# Court of Queen's Bench of Alberta

**Citation: Eisenberg v. Ten Peaks Capital Group, 2012 ABQB 545**

**Date:** 20120904
**Docket:** 1101 03532
**Registry:** Calgary



Between:

**Clifford Eisenberg and Marla Eisenberg**

Applicants

- and -

**Ten Peaks Capital Group, Ten Peaks Capital Corp, operating as Ten Peaks Capital Trust, Ten Peaks Capital Group operating as Ten Peaks Capital Trust and Richard Melchin, John Bachynski, David Harrison and Robin Auld, in their capacities as trustees of Ten Peaks Capital Trust**

Respondents

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**Memorandum of Decision**
**of the**
**Honourable Mr. Justice J.T. McCarthy**

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[1] This matter has come before me as an application for summary judgement pursuant to Rule 7.3 of the Alberta *Rules of Court.*

[2] The Plaintiffs/Applicants, Clifford and Marla Eisenberg, are seeking recovery of a significant sum of money they invested in a fund operated by the Defendants/Respondents, Ten Peaks. The Eisenbergs claim that it was a term of their agreement with Ten Peaks, as set out in a document, or series of documents, referred to the Ten Peaks Capital Trust Subscription Agreement (the "Subscription Agreement"), that they could, at any time, redeem their share units for the full amount invested plus interest. They acknowledge that, if the investment is redeemed during the first two years (or, in the case of one parcel, three years), the amount recoverable is

subject to a 5 percent penalty for early redemption. They are, however, seeking waiver of the early redemption fee in this action.

[3] Ten Peaks, on the other hand, claim that the units are redeemable on the basis of current market value, less any applicable early redemption fees. They further claim that the Plaintiffs failed to give proper notice, that they are not entitled to be paid out in cash, and that the Agreement between themselves and the Plaintiffs is contained not only in the Subscription Agreement but also in several other documents, most particularly in the Deed (or Deeds) of Trust relating to the trust units purchased by the Plaintiffs.

[4] I am asked by the Applicants to dismiss the Statement of Defence on a summary basis and issue judgement in the full amount of the Eisenbergs' investments, plus interest, without imposition of the 5 percent early redemption penalty.

[5] The test for summary judgement under Rule 7.3 is no different than it was under former Rule 159 of the Alberta Rules of Court. The test for summary judgement in an application brought by a plaintiff was clearly set out by the Court of Appeal in *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.,* [2003] A.J. No. 1305; 2003 ABCA 298; 27 Alta. L.R. (4th) 62; 339 A.R. 165 at para s. 15 - 19, as follows:

> **The Test For Summary Judgment**
>
> [15] Rule 159 states that a plaintiff may be granted summary judgment "if the court is satisfied that there is no genuine issue for trial". When applying for summary judgment as a plaintiff, the plaintiff bears the ultimate legal onus of meeting the requirements of R. 159. This ultimate burden is to be distinguished from the evidentiary burden that shifts when applying the R. 159 test.
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> [16] In the transcripts from the chambers proceedings below, counsel and the chambers judge discuss proving a prima facie case beyond a reasonable doubt, phrases which arise from some decisions of the Court of Queen's Bench: *Gerling Global General Insurance Co. v. Canadian Occidental Petroleum Ltd.*, (1998) 64 Alta. L.R. (3d) 174 (Q.B.). These phrases are unfortunate. Neither "prima facie" nor "reasonable doubt" is appropriate in the context of the standard of proof for summary judgment under Rule 159.
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> [17] The test is succinctly set out in *Royal Bank of Canada v. McLean* (1997), 211 A.R. 297 (Q.B.) at paras. 27 to 34, where Hutchinson, J. set out a two step process.
> [18] First, the plaintiff bears the evidentiary burden of proving its cause of action on a balance of probabilities. Each and every fact necessary to support the claim must be proven: *Bank of Montreal v. Kalin* (1992), 131 A.R. 397 (C.A.).
>
> [19] After the plaintiff has proved its case on a balance of probabilities, the evidentiary burden shifts to the defendant but the ultimate burden remains, as always, with the plaintiff. The defendant can avoid a summary judgment in favour of the plaintiff by

> proving that there is a genuine issue for trial. If the defendant meets this evidentiary burden, the plaintiff fails to meet its ultimate burden. It must be beyond doubt that no genuine issue for trial exists.

[6] Or, as stated by the Court of Appeal with regard to summary judgment under Rule 7.3, "The evidence discloses that material facts are in serious dispute, which requires a trial. " *Milavsky v. Milavsky,* 2011] A.J. No. 841; 2011 ABCA 231; 55 Alta. L.R. (5th) 382; 513 A.R. 282, at para. 41.

[7] In this particular case, the Plaintiffs have adduced evidence to establish the elements of their claim. The issue is whether or not the Defendant has adduced sufficient evidence, in its turn, so as to cast doubt on the certainty of that claim. If so, I must dismiss this application and send the matter on to trial.

[8] The simple answer is yes, the Defendants have discharged that burden. They have established that there is some doubt as to the terms of the contract - indeed, there is some conflicting evidence on which document, or documents, actually forms the contract. Each of the parties has referred to Eli Eisenberg, who is not named as a party, as being the other's agent. There is some dispute as to whether or not Clifford and Marla Eisenberg gave proper notice of their intent to redeem the units. And the Plaintiffs have asked for a "waiver" of the redemption penalty, without in any way establishing their entitlement to it.

[9] The conflict regarding the terms and specific make-up of the overall contractual arrangement between Ten Peaks and the Eisenbergs, alone, is sufficient to establish that there is a triable issue. The agency, notice and waiver issues should all be dealt with by a trier of fact, as well. Accordingly, the within application is dismissed. If the parties are unable to agree, costs may be spoken to.

Heard on the 11th day of May, 2012.
Dated at the City of Calgary, Alberta this 4th day of September, 2012.

**J.T. McCarthy**
**J.C.Q.B.A.**

**Appearances:**

David M. Pick
for the Appellants

G. Stephen Panunto
for the Respondents