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Business owner avoids liability under personal guarantee

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Business owners will often be asked to provide a personal guarantee for loans to their corporations to provide an additional measure of security. Lenders should ensure that steps are taken to draw the specific terms of a personal guarantee to the borrower's attention and that it is not buried in the terms of the overall loan agreement or thrown in as an after-thought.

In *Tire Discounter Group Inc. v. MacGibbon*, 2021 ONSC 5199 (CanLII), the plaintiff was one of the largest suppliers of tires in Ontario. The defendant corporation, which carried on business as "Ron's Tire Discounter," was one of the plaintiff's largest customers for 20 years. The individual defendant, MacGibbon, was the sole officer, director, shareholder and operating mind of Ron's Tire.

Over the years Ron's Tire had a credit balance owing to the plaintiff in the range of $180,000. By November 2015 the balance had increased to $397,535.00, and litigation was commenced by the plaintiff to collect the amount owing. MacGibbon was also named as a defendant based on a personal guarantee.

The personal guarantee consisted of a short statement under the heading "Guarantee" at the tail end of a "Credit Application and Security Agreement" between the plaintiff and Ron's Tire dated August 13, 2013. The Guarantee appeared to be signed by MacGibbon and stated that he "personally and unconditionally agreed" to pay to the plaintiff all amounts owed by Ron's Tire, including interest, attorney's fees and collection costs.

The plaintiff claimed that it required the personal guarantee as a condition of an increase to the credit requested by Ron's Tire in 2013 and that MacGibbon agreed to provide it. The court accepted the plaintiff's evidence that in 2013 all of its clients were presented with "updated" credit applications and that these documents contained the same version of the Guarantee that appeared to be signed by MacGibbon.

However, the plaintiff could not produce an original copy of the Guarantee and had no specific evidence about the circumstances in which it was signed. While the document could be sent

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as a PDF attachment to an email, faxed or delivered by the business development manager, the plaintiff could not say when it knew that MacGibbon's document had been completed.

MacGibbon's evidence was that he did not recall the Guarantee document being sent to him. While he admitted that he signed the Credit Application and Security Agreement, he denied signing the Guarantee. He claimed that he was not told at any time that the credit application for Ron's Tire involved any personal guarantee. He denied that he would ever have signed a personal guarantee as he would never have exposed his family to such liability.

By the time of trial, the amount owing by Ron's Tire was determined to be $659,908.87. Ron's Tire was bankrupt so the only remaining issue was whether MacGibbon was liable under the personal guarantee.

The trial judge was satisfied that MacGibbon probably signed the Guarantee. While there was no expert handwriting evidence, the signature in the Guarantee section appeared to the judge to be identical to the signature on the portion MacGibbon admitted signing.

MacGibbon claimed that even if he signed the Guarantee he did not read it. However, the law in Ontario is that in the absence of fraud or misrepresentation a person is bound by an agreement to which they have put their signature, whether or not they have read it or have chosen not to. "Failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it": *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. et al.* 1997 CanLII 4452 (ON CA), [1997] O.J. No. 2359 (C.A.).

MacGibbon therefore had to show that the Guarantee should not be enforceable due to fraud or misrepresentation.

The court found that the overall circumstances in which the Guarantee was signed amounted to a misrepresentation by the plaintiff—namely that the Guarantee was presented to MacGibbon as an "update form" and nothing else. The court noted the casual manner in which the plaintiff treated the document, since no one took care to preserve an original copy, and the fact that within approximately 75 pages of emails between MacGibbon and the plaintiff in 2015 wherein payment arrangements were being discussed between the parties, there was no mention of the Guarantee as a basis for collection.

The court found that there was a special relationship between the parties due to their long history of dealings that imposed a positive obligation on the plaintiff to bring the guarantee clause to the specific attention of MacGibbon. The court found that it was not sufficient for the plaintiff to present a document entitled "Credit Application and Security Agreement" as merely an update without bringing to MacGibbon's attention the personal guarantee contained therein. MacGibbon's signature on the Guarantee was therefore obtained by misrepresentation and was unenforceable.

In most situations, parties will not be able to avoid the legal obligations of agreements that they sign, whether or not they have taken the opportunity to read it. The case was unusual in that the plaintiff was found to have acted in an "unfair and unreasonable way" toward the guarantor based on their long-standing relationship, and the casual way it appeared to treat the guarantee. Had the plaintiff taken

more care to ensure the terms of the Guarantee were drawn to MacGibbon's attention and to have reminded him of his personal obligations thereafter before commencing litigation, he may well have been personally liable for the $659,908.87 debt.

Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook at 416.865.6628, jcook@grllp.com.

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