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Courts
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Division

43 Drummond Street, East
Perth ON
K7H 1G1

(613) 267-2021
Fax/Télécoleur
(613) 267-7055

Ministère
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général

Division des
services
aux tribunaux

43, rue Drummond Est
Perth ON
K7H 1G1

FAX: 613-542-9814

September 14, 2017

Cunningham, Swan
Barristers & Solicitors
Smith Robinson Building
300-27 Princess Street
Kingston, ON K7L 1A3

Attention: Mr. James McDonald

Dear Sir:

Re: Rhino v Farant et al - Court File No. CV-14-593

Please find attached Judgment in the above noted matter.

Thank you.

Yours truly,

CITATION: *Rhino v. Farant et al.*, 2017 ONSC 5463
COURT FILE NO.: CV-14-593-00
DATE: 2017/SEPT/14

ONTARIO

SUPERIOR COURT OF JUSTICE

| | | |
|---------------------------------------|---|--------------------------------------|
| BETWEEN: |) | |
| |) | |
| Rhino Legal Finance Inc. |) | |
| Plaintiff |) | James L. McDonald, for the Plaintiff |
| |) | |
| - and - |) | |
| |) | |
| Joseph Omer Jean-Michel Farant, |) | Jillian Van Allen, for the Defendant |
| Shannon Halladay, Christopher |) | |
| Halladay, Victor Hill, Kelly Hiseler, |) | |
| Nelda Lacroix, Arliegh Hill, Joanne |) | |
| Senack and Darlene Speck |) | |
| Defendant |) | |
| |) | |
| |) | |
| |) | HEARD: December 1, 2016 |

JUSTICE J. JOHNSTON

JUDGMENT

[1] This is a motion for Summary Judgment commenced by the Plaintiff, seeking judgment against the Defendant, Mr. Farant. The Plaintiff seeks damages and pre and post judgment interest on the amounts found owing.

Background:

[2] The Plaintiff, Rhino, is in the business of providing pre-settlement injury claim loans to individuals injured in motor vehicle accidents and who have begun actions in court seeking damages. The loans were payable upon the borrower's legal action being settled and funds received by the borrower's lawyer.

[3] The defendant, Mr. Farant, was at the material time counsel in separate civil actions commenced on behalf of Christopher Halladay, Shannon Halladay,

Victor Hill, Kelly Hiseler, Nelda Lacroix, Arleight Hill, Joanne Senack and Darlene Speck (I will refer to these individuals as the Borrower Defendants). All of the Borrower Defendants had commenced individual legal claims in court seeking damages as plaintiffs, Farant acted for each. Each of the individuals secured loans from the Plaintiff Rhino, to assist them in their respective court cases. In each case, each Borrower, through counsel, contacted Rhino seeking a loan. Loan documents were completed and signed by each respective Borrower Defendant and in all cases by Mr. Farant, as counsel. In each case Mr. Farant signed a Certification and Solicitor Acknowledgement. Rhino was obviously not a party to any of the Borrowers litigation, accordingly they relied upon Mr. Farant to provide accurate and timely information and representations with respect to the status of the various cases.

[4] Each Certification and Solicitor Acknowledgement specially required Farant to undertake, *inter alia*:

- (a) To promptly notify Rhino, once and if, the borrower's litigation has been settled or discontinued or if a judgment has been obtained or if the litigation is otherwise resolved or discontinued;
- (b) To promptly advise Rhino if the lawyer is removed or replaced as solicitors in the borrower's litigation and to advise Rhino as to the identity of the new solicitors and;
- (c) Generally, to provide Rhino with such information concerning the borrower's litigation and its status and conduct and the address and other personal information of the borrower as Rhino may from time to time request.

[5] The Plaintiff advanced funds in respect of loans to the respective Borrower Defendants as follows:

- (1) Christopher Halladay: \$13,550.00 (a first loan of \$10,000.00 on July 23, 2010 and a second loan of \$3,550.00 consisting of an initial payment of \$550.00 on May 18, 2011 followed by six installments of \$500.00, less applicable fees;
- (2) Shannon Halladay: \$5000.00 (an initial payment of \$2,000.00 on October 15, 2010 followed by six monthly installments of \$500.00), less applicable fees;

- (3) Victor Hill: \$13,000.00 (a first loan of \$11,000.00 on July 12, 2010 and a second loan of \$2,000.00 paid in four installments of \$500.00 beginning September 3, 2010), less applicable fees;
 - (4) Kelly Hiseler: \$25,000.00 less applicable fees, on January 26, 2010;
 - (5) Nelda Lacroix: \$5,000.00, less applicable fees on July 27, 2010;
 - (6) Arleigh Hill: \$7,000.00 (a first loan of \$3500.00 on March 9, 2011 and a second loan of \$3500.00 paid in seven installments of \$500.00 beginning May 17, 2011), less applicable fees;
 - (7) Joanne Senack: \$15,550.00 (a first loan of \$10,000.00 on July 14, 2010 and a second loan of \$5,500.00 on October 15, 2010) less applicable fees;
 - (8) Darlene Speck: \$ 5,400 less applicable fees, on August 9, 2010
- [6] Mr. Farant admits to receiving settlement funds on behalf of the borrowers as follows:
- (a) Christopher Halladay and Shannon Halladay: \$410,000 Between December 22, 2010 and May 27, 2011;
 - (b) Victor Hill: \$50,850.00 between June 20, 2010 and October 25, 2012;
 - (c) Kelly Hiseler: \$247,200.00 between March 2, 2010 and July 17, 2013;
 - (d) Nelda Lacroix: \$52,646.00 between December 22, 2009 and July 17, 2013;
 - (e) Joanne Senak: \$66,800.00 on August 1, 2014
- [7] Mr. Farant agrees that no payments were made to the Plaintiff Rhino from any of the settlement monies received by him on behalf of any of the Borrower Defendants. In his affidavit Mr. Farant states at paragraph 18: "*No payments was made to the Plaintiff out of the settlement monies received on behalf of any of the other parties to this action because the amounts claimed for interest were excessive and contrary to law.*" Mr. Farant did not return the original amounts loaned.
- [8] Mr. Farant further swore in his affidavit that he did not misrepresent to the Plaintiff any fact material to the legal actions of Halladays, Hill, Hiseler,

Senak and Speck as alleged. He does state: *"To the extent that I did not provide information to the Plaintiff I considered that to do so would breach the lawyer client duty of confidentiality"*.

- [9] It is agreed all loans documents were executed by the parties in Ontario. All of the loans are subject to the *Consumer Protection Act 2002 SO 2002 c 30*.

Issues:

- [10] The issues to be determined on this motion are:
- (1) Is there a genuine issue with respect to Rhino's claims against Mr. Farant requiring a trial for determination?
 - (2) Do the pleaded defences of Mr. Farant require a trial for determination?
 - (3) If the matter can be dealt with without a Trial, what amounts are payable by the Defendant?
- [11] *Rule 20.01 (1)* provides that a plaintiff may, after the defendant has delivered a Statement of Defence, move with supporting affidavit material for summary judgment. The court must grant summary judgment if there is no genuine issue requiring a trial with regard to a claim or pleaded defence.
- [12] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the judge on a motion is able to: i) make the necessary finding of fact; and ii) apply the law to the facts; and iii) and the process is a proportionate and more expeditious and less expensive means to achieve a just result.
- [13] In the final analysis the motion for Summary Judgment is appropriate if the Judge is confident that he can fairly resolve the dispute.
- [14] In the case at bar, both counsel agree the matter can be resolved by way of Motion, without the necessity of trial. Counsel for Mr. Farant does not dispute liability. However, the parties disagree significantly upon the quantum of payment for damages payable by the Defendant Farant, to the Plaintiff. In their factum, Counsel for Mr. Farant state that the Plaintiff should have judgment for the principal amounts of the various loans, less payments received or recoverable from the co-defendants and interest

thereon pursuant to the *Courts of Justice Act*. In her written submissions dated March 7, 2017, counsel Ms. Allen, states *that 'Rhino is entitled to be repaid the principal amount of the loans plus regular interest at 5 % per annum in accordance with the Courts of Justice Act'*.

- [15] The Plaintiff seeks judgment in accordance with the terms of each loan agreement, including the above normal interest rates, compounded and a 4 percent Annual fee to be added to the debt each year.
- [16] In her oral argument, Ms. Van Allen suggests that the only real issue to be determined is whether the various Statements of Disclosure provided to each Borrower defendants and to Mr. Farant, complied with the Disclosure Requirements of the *Consumer Protection Act (CPA)* and/or to the extent the Disclosure did not comply with the *Act*, whether under *Section 93(2)* of the *Act*, the agreements should be ordered complied with because: *"it would be inequitable in the circumstances for the consumer not to be bound."*

Analysis:

- [17] I agree the issues raised in this matter can be dealt with by way of this motion. There is no requirement for a trial. A judge at trial is unlikely to be in a better position to determine the outstanding issues. I further concur that the real issue is the quantum payable by the Defendant Farant to the Plaintiff.
- [18] Notwithstanding these conclusions, it is necessary to comment upon Mr. Farant's affidavit and assertion therein that he did not mislead the Plaintiff on any fact material to the legal actions of the other Defendants. I reject Mr. Farant's denial of misrepresentation, it is beyond credibility and belief. I find that Mr. Farant did consistently represent to the Plaintiff that the Borrower Defendants' respective legal actions were ongoing, even after he had received settlement funds.
- [19] For example, Mr. Farant, represented that as of July 28, 2014, the Halladay action was ongoing; in fact the Halladays' legal action was resolved as of June 2011. I accept the evidence of Mr. Dudley, that Rhino did not discover, or have reason to believe, that the Halladays' legal actions had been settled, until a Rhino employee spoke with Mr. Halladay on December 8, 2014 and Shannon Halladay on December 9, 2014.

- [20] On June 16, 2014, Mr. Farant completed a Claim Action Status form reporting the status of the legal actions of the Halladays, Mr. Hill, Ms. Hiseler, Ms. Lacroix, Ms Senack and Ms. Speck to Rhino. In the statements Mr. Farant said: *'I confirm that as of April 30, 2014, I represent the claimants listed above and further that their claim proceeding as expected. The claim action status is as indicated above.'* I accept the evidence of Dudley that Rhino relied on Farant's representations and believed that the actions of the Borrower Defendants remained active and that no money had been paid out. This was false. Mr. Farant received settlement funds on account of all of the Borrower Defendants, except for Ms. Arleigh Hill. None of the loans were repaid to the Plaintiff.
- [21] Mr. Farant's stated rationale for not causing his clients to repay to the Plaintiffs the various loans, or his failure to advise the Plaintiff of the true status of the cases is beyond any belief. Mr. Farant and his clients knew full well prior to accepting the loans of the rate of interest. Further, both Farant as lawyer and his clients were aware from the various documentation each signed, that there was an obligation to notify the Plaintiff when the litigation matter was resolved. Under those circumstances Farant was permitted and, in fact obligated, to make disclosure to the Plaintiff. He failed to do and he misrepresented the status of the various actions.

Defences pleaded:

- [22] While counsel for Mr Farant did not address certain defences in oral argument, they were contained in the pleadings. I will briefly address them here. I consider, but reject all pleaded defences (except for the defence under the CPA, which I will address separately).
- [23] I find the Rate of interest on each loan was not usurious, illegal or inequitable. The annual interest rates in each loan varied between 26.57% per year and 47.42%. The criminal interest rate provided for in the *Criminal Code of Canada* is 60%. Similarly I reject the argument that the interest rate was unconscionable, or grossly unfair or improvident. I find the interest rates were set out in the loan documents and Statements of Disclosure. Mr. Farant was legal counsel for each Borrower. These types of loans are advanced to Plaintiffs who have poor credit ratings and are unable to secure more traditional financing. These Plaintiffs seek loans from lenders such as Rhino at the suggestion of legal counsel to help finance litigation that is viewed as likely to succeed. In such circumstance the borrower is aware of

the higher rates and the lender assumes a higher than normal risk. The transactions in these circumstances are not unequitable or unconscionable. The lender assumes a risk that no monies will be recovered by the Defendant Borrower in his or her litigation and as such the loan would not be repaid.

Consumer Protection Act:

[24] I now turn to the real issue in this case: did the various Statements of Disclosure comply with the requirements of the *Consumer Protection Act*; if not can the loan provisions nonetheless be enforceable pursuant to *Section 93* of the *CPA*?

[25] For the reasons that follow, I conclude that the Statements of Disclosure properly set out the loan amounts and the rates of interest and the cost of Borrowing:

[26] Section 66 of the *CPA* defines, '*cost of borrowing*' as:

"cost of borrowing means that all amounts that a borrower is required to pay under, or as condition of entering a credit agreement and all prescribed amounts other than,

(a) A payment or repayment of the principle under the agreement as prescribed, and

(b) Prescribed charges

[27] *Section 70* of the *CPA* sets out the consequences of non-disclosure of the '*cost of borrowing*', as follows:

70. A borrower under a credit agreement is not liable to pay the lender;

a) the cost of borrowing under a credit agreement if the borrower receives no statements required by this Part, or

b) as part of the cost of borrowing, any amount in excess of the amounts specified in the statements that this part requires to be delivered to the borrower in respect of the agreement.

[28] The final section of the *CPA* that is relevant to this matter is *Section 93*, which provides:

93 (1) *A consumer agreement is not binding on the consumer unless the agreement is made in accordance with this Act and the regulations.*

(2) *Despite subsection (1), a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with Act or the regulations, if the Court determines that it would be inequitable in the circumstances for the consumer not to be bound.*

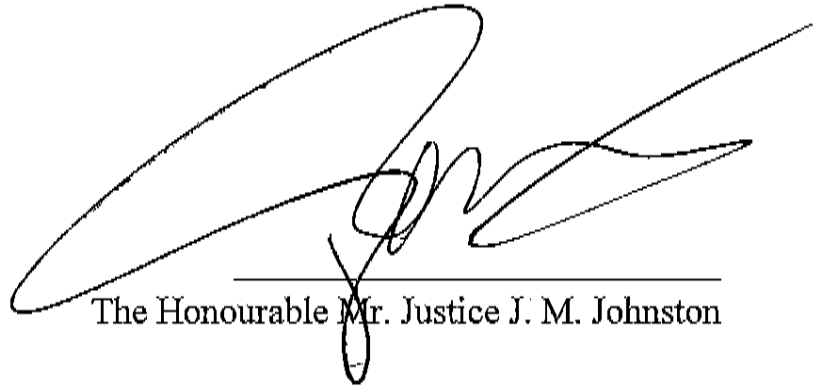
- [29] Counsel for Mr. Farant argues that each Statement of Disclosure in each case is deficient. The Statements of Disclosure do not refer to the 4% annual fee in the calculation of the cost of borrowing. Each Statement of Disclosure does though contain a footnote with respect to this annual fee. Counsel argues this footnote is both misleading and inaccurate and does not correctly explain how it affects the cost of borrowing or the annual percentage rate.
- [30] I agree. I find the 4% annual fee is contained in the Disclosure Statement of each loan agreement, but not in the Cost of Borrowing calculations. The additional 4% cost is reflected only as a footnote. It would have been very easy for Rhino to have included this 4% calculation in the Cost of Borrowing, at least for the first year. It would have made the costs understandable to everyone. The inclusion of this cost only as a footnote is confusing at the very least and may be an attempt to hide charges. The inclusion of these fees are not "*in straightforward and clear language directed toward an unsophisticated person.*" The inclusion of the 4% annually is a cost of borrowing and as such it ought to have been clearly included in the calculations. It was not. The requirement of clearly identifying the cost of borrowing is not satisfied by a footnote reference.
- [31] The question then becomes what is the appropriate remedy? The Defendant argues all terms of the loan ought to be struck and repayment should be at a much lower interest rate.
- [32] Upon review of all submissions and the applicable legislation, I agree with the position advanced by Counsel for the Plaintiff that: *'the correct approach is to reduce damages by any hidden, undisclosed or inadequately disclosed charges rather than invalidating the entire agreement.'*

- [33] The Cost of Borrowing in each case was adequately set out: including the loan amount, the interest rate and further unambiguously identified that interest will compound each month. Eleven of the twelve disclosure statements in issue in this case state: "*Interest Rate and Compound Period: the interest rate is 2.95%, compounded monthly*" The twelfth disclosure statement is similar, stating: "*Interest Rate and Compounding Period: the interest rate is 2.95% compounded monthly.*" It was clear from the documents agreed to that interest would accrue on the outstanding loan balance and accruing interest.
- [34] I find the 4 percent annual fee is ambiguous. The proper result is to render that fee unenforceable, but the remaining portions of the Agreement enforceable. Pursuant to *Section 93 (2)* of the *Act*, the Court retains the ability to order that a consumer be bound by the consumer agreement even if the agreement was not made in accordance with the *Act* or regulations. In the circumstances of these loans, the annual percentage interest rates set out in the statements of Disclosure are the proper measure of interest damages. There is no basis to accept a lower rate of interest as proposed in two alternatives by counsel for Mr. Farant. The Parties to all loan agreements clearly agreed to the interest rate and the fact that it would compound.
- [35] In circumstances such as these loans, parties must be held to their agreements. The Plaintiff is a high risk lender. The Defendants and Mr. Farant benefited from the loans that few other lenders would extend. Each borrower had the benefit of legal advice. Interest is payable in accordance with the terms of each loan agreement, including post judgment interest. I see no reason not to require the Defendant to pay the contractual rate of interest, as opposed to the lower interest rate imposed by the Courts of Justice Act.

Conclusion:

- [36] In conclusion, I grant the Motion for Summary Judgment. The Plaintiff shall have Judgment against the defendant Farant. I will leave it to counsel to prepare the exact calculations of damages based on the terms of my Order herein. The calculations shall include all those claimed by the Plaintiff, except for the 4% annual fee in each instance. In the event there is disagreement between counsel as to the final mathematical calculations, the matter may be returned before me by notifying my office in writing the nature of the dispute in calculations.

[37] In the event counsel are unable to agree upon Costs, I direct the Plaintiff to serve and file within 30 days written submissions, limited to three pages, with a Bill of Costs. The Defendant shall serve and file a response within 30 days of receiving the Plaintiff's submissions, also limited to three pages.



The Honourable Mr. Justice J. M. Johnston

Released: September 14, 2017

CITATION: *Rhino v. Farant et al.*, 2017 ONSC 5463
COURT FILE NO.: CV-14-593-00
DATE: 2017/SEPT/14

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Rhino Legal Finance Inc.

Plaintiff

– and –

Joseph Omer Jean-Michel Farant, Shannon Halladay,
Christopher Halladay, Victor Hill, Kelly Hiseler, Nelda
Lacroix, Arliegh Hill, Joanne Senack and Darlene Speck
Defendants

JUDGMENT

The Honourable Mr. Justice J. M. Johnston