

CANADA / JUDGMENT

Safeway Holdings (Alberta) Ltd. v. Shah

2022 BCSC 259

COURT

Supreme Court of British Columbia

DECIDED

17 February 2022

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2022 BCSC 259 Safeway Holdings (Alberta) Ltd. v. Shah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Safeway Holdings (Alberta) Ltd. v. Shah,

2022 BCSC 259

Date: 20220217

Docket: H50830

Registry: Vernon

Between:

Safeway Holdings (Alberta) Ltd.

Plaintiff/Defendant by Counterclaim

And

Farouk Shah and F.M. Shah Building Design Ltd.

Defendants

And

Estancia Investments Inc. and William Kujat

Defendants by Counterclaim

And

William Kujat

Third Party

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the plaintiff and Defendants by Counterclaim:

A. Powell

For part of the trial, the Defendant F. Shah in person and on behalf of F.M. Shah Building Design Ltd.

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 24-27, 2022

Place and Date of Judgment:

Vernon, B.C.

February 17, 2022

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Introduction

- [1] This case involves a failed investment in a 92-unit, assisted-living, seniors' residence in Osoyoos, BC (the "Project") called Cactus Ridge.
- [2] Three businessmen, and their companies, partnered in several successful developments before their involvement in Cactus Ridge. On each development, the partners operated without a formal partnership or joint venture agreement, and on the understanding that they would each contribute a one-third share to the development and operating costs, and would share the expected profits on the same basis.

- [3] Cactus Ridge was not successful. The partners over-estimated demand in Osoyoos for such a large seniors' residence and did not anticipate the downturn in the real estate market which made it difficult for seniors to sell their homes and move into Cactus Ridge.
- [4] For reasons that will be explained below, only two witnesses testified at trial: William Kujat, the principal of the plaintiff, Safeway Holdings (Alberta) Ltd., ("Safeway"), and Reginald Hammond, the president of Safeway and an associated company, Estancia Investments Inc. ("Estancia"). Both were entirely credible. Understandably, Mr. Kujat, who is 83, did not remember the dates and details of events that happened fifteen years before. As in prior developments between the partners, Mr. Kujat did not intend to be involved in the management of the Project or the operations of Cactus Ridge. He was a passive investor.

The Background to the Cactus Ridge Project

- [5] The individuals, and their companies, who were involved in the Project are:
- a. Mr. Kujat and Safeway;
 - b. Gordon Hoover and his company, Agassiz Developments Ltd. ("Agassiz"); and
 - c. the defendants Farouk Shah and his company, F.M. Shah Building Design Ltd. ("F.M. Shah").
- [6] In these reasons, when referring to Mr. Shah, Mr. Hoover, and Mr. Kujat collectively, I will refer to them as the "partners". Although Mr. Hoover and Agassiz were originally parties to this action, I was advised that Safeway had settled its action against them in mediation.

The Application to Adjourn

- [7] On January 21, 2022, the Friday before this trial started on January 24, Mr. Shah sought an adjournment. Mr. Shah, who represents himself and F.M. Shah, had counsel on the adjournment application by Andrew Prior, who appeared as ad hoc counsel.
- [8] The application was denied by Justice Groves. He concluded that the matter had been adjourned three times before and that Mr. Shah caused or contributed to each of those adjournments. He also concluded that Mr. Shah had been aware of the trial dates for many months and that he should have taken early steps to ensure that he could attend in person from the Bahamas where he resides. He was not satisfied that Mr. Shah had acted reasonably in waiting until just before trial to determine the COVID-19 vaccination status required for travel to Canada without quarantine.
- [9] Justice Groves granted permission for Mr. Shah to appear, on the first day of trial, by MS Teams.
- [10] At the commencement of the trial, Mr. Shah signed into the MS Teams link provided to him by Supreme Court Scheduling, and he was able to see and hear the proceedings. Mr. Shah repeated his request for an adjournment on the same basis as had been rejected by Justice Groves. He said that he had not been heard on the application. I stood down to listen to the

recording. It was apparent from the recording that, in fact, Mr. Shah, through his ad hoc counsel, had been heard and that Justice Groves considered the content of the affidavit he filed in support of the adjournment.

- [11] I explained to Mr. Shah that deciding whether to grant a trial adjournment involved an exercise of discretion and, having not appealed Justice Grove's decision, I was not prepared to revisit it. The trial had been adjourned on three prior occasions, and Mr. Shah knew of the claim against him from at least 2013 when the foreclosure action referred to below was commenced. His presence at the start of the trial demonstrated that he could participate by MS Teams.
- [12] I permitted Mr. Shah to participate throughout the trial by MS Teams and said that he could also have his witnesses attend by MS Teams.
- [13] Mr. Shah participated in the trial on the morning of January 24. Mr. Kujat began his evidence.
- [14] Just after noon, Mr. Shah renewed his adjournment request complaining that he did not have the documents being referred to by Safeway's counsel and by Mr. Kujat in his evidence. He also indicated that, while he believed he could represent himself, he now realized that he needed to retain trial counsel. From time to time throughout the history of the action, Mr. Shah had been represented by counsel; sometimes on the record.
- [15] Latterly, Mr. Shah received advice from Mr. Prior. For example, on behalf of Mr. Shah and F.M. Shah, Mr. Prior negotiated the document agreement, discussed the content of the joint document books, and responded to the Notice to Admit.
- [16] I advised Mr. Shah that it was far too late for him to seek counsel now.
- [17] I adjourned early for lunch and directed Safeway's counsel to deliver electronic copies of the documents to Mr. Shah over the lunch break.
- [18] The trial resumed at 2:00 p.m. Mr. Shah did not sign in to the MS Teams link. Safeway's counsel advised that, after the adjournment was denied, his assistant electronically delivered the documents to Mr. Shah on the weekend.
- [19] I stood down for the balance of the day and arranged for a letter to be delivered to Mr. Shah advising that if he did not appear at 10:00 a.m. on January 25, the trial would proceed in his absence. Mr. Shah did not appear on January 25. The court kept the MS Teams link open throughout the trial, and he never appeared again.

The Project

- [20] Before inviting Mr. Kujat and Mr. Hoover to participate in the Project, Mr. Shah had taken steps concerning it. He is an architect and was involved in the design of Cactus Ridge. He incorporated Cactus Ridge Estates Inc. ("Cactus Ridge Estates"), and Cactus Ridge Estates purchased property in Osoyoos, British Columbia (the "Property"). Mr. Shah contributed \$926,310.64 toward the Project, including buying the Property.
- [21] In May 2006, on behalf of Cactus Ridge Estates, Mr. Shah obtained construction financing from HSBC Bank Canada ("HSBC"). As part of this process, Mr. Shah executed various security documents on behalf of Cactus Ridge Estates, including a standard form mortgage granting HSBC a mortgage over the Property. The mortgage was registered in the Kamloops Land Title Office on June 12, 2006, under Numbers LA078314 and LA078315 (the "Mortgage"). The Mortgage secured payment of the principal sum of \$10,000,000 (the "principal sum") at an interest rate of prime plus one percent per annum (the "interest rate").
- [22] Under the Mortgage terms:
- a) Cactus Ridge Estates agreed to pay the principal sum to HSBC in full on demand and to pay interest on the principal sum from the date of the initial advance at the interest rate, "calculated and payable monthly on the last day of each and every month commencing on the last day of the month following the initial advance of the loan as well after as before demand, default and judgment, until the loan has been paid in full".
 - b) Cactus Ridge Estates agreed to pay HSBC all costs, charges, expenses, and legal fees rendered on a solicitor to his own client basis for any and all steps and proceedings taken to realize on the Mortgage, plus interest on the costs, charges, and expenses as provided for by the Mortgage provided that liability for same should be included in the amount payable thereunder.
- [23] After this initial work, the partners discussed moving forward with the Project together. According to Mr. Kujat, they intended that they would, through their corporations, contribute equally to the development and management of the Project and, after two or three years when it was close to full occupancy, sell it as a going concern.
- [24] On January 22, 2008, F.M. Shah, Agassiz, and Safeway, by their principals, signed a Letter of Understanding concerning the Project.
- [25] In furtherance of the Letter of Understanding, the shares of Cactus Ridge Estates were redistributed such that each of F.M. Shah, Agassiz, and Safeway, received 33.33 percent of the shares. Also, in furtherance of the Letter of Understanding, Agassiz and Safeway contributed \$500,000 each to Cactus Ridge Estates. The funds were used to repay Mr. Shah's earlier contributions. Mr. Shah's own \$500,000 contribution was to be "netted out" when Cactus Ridge Estates was in a position to repay the shareholder loans.

- [26] The Mortgage was modified pursuant to a Modification of Mortgage and Modification of Assignment of Rents dated June 4, 2008, whereby the principal sum was increased to \$11,012,000.
- [27] Construction of the Project commenced in or about 2008. As it proceeded, Mr. Shah took the role of "managing partner". First he oversaw the design and construction of the Project. Later, when Cactus Ridge opened for business, he was responsible for overseeing its management. Mr. Hoover was responsible for overseeing the administration of Cactus Ridge Estates and, ultimately, Cactus Ridge. Mr. Kujat was a silent partner, providing financial stability to the Project.
- [28] On July 9, 2008, the partners and their respective companies signed a Cross-Indemnification Agreement. Under it, the partners agreed to contribute equal funds to the development of the Project and to contribute equal funds for all costs associated with operating Cactus Ridge after the development was complete (the "Operating Funds"). The Cross-Indemnification Agreement provided that if any party to it did not make the required contributions, interest would accrue at the prime bank rate of TD Canada Trust plus five percent.
- [29] Messrs. Kujat and Hoover also signed on to the HSBC construction loan agreement that Mr. Shah had earlier arranged to finance the construction.
- [30] As a part of the construction loan financing, on April 15, 2009, the partners signed a personal guarantee in favour of HSBC, under which they "jointly and severally unconditionally" guaranteed payment to HSBC of "all present and future debts and liabilities direct or indirect, absolute or contingent, now or at any time and from time to time hereafter due or owing" HSBC from or by Cactus Ridge Estates (the "Personal Guarantee"). The Personal Guarantee was limited to \$8,000,000, with interest from the date of the demand for payment.
- [31] The interest rate charged by HSBC on the loans to Cactus Ridge Estates was set by agreement between HSBC, Cactus Ridge Estates, and the partners, to HSBC's Prime Rate plus 2.5% per annum pursuant to a facility letter dated September 10, 2010.
- [32] On September 30, 2011, Cactus Ridge Estates signed a General Security Agreement in favour of HSBC.
- [33] The partners incorporated another company, Cactus Ridge Retirement Residence Ltd. ("Cactus Ridge Residence"), as a wholly-owned subsidiary of Cactus Ridge Estates, to run the Project operations.
- [34] On September 30, 2011, Cactus Ridge Retirement Residence signed an unlimited guarantee of the indebtedness of Cactus Ridge Estates.

[35] In his evidence, Mr. Kujat described the individual responsibility of the three partners. Mr. Kujat and Safeway were, in effect, passive investors as they had the deepest pockets. Mr. Hoover was responsible for the administration, or financial end of the Project, and Mr. Shah, an architect, was responsible for the construction.

[36] Construction of the Project finished in 2010, and, but for a few minor deficiencies, the Cactus Ridge opened for business.

The Operational Difficulties

[37] Cactus Ridge was not immediately successful.

[38] In 2006, on behalf of Cactus Ridge Estates, Mr. Shah signed an agreement authorizing Chartwell Retirement Residences to manage and market Cactus Ridge. Chartwell began its marketing efforts before the opening. It was unsuccessful and the partners terminated the management agreement.

[39] Mr. Kujat testified that when Cactus Ridge opened, only two units were rented. Mr. Hammond put the number of rented units at ten but he was not certain and acknowledged that, at the time, he was less involved than Mr. Kujat in the financial aspects of Cactus Ridge. In any event, residents were slow to arrive, and the rental income could not support the operating costs.

[40] According to Mr. Kujat, the partners were disappointed with Chartwell, and their management contract was terminated.

[41] On December 2, 2011, HSBC amended the terms of its loans to Cactus Ridge Estates, requiring updated appraisal evidence and other evidence about the viability of the Project. Cactus Ridge Estates and the partners, as guarantors, signed the amendment.

[42] Over the next few years, Cactus Ridge Estates hired several managers to manage and market Cactus Ridge. By October 2012, primarily under Mr. Shah's supervision, only 19 units of 92 were rented. Mr. Hammond testified that with so few tenants, Cactus Ridge continued to be unable to cover its operating costs.

[43] The HSBC Mortgage term was set to expire on July 31, 2012 and, on that date, the balance of the principal and interest secured by the Mortgage would become due and payable.

[44] In or about May 2012, HSBC advised the partners that it was concerned about the financial viability of Cactus Ridge. It was dissatisfied with the financial reporting it was receiving from Cactus Ridge Estates and concerned about revenues.

[45] The partners and Cactus Ridge Estates attempted to negotiate with HSBC for an extension of the loan or a forbearance agreement. At the same time, the partners sought potential interest from others about purchasing Cactus Ridge or refinancing the HSBC loan.

- [46] Mr. Kujat testified about his meetings with representatives of HSBC to discuss options. He discussed his meetings with Mr. Hoover. At this time, the relationship between Mr. Kujat and Mr. Shah was strained. He recalled that no one was interested in purchasing or refinancing.
- [47] On July 20, 2012, lawyers on behalf of HSBC, made a demand for payment of \$10,512,184.39, including interest payable to July 20, 2012. It also made a demand of Cactus Ridge Residence under the guarantee it had signed. The firm enclosed a Notice of Intention to Enforce Security under the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3.
- [48] HSBC referred the loan to its special loans office. The owners of Cactus Ridge Estates were advised that the loan needed to be repaid when it came due in July.
- [49] On July 30, 2012, the construction loan became due, and HSBC required repayment of the borrowed funds plus interest.
- [50] Mr. Kujat testified that to avoid the loan going into default, and the potential cost of a receiver being brought in to run Cactus Ridge, he requested a payout statement and caused Safeway to repay HSBC in full. Safeway paid HSBC \$10,474,764.34, the amount then outstanding. A copy of Safeway's cheque was in evidence.
- [51] Mr. Kujat and Safeway paid out the HSBC loan without directly consulting Mr. Hoover or Mr. Shah. Mr. Hoover appears to have been more aware of what was going on but, by July/August 2012, Mr. Kujat and Mr. Shah were not communicating.
- [52] Pursuant to an August 8, 2012 Transfer of Mortgage and Assignment of Rents, Safeway took an assignment of the mortgage. It was registered in the Kamloops Land Title Office on September 10, 2012, under numbers CA2761055 and CA2761056. In addition, pursuant to an Assignment of Loan and Security made effective August 8, 2012, HSBC assigned to Safeway all of Cactus Ridge Estates indebtedness, the Mortgage, the Personal Guarantee, and the Cactus Ridge Residence Guarantee.
- [53] After assuming the Mortgage, Safeway also assumed the operation of Cactus Ridge, installing its wholly-owned subsidiary, Estancia, as manager. The role of Estancia will be discussed later in these reasons.

The Foreclosure

- [54] On or about January 4, 2013, Safeway made demand upon Mr. Hoover and Mr. Shah under the terms of the Personal Guarantee. Neither paid in response to the demand.
- [55] On or about February 25, 2013, Safeway commenced foreclosure proceedings against Cactus Ridge Estates, Cactus Ridge Residence, Mr. Hoover, and Mr. Shah in the Supreme Court of British Columbia, Vernon Action No. 50830 (the "Foreclosure Proceeding").

- [56] On September 27, 2013, Safeway obtained an Order Nisi in the Foreclosure Proceeding and judgment against Cactus Ridge Estates and Cactus Ridge Residence in the amount of \$11,057,947.09.
- [57] Safeway sought an immediate order for the sale of the property, but, based on competing appraisals, the usual six-month redemption period was ordered. Neither Mr. Hoover nor Mr. Shah, or their respective companies, redeemed the mortgage.
- [58] After a marketing period, and pursuant to an October 20, 2015 order approving the sale, Cactus Ridge was sold to a numbered company for \$6 million, leaving a shortfall, as of the closing date, of \$5,717,281.65.
- [59] Safeway sued Mr. Hoover and Mr. Shah, as guarantors, for the shortfall, which has grown due to accruing interest. In the Foreclosure Proceedings, Safeway sought judgment under the Personal Guarantee against Mr. Hoover and Mr. Shah. However, the issues relating to the Guarantee were ordered to be heard at a trial: see *Safeway Holdings (Alberta) Ltd. v. Cactus Ridge Estates Inc.*, 2014 BCSC 2237. As a result, Safeway commenced this action.
- [60] As of the date of the Notice to Admit, filed as Exhibit 2, on February 24, 2020, the shortfall had grown to \$8,178,429.23. As of January 24, 2022, according to Mr. Hammond's evidence and calculations, the amount claimed by Safeway is \$9,194,915.45. As noted above, the Personal Guarantee was capped at \$8 million.
- [61] In its pleadings, Safeway sought judgment against Mr. Shah for the shortfall and calculated interest based on the Mortgage interest rate.
- [62] In my view, the appropriate interest rate, after the order for sale, is the court order interest rate. Recalculated at that lower interest rate, the amount owing to Safeway, as of the date of trial, is \$7,201,535.58.
- [63] Mr. Shah is liable for the full amount owing under the joint and several terms of the Personal Guarantee. He may seek recovery or contribution from the other parties to the Personal Guarantee.

The Claim for Operating Expenses

- [64] Each of Cactus Ridge Estates' shareholders promised, by the Letter of Understanding, to fund equally the Project's and Cactus Ridge's operating costs.
- [65] Each of the shareholders and their principals also signed the Cross-Indemnification Agreement confirming that the parties' participation in the operating expenses was expected to be in proportion to their 1/3 ownership stake in Cactus Ridge Estates and that they would each indemnify the other if one of them made payments, or if they were otherwise "owed money" by Cactus Ridge Estates, in excess of their 1/3 obligation.

- [66] On or about October 31, 2012, Safeway, through its nominee, Estancia, took over the operation of Cactus Ridge, primarily from Mr. Shah. Estancia ensured payroll was met by contributing its own funds, sometimes with a contribution from revenue generated by Cactus Ridge.
- [67] Mr. Hammond testified about some of the difficulties he faced once Estancia became responsible for managing Cactus Ridge. For example, he testified that Cactus Ridge paid a sizeable landscaping deposit to the City of Osoyoos. Once the landscaping was complete, the deposit should have been, but was not, claimed back from the city. There were issues regarding a gas permit and a land swap with the city. Finally, there were staffing and accounting issues.
- [68] Mr. Hammond described the management team he assembled at Estancia and on-site to manage Cactus Ridge. He confirmed that Estancia employees regularly visited the Residence. He described that the number of tenants increased, and was on an upward trajectory, under Estancia management.
- [69] From approximately November 2012 to November 2015, Safeway paid Estancia for Cactus Ridge's operating expenses, and, despite demand, Mr. Hoover and Mr. Shah did not contribute their 1/3 share of the operating expenses.
- [70] As Mr. Hammond explained in his evidence, up until June 2012, cash calls were periodically made by Mr. Hoover - sometimes in relation to Cactus Ridge, sometimes in relation to Cactus Ridge Estates. Each of the shareholders (Agassiz, Safeway, and F.M. Shah) met the cash calls. However, on June 11, 2012, Mr. Hoover made a cash call for \$110,000 from each of the partners. F.M. Shah contributed \$55,000 in response to it.
- [71] On or about October 25, 2012, Mr. Hoover made another cash call for Cactus Ridge for \$20,000. It was not met by F.M. Shah.
- [72] Since November 2012, and until Cactus Ridge was sold, Agassiz and F.M. Shah had not contributed to Cactus Ridge's operating expenses which were entirely funded by Safeway and/or Estancia.
- [73] When Cactus Ridge was sold in 2015, Estancia totaled its payroll expenses from November 2012 and invoiced Cactus Ridge Estates for \$479,833.05. Safeway paid the invoice without contribution from Agassiz or F.M. Shah.
- [74] Estancia also accrued a management fee for running the facility in the amount of \$10,000 per month.
- [75] Because Mr. Shah did not participate in this trial, the amount of Estancia's management fee was not directly challenged. I noted that it was double Chartwell's initial management fee. However, according to Mr. Hammond's uncontroverted evidence, Chartwell's contract was pre-opening and the amount charged would have increased once Cactus Ridge was operating. Further, the services provided by Estancia were more extensive. For example,

Safeway/Estancia provided payroll and other accounting services which were not included in the Chartwell contract. In addition, Mr. Hammond testified that Estancia's management fee was in keeping with the fees Safeway and Estancia charged for managing other residential projects.

- [76] In the circumstances, and in the absence of any challenge to Mr. Hammond's evidence, I am satisfied that Estancia's management fee was reasonable.
- [77] In 2015, Estancia also totaled its unpaid management fees since November 2012 and invoiced Cactus Ridge Estates. The \$441,237.32 invoice, including GST, was paid by Safeway.
- [78] In addition to payroll and management fees, Cactus Ridge incurred other operating expenses including food supplies, taxes, and insurance. Some of those expenses were met from rental revenue. Mr. Hammond testified that shortfalls were met by "cash injections" from Safeway. The amounts paid by Safeway directly to Cactus Ridge up until the sale in 2015, totaled \$213,775.47.
- [79] The total amount for all operating costs for Cactus Ridge up to and including November 30, 2015, when it was sold in foreclosure, was \$1,113,834.53. All of it was paid by Safeway and the cheques were in evidence.
- [80] Mr. Hammond testified that he asked Mr. Hoover to issue cash calls from Cactus Ridge Estates to demand contributions from the other partners but Mr. Hoover did not do so. Mr. Hammond also testified that, in several communications to Mr. Hoover and Mr. Shah, Safeway directly made demands for contributions. None were received. That has been admitted in the Notice to Admit.
- [81] Mr. Shah admitted in the Notice to Admit that, as of its date, the Cactus Ridge operating expenses paid by Safeway and/or Estancia totaled \$1,600,381.10.
- [82] Based on the agreed-upon interest rate in the Cross Indemnification Agreement, as of the trial date, the amount owing to Safeway is \$1,847,112.41.
- [83] Because Mr. Shah and F.M. Shah decided not to participate in the trial, I heard no evidence with respect to the counterclaim or the third-party claim. All of Safeway's evidence was uncontroverted and unchallenged. Much of it was also admitted in the Notice to Admit.
- [84] On all the evidence, I am satisfied that the operating costs claimed by Safeway/Estancia were, in fact, expended by it. There is no evidence on which I could conclude that the expenses were unreasonable. Many of the expenses were admitted in the Notice to Admit.
- [85] There is no evidence that the sale of Cactus Ridge in the Foreclosure Proceeding was improvident or that its value was depleted as a result of Safeway's/Estancia's unreasonable management.
- [86] For these reasons, the counterclaim and the third-party claim are dismissed.

[87] Safeway is entitled to judgment in the following amounts:

- a) as against Mr. Shah, under the Personal Guarantee, for the mortgage shortfall, as of the date of trial, the amount of \$7,201,535.58 inclusive of pre-judgment interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79;
- b) as against Mr. Shah and F.M. Shah, under the Letter of Understanding and the Cross-Indemnification Agreement, the amount of \$1,847,112.41 inclusive of interest; and
- c) post-judgment interest on the amounts set out at a) and b) above, from the date of the trial until payment.

[88] As Safeway has been successful, it is entitled to the costs it seeks for this proceeding at Scale B.

"MacNaughton J."

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