COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. 1643937 Ontario Inc., 2021 ONCA 98
DATE: 20210219
DOCKET: C67540

Doherty, Roberts and Harvison Young JJ.A.

BETWEEN

Royal Bank of Canada

Plaintiff (Respondent)

and

1643937 Ontario Inc., Lorraine MacDonald,
Shawn McHale, Patrick McHale,
and Beverly McHale

Defendants (Appellants)

Jonathan C. Lisus and Zain Naqi, for the appellants

J. Ross Macfarlane, for the respondent

Heard: November 25, 2020 by video conference

On appeal from the judgment of Justice Heather J. Williams of the Superior Court of Justice, dated September 16, 2019, with reasons reported at 2019 ONSC 5145, and from the costs order, dated January 2, 2020, with reasons reported at 2020 ONSC 44.

Roberts J.A.:

A. OVERVIEW

[1] The appellants, Lorraine MacDonald, Patrick McHale, and Beverly McHale, appeal from the judgment for the payment of monies owing under the personal

guarantees they provided to the respondent, the Royal Bank of Canada, following their competing motions for summary judgment.

[2] At the commencement of oral submissions, the appellants abandoned their appeal from the motion judge's dismissal of their counterclaims and further narrowed the issues on appeal.

[3] The issue put forward by the appellants on this appeal was: did the motion judge err in granting the respondent's motion for summary judgment because there was no genuine issue requiring a trial about the scope of the appellants' liability to the respondent under their personal guarantees? The appellants submit that there was a genuine issue requiring a trial, as the respondent misrepresented to them that their liability under their personal guarantees was joint and several with a collective exposure limited to $600,000.

[4] For the reasons that follow, I agree that the motion judge erred and would remit for trial the narrow issue of determining the amount that each appellant owes to the respondent under their respective personal guarantees.

B. BACKGROUND

(1) Facts

[5] The appellants provided personal guarantees as security for several million dollars in loan advances made by the respondent to Ottawa Valley Glass Enterprises Ltd., later named OVG Inc. ("OVG"), a family business in which the

appellants had been directors and shareholders. Ms. MacDonald (whose husband, Jack MacDonald, founded and then sold his shares in and retired from the business), Shawn and Patrick McHale are siblings. Patrick and Beverly McHale are spouses. Ms. MacDonald resigned as a director of OVG in 2006 and sold her shares to her siblings, Patrick and Shawn, in 2006 and 2011, respectively. Although they held 51 percent of the shares in OVG, Patrick and Beverly McHale had relatively little involvement with OVG. Shawn McHale actually operated the business.

[6] The appellant's personal guarantees came about after Shawn McHale approached the respondent with a request for new financing. On September 28, 2007, the respondent offered a credit facility in the amount of $1,000,000. As security for the loan, the respondent required a general security agreement over OVG's assets, together with a personal guarantee and postponement of claim in the amount of $300,000, signed by Ms. MacDonald on October 10, 2007, as well as a postponement and assignment of claims in favour of the respondent from each of Shawn, Patrick, and Beverly McHale, which they executed around the same time.

[7] In the fall of 2008, Shawn McHale requested and obtained a further increase to OVG's operating line of credit from $1,000,000 to $1,500,000. The respondent and OVG entered into a new credit facilities letter, dated December 9, 2008. At the request of the respondent, Shawn McHale executed a personal

guarantee in the amount of $600,000 on December 11, 2008, and Patrick and Beverly McHale executed personal guarantees in the amount of $600,000 on December 15, 2008. Ms. MacDonald did not sign a new personal guarantee.

[8] OVG struggled financially and began to default on its loan obligations to the respondent in the fall of 2012. In January 2013, the respondent proposed a forbearance agreement with stringent conditions that was rejected by OVG and the appellants. On February 12, 2013, the respondent demanded payment from OVG under its various loan agreements and from the appellants under their personal guarantees.

[9] As a result of the respondent's demand, on February 22, 2013, OVG filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. In an attempt to restructure OVG, between February and December 2013, Patrick McHale indicated that he and his wife, Beverly, invested $1,958,498 of their own money into OVG. The restructuring did not succeed. On December 12, 2013, OVG made an assignment into bankruptcy.

(2) Court Proceedings

[10] The respondent brought an action to recover over $3 million owing under the guarantees of OVG's indebtedness. Patrick and Beverly McHale counterclaimed, alleging the respondent improvidently realized on OVG's assets, thereby triggering the bankruptcy of OVG. Shawn McHale made an assignment

into bankruptcy, and the respondent's action was stayed against him. Examinations for discovery were held. The parties brought competing motions for summary judgment. In support of its motion, the respondent filed the affidavit of its manager in the department of Special Loans and Advisory Services, Peter Gordon. Ms. MacDonald, Patrick, and Shawn McHale filed affidavits. No cross-examinations on the affidavits were held, but the parties relied on the transcripts from the various discovery examinations.

[11] On her examination for discovery, dated December 15, 2015, Ms. MacDonald deposed that she believed she signed her personal guarantee in the presence of Kevin Bossy, an account manager with the respondent. Although she could not remember during her examination the conversations she had with Mr. Bossy, she said it had always been her understanding that the personal guarantee she signed in 2007 was joint and several and thereby limited to $300,000 with Shawn, Patrick, and Beverly McHale, and that she did not sign an increased guarantee to $600,000 in 2008 because, by then, she had left OVG and disposed of the majority of her shares.

[12] Shawn McHale's examination for discovery occurred on December 14, 2015. His understanding was that the personal guarantees were for a total of $600,000, although he could not recall the bank representative telling him whether they were joint and several or individual guarantees. He deposed that he was told that the guarantees could be signed in counterpart and would still be

binding, which informed his assumption that the guarantees were joint and several. He also relied on the language in the guarantee that "the undersigned and each of them (if more than one) hereby jointly and severally agree(s) with the bank as follows". He believed the guarantees were joint and several among him, Patrick, and Beverly McHale because of the language of the guarantee that said the guarantees were joint and several and could be signed in counterparts. In his affidavit, sworn on November 5, 2017, Shawn McHale stated the following, at para. 13:

> Again, based on discussions I had with Mr. Bossy of the [respondent's] Renfrew branch, I understood that the total liability under the Replacement Guarantees [was] limited to $600,000 joint and severally between Pat, Bev, and I. Lorraine [MacDonald] never signed the document. This understanding is reflected in OVG's financial statements for year-end March 31, 2009 and all subsequent year-ends.

[13] On his examination for discovery, dated December 14, 2015, Patrick McHale testified that he signed his guarantee in a Tim Horton's restaurant where he met the respondent's representative. He said he understood the guarantee was for a total indebtedness of $600,000 as between him and his wife, Beverly, and that the respondent's representative told them it was for $600,000. They were never told anything different than that, and if they had been told otherwise, they would not have signed the guarantees. In his affidavit, sworn on November 3, 2016, Patrick McHale stated the following, at para. 11:

> Based on information provided and representations made by Mr. Kevin Bossy of the [respondent], it was my understanding and belief that my personal liability under the Replacement Guarantee was joint and several with my wife Bev, Shawn and Lorraine. I understood and believed that the collective maximum personal exposure against all of us was $600,000 and not $600,000 each, as the [respondent] is claiming.

[14] Beverly McHale deposed during her examination for discovery, held on December 14, 2015, that she and Patrick met with Mr. Bossy or his successor, "Milton", at a Tim Horton's restaurant to sign the guarantee. She understood that the $600,000 guarantee was a total amount shared by Patrick, Shawn, and her, and that it was never explained to them that it would be $600,000 for each of them. Unlike Patrick and Shawn McHale, and Ms. MacDonald, Beverly McHale did not file an affidavit on the motions for summary judgment.

[15] The respondent filed no affidavit from Mr. Bossy in response to the appellants' evidence concerning their understanding of the scope of liability under their personal guarantees and their discussions with the respondent's representatives. The respondent did not cross-examine Ms. MacDonald, Patrick, or Shawn McHale on their affidavits.

(3) The Motion Judge's Reasons

[16] The motion judge held that there was no genuine issue requiring a trial in respect of the validity and enforceability of the personal guarantees and that they were valid and enforceable. She rejected the appellants' allegations that the

respondent, through its employee, Mr. Bossy, who was the account manager for their bank accounts, had misrepresented the scope of the liability under their personal guarantees, which they maintained was joint and several with a collective exposure limited to $600,000.

[17] At paras. 55-56 of her reasons, the motion judge explained why she rejected the appellants' allegations of misrepresentation:

> There is no evidence to suggest that any of these circumstances [of *non est factum*, unconscionability, fraud, misrepresentation, or undue influence] existed in this case. Although [Patrick] said in his affidavit that Mr. Bossy of [the respondent] had made representations that left [Patrick] with the understanding and belief that his $600,000.00 liability under the guarantee was shared with his wife and his brother, I cannot accept that Mr. Bossy made any misrepresentations to this effect to [Patrick]. [Patrick] provided no particulars of what Mr. Bossy said to him. [Patrick] did not give evidence at his examination for discovery that he had relied on any representations made by Mr. Bossy and there was no evidence that [Patrick] had ever corrected his examination for discovery evidence.
>
> [Patrick's] evidence about Mr. Bossy was not corroborated by [Beverly], who signed her guarantee at the same time and who had an opportunity to file an affidavit in response to [the respondent's] motion and in support of her own but did not do so.

[18] The motion judge went on to determine that even if she had accepted the appellants' allegations of misrepresentation, the entire agreement clause contained in para. 13 of the guarantees precluded the appellants from relying on any representations that were not set out in the guarantees themselves.

[19] Further, having rejected the allegations of misrepresentation, the motion judge did not accept the appellants' argument that their liability was shared, given that each of the appellants signed a separate guarantee that made no reference to a guarantee or guarantees signed by anyone else, and that para. 9 of the guarantees provided that each guarantee was "in addition to and not in substitution for any other guarantee, by whomsoever given".

[20] The motion judge allowed the respondent's motion for summary judgment and granted judgment to the respondent against Ms. MacDonald in the amount of $300,000, Patrick McHale in the amount of $600,000, and Beverly McHale in the amount of $600,000, plus prejudgment and postjudgment interest.[1] The motion judge found that Patrick and Beverly McHale's counterclaims of improvident realization of OVG's assets was an alleged wrong to OVG that they had no capacity to assert. She therefore dismissed the counterclaims. She ordered that the appellants jointly and severally pay costs to the respondent on a substantial indemnity basis in the all-inclusive amount of $84,490.38.

C. THE PARTIES' POSITIONS

[21] The appellants submit that the motion judge erred in granting summary judgment against the appellants in the total amount of $1,500,000, plus interest.

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[1] Judgment was also granted against 1643937 Ontario Inc., however, it did not appeal the judgment or take any position on the appeal.

They do not challenge that the loan advances were made, and they concede some indebtedness to the respondent under their personal guarantees. However, they say that the motion judge erred in failing to find that there was a genuine issue requiring a trial as to whether the respondent misrepresented the scope of the appellants' liability under their personal guarantees. The appellants maintain that their total joint and several liability under the guarantees is limited to $600,000. They argue that the motion judge's reasons are insufficient, as she did not direct herself to key pieces of evidence. Further, they argue that she failed to recognize that summary judgment was not appropriate for this issue, as the record before her contained real credibility issues that required careful study. As such, some form of oral hearing was required to determine this issue and make the required credibility findings.

[22] The respondent argues that the motion judge made no error, as she based her decision on the clear wording of the personal guarantees signed by the appellants. According to the respondent, the appellants failed to put their best evidentiary foot forward. As such, their evidence about misrepresentations made by the respondent to the appellants was simply insufficient and not accepted by the motion judge. The appeal should therefore be dismissed.

D. ANALYSIS

(1) The Framework for Summary Judgment

[23] At the heart of this appeal is the motion judge's approach to summary judgment and, specifically, her treatment of the evidence and record before her. Absent an error of law, a misdirection, or the creation of an injustice through a decision that is clearly wrong, a motion judge's determination of these questions is generally entitled to considerable deference on appeal: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 81-84. However, here, appellate intervention is required, as the motion judge fell into error and misdirected herself because she failed to determine whether summary judgment was appropriate, having regard to the entire evidentiary record and the *Hryniak* analytical framework.

[24] This determination required the motion judge to follow the analytical approach set out in *Hryniak*, at para. 66, which is summarized as follows:

1. First, the motion judge should have determined if there was a genuine issue requiring a trial based only on the evidence before her, without using the enhanced fact-finding powers under r. 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
2. Second, if there appeared to be a genuine issue requiring a trial, the motion judge should have determined if the need for a trial could be

> avoided by using the enhanced powers under r. 20.04(2.1) – which allowed her to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence – and under r. 20.04(2.2) to order that oral evidence be presented by one or more parties.

[25] While summary judgment is an important tool for enhancing access to justice and achieving proportionate, timely, and cost-effective adjudication, there is no imperative on the court to use it in every case: *Trotter Estate*, 2014 ONCA 841, 122 O.R. (3d) 625, at para. 49; *Lesenko v. Guerette*, 2017 ONCA 522, 416 D.L.R. (4th) 349, at para. 30. As affirmed by the Supreme Court in *Hryniak*, at para. 28, the overarching goal remains to have "a fair process that results in a just adjudication of disputes."

[26] Indeed, notwithstanding the parties' agreement that the action and counterclaims could be determined by summary judgment, it is still incumbent on the motion judge to decide whether it is appropriate to grant summary judgment: *Rules of Civil Procedure*, r. 20.04(2)(b).

[27] In determining whether summary judgment is appropriate, motion judges are required to engage with the *Hryniak* analytical framework process, as described above, look at the evidentiary record, determine whether there is a genuine issue requiring a trial, and assess, in their discretion, whether resort should be taken to the enhanced powers under rr. 20.04(2.1) and (2.2) of the

Rules of Civil Procedure. To do otherwise runs the risk that, in an effort to dispose of a case in a summary fashion, motion judges will not properly analyze the evidence: *Trotter*, at para. 49. Unfortunately, that is what occurred here.

(2) The Motion Judge's Approach

[28] The motion judge's sole brief self-direction about the applicable analytical framework appears at para. 5 of her reasons:

> Rule 20.04(2) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. A trial is not required if a summary judgment motion can achieve a fair and just adjudication, if the process allows the judge to make the necessary findings of fact and apply the law to those facts and if the motion is a proportionate, more expeditious and less expensive means to achieve a just result.

[29] It was, of course, unnecessary for the motion judge to recite *verbatim* the applicable principles from *Hryniak*, so long as she applied them throughout her decision. However, her reasons do not demonstrate that she did. The motion judge did not set out an adequate analysis leading to her conclusion at para. 100(1) that "there is no genuine issue requiring a trial in respect to the validity and enforceability of the guarantees."

[30] In order to come to this conclusion, the motion judge was required to analyze the entirety of the evidentiary record before her and determine whether there was a genuine issue requiring a trial with respect to the appellants'

allegations of misrepresentation and, if so, whether the need for a trial could be avoided by using the enhanced powers under rr. 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*. Unfortunately, she failed to do so.

[31] Specifically, the motion judge's reasons do not adequately explain why she rejected the appellants' unchallenged evidence that, if accepted, would support their allegation of misrepresentation, particularly in the absence of any evidence to the contrary by the respondent. The appellants' and Shawn McHale's unequivocal and unchallenged evidence was that they gave their guarantees on the understanding that their total obligation was $600,000, joint and several, and that this understanding came from the guarantees themselves and discussions with the respondent's representatives. Further, according to Shawn McHale's affidavit, at para. 13, the understanding of the appellants was recorded in the year-end financial statements of OVG. While Mr. Gordon gave evidence regarding his interpretation of the guarantees in an examination for discovery, dated September 21, 2015, he was unable to indicate whether the liability was properly explained to the appellants, as he said the account manager would possess that information.

[32] The motion judge failed to reference Shawn McHale's evidence, and her apparent rejection of the evidence given by Patrick and Beverly McHale was conclusory and in part appears to be based on a misapprehension of their evidence. Other than the guarantee documents and the evidence of Mr. Gordon,

the respondent filed no other evidence challenging the appellants' and Shawn McHale's understanding of the scope of the guarantees, nor were Patrick and Shawn McHale, or Ms. MacDonald cross-examined on their affidavits. The motion judge failed to address this absence of evidence.

[33] With respect to Patrick McHale's evidence, while the motion judge was entitled to reject it, she erred by failing to provide adequate reasons for doing so. Notably, she failed to explain why she labelled Patrick McHale's evidence as lacking particularity and why her observation that certain particulars from his affidavit were not mentioned on his examination for discovery apparently led her to reject his unchallenged evidence. The motion judge's concerns about Patrick McHale's evidence that she did identify, as noted above at para. 17 of these reasons, were not sufficient to reject his evidence out of hand, especially given he had not been cross-examined on his affidavit and there was evidence that, if accepted, could corroborate his evidence. Moreover, his evidence was not speculative and provided some particulars of his dealings with the respondent that were corroborated by his brother and wife.

[34] However, even if the motion judge did not err in rejecting Patrick McHale's evidence, she was required to go beyond it and assess it together with the other evidence in the record that, if accepted, would support the appellants' version of events and corroborate Patrick McHale's evidence. She failed to do so.

[35] Notably, Shawn McHale's evidence was that the respondent had misrepresented the nature of the guarantees and indicated the guarantees could be signed in counterparts, and that the appellants' understanding was reflected in OVG's year-end financial statements. Similarly, while Beverly McHale did not file an affidavit on the motions, the parties relied on her discovery transcript in which she provided some corroboration of her husband's evidence concerning the place of the meeting with the respondent's representative and the appellants' understanding of the scope of their liability under their guarantees as a result of discussions with the respondent's representative. The motion judge's reasons are silent with respect to Shawn McHale's evidence and do not explain why she determined that Beverly McHale's evidence did not corroborate her husband's evidence.

[36] Simply put, if the motion judge rejected Shawn McHale's evidence, she was required to give her reasons. Given that Beverly McHale's examination for discovery did corroborate her husband's evidence in some particulars, the motion judge erred by stating that it did not, without explaining why it did not. It was not necessary for Beverly McHale to repeat her evidence in an affidavit, as the motion judge appears to suggest.

[37] While each piece of evidence by itself may not have been sufficient to establish the appellants' allegations of misrepresentation, the motion judge was required to consider the evidence as a whole to determine whether, in all of the

circumstances of the case, based on the entire record before her, she was able to determine the material issues in dispute without requiring a trial. She failed to do so.

[38] As part of this balancing exercise that she was required to undertake, the motion judge further erred in failing to address the absence of evidence by the respondent to challenge the appellants' affidavits and transcripts. Rather, in evaluating Patrick McHale's evidence, she simply stated that she could not accept that Mr. Bossy had made the misrepresentations to Patrick. This was an error. In this case, the respondent's choice not to cross-examine Patrick or Shawn McHale or Ms. MacDonald on their respective affidavits, and not to tender evidence in response to the appellants' evidence of misrepresentation, ought to have been taken into consideration by the motion judge before she rejected the appellants' evidence and accepted the respondent's position on the key disputed factual issues: *2212886 Ontario Inc. v. Obsidian Group Inc.*, 2018 ONCA 670, 83 B.L.R. (5th) 186, at para. 49, leave to appeal refused, [2018] S.C.C.A. No. 391.

[39] Since the evidence adduced by the appellants was capable of supporting an allegation of misrepresentation and was unchallenged by the respondent in cross-examination, it was incumbent upon the motion judge to explain why she rejected the evidence: *Neuberger v. York*, 2016 ONCA 191, 129 O.R. (3d) 721, at para. 124, leave to appeal refused, [2016] S.C.C.A. No. 207; *Trotter*, at para. 54; *Lesenko*, at para. 19. Her conclusory statements were insufficient. While she

recited the evidence, she did not weigh it, evaluate it, or make findings of credibility as she was required to do in this case. She could not simply prefer one position over another without providing an explanation that is sufficient for appellate review: *Gordashevskiy v. Aharon,* 2019 ONCA 297, at para. 6.

[40] Rather, she was required to undertake a credibility analysis pursuant to the expanded judicial powers under r. 20.04(2.1) of the *Rules of Civil Procedure* to weigh the evidence, evaluate the credibility of the appellants' deponents, and draw reasonable inferences: *Trotter*, at para. 54. Further, if the motion judge determined she could not assess credibility solely on the written record, she should have considered whether oral evidence or a trial were required: *Trotter*, at para. 55.

[41] While summary judgment may have been appropriate had the motion judge carried out the requisite analysis under r. 20.04(2.1) of the *Rules of Civil Procedure* and exercised her powers to hear oral evidence pursuant to r. 20.04(2.2), she did not seek to do so.

[42] I agree that fairness requires a trial of the narrow issue framed by the appellants before another judge of the Superior Court of Justice.

[43] While not pressed in argument by the parties, for the purposes of the trial of the narrow issue, it is important to address the motion judge's related alternative conclusion. As earlier noted, the motion judge concluded that even if

she had found that the respondent had made the alleged misrepresentations to the appellants, the effect of the entire agreement clause in the personal guarantees precluded the appellants from relying on any such representations that were not set out in the guarantees themselves. In my view, this conclusion was erroneous. It is well-established that the defence of misrepresentation is not precluded or diminished by reason only of the existence of an entire agreement clause: *Bank of Nova Scotia v. Zackheim* (1983), 3 D.L.R. (4th) 760 (Ont. C.A.), at pp. 761-62; *Beer v. Townsgate I Ltd.* (1997), 152 D.L.R. (4th) 671 (Ont. C.A.), at paras. 25-32, leave to appeal refused, [1997] S.C.C.A. No. 666. I would not uphold the motion judge's finding on this issue.

E. DISPOSITION

[44] I would allow the appeal and set aside paras. 1, 3 and 4 of the motion judge's judgment, dated September 16, 2019, and the costs order, dated January 2, 2020. However, for greater certainty, I would not disturb the motion judge's conclusions at paras. 100 1. and 2. of her reasons that there is no genuine issue requiring a trial in respect of the validity and enforceability of the appellants' personal guarantees and that the guarantees are valid and enforceable.

[45] The narrow issue requiring a trial is the scope of the appellants' liability under their personal guarantees, having regard to the appellants' allegations of misrepresentations that they say were made by the respondent.

[46] As agreed in oral submissions, I would allow the appellants their partial indemnity costs of the appeal in the amount of $15,000, which is inclusive of disbursements and applicable taxes.

[47] I would also direct that if the parties cannot agree on the disposition of the costs before the motion judge, they should forward brief written submissions of no more than two pages, plus a costs outline, within seven days of the release of these reasons.

Released: February 19, 2021 DD

"I.B. Roberts J.A."

"Doherty J.A."

"I agree. Harrison Young J.A."