

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF  
GUYANA  
APPELLATE JURISDICTION

2018-HC-DEM-FCA-45

BETWEEN:

THE BANK OF NOVA SCOTIA  
Appellant

-and-

BUDHESH CHATTERPAUL  
Respondent

The Honourable Justices Navindra A. Singh and Priya Sewnarine-Beharry

Mr. Kamal Ramkarran representing the Appellant.

Mr. Sohan Poonai representing the Respondent.

**Delivered September 24<sup>th</sup> 2018.**

DECISION

The Appellant, a large commercial bank, instituted proceedings in the Commercial Division of the High Court [2016-HC-DEM-CIV-CD-132] on February 2<sup>nd</sup> 2017 against the Respondent seeking to recover monies advanced together with interest and other fees pursuant to a small business loan AND the balance owing on a credit card facility afforded to the Respondent by the Appellant.

The Respondent filed an Affidavit of Defence dated June 13<sup>th</sup> 2017 setting out his defences to the Claims and thereafter the Appellant filed an Affidavit in Reply dated July 14<sup>th</sup> 2017 addressing the issues raised in the Affidavit of Defence.

The Learned Trial Judge, Justice Insanally thereafter dismissed the Appellant's Claims. Unfortunately no decision or reasons for the dismissal were provided.

As per his Affidavit of Defence, the Respondent sets out as his defence to the claim with respect to the small business loan that his father, Anand Chatterpaul, [who apparently died prior to the institution of the Action], executed a third and fifth mortgage on a property situate at lot 60 First Avenue, Bartica to secure the "payment" of \$21,000,000.00 from the Appellant, however he, the Respondent, was not a signatory to the mortgage facility.

The Respondent states at paragraph 8 of the said Affidavit of Defence "*I did not enter into any agreement with the Plaintiff to repay any sums of money pursuant to the two (2) Mortgage Deeds.*"

This is a patent and purposely misleading representation of the relationship between the Appellant and the Respondent advanced as a defence to the Claim for the following reasons;

Firstly, the Claim is based on a contract, which the Respondent does not actually deny, in fact does not address.

Secondly, it is not the the Appellant's Claim, nor, logically, would it ever be that agreements are signed or entered into to repay monies pursuant to Mortgage Deeds, since Mortgage Deeds are security instruments which secure monies advanced under [in the case of commercial banks] loan contracts.

In fact, the agreement, which the Respondent denies, is the 7 page document titled “Small Business Commitment Letter” exhibited to the Appellant’s Affidavit in their Affidavit in Reply dated July 14<sup>th</sup> 2017.

The Respondent’s signature is found at the end of page 7.

Counsel for the Respondent disingenuously submits that the Respondent’s signature at that point confirms his agreement to the 4 particulars which are found immediately above his signature and no more and further none of those particulars “*are indicative of a binding agreement to pay a particular sum of money by a particular date.*”

At the top of the said page 7 it is clearly stated “*This Commitment Letter replaces all previous Small Business Commitment Letters and any commitments issued by the Lending Bank to you except where other existing agreements provide otherwise.*”

The second paragraph of page 2 makes it very clear that signing the Commitment Letter creates a binding relationship and page 3 records the amount as \$21,000,000.00 which the Respondent implicitly acknowledged in his Affidavit of Defence.

In this regard, as stated above, the Respondent sought to and apparently successfully distracted the Learned Trial Judge from his liability to the Appellant which is founded on a personal contract and not Mortgages.

The Respondent did not in fact disclose such facts as would have entitled him to defend the claims of the Appellant with respect to the small business loan.

The Respondent further avers that there was another Action in existence whereby the Appellant was making a claim based on the Mortgage Deeds, which he argued amounted to 2 concurrent actions for one indebtedness.

The Appellant is entitled to pursue its remedy under the mortgage deeds, which is the security for the loan advanced and in fact in itself a judgment, which they would have had to pursue in *in rem* proceedings since the title holder of the mortgaged property, Anand Chatterpaul, was deceased AND at the same time pursue their *in personam* remedies, that is, their remedies against the person with whom they contracted in accordance with the contract with that person.

There is no principle of law that states that the only redress that the lender has is to realise its security. This would lead to the untenable and quite frankly absurd result that if the security proves insufficient to cover the debt owed then the lender must bear a loss notwithstanding the existence of a contract with the borrower.

With respect to the claim for the the amount owing on the credit card facility, the Respondent simply did not advance a defence.

The Respondent, at paragraph 11 of the Affidavit of Defence simply puts the Appellant to strict proof as to the claim for the amount owing on the credit card facility and further failed to addresses this claim in the Affidavit of Defence.

Based on the foregoing this Court finds that the Learned Trial Judge erred in dismissing the Appellant's Claims.

In the circumstances this appeal is upheld in it's entirety and judgement is hereby granted to the Appellant against the Respondent as prayed for in the Statement of

Claim dated February 2<sup>nd</sup> 2017 together with costs to the Appellant in the sum of \$200,000.00.

JUSTICE N. A. SINGH

JUSTICE P. SEWNARINE-BEHARRY