

**CITATION: NRR One Inc. v. Maha Tibi, 2017 ONSC  
COURT FILE NO.: CV-16-96081  
DATE: November 23, 2017**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**NRR ONE INC.**

Applicant

J.D. McConville, for the Applicant

- and -

**MAHA TIBI**

Respondent

C.H. Wiebe, for the Respondent

**HEARD: February 24, 2017**

**REASONS ON MORTGAGE DISCHARGE APPLICATION**

**SALMERS, J.**

*Nature of the Application*

[1] The applicant, NRR, has applied under s. 12 of the *Mortgages Act* to discharge a mortgage held by the respondent, Tibi. At some time in the past, a trial of an issue was ordered. The issue to be tried was "How much, if anything, is due on the Tibi Mortgage?"

[2] On December 2, 2016, the scheduled trial of the issue was adjourned because Tibi did not have counsel and the presiding judge was not satisfied that Tibi's husband was capable of representing her in court as well as being a witness at the trial of the issue. Subsequently, Tibi retained counsel and the trial proceeded on February 24, 2017.

[3] The evidence at trial included an affidavit of Isaac Grubner, sworn June 16, 2016. Mr. Grubner was not cross-examined on his affidavit and he did not testify at the trial of the issue. The evidence also included affidavits of the principal of NRR, Nandiawathi Karunarathnalage (Linda), the respondent, Maha Tibi (Tibi), and Tibi's husband, Frank Elhami (Frank). Linda, Tibi, and Frank all testified and were cross-examined at trial.

### *Background Facts*

[4] The relationship of Linda, Frank, and Tibi began in 2008. Frank and Tibi are husband and wife. They wanted to establish a Golden Griddle restaurant/bar. Linda, through her company, NRR, owned premises (the NRR Lands) that were appropriate for the venture contemplated by Frank and Tibi. On January 28, 2008, Frank purchased 50% of the shares of NRR. Linda remained as the owner of the remaining 50% of NRR shares.

[5] When Frank purchased his NRR shares, he and Linda entered into a shareholders agreement. That shareholders agreement set out that Frank's share purchase was made in contemplation of him establishing a Golden Griddle restaurant/bar that would be owned and operated by his wife, Tibi. The shareholders agreement imposed obligations upon Frank concerning the establishment and operation of the anticipated Golden Griddle and also with respect to other matters.

[6] At the time that Frank purchased his NRR shares, there was a first mortgage of approximately \$550,000 registered against the NRR Lands. Paragraph 8.03(iii) of the shareholders agreement obligated Frank to make all payments on that mortgage. Further, Frank was obligated to obtain a replacement mortgage when that first mortgage matured. Pursuant to this obligation, Frank obtained a commitment for replacement first mortgage financing from the Auto Workers Community Credit Union Limited (AWCU). The AWCU mortgage was registered on October 1, 2009 against the NRR Lands.

[7] When the AWCU committed to advancing funds, its written commitment specified that each of Linda, Tibi, and Frank, were to provide personal guarantees for \$550,000.00, the full amount being advanced by the AWCU. Additionally, the AWCU was to be given second collateral mortgages for \$100,000.00 against Linda's home and against the home of Tibi and Frank. At that time, Tibi was granted a \$100,000.00 mortgage from NRR (the Tibi Mortgage) against the NRR Lands. It is that mortgage that is the subject of this application. The Tibi Mortgage was registered on October 1, 2009 as instrument number DR 844626.

[8] The relationship between Linda, Frank, and Tibi deteriorated. By October 2012, the relationship was over and pursuant to the shareholders agreement Linda took steps, recovered Frank's shares, and she again became the sole shareholder, owner of 100% of the NRR shares.

[9] The NRR Lands have now been sold. Tibi refused to provide a discharge of the Tibi Mortgage. Funds are being held in trust to cover the amount that Tibi claims is owing pursuant to the Tibi Mortgage. The answer to the question on this trial of issue will determine how much, if anything, is owed to Tibi with respect to the Tibi Mortgage.

#### *The Parties' Positions*

[10] NRR argues that the Tibi Mortgage was given only because Tibi and Frank insisted on it before they would provide the personal guarantees and second mortgage on their house that the AWCU required when NRR obtained the mortgage financing from the AWCU. When the AWCU mortgage was refinanced in 2011, the new mortgagees, the White-Almogs, insisted on the same personal guarantees as the AWCU. The Tibi Mortgage remained in force and was postponed to the White-Almog mortgage. The NRR Lands have now been sold and the sale proceeds covered the amount owing on the White-Almog mortgage without any need to demand payment from any of the personal guarantors or on mortgages given by them. NRR submits that the Tibi Mortgage was granted only to provide security for Tibi in the event that the first mortgagee made claims against the personal guarantors or on the mortgage that Tibi originally gave against the home registered in her name. NRR further submits that because no claim can now be made against the personal guarantors or against the home of Frank and Tibi, the Tibi Mortgage must be discharged as it serves no purpose and no funds were advanced for that mortgage.

[11] Effectively, Tibi agrees that NRR gave the Tibi Mortgage for the same purpose as is NRR's position, but, also for a second purpose. Tibi's position is that NRR also gave the Tibi Mortgage to compensate Tibi for renovations and improvements made to the NRR Lands. In testimony at the trial of the issue and during argument, Tibi's position was expanded to include that the Tibi Mortgage was also partially given as security for monies that would be owed by Linda for operating a bar on the premises.

#### *Analysis*

[12] Tibi's position relies on the evidence of Tibi and Frank that there were underlying oral agreements between the parties. Tibi alleges that it was pursuant to one oral agreement that NRR gave the Tibi Mortgage as security for Tibi's renovations and improvements made to the NRR Lands. Tibi also alleges that there was a second oral agreement pursuant to which Linda would operate a bar and pay monies to Tibi. I have several problems with Tibi's position. I will now set out some of these problems.

[13] Very importantly, there is no documentary evidence supporting Tibi's position. Tibi relies only on oral agreements as the basis of her position that NRR gave the Tibi mortgage to compensate Tibi for renovations and improvements made to the NRR Lands and, also, as security for the aforesaid bar agreement.

[14] Mr. Grubner's evidence totally supports the position of NRR and Mr. Grubner was not cross-examined on his affidavit.

[15] Prior to January 28, 2008, Linda was the sole shareholder of NRR, the corporation that owned 145 King Street West in Oshawa, the relevant commercial property. After negotiations, Frank became a shareholder and director of NRR on January 23, 2008. His purpose in doing so was to enable Tibi to operate a Golden Griddle franchise restaurant on the NRR Lands. Renovations were required to enable this to occur.

[16] Neither Frank nor Tibi disputed Linda's testimony that it was Frank, Tibi's husband, who arranged the replacement first mortgage financing with AWCU.

[17] Also, in their own affidavits, Frank and Tibi acknowledged that it was the AWCU's demands that gave rise to the need for personal guarantees and security that included the personal guarantees of Frank and Tibi and the mortgage of their home to AWCU. All of this was required by AWCU in its September 16, 2009 financing commitment that was mailed to NRR at the home address of Frank and Tibi.

[18] Tibi testified that she signed the security documents, namely the personal guarantee and the mortgage on her home, before NRR's lawyer, Mr. Grubner, and then received independent legal advice from another lawyer, Mr. Greenberg. Tibi testified that she did not read the documents and that, therefore, she was unaware that the mortgage on her home was being given as collateral security for the AWCU financing. I reject that testimony. As stated above, her husband had arranged the AWCU financing. The AWCU financing commitment was mailed to her home and clearly specified that the personal guarantees and mortgages on the NRR shareholders' home were required as security for the proposed AWCU financing. Finally, Tibi is intelligent, not a person who would sign documents without fully understanding them. Neither she nor Frank offered an alternative reason as to why she was mortgaging her home to the AWCU.

[19] Also, it is unlikely that two lawyers would have not adequately and accurately explained to Tibi the nature of the documents that she was signing. There is documentation supporting this finding. Tibi obtained independent legal advice from Harry Greenberg. In his Certificate of Independent Representation, Mr. Greenberg states that he fully explained to Tibi all of the documents relating to the AWCU financing, including the Tibi Mortgage which is referred to as "Second Collateral Mortgage on 145 King St., Oshawa in favour of Maha Tibi." On that same Certificate, Tibi signed an acknowledgment that Mr. Greenberg's statements in the Certificate were "true and correct."

[20] Lastly, even if she did not read the documents when she signed them, that is no excuse. (see *Marvco Colour Research v. Harris*, [1982] 2 SCR 774).

[21] Accordingly, I find that when they signed the personal guarantees and mortgage of their home, both Frank and Tibi were clearly aware that they were doing so in order to provide the collateral security required by AWCU with respect to its replacement first mortgage financing provided to NRR. Tibi's credibility was considerably lessened by her testimony to the contrary.

[22] Concerning the renovations to the property, Frank and Tibi's evidence was vague and inconsistent as to exactly what had been done and how much it had cost. Tibi had incorporated and was sole shareholder of Tequila Willy's Boot Bar Inc. (TWBB). She used TWBB as the

entity to operate the restaurant/bar that was contemplated in Linda and Frank's NRR shareholders agreement. The evidence of renovations and costs was provided by Tibi in her affidavit affirmed February 16, 2017. There are many inconsistencies and deficiencies in that affidavit that cause me to further question Tibi's credibility and the reliability of her evidence. I will now address some of those inconsistencies and deficiencies.

[23] Tibi testified that the restaurant/bar renovations cost over \$300,000. But, little documentation or breakdown was provided to support that amount. The shareholders' agreement with Linda only required Frank to spend \$65,000 on renovations. Tibi was not a party to the shareholders agreement and Tibi personally was not obligated to spend anything on renovations. The few actual renovation invoices (Exhibits A, B, D, and E of Tibi's affidavit affirmed February 16, 2017) that were provided by Frank and Tibi represent much closer to \$65,000 in renovations than \$300,000. Exhibit C to that affidavit is an undated quotation, not an invoice. Also, Exhibit E to the affidavit represents a far different amount than is deposed in paragraph 22 of Tibi's affidavit. Exhibit F to Tibi's affidavit affirmed February 16, 2017, is a spreadsheet that Tibi deposed was provided to her by TD Canada Trust. Notwithstanding any hearsay issues concerning admissibility of that spreadsheet, in the "Paid to supplr" column of the spreadsheet, it indicates that suppliers were only paid approximately \$11,000, a small fraction of the total amount of over \$140,000 that is set out in the "Inv Amt" column of the spreadsheet. There was little, if any, evidence of proof of payment of any amounts to suppliers for renovations.

[24] The shareholders agreement did not provide that NRR was to mortgage lands to Tibi as security for any reason, including for renovation monies payable by Frank pursuant to the shareholders agreement.

[25] As stated previously, Tibi's credibility is already lessened. That factor, together with the vagueness, inconsistencies and deficiencies of her evidence about renovations, significantly affects the reliability of her evidence about the renovations. On the evidence before me, it is impossible to determine what amount was spent on the renovations. Tibi has not satisfied me that there is any nexus between the amount of renovations and the amount of the Tibi Mortgage. There was insufficient, if any, evidence to satisfy me that monies, paid by Frank and/or Tibi and/or by any corporation controlled by either or both of them, represented funds advanced pursuant to the Tibi Mortgage rather than funds that were obligated to be paid in accordance with their shareholders' agreement or funds paid for other purposes unrelated to the Tibi Mortgage.

[26] Concerning the alleged oral bar agreement, Tibi testified that their oral agreement was that Linda was to work in the bar on Friday and Saturday nights and share the profits with Tibi. Tibi testified that NRR gave the Tibi Mortgage in part as security for Linda's obligations in this regard. Linda absolutely denied that there was any such agreement or that she ever worked in the bar. For the following reasons, I reject Tibi's testimony about the alleged oral bar agreement.

[27] Firstly, all of the evidence was that Frank was brought in as a shareholder of NRR in order that he and Tibi would operate a restaurant and bar on the NRR Lands. Effectively, as the previous sole shareholder of NRR, Linda was providing the premises (the NRR Lands) that, after renovations, would enable them to do so. Contrary to the evidence of Frank and Tibi, the documents support that Linda's role was not contemplated as being involved in operations of the

restaurant and/or bar. In fact, the shareholders agreement specifically states that Tibi will be the operator and owner of the Golden Griddle restaurant that was to be located on the NRR Lands. This inconsistency lessens both Frank's and Tibi's credibility.

[28] Tibi testified that she wanted Linda to operate the bar on Friday and Saturday nights and that Linda would pay 25% of those profits to Tibi or Tibi's company. That makes no sense. There was insufficient, if any, evidence as to why Tibi would agree to give up the majority of profits for what are generally accepted as the most profitable nights to operate a bar. In fact, pursuant to paragraph 8.03(v) of the shareholders agreement, Frank was specifically obligated to operate the bar on Friday and Saturday nights. This is another inconsistency that significantly lessens both Frank's and Tibi's credibility.

[29] Further, Tibi's testimony was very vague and inconsistent as to when the bar agreement was allegedly made. Sometimes she testified that the agreement was made in July or August, 2009, before the financing came through. Other times, it seemed that Tibi was testifying that the bar agreement took place in early 2009, when Frank first became a shareholder of NRR. Other times, she testified that the bar agreement was made at the time of the AWCU financing contemplating what was to take place in the future. Tibi testified that Linda only twice carried out her obligations under the bar agreement. But on Tibi's evidence, that may have occurred either before or after the AWCU financing. Depending on which version of Tibi's evidence is accepted, the bar agreement may or may not make sense. But, it still did not make sense that Tibi would give up the two most lucrative nights.

[30] Additionally, there was no evidence as to how much money Tibi anticipated receiving from Linda for the nights that Linda was to operate the bar. Accordingly, as with the renovations, there is no nexus between the amount of the Tibi Mortgage and the amount that Tibi anticipated receiving from Linda for the alleged bar agreement.

[31] It is for those reasons that I am not satisfied that there was an agreement that Linda was to work in the bar at any time, let alone on Friday and Saturday nights.

[32] Even if the alleged renovations and bar agreements were to be considered collectively, for the reasons that I have stated above, the evidence is insufficient to satisfy me that there is any nexus between the total amounts allegedly owing by Linda and the amount on the Tibi Mortgage.

[33] Finally, there was no evidence, documentary or oral, about terms of repayment of the Tibi Mortgage. Linda's relationship with Frank and Tibi broke down. In May, 2010, Frank and Tibi transferred their interest in the restaurant/bar business and, apart from Frank's interest as a NRR shareholder, they ceased to be involved in the restaurant/bar operations or in NRR. They did not demand any repayment at that time. In September 2011, NRR re-financed the AWCU mortgage with new lenders. The new lenders insisted on continuation of the personal guarantees and mortgages that had been part of the AWCU financing. (This indicates that the new lender probably thought that, at that time, the NRR Lands did not have sufficient value to cover the first mortgage without additional security.) In any event, Tibi did not demand repayment of the Tibi Mortgage. She postponed it to the new first mortgage. Frank demanded some money in 2012, but did not refer to it as money owing pursuant to the Tibi Mortgage. It is only now, after the NRR Lands have been sold for sufficient funds to cover all monies owing under the first

mortgage, that Tibi is demanding that any money be paid in order to obtain a discharge of the Tibi Mortgage.

[34] For all of these reasons, I am not satisfied that any funds were advanced for the Tibi Mortgage. Further, Tibi has not satisfied me that there was any agreement that the Tibi Mortgage was given to serve any purpose other than as security for Tibi in the event that either the AWCU or its successor lender demanded repayment of Frank and/or Tibi's personal guarantees or the mortgage given on their home. The NRR Lands have been sold and the sale proceeds were sufficient to fully pay all amounts owing to the first mortgagee. Accordingly, no demand for payment can be made either on the guarantees or on the mortgage of their home. Notwithstanding this, Tibi refuses to provide a discharge of the Tibi Mortgage.

[35] The question that was to be answered on this trial of an issue was, "How much, if anything, is due on the Tibi Mortgage?" For all of these reasons, I find that nothing is due on the Tibi Mortgage. NRR has offered to pay \$2,500, more than the usual amount, for a discharge. Tibi still will not provide a discharge of the Tibi Mortgage.

[36] This is a situation covered by s. 12(8) of the *Mortgages Act*. Although there are no monies owing on the Tibi Mortgage, NRR is unable to obtain a discharge without undue expense. Accordingly, the court must order that the mortgage is discharged.

[37] For all of these reasons, it is ordered:

- a) that the Tibi Mortgage is discharged as requested in paragraph 1(a) of the prayer for relief in the Notice of Application; and
- b) if the parties cannot agree on costs, they shall contact the Oshawa trial coordinator to schedule a costs hearing before me.

*Order to go accordingly*



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Justice D. Salmers