

CANADA / JUDGMENT

Levesque v. MMR Holdings

2002 BCSC 351

COURT

Supreme Court of British Columbia

DECIDED

6 March 2002

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Source record

2002BCSC0351

Citation: Levesque v. MMR Holdings et al Date: 20020306

2002 BCSC 351 Docket:

30284

Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: STRATA LOT 1, SECTION 1, TOWNSHIP 20, RANGE 18,
WEST OF THE 6TH MERIDIAN, KDYD, STRATA PLAN KAS910

BETWEEN:

PAUL LEVESQUE
PETITIONER

AND:

MMR HOLDINGS INC., MICHAEL JOHN RINK
450100 B.C. LTD., AND
#100-1383 MCGILL HOLDINGS LTD.
RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HUNTER

Counsel for the Petitioner G. K. Watson

Counsel for the Respondent, #100-1382 McGill Holdings Ltd. R. W. McDiarmid, Q.C.

Date and Place of Trial: January 29, 30, 31 &

Feb. 1, 2002

Kamloops, BC

- [1] The Petitioner (Mr. "Levesque") seeks declarations that he is entitled to a first mortgage charge on certain lands, that the Respondents are in default under the mortgage, that the monies owing thereunder are \$96,000, an Order Nisi with a redemption period of one month, and judgement against #100-1383 McGill Holdings Ltd. ("#100").
- [2] Counsel advise in passing that all Respondents except for #100 have no financial capacity to satisfy any judgement that might be entered against them in these proceedings.
- [3] In June of 1999 Michael John Rink ("Rink") asked Mr. Levesque to provide him with short term financing of \$100,000 to meet Rink's immediate financial needs until long term financing was completed concerning the ongoing construction of a commercial and residential development known as "Victoria Landing" located on Victoria St. in the City of Kamloops. MMR Holdings Inc. ("MMR") was a lender to that project, 450100 B.C. Ltd. was the registered owner of the property and Mr. Rink was a shareholder in both those companies.
- [4] Mr. Levesque was prepared to loan \$100,000 but not without security. Mr. Rink was unable to provide security. The company #100 owned real property free and clear of encumbrances the legal description of which was:

Parcel Identifier: 017-285-437

Strata Lot 1, Section 1, Township 20, Range 18,

West of the 6th Meridian,

KDYD, Strata Plan KAS910

(The "lands")

- [5] Marilyn VanDongen was the sole shareholder and director of #100.
- [6] Ms. VanDongen's husband, Casey VanDongen had been associated with Mr. Rink and Mr. Rink's companies since July 1993. He had been employed by New Futures Development Corporation ("New Futures"), now known as MMR, as a project manager on several construction projects which Mr. Rink and his companies had underway and in fact was an employee of New Futures between July 1993 and the end of 1996. From that date until the end of 1998 he was a contract construction manager for Mr. Rink and his companies. Before meeting Mr. Rink, Mr. VanDongen worked in the construction business through his company Tri-City Contracting Ltd., ("Tri-City") which business had commenced in 1974. He shut down that business between 1993 and mid 1997 while he was employed, as described, on various construction projects of Mr. Rink's companies and he reactivated Tri-City in mid 1997 when he returned to doing bonded commercial construction and as well contract work for Mr. Rink and his companies including construction site services contracts and leasehold improvement contracts.

- [7] Mr. Levesque and Mr. Rink had a business relationship which commenced some time in 1991. In the late 1980's Mr. Levesque invested funds in Mr. Rink's company "Eyes International", a business which dispensed eyewear. Mr. Levesque acquired with Mr. Rink a 12% interest in a condominium development in Kamloops known as Arbutus Estates in the 1990's. Mr. Levesque and Mr. Rink were joint venturers in a project known as Crystal Villa on Westsyde Road in Kamloops. Mr. Levesque provided some short term financing concerning a development in which Mr. Rink had an interest known as Emerald Estates in Kamloops. Mr. Levesque funded a construction bond through one of his companies concerning Mr. Rink's project known as "The Kamloops Home Support Building" on Tranquille Road in Kamloops and pledged security to enable Mr. Rink to obtain an operating line of credit for this project. On other occasions Mr. Levesque provided short term financing to Mr. Rink and his companies when they were experiencing cash flow problems.
- [8] Another project actively under development in the city in 1999 and 2000 was a proposed convention centre involving property at the southwest corner of Lorne Street and 3rd Avenue. Some of the lots which comprised this proposed convention centre property were owned by D & S Construction Ltd. of which Mr. Levesque was the sole shareholder and the remaining lots were owned by Lorne Street & Johnston Lane Properties Ltd., a company of which Mr. Rink was the principal shareholder but in which Mr. Levesque owned shares as well. These companies granted an option to purchase those lots dated February 20, 1996 to 509749 B.C. The purchase price was \$1,750,000 and the option agreement was later renewed at a purchase price of \$1,850,000. Both Mr. Levesque and Mr. Rink were shareholders of 509749 B.C. which later changed its name to Riverside Centre Development Group Inc. The option agreement which extended the option period and increased the purchase price to \$1,850,000 was dated September 6, 2000. If the convention centre proposal had been approved by the City of Kamloops the option agreement would have been exercised and significant profits realized by Mr. Levesque as a shareholder of the vendor companies.
- [9] By January 1999 Rink and certain of his companies including MMR and 450100 B.C. were indebted to Mr. VanDongen and Mr. VanDongen's companies in an approximate amount of \$260,000 together with certain contingent liabilities approximating \$200,000. To secure these obligations Mr. VanDongen was granted a third mortgage over Rink's office premises located at 1st Avenue and St. Paul Street in Kamloops. These premises were registered in the Land Title office in the name of Rink's company 523983 B.C. Ltd.
- [10] Mr. VanDongen was not involved in the construction of the project known as Victoria Landing. Mr. VanDongen was a shareholder and director of 540978 B.C. (as was Mr. Rink) which owned property at 520 Seymour Street in Kamloops (the old liquor store).

- [11] In 1997 Mr. Rink's company 450100 B.C. Ltd. borrowed \$300,000 from Henry Charles Oliver to purchase the lands upon which the Victoria Landing project was to be constructed. Oliver was the vendor. Oliver was granted a first mortgage on the Victoria Landing lands and a collateral mortgage against the lands at 540 Seymour Street owned by 540978 B.C. Mr. VanDongen as a director and shareholder of that company was a guarantor to the extent of \$100,000 of the debt to Oliver.
- [12] Mr. Levesque in the course of his evidence said that Mr. VanDongen was actively involved in negotiating the \$100,000 short term loan from Levesque. The evidence does not support such a conclusion. Mr. Levesque said that he was first approached by Mr. Rink with regard to borrowing these monies. Mr. Rink confirmed this. Mr. VanDongen said that he had no dealing with Mr. Levesque concerning the loan until October 1999 when the time for repayment was extended to late December 1999. Mr. VanDongen had conversations with Mr. Rink, but not with Mr. Levesque, as a result of which Mr. Rink obtained Mr. VanDongen's agreement to deposit the duplicate certificate of title of the lands as further security for repayment. Throughout the negotiations Mr. Rink and his companies and Mr. Levesque were represented by the same solicitor. On June 22, 1999 the parties met with that solicitor and an agreement was proposed to Mr. Levesque which included no real property security. Mr. Levesque refused to loan monies without real property security. Later that day the loan agreement with security by way of deposit of the duplicate certificate of title was signed by all the parties to this lawsuit including #100. That agreement provided that Mr. Levesque would advance \$100,000, the borrower MMR would pay a commitment fee of \$5,000, there would be no interest charged on the loan and the principal sum would be repaid within 90 days of advancement. MMR, Rink and 450100 B.C. signed a promissory note in favour of Levesque and #100 co-signed the promissory note and hypothecated the duplicate certificate of title of the lands as collateral security for the loan. Mr. Rink guaranteed repayment of the loan. The \$100,000 was advanced by Levesque on that date.
- [13] This agreement contained the following clauses:
- (7) No amendment supplement or waiver of any provision of this agreement or any other agreements provided for or contemplated, nor any consent to any departure by the Borrower, shall in any event be effective unless it shall be in writing and signed by the Lender and then the waiver or consent shall be effective only in the specific instance for the specific purpose for which it has been given.
 - (8) No waiver or act or omission of the Lender shall extend to or be taken in any manner whatsoever to affect any subsequent event of default or breach by the Borrower of any provision of this agreement or the results or the rights resulting from it.
 - (9) Time shall be of the essence of this agreement.
- [14] Mr. Rink and his companies had difficulty putting together financing on Victoria Landing and these monies were not repaid within the 90 days. On October 25, 1999 (four months after the monies were advanced by Mr. Levesque) the loan period was extended by agreement of

all parties until December 23, 1999. In the same week there was some evidence that Mr. Rink had negotiated additional financing for 450100 B.C. to enable it to complete the construction of Victoria Landing. In fact work on Victoria Landing had stopped shortly before because of Rink's cash flow problems. This information about additional re-financing was reassuring to Mr. Levesque as he expected his loan to be repaid from Mr. Rink's profit on that project.

- [15] Mr. VanDongen was never a director of MMR or of 450100 B.C. nor was he involved with the convention centre nor with the Victoria Landing project save for a very small site servicing contract on Victoria Landing. The project manager on Victoria Landing was Don Schuster.
- [16] Peoples Trust, the first mortgagee on Victoria Landing, did advance through the same solicitor some time after October 1999 a further \$750,000 for the purpose of completing the Victoria Landing project. None of these monies however were applied against the Levesque loan. This upset Levesque because by late December 1999 (if not earlier) it was clear to Mr. Levesque that Mrs. VanDongen on behalf of #100 would not agree to a further extension of the Levesque loan. Rather, her only concern was to retrieve the duplicate certificate of title.
- [17] In the last few days of December 1999 and in early January 2000 negotiations took place for a further extension of the time for repayment. Mr. Rink and his companies and Mr. Levesque agreed on a one-year extension. The issue is whether #100 agreed.
- [18] This short term loan agreement was the first financial dealing which Levesque had with Mr. VanDongen or with any company connected with Mr. VanDongen. Mr. Levesque said he did not know in June of 1999 that Marilyn VanDongen was the signing authority for #100. This is contradicted however by his examination for discovery evidence where he agreed that he knew at least shortly after the loan documents were signed, that she was the signing authority for #100. As well, Levesque's solicitor wrote him by letter dated June 28, 1999 (six days after the loan agreement was signed) enclosing a copy of the resolution by #100 authorizing the hypothecation of the duplicate certificate of title bearing the signature of Marilyn VanDongen as director. I am satisfied that Mr. Levesque knew when he signed the loan agreement on June 22, 1999 or thereabouts that Mrs. VanDongen was the signing authority for #100.
- [19] Mr. Levesque knew at all times that repayment was to be made by MMR. He did not expect such payment to come from #100 unless this was necessary to retrieve its duplicate certificate of title in the event of default by MMR.
- [20] Mrs. VanDongen was upset with her husband for delivering the duplicate certificate of title as collateral security however she signed the loan agreement recognizing that there was some risk but knowing that it was the responsibility of the other Respondents to repay this debt. Mrs. VanDongen conceded that she had confirmed Mr. VanDongen's commitment of #100 to the agreement extending the repayment deadline to December 23, 1999.

- [21] In the same week that the loan agreement extension was signed (late October 1999) a Kamloops newspaper article confirmed that Mr. Rink had obtained additional financing to enable completion of Victoria Landing and this newspaper article also confirmed that legal and financing work was continuing on the convention centre project being developed by Rink's company MMR.
- [22] Peoples Trust, before advancing the \$750,000 to 450100 B.C. Ltd. required a written statement from Total Concept Developments Ltd. (which I will refer to as "Total") that Total's mortgage over property in which Peoples Trust was going to obtain collateral security was in good standing. Total was a company owned by the VanDongens. By letter of November 16, 1999 Mr. VanDongen wrote to Mr. Rink advising that no such letter would be written until agreement had been reached on a number of matters including the return to #100 of the duplicate certificate of title.
- [23] There were two or three meetings in the time frame of late December 1999 - early January 2000 in which Levesque, Rink and Mr. VanDongen discussed the loan which came due on December 23, 1999. Mr. VanDongen denied that #100 agreed to a further extension other than the one signed on October 25, 1999. He agreed that the granting of a further extension was discussed between the three of them but said that he had insisted that there must be a return of the duplicate certificate of title.
- [24] A further extension was contemplated by a document dated in February 2000. The parties described in that document were MMR, Levesque, Rink, 450100 B.C. and #100. This document was signed by Rink as guarantor and by Rink on behalf of MMR and 450100 B.C. It provided for a one year extension of the loan agreement, payment by MMR of a further \$5,000 to Levesque and payment of monthly interest of \$1,000. The document was not signed by #100. It was also not signed by Levesque although it is clear from the evidence that he would sign once #100 had signed. MMR paid the \$5,000 to Levesque and delivered 12 post dated cheques of \$1,000 (the "interest cheques"). The \$5,000 cheque was cashed as were the interest cheques for January, February, March and May, 2000. The April interest cheque was returned to Levesque by the bank marked "NSF".
- [25] #100 did not sign the February 2000 document and Mr. Levesque knew that any extension had to be in writing and that the document had to have Marilyn VanDongen's signature on it. No demand for repayment was made by Levesque of any of the parties before the \$5,000 was paid to Levesque in February 2000 or before the interest cheques were delivered to him. #100 received no consideration for the extension and of course denies that it agreed to the extension.
- [26] Mr. Rink knew at all relevant times that the proposed extension had to be documented and required Mrs. VanDongen's signature on behalf of #100. Mr. Rink conceded this at trial and Mr. Rink's knowledge of this is confirmed by the content of VanDongen's letter to him of November 16, 1999, to which I have referred.

- [27] I am satisfied that Levesque agreed to the one-year extension despite knowing that #100 had not agreed.
- [28] The circumstances show as well that #100 was prejudiced by the granting of the extension. In December of 1999 and the early months of 2000 the \$750,000 financing for Victoria Landing had been advanced and the convention centre negotiations were continuing. The bank statement of 450100 B.C. in December 1999 showed a credit balance of \$30,000. Rink's companies had a project underway on Tranquille Road in North Kamloops (the Thompson Health Region contract). There is merit to the argument advanced on behalf of #100 that if Levesque had insisted on repayment of this loan in December of 1999 or early 2000 that Rink would have found a way to make payment to avoid a lawsuit and publicity which would likely have jeopardized the convention centre negotiations.
- [29] The evidence also shows that it was Rink's intention to pay this \$100,000 debt from profits realized by Rink upon sale of the property at 3rd Avenue and Lorne Street (the proposed convention centre site) to a third party developer if the city approved the convention centre proposal. Levesque conceded that if this sale took place that he expected Rink and MMR would have the funds to repay the loan.
- [30] In August of 2000 Levesque and Rink continued to be in a business relationship. On September 11, 2000 Peoples Trust obtained an Order Nisi on the Victoria Landing mortgage and affidavit material in those proceedings showed a probable shortfall of \$3.5 million. In the Order Nisi, judgement was obtained in an amount in excess of \$7 million against the Respondents 450100 B.C., MMR and Rink. A short time later the City of Kamloops terminated discussions regarding the convention centre proposal.
- [31] I am satisfied on the evidence that Mrs. VanDongen, and therefore #100, never agreed to a further extension of the loan agreement, that is, beyond the extension granted on October 25, 1999. I am satisfied that Mr. Levesque was not misled into believing that #100 was agreeing to a further extension. It is significant that Mr. VanDongen, while being aware of discussions between Mr. Rink and Mr. Levesque about an up front payment of \$5,000 in exchange for the granting of a further extension and monthly interest payments of \$1,000 did not become aware of the fact that those payments had actually been made until a conversation he had with Mr. Levesque in April or May 2000 when Mr. Levesque advised him that the April cheque had been dishonoured. I accept as well the evidence of Mr. VanDongen that he told Mr. Levesque in a conversation after a church service which both of them attended in Kamloops in early 2000 that Mrs. VanDongen would not agree to a further extension.
- [32] Mr. Levesque simply entered into a new contract, extending the time for repayment of the \$100,000, for which he received from MMR \$9,000 as consideration, with the expectation that Victoria Landing would complete, the convention centre would proceed and he would then be repaid.

THE LAW

[33] #100 claims that Mr. Levesque, the creditor, acted in a way that was not beneficial to #100 by entering into an agreement with all Respondents except #100 to extend the term of repayment for a further year. The Canadian Encyclopedic Digest, Third Edition, Western, Volume 16, Title 71 states at para. 267:

The surety will be discharged as a result of a change to the documents only where the change was material. A change is material where it has an effect on some contract or right, either by providing a new right to one of the parties or by otherwise changing the substantive nature of the instrument itself. ...

And at para. 268:

A change need not necessarily be detrimental in order to be material, but it must be at least potentially detrimental to the interest of the surety. ...it appears that any alteration that affects the liability of a surety is sufficient to vitiate the guarantee, even if the potential for prejudice is low. ...

[34] I refer to *Bank of Montreal v. Wilder*, [1986] 8 B.C.L.R. 282, at p. 290:

It is trite law that any material variation of the terms of the contract between the creditor and the principal debtor to the prejudice of the guarantor without the guarantor's consent will discharge the guarantor. ...

And at p. 293:

...In the case of a specific contract it is to be assumed that the guarantor gave his guarantee in contemplation of an ascertainable and clearly identified risk inherent in the contract. The guarantor in such a case is discharged because he is powerless to protect against the variation of the principal contract by the parties to that contract. Once he has given his guarantee on the basis of that particular risk, equity protects him against any variation of it to which he was not a party.

[35] In *CIBC v. Kennedy* (24 May 1988), Kelowna Registry, 86-504 (B.C.S.C.) the following appears at p.6 having been adopted by Leggatt J. from *The Bank of Nova Scotia v. Bulych et al*, [1984] 3 W.W.R. 746, (Sask. Q.B.) at p. 756:

It seems abundantly clear to me on the authorities cited above that the plaintiff, through its unilateral alterations, variations and breaches of the original agreement between itself and Citi on the one hand, and itself and the guarantors on the other, without the knowledge or consent of the guarantors, is sufficient to discharge the latter from the terms of their guarantees. This constitutes an alteration of the surety's obligation which is sufficient to discharge the surety from liability.

[36] It follows that if the covenant of the guarantor (that is, the hypothecation of the duplicate certificate of title by #100) is no longer enforceable because of the later contract to which the guarantor or surety is not a signatory or party, that #100 is entitled to the recovery of the duplicate certificate of title. In support of this proposition I refer to *Bolton v. Salmon*, [1891] 2 Ch. 48, at p.53:

...On principle I can find no ground for the proposition that, although the surety's covenant is gone by alteration of the contract with the principal debtor, yet the security which the surety has given remains bound. A surety pledges his personal credit by note, covenant, or otherwise, and by the same contract pledges also his goods or charges, or mortgages his lands, as security for the same debt. The alteration of the contract without his consent or without the reservation of rights against him affects his position equally in regard to every part of his contract of suretyship. ...

and at p.54:

... The true rule, as the Lord Justice went on to show, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if there is any alteration, which is not obviously either unsubstantial or for the benefit of the surety, he is to be the sole judge whether he will remain liable. This reasoning applies with the same force to a security given by the surety as it does to a personal obligation entered into by him. ...

[37] In the circumstances before me I have concluded that Mr. Levesque extended the time for payment by the debtor by a further year without the consent of #100 and to the prejudice of #100, that being that #100 if it chose to redeem its security (the duplicate certificate of title) was prevented from then pursuing its remedy against the debtors until the expiry of the extension period by which time hindsight confirms that the debtors no longer had the funds to meet their obligation to repay. As I have said Mr. Levesque knew that he needed the agreement of #100 to the extension, and that this required the consent and signature of Mrs. VanDongen on behalf of #100 and further that she would not agree to that. Despite this refusal by #100, Mr. Levesque entered into a fresh agreement with the other Respondents for which he received the sum of \$5,000 and, as time passed, four monthly interest cheques each in the amount of \$1,000, before the other Respondents failed financially.

[38] It is of significance as well that if Mr. Levesque had insisted on payment in late December 1999 or January 2000 it was likely that the debtors would have then come up with the money because all Mr. Rink's projects were then in good standing and the threat of legal proceedings might well have compromised the convention centre negotiations.

[39] Mr. Levesque's claim against #100 is dismissed with costs to #100 at Scale 3. The duplicate certificate of title will be returned to #100.

"R.B. Hunter, J."

The Honourable Mr. Justice R.B. Hunter

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/02/03/2002bcsc0351.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/levesque-v-mmr-holdings-2002>

Prepared on 28 October 2026 · Esheria