue on the question of there being a fraudulent practice by the plaintiff of billing debtors for "expenses" not actually incurred, namely, for employee time, which charges were actually a profit-making tool by the plaintiff. If there is evidence of this, I conclude that the rest of the fraudulent misrepresentation elements arise sufficiently by inference to give rise to a triable issue.

[94] There is evidence before this Court of:

- (a) the Loan Agreement in this case, the language of which at least raises a triable issue that it allowed the plaintiff to only charge to the debtor's account reasonable out-of-pocket expenses actually incurred by the plaintiff, and that this did not permit the plaintiff to charge as "expenses" to the debtor's account the time spent by the plaintiff's own salaried employees at rates which had a built-in profit-margin;
- (b) a pre-existing practice by the plaintiff of charging employee time to debtors' accounts, which was charged at rates that included a profit margin;
- (c) the plaintiff having lost documents or having poor record keeping in relation to these types of charges.

[95] In addition, questions that are raised by the above evidence are not answered by the plaintiff. For example:

- (a) the plaintiff does not identify any evidence by which it claims to have given clear notice to the debtor, TLT, of the fact of these employee charges and the basis for them;
- (b) there is no evidence that suggests that because of an oversight the Loan Agreement did not contain language that was ordinarily used by the plaintiff to allow for these types of charges.

[96] It is interesting that the evidence from the plaintiff's own witness, Mr. Hudson, is that the deciding factor in recording these employee charges was the chance of recovery in the scenario where the debtor was in receivership and its assets were being realized. A number of questions naturally arise from this, including the potential difficulty for a debtor in such a

situation to question the accounting statement produced by the lender where such expenses are embedded and not clearly identified. This evidence also implies that there was no factoring in of the language of the loan documentation on a particular loan before employees would make a decision to charge their time to a debtor.

- [97] The plaintiff criticizes the defendant for not filing evidence of the state of mind of the plaintiff's employees, and argues that the defendant has no evidence that the plaintiff had a fraudulent intent. At most, plaintiff's counsel argues, the evidence could give rise to an issue of contractual interpretation, with the plaintiff employees thinking that the wording of the loan documents entitled them to bill for employees' time at rates that included a profit margin.
- [98] Also, the plaintiff's counsel says that the suggestion that this practice in relation to other borrowers was fraudulent is just speculation, of which there is no evidence in support.
- [99] With respect, the plaintiff's argument ignores the reality that fraudulent intent is often inferred from a variety of circumstantial evidence.
- [100] The plaintiff's argument ignores the possibility that a trial judge might find that despite arguments that the loan agreements bear a different interpretation, in fact the plaintiff's employees engaged in this practice of billing time either knowing it was not permitted by the loan documents or without any care as to whether or not the loan documents permitted it; that in fact none of the standard loan document clauses used by the plaintiff historically allowed the plaintiff to bill debtors for employee time at rates which included a profit margin; and further, that the plaintiff had a general business practice to falsely characterize employee time as expenses as a form of revenue generation for the plaintiff.
- [101] Knowingly billing a client for expenses not actually incurred has long been understood as being capable of constituting fraudulent misrepresentation. Here, the "bill" would be the account statements issued by the plaintiff to the debtors, asserting what the debtors owe to the plaintiff.
- [102] An instructive case is *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2009 NSSC 404 [GSI.]. There the plaintiff, GSI, had a contract with the defendant, SMS, whereby SMS was to provide certain services. GSI later brought an action claiming that SMS had overcharged it. GSI took the position that the contract allowed SMS to charge "cost plus 5%", which it argued meant SMS could charge for the actual salaries and benefits paid to its crews, plus 5%. Instead, SMS charged a flat fee of US \$143,900 per month.
- [103] In GSI, the defendant SMS argued that the contract bore a different interpretation, and that the interpretation proposed by the plaintiff would not be commercially sensible. Further, SMS argued that even if it was wrong on the contract interpretation, that its agents could not be said to have had fraudulent intent simply by having a different interpretation of the contract. Similar arguments are advanced by counsel for the plaintiff here.

[104] In GSI, the Court rejected the evidence of SMS and found in favour of the plaintiff. The Court rejected the argument that the issue was a matter of contractual interpretation only. The Court found that the invoices that SMS sent to GSI constituted fraudulent misrepresentations and that GSI paid the invoices relying on the misrepresentations.

[105] The Court in GSI analyzed the elements of fraudulent misrepresentation in relation to the facts as follows at para. 145:

Resolution of this issue depends on: (1) whether the representation made by SMS in the invoices to GSI were false in fact, that is, not in accordance with the agreement, and (2) that SMS, when it made the representation, knew that it was false, or made it recklessly without knowing whether it was true or false, and (3) that GSI was thereby induced to unwittingly pay the invoices.

[106] The trial judgement in GSI was upheld on appeal, with leave to appeal to the Supreme Court of Canada refused: 2012 NSCA 33; [2012] S.C.C.A. No. 245.

[107] In 561895 Ontario Inc. v. Metropolitan Trust Co. of Canada, [2001] O.T.C. 423 (S.C.J.), the Court found that the acts of the mortgage lender, in charging unauthorized fees to the borrower's loan account, and then delivering statements in which those fees were buried or disguised, had engaged in fraud and deceit.

[108] Here, the allegations by the defendant are two-staged: first, that the plaintiff had a business practice of charging debtors for false expenses; second, by representing to the guarantor of a debtor, the defendant, that her liability would be limited to the liability arising under the loan documents, knowing that the plaintiff had this practice of charging debtors for false expenses, the plaintiff made a false misrepresentation to the defendant.

[109] I find that the evidence on this application does raise a triable issue on the Fraudulent Misrepresentation Allegations. On its face, the evidence is sufficient to raise a reasonable suspicion of misconduct: the admission as to the charges made by the plaintiff to TLT's account when contrasted to the language of the Loan Agreement; the admission that this was a practice of the plaintiff, to bill debtors for employee time charged at a rate that included a profit margin; combined with a lack of evidence as to any clear policies or internal controls documenting these kinds of charges or as to any form of clear notice to debtors of these charges being made.

[110] This is not to say that either party has a stronger case on the merits; simply that there is a triable issue such that the Fraudulent Misrepresentation Allegations ought not to be dismissed on the plaintiff's summary judgment application.

[111] Having concluded that there is a triable issue, the defendant is entitled to withdraw the admission contained in para. 16 of the Amended Statement of Defence, as discussed above.

[112] Also, having found that the defendant has raised a triable issue, there is no merit in the plaintiff's submission that the pleadings are frivolous or vexatious.

Document Production and Particulars

- [113] I turn now to the applications for production of documents and particulars.
- [114] The plaintiff argued on the summary judgment application that the Fraudulent Misrepresentation Allegations ought to be dismissed, because not to do so would give rise to a much broader scope of document production and discovery relating to other loan accounts where these charges were made against the debtor's loan account, so as to determine whether or not the practice was indeed fraudulent.
- [115] The potential scope of document discovery is not a reason to summarily dismiss triable issues.
- [116] Furthermore, I am not persuaded that the document discovery issue is as unmanageable as contended by the plaintiff.
- [117] The defendant seeks production of loan files between the plaintiff and other debtors relating to the plaintiff's practice of billing debtors for the time of the plaintiff's employees.
- [118] Initially the defendant sought the plaintiff's loan files going back to 2003. However, the plaintiff's evidence is that this will create a hardship for it, as it does not have an easy way of locating this information which will be stored electronically prior to 2007. The plaintiff's evidence is that it does have some but not all physical records for loan files going back to 2007.
- [119] The plaintiff apparently has a problem with its record-keeping and some corruption of its electronic records. Of course, if it is unable to locate documents it must so advise the defendant. Any order for production of documents is not an order to produce something the party does not have.
- [120] In oral submissions, the defendant accepted that the plaintiff's evidence is that it does not have hard copies of records preceding 2007 and that its electronic records are not organized in a way to readily search for the relevant information. On this basis, the defendant is content for the start date of the document production to be in 2007 through to March 2008, which is prior to the TLT Loan Agreement, with the proviso that, if the plaintiff does locate earlier records relevant to the issues, they will be produced. I consider this time frame to be appropriate and I am not persuaded that it will pose any hardship.
- [121] As to the category of documents that ought to be produced, this flows from the plaintiff's evidence. It is the plaintiff's evidence that it had a practice of charging debtors for employee time, at the plaintiff's discretion, when the debtor was in a receivership situation. The plaintiff's position was that it was entitled to do so. Clearly the most likely place the authority to charge these expenses will be found is in the loan agreements between the plaintiff and these other debtors.

- [122] I am of the view that as part of the discovery process and within the time-frame mentioned, the plaintiff must take steps to try to identify the loan accounts against which it charged employee time. From this, there will arise the following relevant categories of documents which ought to be produced to the defendant:
- (a) evidence of the loan documentation which the plaintiff relies on as giving it authority to charge these types of expenses to the debtors, such as loan agreements;
 - (b) evidence of any documents which the plaintiff relies on as identifying that it gave notice to debtors that it was charging these expenses;
 - (c) evidence of any internal policies or forms relating to employees charging their time, including evidence of how any revenue arising from the charges was treated in the company, including in the accounting records;
 - (d) evidence of any study or analysis undertaken by the plaintiff to support the reasonableness of the rates at which it was charging the employee time;
 - (e) any documents which the plaintiff relies on as refuting that these charges were made by employees knowing that they were not valid expenses under any applicable loan agreement.
- [123] If the plaintiff takes the position that it had oral permission of debtors to charge these expenses then to the extent they exist, the plaintiff must also produce any notes or records of such oral permission. In order to allow the defendant to probe such an assertion of an oral agreement, the loan documentation in such cases should also be produced, so that the defendant can probe whether or not the agreements contained an "entire agreement" clause or other clause disclaiming any oral representations.
- [124] Counsel for the plaintiff raises the spectre that different loan agreements were prepared for different debtors, and authority to make these charges could vary from debtor to debtor. Even allowing for this, the timeframe for the production of the records is quite limited and the scope of production should not prove onerous.
- [125] The defendant's position is that the plaintiff was clearly not entitled to apply these charges to the TLT account under the Loan Agreement with TLT and so the inference can be drawn that it was also not entitled to do so under any other loan agreements. In a sense, the defendant believes the inference can be drawn, from the limited evidence produced, that the plaintiff disguised these charges as "expenses incurred" but since they were not in fact expenses incurred, the plaintiff never had authority for the charges.
- [126] I find that the above categories of documents, in the date range starting in 2007, may assist a party at trial to prove a material fact (either that there was or was not contractual authority to charge employee time to debtors' accounts, which either will help disprove or prove the Fraudulent Misrepresentation Allegations). They are thus producible under Rule 7-1(1)(a)(i).

- [127] These documents are also producible pursuant to Rule 7-1(13) as the defendant has made a general written request for them pursuant to Rule 7-1(11) and the plaintiff has refused production.
- [128] I concur with the observations of Voith J. in *XY, LLC v. Canadian Topsires Selection Inc.*, 2013 BCSC 584 that it may not always be possible for the party requesting documents to identify the sought-after documents with precision, especially when the party being asked to produce the documents is alleged to have acted dishonestly. This should not foreclose the requesting party from accessing broader document discovery.
- [129] The plaintiff has expressed a concern for the privacy of the debtors who might be named in these records. It is within this Court's discretion to order on a preliminary basis that the plaintiff may produce these documents with the names of any of the debtors other than TLT redacted, which I consider the appropriate order here, given that the relevance of the documents relates to the terms of the documents, not the names of the debtors. If groundwork is later laid to establish that the names of these parties in the documents ought to be produced, then the defendant has liberty to apply for production of the unredacted records.
- [130] The plaintiff has also expressed a concern about producing information which it considers commercially sensitive. In my view, the implied undertaking as to confidentiality can adequately address any concern in that regard and no special order is necessary.
- [131] I turn to the plaintiff's application for production of documents from the defendant relating to the Fraudulent Misrepresentation Allegations, and for particulars of these allegations.
- [132] Most of the evidence relating to the Fraudulent Misrepresentation Allegations will originate from the plaintiff.
- [133] However, I understood from the parties' submissions that the defendant had not been timely in producing a further list of documents and was agreeable to do so by April 11, 2014. I assume that has occurred and there is no need for an order.
- [134] As for particulars, the defendant's Response to Civil Claim does particularize the alleged fraudulent practice as being the billing of debtors for false expenses attributed to the work of its employees i.e. when it did not have the authority for those charges under the applicable loan agreements. But the defendant has also agreed to provide any further particulars of the Fraudulent Misrepresentation Allegations once the plaintiff has complied with its obligation to produce documents.
- [135] In order to keep the litigation on track, but appreciating that it may take some time for the plaintiff to produce its documents and then for the defendant to inspect and digest the same, I will order the following:
- (a) that the plaintiff produce the further documents within 45 days of this ruling;

- (b) that the defendant have leave to file an Amended Response to Civil Claim no later than within 45 days of production of the plaintiff's additional documents;
- (c) that if the defendant has further particulars of the Fraudulent Misrepresentation Allegations not provided in the Amended Response to Civil Claim, that it provide these within 60 days of the plaintiff's production of further documents.

[136] The parties of course have leave to agree to change these deadlines.

Conclusion

[137] I have concluded that:

- (a) the defendant has leave to withdraw the admission made in para. 16 of the Amended Statement of Defence;
- (b) the defendant has leave to advance the Fraudulent Misrepresentation Allegations in the Response to Civil Claim;
- (c) the plaintiff's application to strike or dismiss the Fraudulent Misrepresentation Allegations is dismissed;
- (d) the defendant's application for production of documents from the plaintiff is granted on terms described above; and,
- (e) the defendant must file an Amended Response to Civil Claim; and provide further particulars of the Fraudulent Misrepresentation Allegations to the extent these allegations are not otherwise particularized in the Amended Response to Civil Claim, the timing of which is described above.

[138] If the parties wish to address costs they have liberty to seek a hearing before me.

[139] Despite the sensible recommendations of the Supreme Court of Canada in Hryniak at para. 78, it will be impractical for me to be seized of the trial of this matter. The recommendations in Hryniak were based on the theory that the summary judgment judge may have gained insight into the evidence and issues so as to be able to more effectively manage an efficient trial, and was in contemplation of the broad trial management tools contained in Ontario's summary judgment Rule. These considerations do not necessarily apply to a summary judgment application in British Columbia, given that here the question before the application judge focuses on whether or not there is a triable issue. Further, the hearing of any trial in this matter could be unduly delayed if I was to be the trial judge given my present and upcoming rota and limited opportunity to return to this location, which could cause considerable inconvenience to the parties.

"S.A. Griffin, J."

The Honourable Madam Justice Susan A. Griffin

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Prepared on 27 October 2026 · Esheria