

CANADA / JUDGMENT

McBryde v. Shehjavan

2015 BCSC 2222

COURT

Supreme Court of British Columbia

DECIDED

1 December 2015

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2015 BCSC 2222 McBryde v. Shehjavan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McBryde v. Shehjavan,

2015 BCSC 2222

Date: 20151201

Docket: S142601

Registry: Vancouver

Between:

Edward McBryde and Shadi Golestani

Plaintiffs

And

Ehsanollah Mirzaei Shehjavan and

Fereshteh Mohebi Kordsofla

Defendants

Before: The Honourable Mr. Justice Myers

Corrected Reasons: The headings in these

reasons were removed on December 4, 2015

Reasons for Judgment

Counsel for the Plaintiffs:

Andrew Spence

Counsel for the Defendants:

Self-represented

Place and Dates of Trial:

Vancouver, B.C.

September 28-30, 2015

Written Submissions:

October 5 and 29, 2015 and November 2, 2015

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2015

- [1] The plaintiffs claim repayment of two loans documented by promissory notes. The plaintiffs also claim fraud based on an alleged representation that the defendants' restaurant business was making \$20,000 a month.
- [2] There is no issue as to the advance of the funds. There is a dispute as to what has been repaid. The defendants plead unconscionability and a defence under the Business Practices and Consumer Protection Act, R.S.B.C. 2002, c. 2.
- [3] The plaintiffs, who are married to each other, own Luxury Hygiene Inc., which sells janitorial and washroom supplies to businesses. They got to know the defendants when, in 2012, Luxury Hygiene began to sell product to the defendants' kebab house in North Vancouver. The plaintiffs ate frequently at the defendants' restaurant.
- [4] The defendants, who are also married to each other, are Iranian and speak English with difficulty. Their evidence was given through an interpreter. The plaintiff, Ms. Golestani, is also Iranian and she speaks fluent English and Farsi. I mention this because the defendants' ability to understand what they were signing was an issue raised by them, although there was no plea of non est factum.
- [5] When the parties met, the defendants had an outstanding loan from their cousin. The interest was \$800 per month per \$10,000 loaned, a criminal rate of interest. The principal was to be paid in a lump sum. The defendants mentioned this to the plaintiffs and discussions took place with respect to the plaintiffs making a replacement loan. There is disagreement as to whether the plaintiffs made the offer for the loan first or whether the defendants requested it, however I do not think the determination of that has any bearing on my decision.

- [6] Ms. Golestani and Mr. McBryde said the defendants told them that they were making \$20,000 a month at the restaurant. Ms. Golestani said she understood that to be profit. She said that but for the representations, the plaintiffs would not have made the loan. Mr. McBryde's evidence was similar. Mr. Shehjavani said that " maybe there was talk about \$20,000 - maybe they didn't understand - I meant income and costs ".
- [7] The end result was that the plaintiffs loaned the defendants \$40,000. A promissory note was signed on February 28, 2013 providing for a term of 60 months with interest at the rate of 55% to be paid monthly (\$1,833 per month) and the principal to be paid back at the end of the term. Ms. Golestani said that the defendants asked for the advances to be made in cash and that is how they were paid.
- [8] The defendants said that they did not fully understand the document that they were signing. On the other hand, the plaintiffs say that Ms. Golestani went over each and every part of the note and where necessary translated for the defendants.
- [9] Whatever took place at the meeting where the document was signed, it is clear from the cross-examinations of the defendants that they understood the terms of the loan.
- [10] At some point after the first loan was made, the parties began to discuss a second loan so that the defendants could open up a new and larger restaurant. The end result was a further loan of \$178,000 and promissory note dated May 21, 2013. The terms, including interest, were the same as the original loan. The monthly payment was to be \$8,158.
- [11] According to the plaintiffs:
- The defendants paid the monthly amount required under the February 2013 note from March 28, 2013 through to August 28, 2013.
 - The defendants made no payments with respect to the May 2013 note until September 28, 2013.
 - From September 28, 2013 to November 28, 2013, the defendants paid \$9,000 per month toward both promissory notes, which was less than the \$9,980.66 combined requirement.
 - The defendants made no further payments after the payment of November 28, 2013.
- [12] The defendants do not dispute that, except to say that they made a payment of \$20,000 against the February loan, which the plaintiffs deny. Ms. Golestani recorded payments in a book, which was put into evidence. It does not show the alleged \$20,000 payment. The defendants have no documentation to prove the payment. Ms. Kordsofla says that she had receipts made out by her that Ms. Golestani signed, but in a meeting Ms. Golestani took them from her, ripped them up and said she would provide neater ones. Ms. Golestani denies that.
- [13] I do not accept that the \$20,000 was paid. It is of note that it was not pleaded in the Response to Civil Claim, which was filed when the defendants had counsel. The defendants' evidence was inconsistent on the point. They were unable to answer questions with respect to

whether the claimed payment of \$20,000 was over and above the monthly interest payments of \$1,833.33 or was inclusive of them. The defendants claimed to have borrowed the money from their children, friends and family but failed to provide those names despite that this was requested in discovery. Additionally, the defendants failed to call any individuals to corroborate that evidence despite the fact that their daughter was available to provide evidence.

- [14] Turning to unconscionability, there is nothing to indicate the plaintiffs took advantage of any weakness of the defendants.
- [15] Although the interest rate was exceedingly high it was not at the prohibited criminal rate. In *Harry v. Kreutziger*, [1978] B.C.J. No. 1318 (C.A.), Lambert J.A. noted:
29. In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired, to select words from both statements of principle, the Morrison case and the Bundy case, are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. To my mind, the framing of the question in that way prevents the real issue from being obscured by an isolated consideration of a number of separate questions; as, for example, a consideration of whether the consideration was grossly inadequate, rather than merely inadequate, separate from the consideration of whether bargaining power was grievously impaired, or merely badly impaired. Such separate consideration of separate questions produced by the application of a synthetic rule tends to obscure rather than aid the process of decision.
30. The single question of whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded must be answered by an examination of the decided cases and a consideration, from those cases, of the fact patterns that require that the bargain be rescinded and those that do not. In that examination, Canadian cases are more relevant than those from other lands, where different standards of commercial morality may apply, and recent cases are more germane than those from earlier times when standards were in some respects rougher and in other respects more fastidious. In my opinion, it is also appropriate to seek guidance as to community standards of commercial morality from legislation that embodies those standards in law.

In light of this comment it is significant to note that the loan from the plaintiffs replaced a loan from the defendants' relative, which had been at an even higher rate.

- [16] Regarding the language comprehension issue, even if Ms. Golestani did not go over each and every term of the promissory note and translate some or all of them, the defendants were not forced to sign the notes or take the money at any particular time - no deadline was imposed. The defendants could have sought legal advice.

- [17] The defence under the Business Practices and Consumer Protection Act has no merit, because this was a business transaction and not a consumer transaction within the definitions of the Act: *Bryan v. Gill*, 2013 BCSC 1898.
- [18] The remaining issue is the plaintiffs' claim in fraud, based on the representation that the defendants' business was earning \$20,000 per month.
- [19] The Supreme Court of Canada in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, succinctly set out the elements of fraud:

21 From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

- [20] The amount advanced was significant. Fraud is a serious allegation, and one expects the alleged representation to be attested to with some precision. As relayed by the plaintiffs, the discussions with respect to the loan were exceedingly casual. The plaintiffs' evidence was vague as to precisely what was said and when. There was no review of financial statements. As I said above, although Mr. Shehjaman acknowledged that the \$20,000 per month was discussed, he said that he meant to refer to gross income. I accept that. Moreover, any unintended ambiguity in the representation would not make it fraudulent.
- [21] The plaintiffs' evidence with respect to the \$20,000 representation becomes even more vague and unsatisfactory when it comes to the second loan. It is not clear whether they professed to rely on the representation made before the first loan or whether a fresh representation was made. If the former, it is hard to see how that could be operative for the second loan, given that the loan was for the opening of a new restaurant that would have a completely different revenue stream and might not make a profit at all.
- [22] I note the financial statements indicate that for the fiscal year ending August 31, 2013 the average monthly gross revenue was \$19,000. For the following fiscal year, it was \$25,000.
- [23] There were credibility difficulties with all of the witnesses. The defendants' evidence was confused even making allowances for their language difficulties. The plaintiffs' evidence was overly vague and simplistic. Neither side gave a satisfactory explanation as to why the advances were made in cash. Even if the defendants asked for it, it is hard to understand why the plaintiffs would comply, unless it was to enable the plaintiffs to avoid taxes.
- [24] I therefore do not find that the defendants acted fraudulently and dismiss the claim for fraudulent misrepresentation.
- [25] The plaintiffs shall recover the principal amount owing with interest at the contractual rate to the date of trial, being \$468,432.

[26] This leaves the issue of costs. The plaintiffs claim solicitor and client costs as per the promissory note. However, an unproven allegation of fraud may, if made recklessly, attract an order for special costs. In my view the fraud allegation was made recklessly because it was based on scanty evidence. The fairest result is to award the plaintiffs their taxable costs at Scale B.

"E.M. MYERS, J."

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