

**CITATION:** Strashin v. Benzacar, 2013ONSC 4175  
**COURT FILE NO.:** CV-10-407559  
**DATE:** 20130617

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
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)  
STRASHIN DEVELOPMENTS LIMITED ) Brian Illion, for the Plaintiff  
)  
Plaintiff )  
)  
- and - )  
) James Diamond and Marc Gertner, for the  
JACK BENZACAR ) Defendant  
)  
Defendant )  
)  
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)  
)  
) **HEARD: October 29, 2012**

2013 ONSC 4175 (CanLII)

**ELLEN MACDONALD J.**

**Introduction and Factual Background**

**REASONS FOR DECISION**

[1] The Plaintiff, Strashin Developments Limited (“Strashin”) seeks summary judgment for \$41,137.13 plus interest and costs. Strashin alleges that the Defendant (Jack Benzacar) is liable pursuant to a joint and several Guarantee securing certain demand Promissory Notes.

[2] The Guarantee document is attached to the affidavit of Elliot Strashin. Jack Benzacar did not pursue his right to determine his further liability under the Guarantee by providing the notice required pursuant to paragraph 9 of the Guarantee.

[3] The Promissory Notes and Guarantee were assigned to HSBC Bank of Canada (“HSBC”) by Strashin effective November 16, 2007.

[4] On March 25, 2010, Strashin made demand upon the debtor, Vain Magazine Inc., for payment of \$41,137.13, being the outstanding indebtedness at that time. Prior to this, no demand has been made by Strashin or HSBC.

[5] Then on April 28, 2010, Strashin made demand upon Jack Benzacar to pay the indebtedness as the debtor, Vain Magazine failed to pay the indebtedness pursuant to the demand. The Promissory Notes and the Guarantee were all made August 20, 2001. In this motion, Jack Benzacar does not dispute the Promissory Notes nor does he dispute his Guarantee of the indebtedness nor the assignment of the same to Strashin.

[6] In this motion, the issues are:

- (a) Whether the Plaintiff's claim pursuant to the Guarantee is statute barred pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B ("*Limitations Act*"); and
- (b) If such action is not statute barred, whether Jack Benzacar ought to be liable for only half of the amount claimed, given that the Guarantee was given jointly and severally by Mr. Benzacar and Elliot Strashin.

[7] Demand for payment of the indebtedness pursuant to the demand notes was first made on March 25, 2010. On April 28, 2010 demand for payment pursuant to the Guarantee was made upon Jack Benzacar.

[8] Strashin takes the position that HSBC never made demand pursuant to the demand notes or the Guarantee. This is corroborated by Jack Benzacar's admission that HSBC could not locate any record of the demand being made.

[9] The Guarantee is joint and several. Paragraph 14 of the Guarantee provides that "no suit based on this Guarantee shall be instituted until demand for payment has been made...". The Statement of Claim was issued on July 26, 2010, the same year that the demand was made.

[10] The issues on this motion are:

- (a) With respect to Jack Benzacar's liability as Guarantor, does the limitation period only begin to run following demand pursuant to the Guarantee; and
- (b) Does the fact that the obligations pursuant to the Guarantee were made on a joint and several basis mean that Strashin is entitled to recover the full amount of the indebtedness from any of the guarantors?

[11] Strashin answers each question set out above in the affirmative.

[12] Strashin submits that the limitation period in relation to the Promissory Notes expires six years after the last payment of principal and interest against the indebtedness which in this case would mean not before January 2012. Unlike a demand promissory note in relation to the

Guarantee, the limitation period only begins to run following demand upon the Guarantor that the demand is a condition precedent to the obligation.

[13] Strashin submits that the obligations of the debtor under the Promissory Notes are demand obligations. As such, if the “new” *Limitations Act* rules are applied without regard to the transition provisions, the obligation to repay does not arise until a formal demand is made by the holder of the Promissory Notes. As such, the limitation period would only begin to run in 2010 as against the principal debtor following formal demand.

[14] Section 5(3) of the *Limitations Act*, provides that the “date that the injury, loss or damage had occurred” in relation to a demand is “the first day on which there is a failure to perform the obligation, *once a demand for the performance is made.*” [emphasis added]

[15] The jurisprudence has established that a demand must be a formal demand and must be clear and unequivocal. See *Bank of Nova Scotia v. Williamson*, 2009 ONCA 754, 97 O.R. (3d) 561 (“*Williamson*”).

[16] In this case, the holder of the Promissory Notes first made a formal demand for payment on March 25, 2010 against the debtor and on April 28, 2010 upon Jack Benzacar as Guarantor. As a result this action is not statute barred.

[17] The payments on the Loan made prior to the assignment would have reset the limitation clock. Under the previous *Limitations Act*, R.S.O. 1990 c.L.15 each payment would reset the six-year limitation period.

[18] At common law, in relation to the enforcement of Continuing Guarantees, the limitations period only starts running following demand upon the surety. The Guarantee in this case is a Continuing Guarantee of the kind described in *Williamson*.

[19] The Guarantee in this case expressly provides that “...This shall be a continuing guarantee and shall cover and secure any ultimate balance owing to the Bank” (emphasis added). In addition, pursuant to the Guarantee, a demand is a required condition precedent to the enforcement. Mr. Benzacar never provided any notice to determine his further liability under the Guarantee. The result is that the Guarantee remains in full force and effect against Mr. Benzacar.

[20] I have concluded that Strashin has no obligation to proceed against Vain Magazine Inc., which is the principal debtor under the Promissory Note and is referred to as the “Customer” in the Guarantee which explicitly provides that: “...The Bank shall not be obliged to enforce its rights against the Customer...”.

[21] The Guarantee further provides that:

...The Bank, without exonerating in whole or in part the undersigned, may grant time, renewals, extensions, indulgences, releases and discharges to...and may

otherwise deal with the Customer and all other persons (including the undersigned and any other Guarantor...as the Bank may see fit...no loss of or in respect of the securities received by the Customers or others whether occasioned by the fact of the Bank or otherwise, shall in any way limit or lessen the liability of the undersigned under this Guarantee. Until all indebtedness of the Customer to the Bank has been paid in full, the undersigned shall not have any right of subrogation to the Bank or to the securities held by the Bank and this Guarantee shall not be diminished or affected on account of any act or failure to act on the part of the Bank which would prevent subrogation from operating in favour of the undersigned...

[22] Strashin is not obliged to proceed against Vain Magazine (the principal debtor). The enforceability of Strashin's claim against Vain Magazine does not relieve Mr. Benzacar from his obligations pursuant to the Guarantee to pay the indebtedness following demand upon the surety.

[23] Strashin submits that the amount of indebtedness set out in the Notice of Assignment dated December 4, 2007 delivered to Jack Benzacar is conclusive evidence of the amount of the indebtedness as of that date. I agree. Demand upon Mr. Benzacar's surety was made on April 28, 2010. The present action was commenced on July 26, 2010.

[24] I conclude that Jack Benzacar's unconditional continuing Guarantee is valid and enforceable and that Jack Benzacar is responsible to pay the full amount of the indebtedness. The Guarantee also provides that: "... the Defendant is responsible for paying all costs, charges and expenses (including legal fees on a solicitor and client basis) incurred by the Strashin".

[25] An issue was raised on the matter of joint and several liability of Mr. Benzacar. Strashin submits that the joint and several nature of the obligations pursuant to the Guarantee mean that Strashin is entitled to recover the full amount of the indebtedness from any of the Guarantors. A joint and several obligation exposes each of the makers of the obligation to liability for the full amount of the principal obligation. See *Canada Trustco Mortgage Co. v. McDade*, 2004 ABQB 51, 129 A.C.W.S. (3d) 296.

[26] In this case, until the full amount of the Promissory Note is paid in full by one or both of Elliot Strashin or Mr. Benzacar, either individually or in conjunction, the holder of that Note remains entitled to collect under it from either of them. Elliot Strashin from Strashin is a Co-Guarantor of the indebtedness pursuant to the Guarantee. Strashin with its status as a corporation is not a Co-Guarantor of the indebtedness pursuant to the Guarantee. Mr. Benzacar has no right of set-off against Strashin pursuant to the terms of the Guarantee. Mr. Benzacar has not issued a third party claim against Elliot Strashin.

[27] I also note the point set out in paragraph 44 of the Factum of Strashin. It is that the mere fact that Elliot Strashin is a shareholder and officer of Strashin does not alter Strashin's right of action against Mr. Benzacar under the note. Elliot Strashin will not be unjustly enriched or receive any kind of windfall from Strashin's action herein. It was Strashin and not Elliot

Strashin which purchased the rights it now has under the Promissory Note, and it will be Strashin and not Elliot Strashin which receives any monies payable under the Promissory Note.

[28] For all of the above reasons, the Plaintiff is granted:

- (a) an Order for judgment in the amount of \$41,137.13;
- (b) Pre-judgment interest from July 26, 2010 being the date of issuance of the claim;
- (c) Post Judgment interest in accordance with the *Courts of Justice Act*.

[29] I fix costs in this motion at \$5,000.00 plus disbursements. These costs and disbursements are payable forthwith.

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Ellen Macdonald J.

**Released:** June 17, 2013

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Plaintiff

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Defendant

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**REASONS FOR DECISION**

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