
CANADA / JUDGMENT

Moran v. Gutoski

2008 BCSC 127

COURT

Supreme Court of British Columbia

DECIDED

16 January 2008

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2008 BCSC 127 Moran v. Gutoski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moran v. Gutoski,

2008 BCSC 127

Date: 20080116

Docket: 67795

Registry: Kelowna

Between:

Derek Frederick Moran

Plaintiff

And:

Michelle Gutoski, also known as Michelle Julie Sargent

Defendant

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Judgment

In Chambers

January 16, 2008

Counsel for Plaintiff:

H. Taylor

Counsel for Defendant:

P. Hergott

Place of Hearing:

Kelowna, B.C.

- [1] THE COURT: The plaintiff is seeking judgment based on a personal guarantee given by the defendant of debts advanced to her deceased former common-law husband's business. The defendant argues, among other things, that when various payments that were made by the debtor company are properly attributed as between various debts the company owed to the plaintiff, there is nothing owing on the note that is the basis for this action.

The Facts

- [2] Mr. Moran is a businessman and was an acquaintance of Mr. Yakabuski. Mr. Yakabuski was the owner of Abacus Financial Inc. ("Abacus"). He and the defendant, Ms. Gutoski, began a relationship in the 1990s and lived together from approximately 1994 until the summer of 2002.
- [3] Beginning in 1998, Mr. Moran began lending money to Abacus. The loans were all evidenced by promissory notes prepared and issued by Mr. Yakabuski on behalf of Abacus. The loans generally ranged in amount from between \$15,000 to \$25,000 and carried interest at between 24 and 30 percent per annum. The loans were usually for short fixed terms. Sometimes they would be paid when they matured; on other occasions, they would be "renewed" by Abacus issuing a new promissory note with a new term and sometimes with a different rate of interest.
- [4] As of April 2001, the only money Abacus owed to Mr. Moran was \$20,000 secured by a note dated the 12th of that month. By its terms, interest is defined as "2% per month (24% per annum) and payable on the maturity date hereof being October 12, 2001". The note defines certain events as events of default which, should they occur, would allow Mr. Moran to accelerate payment. It also contains the following clause:

The Borrower hereby waives presentment for acceptance and payment including applicable grace periods, demand, notice of dishonor and protest or a further notice of any kind and agrees that it shall remain liable in respect hereof as if presentment, demand, notice of dishonor and protest had been duly made or given.

- [5] Although the note seems to require that the interest it carries be payable on maturity and only on maturity, Abacus began paying interest, which it calculated at \$400 per month, on May 7, 2001. With some minor exceptions, it continued to make monthly payments in that amount throughout the remainder of 2001, during all of 2002, and up until February of 2003.

- [6] Mr. Moran did not demand repayment of the principal when it came due on October 12, 2001. Indeed, there is no evidence that he has ever demanded payment of the loan. Given the clause by which the borrower waived the need for a demand, and the fact that the note itself is for a fixed term, it may be that a demand was unnecessary. Unlike earlier instances when a loan was not repaid when due, Abacus did not issue a replacement note or, to use the language the parties employ, "reinvest" the debt evidenced by this note.
- [7] On May 4, 2002, while the loan from April 2001 was still outstanding, Abacus borrowed an additional \$25,000 from Mr. Moran. Mr. Moran wanted Mr. Yakabuski to personally guarantee this loan, and to that end, he investigated Mr. Yakabuski's circumstances to determine whether his personal guarantee would be of any value. He learned that the home in which Mr. Yakabuski was living was registered in the name of Ms. Gutoski. He was satisfied that there was equity in the home and agreed to accept Ms. Gutoski's guarantee of the loan. She agreed to guarantee the debt and the loan was advanced. I will variously refer to this loan as the "May 2002 loan" or the "new loan" or the "high-interest loan". The note that evidences this loan is in precisely the same terms as the earlier notes, including the April 12, 2001 note, except that it carries interest "at the rate of 4% per month (48% per annum)" and was due and payable on June 2, 2002.
- [8] Mr. Yakabuski signed the note on behalf of Abacus, and Ms. Gutoski and Mr. Yakabuski signed guarantees.
- [9] Abacus did not repay the May 2002 note when it was due, although on June 7, 2002, it issued a cheque to Mr. Moran for \$11,000. Mr. Moran wrote to Mr. Yakabuski and Ms. Gutoski on June 14, 2002, as follows:

According to the promissory note issued May 2, 2002, you are now in default. You have until Wednesday, June 19th, 2002 to repay the note in full including interest.

As of the [sic] 4:00 pm Wednesday, June 19th, 2002 the total interest and remaining principal payable will be \$15,461.59. This assumes that your \$11,000 cheque received by me Friday June 7th, 2002 does not bounce.

If you fail to provide a certified cheque by this date, I will have no choice but to seek legal action.

Abacus did not pay the loan as demanded. It continued, however, to make the \$400 monthly payments on the April 2001 note.

- [10] On September 20, 2002, Abacus caused a further cheque to be issued to Mr. Moran, this time in the amount of \$10,000. There is no evidence as to what if any documents accompanied this payment. All that can be said is that it was made without anything which would indicate whether it was intended to apply to the May 2002 debt or the older and earlier debt from April of 2001.

- [11] On October 2, 2002, Abacus made another \$400 monthly payment. On October 17, 2002, it made a further lump sum payment, this time in the amount of \$7,272.94. This payment was accompanied by a statement from Abacus dated October 15, 2002. The statement relates only to the May 2002 loan (Abacus issued separate statements for the loan dating from April of 2001).
- [12] The statement shows the receipt of the loan on May 3, 2002, and adds to that balance \$1,000 in interest so that the opening balance is \$26,000. It records that on June 7, 2002, a payment of \$11,000 was made and interest calculated to that date amounted to \$706.67, such that the balance due was \$15,706.67. There was a further interest charge on September 2, 2002, in the amount of \$1,120, such that the outstanding balance was \$16,826.67. The statement then records a \$10,000 payment on September 19, 2002; an interest charge on October 2, 2002, for \$386.67; and a further interest calculation as of October 15, 2002, in the amount of \$67.10. The result of all of the foregoing is that, according to the statement that Abacus issued, the balance due in respect of the May 2002 note was \$7,280.44. Finally, the statement records a payment in that amount, thus, clearing the balance to zero.
- [13] On examination for discovery, Mr. Moran agreed that he likely received this statement when it was dated, that is, October 15, 2002. There is in evidence a second statement relating to this loan and also dated October 15, 2002. It is obvious, however, that that statement was not issued on October 15, 2002, because it contains entries up to and including November 21, 2002. In addition, interest is calculated in a different manner in the second statement.
- [14] All that need be said about the fact that there were two statements issued for the period ending October 15, 2002, is that the former statement either accompanied the final payment or it was sent so closely to it as to effectively have accompanied it.
- [15] Returning to the narrative, Abacus continued to pay the \$400 monthly payments it had been making since 2001. At the end of 2002, it issued two T5 Canada Custom and Revenue Agency forms to Mr. Moran for the interest that it, that is, Abacus, considered it had paid in relation to the two loans. One of the T5s is for \$4,800, which is the product of 12 monthly payments of \$400; and one is for \$6,702.01, which is precisely what Abacus paid in interest, according to the second version of the October 15th statement on the May 2002 loan (plus interest on an earlier loan that was advanced and repaid in April of 2002).
- [16] Mr. Moran did not question the T5s nor did he ask for revised forms to be issued.
- [17] Abacus made one further \$400 monthly payment in February of 2003 and then a final payment in June of that year of \$2,000.
- [18] Mr. Yakabuski died sometime in either early 2005 or late 2004. The only evidence on the point is that of Ms. Gutoski, who has deposed that she learned of his death in either January or February of 2005.

- [19] Following the payments in 2002 and 2003, nothing appears to have been done by either Mr. Moran or Mr. Yakabuski or anyone else in relation to the financial relationship between Abacus and Mr. Moran until March 14, 2005, when Mr. Moran's solicitor wrote to Ms. Gutoski demanding payment of the May 2002 note. The demand was for the sum of \$59,657.95 as of March 1, 2005, with a per diem rate of interest thereafter of \$74.02.
- [20] The plaintiff seeks judgment as of December 17, 2007, in the amount of \$143,661.82. This sum is calculated on the basis that the lump sum payments made by Abacus in June, September, and October 2002 were credited first to the indebtedness due under the earlier note with the remainder plus the \$400 monthly payments being credited to the May 2002 note.

The Issues

- [21] The plaintiff argues that, in the absence of an attribution by the debtor, Abacus, as to which indebtedness payments were to be applied, it is open to him to attribute the payments in the manner he sees fit. He argues that none of the payments were attributed by the debtor when they were made, and thus he was entitled to treat them as applying to the older and less secured and lower interest-bearing loan, and that is what he purports to have done.
- [22] Ms. Gutoski argues that at least the \$11,000 payment of June 2002 was attributed by Mr. Moran to the high-interest loan and that attribution was communicated to the debtor by the letter of June 14, 2002. Once that was done, the election was irrevocable.
- [23] In addition, Ms. Gutoski argues that the payment of October 17, 2002, was effectively attributed by the debtor and the attribution was communicated to Mr. Moran through the issuance, either contemporaneously or so near in time as to be effectively contemporaneous, of the account statement showing how Abacus was treating the payment.
- [24] As for the September 2002 payment, it is conceded that no attribution was made when the payment was made, but it is argued that it was clear to Mr. Moran as early as October of 2002 that Abacus was treating it as applicable to the high-interest loan. Abacus's treatment is revealed by the statements and T5s it issued, and by virtue of the fact that it continued to make the \$400 interest-only payments in relation to the earlier loan.
- [25] Ms. Gutoski also argues that the plaintiff has not proven that the guarantee relates to the debt on which the plaintiff is suing, nor has he proven that she signed the guarantee.
- [26] Finally, she argues that if she is liable, and if there is an amount owing on the loan, then the amount needs to be calculated exclusive of interest because the loan, when properly interpreted, carries a criminal rate of interest.

- [27] In the further alternative, she argues that the loan does not comply with the provisions of the Interest Act, R.S.C. 1985, c. I-15, in terms of expressing the interest as an annual rate, and thus even if it is not a criminal rate of interest, recovery is limited to that allowed by the Interest Act.

Analysis

- [28] I will deal with the issues relating to the signing of the guarantee and whether it relates to the note in question first because they can be disposed of summarily.
- [29] Ms. Gutoski does not deny that she signed the note. Rather, she deposes that she has no memory of doing so and that, for a variety of reasons, it is likely that she did not.
- [30] As noted, Ms. Gutoski separated from Mr. Yakabuski in the summer of 2002. In the months leading up to that separation, their relationship was not good. Mr. Yakabuski had been spending most of his time in Alberta, and Ms. Gutoski was spending most of her time in Kelowna under the influence of alcohol. She has deposed that she knew Mr. Yakabuski was having serious financial troubles in the spring of 2002, so serious that in April he sold their plasma television set and their stereo system.
- [31] Ms. Gutoski was, at the time, operating her own business. She has deposed that knowing what she did of Mr. Yakabuski's financial situation, and of the unstable nature of their relationship, it is unlikely she would have signed a guarantee relating to his company's debts. In addition, she was in the habit of telling one of her employees with whom she had a close emotional bond, a lot about her personal and financial circumstances, and that person has deposed that Ms. Gutoski made no mention of signing a guarantee at the time in question.
- [32] Finally, Ms. Gutoski points to the fact that, under the line over which her signature appears, her name is typed and her first name is misspelled. She has deposed that if she signed the document she would likely have noticed that and corrected it. In addition, she says that a number of documents that she signed in or around that period bear a signature that is markedly different from the signature that appears on the guarantee.
- [33] The evidence about the execution of the guarantee is found in the affidavit of Mr. Moran and, to a lesser degree, from the inferences that can be drawn from the fax notations that are on the top of the guarantee itself. Mr. Moran has deposed that he required Ms. Gutoski's guarantee because she was the one that owned the property. The promissory note is signed and dated May 3, 2002. It shows it was faxed from Abacus on that day at 4:38 p.m. to an unknown destination. The guarantee is signed and dated May 4, 2002, that is, the next day, and it shows that it was faxed from Ms. Gutoski's business to an unknown destination at 11:15 a.m. that day.

- [34] From this, Ms. Gutoski argues that it does not appear that the note was sent to Ms. Gutoski, although it is apparent that the guarantee, at least at some point, was within the confines of her business. Further, because the guarantee refers to a note dated May 4, 2002, and the note in question is dated May 3rd, it cannot be said with any degree of confidence that the note in issue is the one that was guaranteed.
- [35] I accept that Ms. Gutoski may not have intended to sign the guarantee, but it is also plain that she was careless about many matters during the period in question. By her own account, she was drunk most of the time, often to the point where, although outwardly she appeared able to function, she would be left with no memory for periods of time. It is at least as likely that she signed the guarantee and does not now remember doing it. If that is the case, it would not be surprising that she did not mention it to her employee or that she did not notice, never mind correct, the spelling of her name.
- [36] There is, however, more than just this to consider. There is no question but that the guarantee was faxed from Ms. Gutoski's business. If she did not sign it, the only other person that might have signed it on her behalf is Mr. Yakabuski. If he signed it, there would be no reason for him to take it to her business or fax it from her business to some other destination. Indeed, there would be many reasons for him not to do just that, the most obvious of which is that it might well have come to the attention of Ms. Gutoski and invited an inquiry.
- [37] I am satisfied, on the balance of probabilities, that Ms. Gutoski signed the guarantee. I am also satisfied that it relates to the note that is being sued on. The fact that the date of the note referenced in the guarantee is May 4, 2002, and the note is, in fact, dated May 3, 2002, is of no consequence, in my view. There is only one loan between the parties in the month of May, and it is this one. The amount of the note (\$25,000) is specified in the guarantee, as is the identity of the lender and the identity of the borrower. What I infer happened is that Mr. Yakabuski signed the note on May 3, 2002, and the next day both he and Ms. Gutoski signed the guarantee, inserted the date of the note in error, and then returned the documents to Mr. Moran.
- [38] The more substantial question is in relation to the issue of attribution of the payments. The law on the point is succinctly summarized by Maczko J. in *Crescent Petroleum Ltd. v. Portserv Ltd.*, [1997] B.C.J. No. 2529 (S.C.) [Crescent Petroleum] at para. 11:

Where a debtor has a number of debts with a creditor and the debtor pays to the creditor an amount of money insufficient to cover the total amount of all the debts, the debtor has the right to declare which debt will be paid first. If the creditor accepts the money, he or she must abide by the debtor's appropriation. If the debtor does not make the appropriation, that right devolves upon the creditor.

- [39] Maczko J. cited, as authority for this proposition, Chitty on Contracts, 27th ed. (London: Sweet & Maxwell, 1999). In the 29th edition of that text, the author prefaces the statement of the principle with the phrase "where several separate debts are due from the debtor to the

creditor..." (emphasis added). In the matter at hand, the plaintiff only demanded payment of one debt and that was the May 2002 debt. Although by its terms the April 2001 debt was due, the plaintiff had not demanded payment and continued to accept the interest only payments the debtor made. Arguably, neither the plaintiff nor Abacus treated the April 2001 debt as being due. To the extent that is so, no attribution issue arises. The lump sum payments were made on the only debt due, namely, the May 2002 debt. If I am wrong in this conclusion, I will, in what follows, address the issue of attribution, on the basis of the law as expressed by Maczko J. in *Crescent Petroleum*.

- [40] The plaintiff argues that, as a creditor, he can appropriate payments, when the debtor has not done so, at any time "up to the very last moment". This expression of the principle is taken from *Cory Bros. & Co. v. Owners of Turkish Steamship "Mecca"*, [1897] A.C. 286, ("the Mecca case"), as cited in *Crescent Petroleum*.
- [41] An extreme example of the application of this principle is found in *Seymour v. Pickett*, [1905] 1 K.B. 715 (C.A.), where the creditor was allowed to appropriate when he was giving his evidence in the action taken to recover on the very debt at issue. In that case, Stirling L.G. explained the principle in the following terms at p. 727:

In *The Mecca* it was decided that, when no appropriation has been made by a debtor at the time of payment, the creditor is entitled to appropriate "up to the very last moment." That I think means until something has happened which prevents the creditor from exercising his right -- some such event as, for instance, if the creditor has already made an appropriation and has communicated it to the debtor. By bringing an action the creditor may in fact shew that he has made an appropriation, and the very form of the writ may shew a communication of the appropriation of the debtor. ... I do not profess to give an exhaustive account of the circumstances which may preclude a creditor from exercising his right of appropriation. All that is necessary now to say is that, until something has happened which would render it inequitable for the creditor to do so, he is at liberty to exercise his right.

(emphasis added)

- [42] While the creditor may theoretically have until giving evidence in support of its claim on the debt to make an election or appropriation, it may not always have until that time. If, by reason of the circumstances, it would be inequitable to allow the creditor to do so, even if the debtor has not expressly exercised its right to appropriate, the court is not bound to accept the creditor's appropriation.
- [43] Returning to the facts, there can be no doubt that the plaintiff attributed the first lump sum payment of \$11,000 to the May 2002 debt. Mr. Moran wrote to Mr. Yakabuski and Ms. Gutoski advising that the balance due on the May 2002 note would be \$15,461.59, assuming the \$11,000 cheque cleared. It cleared. It was argued that because the attribution was conditional, it is not somehow binding. Although conditional, the condition upon which it rested was fulfilled and thus the attribution became unconditional.

- [44] The last payment, that is, the payment made in October 2002, was accompanied either coincidentally, or very nearly so, with a statement from Abacus which showed that Abacus had, for its purposes, applied the payment to the May 2002 indebtedness. That amounts to an attribution by the debtor. Mr. Moran accepted the payment and the accompanying statement, and thus the attribution was effectively communicated to him and it remains binding.
- [45] It is only in relation to the second of the three lump sum payments that the issue is less clear. That payment was not earmarked as applying to any particular indebtedness by Mr. Yakabuski.
- [46] There are, in my view, four reasons why it would be inequitable to allow Mr. Moran's purported attribution to stand. First, as already noted, the parties did not treat the old debt as due. Although the note does not require that a demand be made in order to trigger the obligation, Abacus continued to make, and Mr. Moran continued to accept, what can only be calculated or accounted for as interest-only payments. By contrast, and notwithstanding that the May 2002 note is in precisely the same language, when it became due Mr. Moran demanded payment. In doing so, he made no reference to the April 2001 note. Rather, he demanded payment only of the May 2002 note and continued to accept payments made under the earlier note. This circumstance alone would make it clear to any reasonable person that the lump sum payments (which payout to the penny the May 2002 loan) were, in fact, being attributed by the debtor to that loan, an attribution the debtor was making at least in part in response to the demands made by the creditor.
- [47] There is, however, more. Mr. Moran would have known that Abacus was attributing the September payment to the May 2002 loan when he received the statements in October. Although those statements clearly did not accompany the September payment, he would have known that the debtor was treating that payment as applying to the debt when he received it. He did nothing to correct the misapprehension.
- [48] Finally, Mr. Moran would have known of Abacus's attribution because he received the T5s issued by Abacus for the interest income it considered that it had paid. The only way those T5s make sense is if the old note remained outstanding for the entirety of 2002 and the note from May of 2002 was paid off through the lump sum payments. Mr. Moran did nothing to correct what he must have known, and what any reasonable observer would have concluded, was an obvious misapprehension by the debtor. Not only did he not correct it but it appears that he accepted the attribution, at least for purposes of his own income tax.
- [49] From all the foregoing, I conclude that Mr. Moran knew, and clearly knew, that Abacus was treating the September payment as a payment against the May 2002 indebtedness. Fixed with that knowledge, it would be inequitable to allow him to wait a further two and a half years while interest accrued at 48 percent per year before communicating his attribution to Abacus or Ms. Gutoski. To put it another way, Mr. Moran is estopped from now denying the attribution of the funds. To conclude otherwise would be inequitable, in my judgment.

[50] In the result, the funds due on the May 2002 note are paid in full and the action stands dismissed.

[51] Mr. Hergott, you said that you wanted to make submissions with respect to the issue of costs?

[SUBMISSIONS RE COSTS]

[52] THE COURT: I am not persuaded that this is a circumstance in which special costs should be awarded. It would not be unreasonable for Mr. Moran to assume that Ms. Gutoski knew what Mr. Yakabuski knew, and thus I do not consider it unreasonable to simply pursue the matter in the fashion that he did. Moreover, while successful, Ms. Gutoski is not entirely without blame, if I can use that word, in the sense that she was careless about her own affairs. In part, that gave rise to what might be viewed as an ambiguous situation from Mr. Moran's point of view and he took advantage of it. I say that not in a critical sense.

[53] I do not consider that the conduct of the action rises to the level necessary to warrant an award of special costs. I think it appropriate simply to apply the ordinary rule and award costs on Scale B.

[54] Ms. Taylor, are there any questions from your perspective?

[55] MS. TAYLOR: Not at this time, My Lord.

[56] THE COURT: Okay. Thank you.

[57] Thank you, Ms. Taylor. Thank you, Mr. Hergott.

[58] MR. HERGOTT: Thank you, My Lord.

[59] THE COURT: We will adjourn.

Barrow J.

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