Citation: - 2017 NBQB 039
Docket No.: M/M/136/2016

Date: March 7, 2017

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

BETWEEN:

DARREN ELSLIGER

Applicant,

- and -

SEAHOLD INVESTMENTS INC.,

Respondent.

DECISION

BEFORE: Mr. Justice Stephen J. McNally

AT: Moncton, New Brunswick

DATE OF HEARING: March 7, 2017

DATE OF DECISION: March 7, 2017

COUNSEL:

Jordan Thompson for the applicant

Michiel J. Vandenberg for the respondent

S.J. MCNALLY, J. (Orally)

(1) The applicant, Darren Elsliger brings this Notice of Application seeking:

(a) A declaration that the interest amount payable on a loan of $3,000.00 from Seahold Investments Inc. advanced by it to the applicant on December 16, 2008 bearing an interest rate of 2.4% per month, or 28.8 % per year, compounded monthly, not in advance is unconscionable and unjust, and

(b) An order directing that the applicable interest rate in the contract of loan be reset to reflect the purported original intention of the parties for reasonable remuneration on such loan intended over a short term pursuant to section 2(a) of the *Unconscionable Transactions Relief Act*, RSNB 2011, c 233.

(2) The plaintiff was injured in a motor vehicle accident on November 16, 2007. He asserts that he is still significantly afflicted by his injuries and that he could not return to work following the accident. He hired a lawyer and commenced legal proceedings on October 2, 2008 against the other party involved in the accident. By the end of 2008 he was still unable to return to work and was struggling financially. His Section B insurer was also delaying payment of his weekly indemnity payments which further exacerbated his precarious financial situation.

(3) The applicant says he was unable to borrow money from friends or family and was not eligible for social assistance or Employment Insurance benefits. He was unable to borrow funds from the Royal Bank or any other financial institution.

(4) His lawyer at the time, informed him that the respondent, Seahold Investments Inc. provided loans to plaintiffs at a high interest rate, which the applicant understood was at significantly higher rates than that of banks or other financial institutions. Nevertheless, the applicant felt it was his only option at the time if he wanted to eat, attend appointments and proceed with his litigation. He understood that he would repay the loan out of his settlement funds.

(5) He entered into an agreement with Seahold on December 16, 2008 where he borrowed $3,000.00 for which he gave a letter of direction to his lawyer to repay to Seahold out of any settlement or judgment proceeds from the claim he brought against the defendant that he was suing in relation to his motor vehicle accident. By the terms of the loan agreement, the applicant agreed to pay interest at 2.4% per month, or 28.8 % per year, compounded monthly, not in advance. The loan was repayable by the borrower at any time without penalty. The only security held on the loan by Seahold was a Demand Note, a Letter of Direction from the applicant to his solicitor and an acknowledgement of his solicitor to repay the loan and interest out of any funds eventually received by way of settlement or judgment upon the final resolution of the claim.

(6) Seahold was not involved in directing the pace or management of the litigation. That was left to the applicant and his counsel.

(7) The applicant also commenced action against his Section B insurer and the action was eventually settled in July 2016 for $100,000.00. By that time, the applicant had made no payments on the original $3,000.00 loan and as I understand it the monthly interest charges were also not being paid and were added to the principal of the loan on a monthly basis such that the total amount owing on the loan together with interest was $25,662.45.

(8) On August 26, 2016, after receiving his Section B settlement funds, the applicant's current lawyer paid to Seahold care of its solicitor's firm "in trust" the sum of $26,000.00 to be held until the outcome of the present application was decided. Seahold submits that as of the date of the hearing, March 7, 2017 the amount now due is $31,192.13.

(9) The applicant's Section A claim against the defendant who he alleges caused the accident has not yet been resolved by settlement or judgment.

(10) The applicant submits that the interest charged by Seahold is unconscionable and constitutes an unjust enrichment to Seahold and should be reset pursuant to the provisions

of the *Unconscionable Transactions Relief Act*. He further alleges that there was *no consensus ad item* with respect to the terms of the loan.

(11) I will address the *consensus ad item* issue first and simply state that the applicant has not persuaded me that there was no *consensus ad item* with respect to the nature of the loan or the terms that were being agreed to. Mr. Elsliger was represented by legal counsel at the time of entering the loan agreement. Indeed, the loan was entered into after his counsel advised him of the availability of this source of funding but who also advised him that it was at a high interest rate, which the applicant understood was significantly higher than that of banks or other financial institutions – see paragraph 11 of Darren Elsliger's affidavit.

(12) Additionally, the terms of the Demand Note, including the interest rate of 2.4% per month or 28.8% per annum compounded monthly not in advance were clear. In fact, the Demand Note provided an example to illustrate the cost of the first years financing on a loan of $1,000.00. In addition, Seahold sent the applicant a monthly statement on the outstanding loan as well as quarterly statements to his lawyer. If there was any confusion about the terms of the loan or interest rate agreed to or interest calculations and interest owing, this would have been apparent to the applicant very early on upon the receipt of his initial monthly statements. No issue was raised by the applicant until he settled his Section B claim and was in a position to receive the proceeds of the settlement.

(13) Mr. Elsliger also alleges that the parties only anticipated a very short term for the loan, however, this is not supported by evidence where there was no due date stated on the loan and I am satisfied that neither party could have reasonably anticipated how long it might take to settle or resolve the action. Certainly, Seahold, who was not involved in directing and had no right to direct the course or timing of the litigation, could not have reasonably anticipated how long it might take for the case to be completed. Further, as already noted, Mr. Elsliger and his lawyer were clearly aware of the duration of the litigation and the term of the loan on an ongoing basis as they received regular statements of account. Mr. Elsliger concedes that it was not a condition of the loan that it be only

for the short term and he did not communicate to Seahold any intention on his part that it would only be a short term loan.

(14) Turning to the issue of the purported unconscionable nature of the loan, section 2(a) of the *Unconscionable Transactions Relief Act*, R.S.N.B. 2011, c 233 states:

> If, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may
>
> (a) reopen the transaction and take an account between the creditor and debtor.

(15) The *Act* provides no direction or guidelines on what constitutes an excessive cost of a loan or what amounts to being harsh or unconscionable. I note that the interest rate being charged in the present case appears to be no higher in some instances, or certainly not substantially higher, than the rates often charged by federally regulated banks and other traditional lenders that we see regularly in our courts involving claims for debts due on credit card accounts and cash advances made on such accounts.

(16) There is no doubt that interest rates at this high level being charged to needy borrowers are disconcerting and troubling. Their troubling effect is illustrated even more with the consequences of compounding interest over the long term. However, I cannot conclude that in the circumstances of this case that the rate being charged was excessive, harsh or unconscionable particularly having regard to the risks involved. It must be remembered that Mr. Elsliger was obviously viewed by more traditional lenders as of such a high risk that they would not even lend to him. This is understandable as he was unemployed at the time, had no source of income and his prospects for employment did not look encouraging considering his purported disability from working due to his injuries.

(17) Seahold would not likely be able to collect either interest or principal on the loan unless Mr. Elsliger was successful in resolving his claim with a substantial monetary award, an eventuality far from certain at the time Seahold advanced the loan. I note that

the accident occurred almost nine and one-half years ago and the Section A claim against the tortfeasor is still not resolved and presumably the likelihood of success remains somewhat uncertain.

(18) Seahold did not seek the applicant out to loan him money or to pressure him into entering the loan agreement. Mr. Elsliger sought Seahold out on the suggestion of his lawyer who again, advised him of the higher interest rate that would be charged on the loan. In that sense there was no inequality of bargaining power. Quite simply, Mr. Elsliger did not have to accept the loan offer and Seahold did not exert any pressure upon him to do so or take unfair advantage of him. Any personal needs that would cause the applicant to accept the terms of the loan were not created by or due to any action or inaction on the part of Seahold.

(19) Further, Mr. Elsliger stated in his affidavit that the loan was his *"only option at the time if I wanted to eat, attend appointments, and proceed with my litigation"[underlining added]*. A benefit or part of the benefit he received from the loan appears to have been to enable him to continue to pursue his claims against the tortfeasor and his Section B insurer and he was successful to this point in obtaining a settlement of $100,000.00 with potentially much more to come. In that regard, it is difficult to conclude that the loan was not a significant benefit to him or that it was totally improvident.

(20) As noted in the applicant's brief Professor J. D. McCamus wrote at page 407 of *The Law of Contracts* (Toronto, Irwin Law Inc., 2005):

> "In order to set aside a transaction on the ground of unconscionability, one must establish both inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests and undue advantage or benefit secured as a result of that inequality by the stronger party"

(21) Further, due to the applicant's condition, inability to work and the fact that Seahold would likely not get repaid if he was not successful in his legal action, he was considered a high risk borrower who could provide no traditional security or collateral to

repay the loan and none was sought by Seahold except that he provide a letter of direction to his lawyer to repay the loan out of the settlement or judgment proceeds. I am satisfied that Seahold wanted to ensure it made a healthy profit on the loan and in its lending business and the interest rate it charged reflected this objective as well as the high risk in being repaid on the loan, but I cannot conclude, in the circumstances, that the bargain they struck with the applicant was unconscionable.

(22) In *LeBlanc v. Doucet and New Brunswick Power Corporation*, 2012 NBCA 99 the Court of Appeal confirmed that an interest charge identical to that in the present case from Seahold to the plaintiff was a reasonable rate of interest in relation to it being determined to be a reasonable disbursement incurred in the course of litigation and ultimately payable by the defendants in that action.

(23) Counsel for the applicant also argued that the loan constituted an unjust enrichment to Seahold and that it should be reformulated on that basis. There are three requirements to establish unjust enrichment: an enrichment, a corresponding deprivation and an absence of any juristic reason for the enrichment. The agreement entered between the parties provided that the applicant would receive the benefit of the loaned funds and be enriched by those funds until his case was settled or otherwise resolved and principal and interest would only be payable at that time. The loan also appears to have been a benefit to Mr. Elsliger, according to his affidavit, in enabling him to continue to pursue his litigation against his insurer which was ultimately successful.

(24) Seahold would suffer the deprivation of the use or benefit of its funds, the $3,000.00, until the applicant's case was resolved and likely only in the event that the applicant was successful in his action.

(25) Correspondingly, upon settlement the applicant would be required to pay the principal and interest owed on the loan being to his detriment (deprivation) while on the other hand Seahold would receive the benefit of the interest paid at that time, again most likely only in the event that the applicant was successful. The juristic reason for the parties' respective deprivations and enrichments was their agreement. Accordingly, in my

view, there is no basis upon which the agreement should or could be reformulated under the doctrine of unjust enrichment.

(26) For the foregoing reasons, the application is dismissed. Seahold is entitled to its costs on the application which I fix at $1,500.00 plus its taxable disbursements.

STEPHEN J. MCNALLY
Judge of the Court of Queen's Bench of
New Brunswick