1989 CarswellNB 153
New Brunswick Court of Queen's Bench Trial Division

Otto Pick & Sons Seeds Ltd. v. W.D. Thomson Enterprises Ltd.

1989 CarswellNB 153, [1989] N.B.J. No. 706, 100 N.B.R. (2d) 136, 17 A.C.W.S. (3d) 123, 252 A.P.R. 136

Otto Pick & Sons Seeds Ltd., Plaintiff v. W. D. Thomson Enterprises Ltd., and Willam D. Thomson, Defendants

Creaghan J.

Judgment: August 25, 1989
Docket: Doc. M/C/1249/88

Counsel: *Kenneth W. Martin* , for Plaintiff.
W. S. Reid Chedore , for Defendants.

Subject: Evidence; Corporate and Commercial

Headnote

Evidence --- Legal proof — Presumptions — Non-production of evidence

To challenge authenticity of signature on guarantee document.

Defendant president and sole shareholder of corporate debtor executed a personal guarantee for company's indebtedness to plaintiff. Plaintiff sued on the personal guarantee and defendant disputed the authenticity of his signature on the guarantee document. Defendant failed to call in evidence to support his claim. Held, plaintiff's action was allowed. Given defendant's failure to call in evidence to support his claim, and based upon all circumstances, plaintiff had established on a balance of probabilities that the signature was that of defendant.

Guarantee and Indemnity --- Guarantee — Contract of guarantee — Consideration

Personal guarantees -- Guarantee executed by sole officer and shareholder of corporate debtor.

Corporate debtor was granted a product distributorship which was of personal benefit to defendant as president and sole owner of the company. Defendant executed a personal guarantee for the company's indebtedness to plaintiff. Plaintiff sued on the personal guarantee. Defendant claimed the guarantee was invalid as it was not under seal. Held, plaintiff's action was allowed. The grant of the distributorship was adequate consideration for the guarantee. The document was valid regardless of the fact that it was not made under seal.

P. Creaghan, J. **:**

1 The Plaintiff claims against the Defendant William D. Thomson as guarantor of payment of money due to the Plaintiff by the Defendant W. D. Thomson Enterprises Ltd.

2 It is common ground that the corporate Defendant was in default on an amount due for goods sold and delivered and that a demand was made upon William D. Thomson on the basis of a personal guarantee on September 7, 1988 in the amount of $8,003.63. In fact the Plaintiff took judgment by consent against the corporate Defendant on February 24, 1989 for this amount together with interest to the date of judgment.

3 The Plaintiff is in the business of producing and selling lawn grass seeds suitable for lawn use or for ground cover. For a number of years the Plaintiff had done business with William D. Thomson through certain of his corporate entities as a purchaser of the Plaintiff's product. Around 1986 the Plaintiff, through its sales manager Douglas MacMillan, began discussions with a view to have William D. Thomson, through one of his companies, become a distributor of the Plaintiff's lawn seed products in the Maritime Provinces.

4 In 1987 the parties came to an agreement. There are however quite different accounts of the circumstances and terms under which this agreement was reached.

5 Mr. MacMillan, who has been employed by the Plaintiff for some twenty-five years, testified that as a result of his discussions with Mr. Thomson he sent a signed but undated letter agreement to Mr. Thomson. Mr. Thomson then made certain changes in the agreement, including the name of the corporate entity to be used as the distributor, and returned the revised agreement to Mr. MacMillan.

6 It is Mr. MacMillan's direct testimony under oath that Mr. Thomson came to the Plaintiff's offices in Richmond Hill, Ontario on March 17, 1987 at which time the revised letter agreement setting out the terms of the distributorship with W. H. Thomson Enterprises Ltd. was executed by both parties, that is by Mr. MacMillan on behalf of Otto Pick & Sons Seeds Limited and Mr. Thomson on behalf of W. H. Thomson Enterprises Ltd.

7 It is also Mr. MacMillan's direct testimony that at that same time Mr. Thomson was presented with a personal guarantee of the future indebtedness of the corporate defendant and was advised that the Plaintiff required his personal guarantee because of the perceived weakness in the financial position of his company as the named distributor.

8 It is further Mr. MacMillan's direct testimony that Mr. Thomson also executed the personal guarantee at the Plaintiff's offices in Richmond Hill, Ontario on March 17, 1987.

9 His evidence is straightforward. He states that he saw Mr. Thomson execute the guarantee at that time and that he witnessed Mr. Thomson's signature.

10 Mr. Thomson in his direct testimony under oath testifies to the transaction entered between the parties in terms which are materially different and indeed this difference between his testimony and that of Mr. MacMillan results in a question of credibility upon which the issue essential to this case must turn.

11 Mr. Thomson is the President and sole owner of W. D. Thomson Enterprises Ltd. For several years he had done business through various corporate entities as a customer of the Plaintiff. He was desirous of taking on a distributorship for product and to this end entered negotiations with the Plaintiff and other suppliers. He states that he decided to take on the Plaintiff's product because they offered a more complete product line.

12 His testimony is that he received a signed but undated letter agreement from the Plaintiff and made certain revisions in it, including the name of the corporate entity to be used as the distributor, and returned the revised agreement to Mr. MacMillan. He states that he visited Mr. MacMillan at the Plaintiff's offices in Richmond Hill, Ontario in January of 1987 but that no agreement or documentation was signed at that time.

13 It is Mr. Thomson's direct testimony that Mr. MacMillan came to Saint John, New Brunswick for a trade show during the period March 10 to 12, 1987 and during the course of this period he went to Mr. MacMillan's hotel room where he executed the distributorship agreement on behalf of W. D. Thomson Enterprises Ltd. He testified that Mr. MacMillan did not date or sign the document at that time, but took the document and later returned a copy to him signed by Mr. MacMillan on behalf of the Plaintiff and dated March 17, 1987.

14 It is Mr. Thomson's direct testimony that he did not sign a personal guarantee.

15 It is also Mr. Thomson's direct testimony that he did not go to the Plaintiff's offices in Richmond Hill, Ontario on March 17, 1987.

16 It is further Mr. Thomson's direct testimony that the signature on the personal guarantee introduced in evidence is not his and that the first time he saw the guarantee was when he received a copy with the demand for payment by letter dated September 7, 1988.

17 It is trite law that the Plaintiff must establish his claim against the Defendant on the balance of probabilities. Here we have the direct evidence of Mr. MacMillan that he saw Mr. Thomson sign the guarantee at the Plaintiff's offices in Richmond Hill, Ontario on March 17, 1987 and in fact signed as a witness to his signature. Mr. MacMillan had no doubt that Mr. Thomson signed the guarantee at that time along with the letter agreement for the distributorship.

18 The law provides that signature of a document may be proved by the testimony of a witness who saw the document being signed. Sopinka and Lederman, *Evidence in Civil Cases* , (Butterworths) 1974, p. 437. My assessment of the demeanour of Mr. MacMillan on the stand, the fact that his testimony stood up well on cross-examination and the forthright manner of his testimony persuaded me that he was a credible witness and that his testimony was reliable particularly in light of the fact that if his unequivocal evidence that he saw Mr. Thomson sign the guarantee was not the truth then his testimony gives rise to the further inference that he was at least a party to a forged document. I am not persuaded that such was the case.

19 I was concerned that the Plaintiff did not call for further evidence that Mr. Thomson was in their offices on March 17, 1987, however it is common ground that whenever the parties met and documents were signed only Mr. MacMillan and Mr. Thomson were present. I was concerned that the date apparent on the face of the guarantee document introduced in evidence is not clear and could be seen as being March 10th rather than March 17th. However the letter agreement for the distributorship is clearly dated March 17, 1987 and it stands to reason that the guarantee would not be dated prior to the letter agreement. I also noted that the Plaintiff did not call expert evidence to attempt to authenticate the signature on the guarantee. However it is likely that reliable signature samples necessary to make an expert comparison would be difficult for the Plaintiff to obtain without the Defendant taking the initiative in this regard.

20 I do have greater difficulty with respect to the testimony of Mr. Thomson. First he testifies that he signed the letter agreement on behalf of W. D. Thomson Enterprises Ltd. sometime during the period March 10th to 12th in Mr. MacMillan's hotel room in Saint John. It is true that Mr. MacMillan confirms that he was in Saint John during this period and that he probably discussed the agreement with Mr. Thomson. It seems to me unlikely however that Mr. Thomson would have signed the agreement at that time and simply handed it over to Mr. MacMillan for his signature and completion of the date at a later time.

21 Mr. Thomson states that he was not in Richmond Hill on March 17, 1987. He offers evidence in support of this contention in the form of telephone and electric power bills which show payment made on March 17, 1987 in Saint John, N. B. further to his testimony that he personally paid these bills. His testimony is that he always pays these bills, however it must be noted that the receipts themselves do not indicate who in fact made the payments.

22 I cannot ignore the fact that on Examination for Discovery held February 16, 1989 Mr. Thomson testified that he believed he went to Richmond Hill, Ontario on March 17, 1987 and signed the letter agreement for the distributorship. His explanation of the apparent conflict with his direct testimony at the trial was that at the time of the Examination he "wasn't quite sure on the full surrounding of the details of the complete signing of the agreement document and it wasn't until after a later date that I obtained one of my files that revealed to me that it was in January that I had visited Richmond Hill". I find it difficult to believe that Mr. Thomson would have been confused on such a vital aspect of his testimony when questioned on Discovery.

23 The fact is that the guarantee tendered in evidence purports to be signed by Mr. Thomson. By his own admission it resembles his signature. His testimony is unequivocal that he did not sign a personal guarantee. However he takes pains in his testimony to explain that he is sure it is not his signature because of the nature of the document, that is because he would not have signed a personal guarantee. His testimony is that he does not sign personal guarantees with anyone but the bank.

24 The question must also be asked why the Defendant, who certainly was in the better if not the only position to do so, did not call an expert who might testify as to the authenticity of his signature on the guarantee document. Further the matter of the Defendant's presence in Saint John on March 17, 1987 begs the question of why the Defendant did not call some witness who might corroborate that fact by direct testimony. Surely if he was in Saint John on that date rather than in Richmond Hill, some person would be available to testify to that fact rather than rely on receipted utility bills which might have been paid by anyone.

> It is well recognized that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.
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> The rule is not restricted in its application to the plaintiff or other party who has the ultimate burden of proof. Failure on the part of a defendant to testify or to call a witness, once a *prima facie* case has been made out against the defendant, may be the subject of an adverse inference. While such failure will not, in itself, fill a gap in the case of the party who has the burden of proof, when sufficient evidence has been produced by the latter, so as to create a secondary burden on the opposite party, failure by such party to testify or to call on a witness strengthens the case against him.

25 *Sopinka and Lederman* , supra, pp. 535, 536, 537.

26 It may well be that Mr. Thomson has convinced himself that he did not sign a personal guarantee for the indebtedness of the distributorship to the Plaintiff, however on the evidence before me and upon my assessment of the credibility of the testimony presented, I find on the balance of probabilities that he did execute the guarantee with knowledge that he was acting as personal guarantor of the indebtedness of W. D. Thomson Enterprises to the Plaintiff.

27 Briefly, I should mention that counsel for the Defendant, although stressing the matter of credibility as the major point in issue, did raise other collateral issues in argument pertaining to the guarantee. I feel these issues can be disposed of summarily. The fact that the guarantee document refers to "W. D. Thomson Enterprises" rather than "W. D. Thomson Enterprises Ltd." does not constitute a substantive defect in the guarantee. In the circumstances of this case both parties clearly knew the name of the corporate entity whose obligations were being guaranteed.

28 The fact that the guarantee was not under seal cannot defeat the validity of the document. Mr. Thomson was the President and sole owner of the company. The granting of the distributorship to the company was of personal benefit to him as an officer and principal shareholder. There was adequate consideration for giving his personal guarantee.

29 Accordingly, I find that the Defendant William D. Thomson is liable for the sum stated in the demand made upon him pursuant to his personal guarantee of the indebtedness of the corporate Defendant to the Plaintiff at the time the demand was made.

30 The Plaintiff shall have judgment against the Defendant William D. Thomson in the amount of $8,003.63 plus interest at the rate of 10% per annum from September 7, 1988 to the date of this judgment together with costs in the amount $1,240.00 based on an amount involved of $8,000.00 under scale 2.

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