

in March 1990, guaranteed the indebtedness of the defendant/plaintiff by counterclaim, Elsberth G. Terry (hereinafter "Terry"), to the First Cayman Bank Ltd (hereinafter "the Bank"). The principal amount of Terry's indebtedness was US\$18,529.95. A demand was later made by the Bank upon the guarantor, and Zuiderent on 26 September, 1995 paid the Bank the sum of US\$21,659.32 representing principal and interest. As a result of an Order 14 application in this cause, Zuiderent subsequently obtained judgment against Terry for the sum of US\$22,433.27, execution thereon to be stayed pending the determination of the counterclaim.

Allegations

In a nutshell, Terry alleges that as a result of an oral agreement made on or about 1 April 1992, Zuiderent agreed to make payments of C\$700 per month by way of rent for the use of Terry's warehouse in Prospect, and that Zuiderent would pay the monthly rent to the Bank. Terry alleges that Zuiderent entered into possession on 1 April, 1992 and kept possession until 30 June 1994, covering a period of some 26 months, thereby incurring rent totalling C\$18,200.00 or US\$21,666.66. Terry maintains that this rent was never paid and that it, in effect, "sets off" the judgment debt.

Zuiderent, on the other hand, denies that there was any agreement between him and Terry. Instead, Zuiderent introduced a friend, one Eddie Balderamos (hereinafter "Balderamos"), to Terry in early 1992 (his actual evidence was that this occurred in 1993), as Balderamos was looking for storage facilities for his



business. Zuiderent alleges that Balderamos or his company, Hospitality Technical Services Ltd, rented the premises from Terry. Zuiderent denies having any interest in the alleged lease or in Balderamos' company.

In short, there is a factual dispute as to the existence of the oral agreement alleged by Terry. This whole counterclaim turns on credibility. There were only two witnesses, Terry and Zuiderent.

Evidence of Terry

Terry testified in chief that he and Zuiderent had been friends for a long time. In March 1990 Zuiderent acted as guarantor in connection with his loan from the Bank. Terry made several payments towards the loan. These appear to be reflected in four entries in 1990 and 1991 in the loan account statement. Terry indicated, in response to my questioning, that he could not remember the repayment terms. He claimed to have no documentation relating to the loan.

Terry testified that in late March 1992 Zuiderent came to him and asked if he, Zuiderent, could rent the warehouse. Terry agreed, and there was some negotiation that involved the reduction of an initial proposed rent of CI\$800 per month to CI\$700 per month. Terry said that Zuiderent told him Zuiderent would pay CI \$700 per month towards the loan that was outstanding at the Bank, that is, the loan that Zuiderent had guaranteed. Terry agreed and gave Zuiderent the keys. There was no document of any kind reflecting this alleged agreement.



Terry had been using the warehouse for the storage of carpet and tiles for use in his business, but by that point it appeared he was virtually out of business due to his poor financial condition.

Terry testified that Zuiderent took possession on 1 April 1992 when he came with a van of "stuff". Terry said that, thereafter, he saw Zuiderent come many times along with other people.

Terry's evidence in chief then jumped ahead to 1994 when he said that the Bank wrote to him in connection with the outstanding loan balance. He testified he then spoke to Zuiderent and talked about the agreement they had. Terry's evidence was that in May 1994 he gave notice to Zuiderent to leave at the end of June, which Zuiderent did. He said the reason he did that was because, according to Terry's figures, the balance owed to the Bank should have been paid off by then but it hadn't been. In fact, as appears from the Bank loan statement, very little principal had been paid off at all.

In cross-examination, Terry struck me as very evasive, and very selective as to his recollection. He was evasive as to the source of the loan repayments he did make in 1990 and 1991, and as to his relationship with the Bank generally. I am convinced that Terry was in financial difficulties at all material times, though he was not always prepared to admit this in cross-examination.



He admitted in cross-examination that Balderamos used to come with a van to the warehouse. He used to bring goods in and out. He remembers some company name written on the van and it "was Hos...or something".

The loan statement shows three credits each in the amount of US\$833.33 (or C\$700.00) in late 1993. One is a "customer deposit" in September, one a "cheque" in October, and the other a "cash deposit" in November. As will be seen, this is consistent with Zuiderent's version that the lease between Terry and Balderamos commenced at this time in 1993, not 1992. For his part, Terry claimed not to know the source of any of these credits to his loan account. I found his evidence in this area highly suspect. He never investigated these credits, and in fact went so far as to maintain in cross-examination that he never saw any bank statements relating to the loan after 1992. I regard that as highly improbable.

Terry's position in cross-examination was that from 1992 until 1994 he merely assumed that loan payments were being made on his behalf by Zuiderent, and he had no further contact with Zuiderent or the Bank until 1994. That evidence is improbable in the circumstances. Terry maintained that he did not know the loan account was seriously in arrears through these many months, and claims to have realized the true situation only when Zuiderent sued him in this cause. I find that incredible.



In my view the inescapable conclusion is that the allegation of the lease between Terry and Zuiderent was merely a concoction by Terry in order conveniently to set up a supposed debt of like amount to set off against Zuiderent's legitimate claim, after Terry had been sued.

Evidence of Zuiderent

I regarded Zuiderent as a much more forthright witness. His evidence in chief was that he, a successful investor and real estate developer, had employed Terry to work on condominiums he was building. Zuiderent knew of Terry's financial problems and felt sorry for him. He recalls that Terry needed funds in the approximate amount of C\$15,000 to pay suppliers. Terry asked Zuiderent if he would loan him the money and Zuiderent replied that he could arrange a loan at his bank. That was the connection with First Cayman Bank. This inevitably involved the guarantee which was ultimately put in place.

Zuiderent testified that he next heard about the loan in early August 1993 when a Bank employee told him the loan was in arrears. At that time Zuiderent knew that Balderamos wanted some storage place for his products. These were towels, cups, detergent and generally materials traded by Balderamos through his company Hospitality Technical Services Ltd for the hospitality industry.

Zuiderent testified that he introduced Terry to Balderamos as he knew that Terry had warehouse space available. Zuiderent's thinking was that this might generate some revenue for Terry so Terry could start paying the loan. Beyond



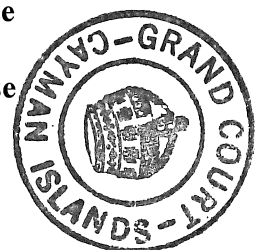
putting the two together, Zuiderent could give no direct evidence of a lease agreement between the two. He certainly denied that he was a party to any such agreement. He was not able to give any evidence as to what arrangements had been made as between Terry and Balderamos, or as to what payments might have been made by Balderamos.

Zuiderent did not remember any contact with the Bank between 1993 and 1995. His next recollection was the demand made on him as guarantor in 1995.

Zuiderent adamantly denied that the topic of a lease or rent ever came up between him and Terry at any material time prior to this litigation. On the contrary, Terry told Zuiderent in September 1995 that Terry would pay his debt obligation to Zuiderent.

In response to questioning from me, Zuiderent admitted that he had spent time in the warehouse, only because he was frequently visiting Terry at his shop. Sometimes he had to go into the warehouse to find Terry. After September 1993 he recalls seeing Balderamos' products in the warehouse.

In my view, there were no significant discrepancies or inconsistencies in the evidence of Zuiderent. In the pleadings Zuiderent did allege that the introduction to Balderamos was in "early 1992" He corrected this in evidence and identified the timing as August 1993. He said he was sure of that because he recalls being in a body brace at the time due to a medical problem.



Zuiderent's testimony was not undermined in any significant way in cross-examination.

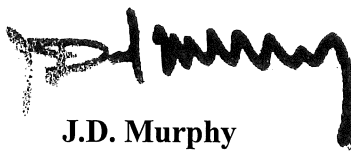
There are inherent improbabilities in Terry's account of what transpired.

Quite apart from that, where there are differences between the accounts of the two parties (and these are substantial), I unhesitatingly accept the evidence of Zuiderent. I do this on the basis of my observation of Terry under cross-examination. I regarded him as highly evasive and selective in his recollection. This litigation turns on credibility, and I simply do not believe Terry's account.

I have no hesitation in concluding that Terry has not proven the counterclaim on a balance of probabilities.

Accordingly the counterclaim is dismissed with costs. This stay of the order of the Chief Justice dated 29 February 1996 is lifted.

Dated this 28th day of January, 1997.



J.D. Murphy

Judge of the Grand Court

