

**CITATION:** Invoice Payment System Corporation v. Bombay Breeze Speciality Foods Inc.,  
2016 ONSC 5923  
**COURT FILE NO.:** Brampton CV-14-2190-00  
**DATE:** 2016-09-20

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** INVOICE PAYMENT SYSTEM CORPORATION, Plaintiff

**AND:**

BOMBAY BREEZE SPECIALITY FOODS INC. and RAJU TRIPATHI,  
Defendants

**BEFORE:** Gibson J.

**COUNSEL:** Spencer Toole, Counsel for Plaintiff

Harry Mann, Counsel for Defendants

**HEARD:** July 13, 2016

**ENDORSEMENT**

[1] This is a motion by the Plaintiff for summary judgment in accordance with the Statement of Claim. The Plaintiff claims a liquidated debt plus accruing factoring fees of 0.1 per cent per day. The original amount outstanding was \$58,057.20. At the time the claim was issued in 2014, the amount of damages claimed, with accrued fees, was \$219,070.92. As at September 15, 2015, the outstanding amount claimed was \$253,549.08.

[2] In the alternative, the Plaintiff seeks orders compelling the Defendant Raju to provide answers to undertakings given at his examination for discovery within 30 days or to re-attend at examination to provide answers to the undertakings.

**Facts**

[3] This action was commenced by the Plaintiff, Invoice Payment System Corporation (“IPS”) against the Defendants Bombay Breeze Speciality Foods Inc. (“Bombay”) and the Defendant Raju Tripathi (“Raju”) for monies that it says they owe to IPS pursuant to a factoring agreement and a guarantee.

[4] IPS is a company incorporated under the laws of Ontario, with its head office in Mississauga. IPS is in the business of factoring accounts receivable.

[5] Bombay is a company incorporated under the laws of Ontario, with its head office in Waterloo, Ontario. At the relevant time it was engaged in the business of food distribution. Raju is an individual residing in Waterloo, Ontario, and is a director, shareholder and the controlling mind of Bombay.

[6] IPS and Bombay entered into a factoring agreement on February 1, 2004. Pursuant to the agreement:

- a) IPS agreed to advance to Bombay 90 per cent of the face value of eligible invoices Bombay rendered to its clients in the course of carrying on business;
- b) Bombay agreed to assign the eligible invoices to IPS, with IPS acquiring all rights, title and interest to and in the invoices;
- c) Bombay agreed to pay IPS a fee of 0.1 per cent per day on the face value of the submitted invoices;
- d) Bombay agreed to repurchase any invoice which had not been paid within 90 days of the invoice for the amount outstanding on the invoice, plus the factoring fee; and,
- e) Bombay agreed to indemnify IPS for any and all claims, losses, damages, costs and/or expenses related to or resulting from the factoring agreement.

[7] On April 24, 2006, the Plaintiff says that the Defendant Raju executed an unconditional guarantee which guaranteed full payment of all of Bombay's present and future indebtedness to IPS. The guarantee included waiver of any right Raju might have to require IPS to proceed against Bombay for amounts owing. Raju also agreed to pay reasonable legal fees and costs incurred by IPS in enforcing the guarantee.

[8] In January and February 2008, IPS advanced \$66,348.00 to Bombay and Bombay assigned invoices to IPS. The invoicee, Unifoods International Inc., has not made any payments on the account. Bombay and Raju have only made payments of \$15,662.80 on the outstanding

amounts. \$58,057.20 remains outstanding. The Defendants have not made any payments since January 27, 2014.

[9] The Statement of Claim was issued on May 14, 2014, and the Statement of Defence delivered on July 9, 2014.

[10] Raju was examined for discovery on May 5, 2015.

[11] As of September 15, 2015, the factoring fees totaled \$195, 491.88.

### **Issues**

[12] There are two main issues to be determined on the motion:

1. Is there a genuine issue requiring a trial, or should summary judgment issue?
2. If summary judgment is not given, what order should be made in relation to Raju's undertakings?

### **Position of the Parties**

#### **Plaintiff**

[13] The Plaintiff says that the Defendants do not dispute that they owe monies to IPS, rather they dispute the amount. The Plaintiff says that this position is not supportable, and has no chance of success. Consequently, there is no genuine issue requiring a trial, and summary judgment should issue.

[14] At his examination for discovery on May 5, 2015, Raju admitted the amount outstanding, that he executed the factoring agreement, and that he did not dispute the factoring fee was owed to IPS.

[15] The Plaintiff submits that the affidavit and examination for discovery evidence before the court is sufficient to make findings that Bombay entered into the factoring agreement and Raju entered into the guarantee; that pursuant to the agreement, IPS advanced \$66,348 to Bombay and Bombay assigned invoices to IPS; that Unifoods, the invoicee, did not make any payment on the invoice; and that Bombay and Raju have failed to make full payment on the balance of the advance or the accruing factoring fees. Consequently, there is no genuine issue for trial.

## Defendants

[16] The Defendant Raju says that there are material facts in issue, and that that summary judgment ought not to be granted. He contests the validity of his signature on the Personal Guarantee dated April 24, 2006. He also says that it is illogical that Raju would have signed the personal guarantee two years and two months after the original agreement. He also argues that no consideration flowed to Raju personally, as opposed to the company Bombay Breeze.

## Analysis

[17] The test for summary judgment is set out under Rule 20.04 of the *Rules of Civil Procedure*. In determining whether the Court is satisfied that there is no genuine issue requiring a trial with respect of a claim or defence, the Court shall consider the evidence submitted by the parties and the judge may exercise any of the following powers for that purpose, unless it is in the interests of justice for such powers to be exercised only at a trial:

- a) Weighing the evidence;
- b) Evaluating the credibility of a deponent; and
- c) Drawing any reasonable inference from the evidence.

[18] The evidence of Mr. Iqbal concerning the April 24, 2006 meeting about the Guarantee is essentially uncontested on this motion. Iqbal specifically recalled meeting with Raju Tripathi. Iqbal had no doubt Raju Tripathi understood terms of guarantee, and witnessed Raju sign the guarantee.

[19] As counsel for the Plaintiff noted in argument, Mr. Iqbal was not cross-examined on his affidavit, and his evidence was not challenged on examination for discovery. It appears to be only now that the Defendant Raju is raising this concern about the genuineness of his signature on the guarantee. Raju has not sworn an affidavit contesting the Power affidavit or the Iqbal affidavit.

[20] At page 105, Question 629 of the examination for discovery transcript, Raju admitted that he knew if he had not signed personal guarantee and postponement, IPS would have ceased to deal with him. Moreover, I concur with the submission of counsel for the Plaintiff that it is

not necessary for consideration to have flowed to Raju personally; it is sufficient that consideration flowed to the company, which Raju is the principal of.

[21] Bombay admits that it owes \$58,057.20.

[22] IPS offered to allow Bombay to repay the amount owed to IPS plus a flat interest rate of 10 per cent, rather than the factoring fee. Bombay (and Raju) never provided a position in response to IPS's offer to pay the lower flat interest rate of 10 per cent. Rather, Bombay continued to make monthly payments in the amount of \$500 per month, later reduced to \$220 per month.

[23] I agree with the Plaintiff's submission that if Raju had indeed agreed on the 10 per cent interest in lieu of the full amount, as he now contends, his email of August 9, 2010 would not have been expressed in contingent terms, as well as setting out alternative possibilities. Moreover, as counsel submits, if there had indeed been an agreement on the 10 per cent, Raju would surely have taken exception to the later emails from Ms. Powers asking for payment of the larger figure. Raju did not dispute the factoring fee or the fact that it continued to accrue, until the Plaintiff issued its Statement of Claim.

[24] Weighing the evidence submitted in this matter, I must concur with the submission of counsel for the Plaintiff that the position now being taken by Raju is implausible, if not preposterous. It is not consistent with the evidence, and I do not find it credible.

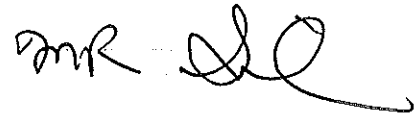
[25] I conclude that there is no genuine issue for trial in this matter, and that summary judgment should be given for the Plaintiff.

### **Disposition**

[26] Therefore, the Plaintiff's motion for summary judgment is allowed. The Defendants (jointly and severally) shall pay \$253,549.08, plus pre-judgment and post-judgment interest on this amount in accordance with the *Courts of Justice Act*.

[27] If they are not able to agree on costs for this motion, the Parties may make submissions to me in writing, not to exceed three pages (plus a bill of costs). The Plaintiff will have two weeks from the release of this endorsement to provide any submission, and shall ensure that a

copy is provided to the Defendants. The Defendants will have two weeks to respond, with a copy to the Plaintiff. The Plaintiff will then have one week further for any reply.

A handwritten signature in black ink, appearing to read "Gibson J.", written over a horizontal line.

Gibson J.

**Date:** September 20, 2016