
CANADA / JUDGMENT

Powers v. Mesaros

2007 BCSC 694

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 694 Powers v. Mesaros

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Powers v. Mesaros,

2007 BCSC 694

Date: 20070518

Docket: S067657

Registry: Vancouver

Between:

Leo C. Powers

Plaintiff

And

Bradford W. Mesaros, Brenda J. Mesaros and

Northwest Marketing Concepts Inc.

Defendants

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:

K.G. McKenzie

Counsel for the Defendants, B.W. Mesaros

and Northwest Marketing Concepts Inc.:

K.A. Robertson

Counsel for the Defendant, B.J. Mesaros:

S.A. Dubo

Date and Place of Trial:

May 4, 2007

Vancouver, B.C.

Introduction

[1] This was a summary trial. The plaintiff is the holder of a promissory note executed by the corporate defendant and the two individual defendants. The plaintiff and the defendants also entered into a contract whereby the plaintiff was to supply consulting services to the defendants and for which services the defendants were to pay a certain monthly sum. The defendants resist the plaintiff's claims for payment on the note and the contract. The defendants say that the plaintiff assured them that he would not unreasonably make demand on the note and that the consulting services the plaintiff supplied were not worth the price the plaintiff demands for them. Mrs. Mesaros also argues that she is not liable on the note because she received no consideration for it, and if she did she should nonetheless escape liability because she signed the note while unduly influenced by her husband Mr. Mesaros. Finally, if the defendants are liable on the note, they say that their liability should be reduced due to the improvident and commercially unreasonable sale of certain assets that the plaintiff seized and sold under a personal property security instrument.

The Facts

- [2] The plaintiff lives and carries on his business in Washington State, U.S.A. The plaintiff's son, Michael Powers, and the defendant, Bradford Mesaros, were shareholders in Northwest Marketing Concepts Inc. Northwest operated in Washington State, and it was in the business of publishing advertising and promotional materials. Mr. Mesaros and his wife, Brenda, lived in Abbotsford, B.C. Income generated by Northwest supported the Mesaros family.
- [3] The promissory note on which the plaintiff sues in this action was the third in a series. The first promissory note was created when, in or around December 2004, the plaintiff loaned \$100,000 US to Northwest. Northwest, Michael Powers, and Bradford Mesaros all executed that first promissory note with respect to the loan. The first note was dated December 23, 2004. It specified that the joint obligors (the note was drafted by a U.S. attorney, and employs language used in that jurisdiction) were required to pay monthly interest on the loan calculated as a flat \$1,000 plus interest of 6.5 percent of the outstanding principal. In the event of default, the plaintiff was entitled to demand payment of the principal and accrued interest then outstanding. The first note was due on November 30, 2005.

- [4] When the end of November 2005 came around, Northwest, Michael Powers and Mr. Mesaros were unable to pay out the loan. The parties to the first note agreed to the terms of a second note. The second note confirmed that the \$100,000 loan had been advanced and that the signatories to the second promissory note were liable for payment of the loan. The second note stipulated a new annual interest rate of 7 percent and provided that the signatories were liable to make monthly payments of \$1,161. The monthly payments comprised a blend of interest and principal. The payments were to be made for a term of ten years, at the end of which time the remaining balance of the loan and interest would become due. The second promissory note again provided that if the payments were not made as required, the loan would be in default and the plaintiff was entitled to demand payment of the balance of principal and accrued interest.
- [5] Mrs. Mesaros knew about the \$100,000 loan to Northwest because her husband told her about it. She did not know any details about the security for the loan or about Mr. Mesaros' personal liability for the loan.
- [6] Shortly after the second note was executed, the plaintiff's son Michael decided to leave Northwest. Northwest never did make any payments as required by the second promissory note, and so when Michael decided to quit, he, Northwest and Mr. Mesaros were in default of the note's terms and were in jeopardy of the plaintiff's demand for payment.
- [7] Mr. Mesaros wanted to carry on with the business despite Michael Powers' departure. He could not do so if the loan was called in. The plaintiff wanted further security from Mrs. Mesaros before he agreed to forebear demanding payment of the loan. The plaintiff agreed to not make demand on the second promissory note provided that Northwest, Mr. Mesaros, and Mrs. Mesaros signed a new promissory note to replace the previous one. The third note was prepared. It was on substantially the same terms as the second note, except it noted that it replaced the second promissory note and it contained a spot for Mrs. Mesaros to sign instead of a spot for Michael Powers. At roughly the same time, the plaintiff required Northwest to grant him what amounted to personal property security over Northwest's assets, and he required Northwest and Mr. and Mrs. Mesaros to sign a consulting agreement. The consulting agreement provided that the plaintiff would provide Northwest with consulting services in return for a flat fee of \$1,000 per month. The contract did not specify the frequency or quality of the consulting services that the plaintiff was obliged to supply. All that the plaintiff knew about Mrs. Mesaros was that she was married to Mr. Mesaros. He was not aware of any particular aspects of that couple's relationship.
- [8] Mr. Mesaros deposed that when the plaintiff asked him to sign the third promissory note the plaintiff assured him that he would not unreasonably call upon the note. Mr. Mesaros interpreted this to mean that since the plaintiff had allowed both prior promissory notes to go into default, he would allow the third to go into default as well and that the plaintiff would not insist on the monthly payments being made.

- [9] Mr. Mesaros brought the third promissory note and the consulting contract home to Abbotsford for his wife to sign. Mrs. Mesaros deposed that when Mr. Mesaros put the documents before her to sign, he said words to her to the effect that they were for the plaintiff and were so that the plaintiff would be paid the money that the plaintiff had put into Northwest. Mrs. Mesaros is a fully functional person who operates in the world of adults. Mrs. Mesaros is literate, but she elected to not read the note or the contract. It appears not to have occurred to her to pay attention to the terms of the documents her husband asked her to sign. She deposed that she simply trusted her husband and accepted his request that she sign the documents, and sign she did.
- [10] The plaintiff did supply some consulting services to Northwest after February 2006. He attended five meetings and had numerous telephone calls with Mr. Mesaros. The subject of those interactions included efforts to sell Northwest to an interested investor, and efforts to improve Northwest's business viability. Northwest never did make any payments as required by the third promissory note or the consulting contract.
- [11] In November 2006 the plaintiff retained counsel in B.C. and instructed him to make demand for payment under the third promissory note and the consulting contract. Northwest and the Mesaroses received that demand in mid-November. They did not tender payment. The plaintiff commenced the present action at the end of November 2006.
- [12] In late 2006 and early 2007 Mr. Mesaros tried to sell Northwest to one Steve Davis of Washington State. Mr. Mesaros says that he proposed to sell Mr. Davis all of Northwest's assets (over which the plaintiff held a security interest), including a transfer of three substantial pieces of machinery which were subject to leases to third parties. The proposed sale excepted only cash on hand, accounts receivable, and an Itek Twin Tower Printing Press. The plaintiff had no security interest over the three leased items. Mr. Mesaros deposed that Mr. Davis agreed to pay \$90,964 for the assets, including Northwest's interest in the leased machines. There was no evidence from Mr. Davis himself to that effect, and Mr. Davis never did execute any sale documents presented to him by Mr. Mesaros. The evidence in this proceeding showed that Mr. Mesaros' proposal was, in fact, tripartite in nature. The third party was, of course, the plaintiff, who, owing to his security interest, had to release his security so that Mr. Mesaros could pass clear title to Mr. Davis.
- [13] Both the plaintiff and Mr. Mesaros deposed that the proposal to Mr. Davis never went anywhere. That was because the \$90,964 Mr. Mesaros asked Mr. Davis to pay was not enough to pay out all of the creditors (including the plaintiff) whose cooperation was necessary to complete the transaction. Specifically, under the deal Mr. Mesaros proposed, the plaintiff would be short several tens of thousands of dollars. Mr. Mesaros wanted the plaintiff to agree to release him and his wife from all liability in return for that shortfall payment. The plaintiff was not prepared to release his security and the promissory note for anything less than full payment of the debt.

- [14] When it became apparent that Mr. Mesaros' proposal could not succeed, the plaintiff stepped in. He executed on his security and he seized Northwest's assets. The plaintiff then sold the items he had seized to Mr. Davis. Mr. Davis paid \$55,000 US for those items. The documents adduced by the parties do not clearly demonstrate that Mr. Davis purchased precisely the same things that were in Mr. Mesaros' aborted proposal. Several items appear to have been included in the proposal that were not in the completed sale. The Itek 3985 Twin Tower Printing Press is chief among those missing items. Also, since the plaintiff did not have a security interest in the machines that were subject to the third party leases, those machines were also not included in the list of assets for which Mr. Davis agreed to pay \$55,000 US.

Issues

Consulting Contract

- [15] The Mesarosés argue that the plaintiff did not perform his part of the consulting contract, and so they should not be required to pay anything under it.
- [16] The evidence is clear that the Mesarosés signed the contract and that the plaintiff did, in fact, provide some consulting services to Northwest. The contract required the plaintiff make himself available to the defendants for advice, and the plaintiff deposes that he did just that. Whether the defendants called on him as often as they were entitled to is their lookout, not his.
- [17] The consulting contract may have been a bad or even an improvident deal for the defendants to have made, but their poor business judgment is not a reason to vitiate the contract.

Promise to Forebear

- [18] Mr. Maseros' assertion concerning the assurance he says the plaintiff gave him is purest parole evidence. It is directly contrary to the clear and unambiguous terms of the promissory note. Such evidence cannot displace the agreement to which the parties agreed in writing. To allow such a thing would be to render the written contract meaningless. As Finch C.J.B.C. said in *Arens v. M.S.A. Ford Sales Ltd.*, 2002 BCCA 509:
- [5] In my respectful view, evidence of the pre-contractual representations was inadmissible. Those representations are inconsistent with the terms of the written contract. The admission of that evidence would render the entire agreement clause and other terms of the written contract meaningless. The plaintiff did not allege that the written agreement did not contain the whole agreement. Parole evidence cannot be admitted to vary or contradict the written agreement's express terms.

Consideration

- [19] Mr. Mesaros acknowledges that he received consideration for his signature on the third promissory note. That consideration comprised the earlier advance of \$100,000 US.
- [20] Mrs. Mesaros says she received no consideration, and should therefore not be held liable on the third promissory note. She is wrong. As noted above, in February 2006 the plaintiff agreed to not make demand for payment of the \$100,000 in return for the third note, the security agreement, and the consulting contract. The plaintiff's forbearance was the consideration offered and supplied by the plaintiff to Mrs. Mesaros in return for her commitment on the third note and the consulting contract. Mrs. Mesaros must, therefore, be held to her obligations under both the note and the consulting contract.

Undue Influence

- [21] Mrs. Mesaros complains that she was subject to undue influence from her husband, and that the plaintiff must be fixed with knowledge of that influence. She maintains that because the plaintiff had actual or constructive knowledge that she did not sign the promissory note and the consulting contract by her own free will, then the plaintiff cannot require her to comply with either document.
- [22] The issue here is whether Mrs. Mesaros was subject to undue influence, and if she was, whether the plaintiff must be found to have known it, or, if he did not know it for certain, then whether the circumstances of the case put him on notice that something could be amiss so that he was obliged to make further inquiry. Since he did not make further inquiry, Mrs. Mesaros argues that the plaintiff cannot hold her to the note or the contract.
- [23] Mrs. Mesaros relies upon two authorities from the English courts to support her position. The earliest of these cases is *Barclays Bank plc v. O'Brien*, [1993] 4 All E.R. 417 (H.L.). The pith of that decision may be found in this extract from the headnote of the case:

there was no basis for providing special protection in equity to wives in relation to surety transactions; but that where a wife had been induced to stand as surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong, she had an equity as against him to set aside that transaction; that on ordinary principles the wife's right to set aside the transaction would be enforceable against a third party who had actual or constructive notice of the circumstances giving rise to her equity or for whom the husband was acting as agent; that when a wife offered to stand surety for her husband's debt in a transaction which was not to her financial advantage and which carried a substantial risk of the husband committing a legal or equitable wrong entitling the wife to set aside the transaction, the creditor was put on inquiry and would have constructive notice of the wife's rights unless he took reasonable steps to ensure that her agreement to stand surety had been properly obtained; that in the circumstances, the bank was fixed with constructive notice of the wrongful misrepresentation made by the husband to the wife; and that the wife was entitled as against the bank to set aside the legal charge on the matrimonial home securing the husband's liability to the bank.

- [24] The principle that Mrs. Mesaros urges in this case, and which she says can be found in Barclays, is that if a creditor is aware that a spouse will be asked to sign a guarantee, then the creditor is deemed to know that the spouse may be subject to undue influence and that if the creditor does not take steps to ensure that no undue influence is in play, then the creditor may not rely on any security the spouse might execute.
- [25] The B.C. Court of Appeal considered these issues in *Van Der Ros v. Van Der Ros*, 2003 BCCA 270. In that case the main question was whether by a defence of non est factum the wife could avoid her guarantee of her husband's debt. The wife also raised the defences of unconscionable contract and undue influence. The learned trial judge found that the husband caused his parents to borrow money to finance his business, and that the parents required the wife and the husband to agree to indemnify them for that borrowing. The husband presented the guarantee to the wife and she signed it. She knew that the guarantee had to do with raising some financing for the business. She did not read the guarantee before she signed it, although she had an opportunity to do so. The wife asserted that the husband made various misrepresentations to her about the nature of the document and that she relied on those misrepresentations. The wife then said that the parents did not ensure that she was fully informed about the document they wanted her to sign and that they could not, therefore, hold her to it. The learned trial judge found that the wife knew that the document had to do with the financing arrangement. The wife was held liable on her guarantee. On appeal, the Court of Appeal said this about the wife's defence of undue influence:
- [20] The appellant submits, on the basis of *Barclays Bank plc v. O'Brien*, [1993] 4 All E.R. 417 (H.L.), which was approved in *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 (at paras. 60, 78-79) that the plaintiffs failed in their duty in these circumstances to ensure that the appellant was told of the risk that she was running and of the extent of her possible liability and, as well, their duty to urge her to take independent legal advice. The principle developed in *O'Brien* is that when "a creditor is approached by cohabitees, one the principal debtor and the other the surety, and the proposed transaction is clearly to the disadvantage of the surety, it will be under a duty to inquire" which it can discharge by taking the steps just mentioned; if it fails to do so, undue influence is presumed and the creditor is fixed with constructive knowledge of the husband's wrongdoing (per Sopinka J. in *Gold v. Rosenberg* at para. 78).
- [21] Nevertheless, as was emphasized in *Bank of Montreal v. Duguid*, (2001), 185 D.L.R. (4th) 458 (Ont. C.A.) at para. 15:
- [A] transaction is not automatically vitiated by the failure of the creditor to satisfy these requirements. The surety must establish her legal entitlement to set aside the transaction. If she is successful, the creditor's failure to satisfy its duty to inquire will prevent the creditor from avoiding the rights of the surety.

- [22] If it can be said that the plaintiffs failed to take reasonable steps to satisfy the requirements laid down in O'Brien and adopted in Gold v. Rosenberg, on which I express no opinion, it cannot be said that the appellant has established her legal entitlement to set aside the guarantee. She did not take the time to examine the document before signing it. Given his findings, the trial judge's rejection of her defence of non est factum is unassailable and, as I have explained, the other allegations of misconduct against Cornelis cannot be supported.
- [26] The Court of Appeal did not specifically address the degree to which a creditor must inquire after a guarantor's freedom to act, but did appear to accept that the principles in Barclays are, by virtue of their adoption by the Supreme Court of Canada in Gold, principles of law in this jurisdiction. Leaving the creditor's duties aside, the Court of Appeal had no difficulty concluding that in the absence of misrepresentation by the husband, the wife could not be said to have been unduly influenced by him to sign the guarantee.
- [27] In my view, the present case is similar. Mr. Mesaros told Mrs. Mesaros that the document he presented to her had to do with ensuring that the plaintiff got paid the money he had invested in Northwest. That was true. Mrs. Mesaros could have read the promissory note and the contract, but she did not. It cannot be said that she was in any way unduly influenced to sign both documents.
- [28] I pause to note that it appears that the concept of the transaction being "clearly to the disadvantage of the surety" is a key element in a successful undue influence defence. On the facts of the present case, it cannot be said that the transaction (i.e.: the promissory note and the consulting contract) were financially disadvantageous to Mrs. Mesaros. That is because in February 2006 the plaintiff could have called in the \$100,000 loan from Northwest. Northwest could not have paid the debt. If the plaintiff had pursued his collection of the debt the business may well have collapsed. Obtaining the plaintiff's forbearance preserved Northwest for a time. The Mesaros family, including Mrs. Mesaros, relied on income from Northwest to pay their expenses. Keeping Northwest going was, therefore, obviously to Mrs. Mesaros' advantage.

Commercially Reasonable Seizure and Sale

- [29] Mr. and Mrs. Mesaros maintain that the plaintiff was obliged to sell Northwest's assets in a commercially reasonable manner, as required by s. 68(2) of the Personal Property Security Act, R.S.B.C. 1996 c. 359. They say he did not, and they say that they should, have the benefit of whatever value that the plaintiff failed to realize when he seized and sold the company's assets.
- [30] According to the Mesaroses, the plaintiff was obliged to take a variety of steps when he offered Northwest's assets for sale. They cite the case of Case Credit Ltd. v. Rhodan Contracting Ltd., 2004 BCSC 1783 as authority for the kind of marketing efforts a creditor must to make in order to satisfy its obligation to act in a commercially reasonable manner.

- [31] In Case Credit, the assets under seizure were two highway tractor trucks and three trailers. The creditor published the availability of the equipment on a bid list and that list was sent to some 600 dealers. It is unclear from the Reasons for Judgment whether the equipment was purchased by one or more of those dealers, or whether it was ultimately put up for auction. Either way, the defendants were unhappy with the price received and they complained that the sale was not done in a commercially reasonable fashion. The court in Case Credit agreed. Presumably, the court there had the benefit of evidence showing that there were other steps available to the creditor which would have some influence on price realized for the assets. The court found that the creditor did not appraise the equipment; that 600 dealers is not a large number of potential purchasers; that the creditor did not clean, maintain, or service the equipment so as to increase its value; the equipment was not transported out of Northern B.C. to a different market where there might be more purchasers; and that the creditor did not publish particulars of the equipment to the prospective purchasers. Because the creditor did not do these things and, again, because the court must have had evidence that these were things that other more reasonable creditors have done under the circumstances, the court held that the creditor had not acted reasonably. The defendants were, therefore, relieved from their guarantee.
- [32] In the present case the Mesaroses offered no evidence upon which one could find as a fact that there were other marketing efforts that the plaintiff could and should have employed. The Case Credit decision is fine so far as it goes (although I would hesitate to endorse the notion that a creditor is obliged expend its own resources to improve the condition of heavy equipment, or that it ought to incur transportation expenses in order to move it to some other locale before sale), but Case Credit dealt with a particular kind of asset and the court presumably had adequate evidence upon which to make the findings of fact that it did.
- [33] The assets in this case are different. They were equipment designed to publish advertising materials; they were not heavy industrial equipment. It was incumbent on the Mesaroses to adduce evidence in this trial to support their contention that other marketing efforts were available to the plaintiff; that vendors of equipment like the items under seizure would normally do this or that in order to maximize the price received for the goods; and that these efforts, had the plaintiff undertaken them, would have had a positive impact on the net price that plaintiff actually received for the goods. The Mesaroses came to trial with no such evidence, and they have failed to discharge the onus on them to show that the plaintiff did not act in a commercially reasonable manner.
- [34] The court cannot take judicial notice of the correct marketing methods for such items, and that is particularly so when those things are in a foreign jurisdiction. (It should not be forgotten that Northwest carried on business in Washington State, U.S.A.)

- [35] In any event, in order for the Mesaros to achieve some positive result they need to go beyond showing a lack of commercial reasonableness - to reduce their debt they have to show that if the plaintiff acted commercially reasonably then he would have received more money for the assets. The sum total of the evidence on that point was Mr. Mesaros' affidavit where he said that Mr. Davies agreed to pay \$90,964 for, among other things, the assets that the plaintiff ultimately sold to him.
- [36] There are two problems with that assertion.
- [37] The first fatal problem is that it is hearsay evidence. This proceeding was conducted summarily, but it was nevertheless a trial, and the conventional rules of evidence apply. Mr. Mesaros asserted Mr. Davies' agreement to pay \$90,964 for the truth of its content. That assertion does not comply with any of the conventional exceptions to the exclusion of hearsay rule. That is to say: it was not a spontaneous utterance; it was not made by a party contrary to his interests; it was not given under oath or affirmation in this or some other proceeding. Neither does the assertion satisfy a primary criteria for admission under what has come to be known as the principled exception to the exclusion of hearsay, viz: that it was necessary to admit the evidence because the person who made it was not able give the evidence himself (see *R. v. Khan*, [1990] 2 S.C.R. 531 at paras. 26 and 33). In this case there was no evidence that Mr. Davies was not available to testify that he had, in fact, offered \$90,964 to Mr. Mesaros.
- [38] The other reason that Mr. Mesaros' assertion that Mr. Davies' agreement to pay \$90,964 could not establish that the plaintiff's sale to Mr. Davies was not commercially reasonable is that if Mr. Davies actually did make that offer, it was for a different deal than the one he ultimately made with the plaintiff. Most particularly, Mr. Mesaros proposed that Mr. Davies buy the assets over which the plaintiff held security plus Northwest's interest in three other leased pieces of equipment. Mr. Davies eventually bought the assets that were under the plaintiff's seizure, but the three leased machines were not among them. Clearly, then, the deal that Mr. Mesaros urged on Mr. Davies was different from the deal that Mr. Davis ultimately made with the plaintiff, and the price Mr. Davies paid reflected that fact.

Conclusion

- [39] The plaintiff is entitled to judgment against all the defendants for the amount due on the promissory note less the \$55,000 US he realized on the sale of Northwest's assets, plus interest. He is also entitled to judgment against the defendants for the amounts not paid on the consulting contract, plus court order interest.
- [40] I find that the plaintiff's Schedule of Relief accurately describes his claim as of the trial date. The plaintiff will have judgment against the defendants for \$45,000 on the promissory note, plus interest to the trial date of \$6,946.31, plus late fees of \$522.48 and court order interest on that sum of \$7.55.

[41] The plaintiff will have judgment against the defendants on the consulting contract for \$9,000 plus court order interest of \$130.18.

[42] The plaintiff advised by written submission that he preferred judgment in Canadian currency. I accept the plaintiff's advice that on the day of trial the exchange rate was 1.1267 CDN dollars per 1 US dollar. The plaintiff will, therefore, be entitled to judgment as follows:

1.

Principal

\$50,701.50

2.

Interest

\$7,826.40

3.

Late Fees

\$588.78

4.

Interest

\$8.50

5.

Consulting Contract

\$10,140.30

6.

Interest

\$146.67

Costs

[43] The plaintiff has been successful and is entitled to his costs on Scale B.

"P.J. Rogers, J."

The Honourable Mr. Justice Rogers

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