CITATION: Montcap Financial Corporation v. Schyven, 2011 ONSC 4030
COURT FILE NO.: 09-CV-392171
DATE: 20110627

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MONTCAP FINANCIAL CORPORATION	)	*Howard F. Manis*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
WOBBY INA SCHYVEN a.k.a. INEKE SCHYVEN-SMITH	)	*Christopher J. Cosgriffe*, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** June 20, 2011

PERELL J.

[1] The Plaintiff, Montcap Financial Corporation, moves for summary judgment against the Defendant, Wobby Ineka Schyven-Smith, who is a guarantor of repayment of the indebtedness of Spiral Paper, a now defunct business that was owned by Ms. Smith and Abraham Pagrach.

[2] Without bringing a cross-motion for summary judgment, Ms. Smith submits that Montcap's action should be dismissed because it is statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24 Sched. B. In the alternative, as a defence to the motion for summary judgment, Ms. Smith submits that Montcap's motion for summary judgment should be dismissed because there are two genuine issues requiring a trial; namely: (1) whether an acknowledgment has restarted the running of the limitation period so that Montcap's claim is not statute-barred; (2) whether Ms. Smith should be discharged from liability under her guarantee because of Montcap's alleged failure to use commercially reasonable efforts to obtain mortgage security from Mr. Pagrach.

[3] I agree with Ms. Smith's alternative submission and, therefore, I dismiss Montcap's motion for summary judgment.

[4] In order to explain my conclusion, I will describe the factual background from Montcap's perspective and then summarize the competing legal arguments of both parties.

[5] Montcap's version of the factual background is that it lent money to Spiral Paper, which was owned by Ms. Schyven and Abraham Pagrach, and on November 8, 2001, Ms. Schyven signed an unlimited guarantee to repay Spiral Paper's indebtedness to Montcap. As collateral security for the guarantee, she mortgaged her matrimonial home at 34 Shamokin Dr., Toronto, and her cottage in Muskoka.

[6] Mr. Pagrach also provided a guarantee and collateral security on his home. However, Mr. Pagrach's collateral security was later released and not replaced as was intended.

[7] On November 23, 2004, Montcap made a formal demand on Ms. Smith's and Mr. Pagrach's guarantees.

[8] In March 2005, Spiral's property was sold by a receiver, and its indebtedness to Montcap was reduced, but Spiral's debt was not discharged by the proceeds of the sale.

[9] On April 1, 2005, Ms. Smith signed an acknowledgement in which she confirmed, among other things that: she did not dispute her liability to pay the indebtedness; she had no claim, set-off, or counterclaim against Montcap; and Montcap had a valid and subsisting security over the Toronto Property and the Muskoka Property.

[10] Two years later, on April 2, 2007, Montcap agreed to discharge its mortgage on Ms. Smith's Muskoka Property in exchange for the receipt of $299,031 from the proceeds of the sale of that property. The receipt of this sum would reduce the indebtedness under the guarantee to $40,263.43 plus accruing interest.

[11] On April 3, 2007, Montcap's lawyer wrote Ms. Schyven's daughter, who is a lawyer, to confirm an agreement between Montcap and Ms. Schyven. The letter stated:

> Further to our agreement, we confirm on behalf of our client, Montcap Financial Corporation ("Montcap"), the terms of settlement with Ineke Schyven-Smith as follows:
>
> 1. Following the receipt by our firm, in trust, of the sum of $299,031.00 from Pinckard Wyjad Fleming in respect of the sale of the Muskoka property, the indebtedness due and owing to Montcap as of April 3, 2007 shall be $40,263.43 plus interest accrued thereon from April 3, 2007 at the rate of prime plus 3% and reasonable legal fees incurred in the within negotiations and to be incurred in further pursuit of its remedies towards collection of the balance due and owing to it.
>
> 2. Subject to the provisions of Section 6 below, the principal amount of the mortgage in favour of Montcap registered against the property municipally known

> as 34 Shamokin Drive, Toronto, Ontario (the "Shamokin Property") shall be reduced to $100,000.00 and the interest rate applicable to the indebtedness shall be reduced to prime plus 3% and shall continue to compound on the same terms as they currently exist. You will prepare the necessary documentation in this regard for our review and execution by our client and registration on title to the Shamokin Property.
>
> 3. Montcap undertakes to issue a demand letter to Mr. Pagrach this week for collection of the balance due and owing to Montcap. In addition, Montcap will use commercially reasonable efforts to obtain mortgage security on Mr. Pagrach's matrimonial home but we cannot guarantee our obtaining same.
>
> 4. Once the balance of the outstanding as described in Section 1 hereof has been paid to Montcap in full, Montcap will execute a Discharge of the mortgage in favour of Montcap registered against the Shamokin Property and will execute a Full and Final Release of Ineke Schyven-Smith.

[12] On April 9, 2007, Montcap wrote a demand letter to Mr. Pagrach. What followed was a sporadic exchange of correspondence that lasted for several years about the calculation of the outstanding debt. Eventually, Montcap decided not to pursue obtaining a security instrument from Mr. Pagrach, and On November 27, 2009, Montcap commenced this action against Ms. Smith.

[13] In the period between April 2007 and the commencement of the action, there were ongoing conversations and correspondence between Montcap's principal, Harold Shapiro and Ms. Smith and her daughter, and Montcap's mortgage continues to be registered against the Ms. Smith's Toronto property. Montcap characterizes the communications as acknowledgements and affirmations of Ms. Smith's ongoing indebtedness under the guarantee. One of the conversations occurred on the Thanksgiving weekend in October 2009, shortly before Montcap commenced its actions against Ms. Smith.

[14] Based on these factual circumstances, Montcap's legal argument is that Ms. Smith signed a guarantee and acknowledged her liability under it just before the commencement of the action, and it submits that there is no genuine issue about the amount of the debt.

[15] Further, Montcap submits that there is no merit to Ms. Smith's defence based on the *Limitations Act, 2002*. Montcap also argues that there is no merit to Ms. Smith's remaining defence that she should be discharged because of Montcap's alleged failure to obtain mortgage security from Mr. Pagrach. In this last regard, Montcap submits that it did not guarantee it would succeed in obtaining a mortgage, and it submits that it used commercially reasonable efforts to obtain mortgage security on Mr. Pagrach's matrimonial home.

[16] In support of its argument that Ms. Smith acknowledged the debt, Montcap relies on ss. 13 (1) and (2) of the *Limitations Act, 2002*, which state:

> 13(1) If a person acknowledges liability in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgement was made.
>
> (2) An acknowledgment of liability in respect of a claim for interest is an acknowledgment of liability in respect of a claim for the principal and for interest falling due after the acknowledgment is made.

[17] In response to these facts, Ms. Smith's legal arguments are that Montcap's claim should be dismissed as statute-barred. It submits that the Ms. Smith's last acknowledgement of liability under the guarantee was in April 2007, but Montcap's action was commenced on November 27, 2009, which is after the two year limitation period under the *Limitations Act, 2002*. Ms. Smith submits that the limitation period under the Act had run its course because the alleged later acknowledgements, which would re-start the running of the limitation period, do not qualify as acknowledgments under the Act.

[18] She submits that these other alleged acknowledgments do not satisfy the requirements of s. 13 (10) of the Act that states that s. 13(1) does not apply "unless the acknowledgment is in writing and signed by the person making it or the person's agent."

[19] Further, Ms. Smith submits that if there are oral acknowledgments that could have the effect of restarting the clock such that Montcap's claim is not time-barred, there are material facts in dispute that can only be determined through a trial. In this regard, there is conflicting evidence from Mr. Shapiro and Ms. Smith about whether there was any acknowledgement of the indebtedness. On cross examination, Mr. Shapiro stated that Smith was lying when she denied that she had acknowledged that a debt was owing.

[20] Ms. Smith also submits that Montcap abandoned its efforts to pursue Pagrach and did not fulfill its undertaking and obligation to pursue him and she submits that there is a genuine issue requiring a trial about whether Montcap breached the Agreement by failing to take commercially reasonable steps as against Pagrach.

[21] I pause here to note that neither party provided the court with any evidence about what might be the measurement of taking commercially reasonable steps.

[22] With this background, I can now turn to the merits of Montcap's motion for summary judgment.

[23] There does not appear to be any dispute between the parties that given that Montcap made its first demand for payment in 2004, its claim would be statute-barred unless the limitation period was restarted from time to time or unless Ms. Smith was otherwise unable to rely on the tolling of the limitation period.

[24] In this last regard, as noted above, Ms. Smith submits that the last legally effective acknowledgement occurred in April 2007, and she submits that the subsequent alleged acknowledgements are ineffective because they do not comply with s. 13 (10) of the *Limitations Act, 2002*.

[25] I agree with Ms. Smith's submission that her subsequent words and conduct would not constitute an acknowledgment under s. 13 of the *Limitations Act*.

[26] With each payment, a debtor acknowledges or re-acknowledges his or her liability; partial payment acts as an acknowledgment that will restart the running of the two-year limitation period: *ABC Lumber Ltd. v. Bodrenok*, 2010 ONSC 769 (S.C.J.) at para. 39; *Emmott v. Edmonds* 2010 ONSC 4185 (S.C.J.); *Bank of Nova Scotia v. Christie***,** [2008] O.J. No. 2971 (S.C.J.) at paras. 58-59; *Montreal Trust Co. of Canada v. Vanness Estate*, [2005] O.J. No. 594 (C.|A.) at para. 2; *Markham School for Human Development v. Ghods* (2002), 60 O.R. (3d) 624 (Div. Ct.). However, in the case at bar, after the sale of the Muskoka cottage, there was no partial payments by Ms. Smith.

[27] After the sale of the Muskoka cottage, there were also no written acknowledgments that would satisfy the requirements of s. 13 of the Act. In *Middleton v. Aboutown Enterprises Inc.*, [2008] O.J. No. 3608 (S.C.J.), Justice Lederer stated at para. 11 that an acknowledgement for the purposes of the *Limitations Act, 2002* must, at a minimum, confirm and concede the amount that remains owing.

[28] Although I agree with Ms. Smith that there are no acknowledgements within the meaning of s. 13 of the *Limitations Act, 2002*, nevertheless, there is a genuinely triable issue that Ms. Smith may be estopped from relying on a limitation period defence. If proven, promissory estoppel can operate as an answer to a limitation defence. See: *Whorpole Estate v. Echelon General Insurance Co.*, 2011 ONSC 2234 at para. 14; *Chanore Property Inc. v. ING Insurance Co. of Canada*, [2010] O.J. No. 3880 (Master).

[29] In *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at para. 13, Justice Sopinka set out the requirements for promissory estoppel:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[30] See also: *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281at para. 45; *Saltsov v. Rolnick*, 2010 ONSC 914; *Fritsch v. Magee*, [2009] O.J. No. 2432 (S.C.J.) at para. 24.

[31] While it is not well articulated or well labelled, it is clear enough that the substance of Montcap's submission is that through her words and conduct, and perhaps the words and conduct

of her daughter as her agent or representative, Ms. Smith is estopped from relying on a limitation period defence. In other words, Montcap is not relying on an acknowledgement under s. 13 of the Act but rather on the doctrine of promissory estoppel, which, if proven, is another way of avoiding the tolling of a limitation period.

[32] I do not say one way or the other whether Montcap's counterplea of promissory estoppel will be proven, but, in my opinion, there is a genuine issue requiring a trial about the merits of this plea. I also think there is a genuine issue requiring a trial about whether Ms. Smith's liability under the guarantee has been discharged because of what Montcap did or did not do in pursuing Mr. Pagrach for security.

[33] For present purposes, I do not think it is necessary to engage in any discussion about the test for summary judgment or about whether that test may have changed because of the amendments to the summary judgment rule introduced in early 2010. My opinion is simply that there are genuine issues that cannot be fairly and justly be decided summarily and that the issues in this case require a trial.

[34] I, therefore, dismiss the motion for summary judgment.

[35] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Smith's submissions within 15 days of the release of these Reasons for Decision followed by Montcap's submissions within a further 15 days.

PERELL, J.

Released: June 27, 2011

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BETWEEN:

MONTCAP FINANCIAL CORPORATION

Plaintiff

– and –

WOBBY INA SCHYVEN a.k.a. INEKE SCHYVEN-SMITH

Defendant

REASONS FOR DECISION

PERELL J.

Released: June 27, 2011