
CANADA / JUDGMENT

Rosas v. Toca

2016 BCSC 1754

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1754 Rosas v. Toca

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rosas v. Toca,

2016 BCSC 1754

Date: 20160926

Docket: S156337

Registry: Vancouver

Between:

Enone Rosas

Plaintiff

And

Hermenisabel Guarin Toca and Gener Pentecostes Visaya

Defendants

Before: The Honourable Madam Justice Church

Reasons for Judgment

Counsel for plaintiff:

G. Tedham

K. Dotten

Counsel for defendants:

D. Moonje

Place and Dates of Trial:

Vancouver, B.C.

June 28, 29 and 30, 2016

July 4, 5, 6, 7, 8, 18 and 19, 2016

Place and Date of Judgment:

Vancouver, B.C.

September 26, 2016

INTRODUCTION

- [1] Like many British Columbians, the plaintiff, Enone Rosas dreamed of winning the lottery. Her dream came true on January 8, 2007 when she learned that she had won \$4.163 million in the lottery draw held on January 6, 2007. From that moment on, the plaintiff's life changed. She and her husband were able to stop working, buy a house for their family as well as other rental properties, travel the world and make regular visits to their former home in the Philippines. The plaintiff was also able to share her good fortune by making generous gifts to and otherwise financially assisting her friends. It was in relation to the latter that Ms. Rosas' dream has become something of a nightmare.
- [2] On January 10, 2007, Ms. Rosas picked up her lottery winnings from the BC Lotteries Corporation in Richmond, B.C. and immediately deposited them into her bank account. At the same time, she requested and received three bank drafts of varying amounts made payable to three of her good friends. There is no dispute that two of those three bank drafts were gifts from Ms. Rosas, but it is the characterization of the third and the largest of the three bank drafts that is at issue in this litigation.
- [3] Within hours of receiving her lottery winnings, Ms. Rosas handed a bank draft in the amount of \$630,000 (the "Advance") to her friend, the defendant, Hermenisabel Toca. She alleges that \$30,000 of the Advance was a gift and \$600,000 was a loan to Ms. Toca so that she and her husband, the defendant Gener Visaya, could afford to buy a house. Within weeks of receiving the bank draft from the plaintiff, the defendants purchased a house at XXXX Dumfries Street, Vancouver, B.C. near where they had been renting a two bedroom basement apartment. While they acknowledge that the Advance from the plaintiff was to enable them to buy a house, Ms. Toca and Mr. Visaya allege that the entire Advance was a gift rather than a loan.

BACKGROUND

- [4] The plaintiff is originally from the Philippines and arrived in Canada in September 1990 to work as a nanny. She has resided in Canada ever since. She lives in Vancouver with her husband, Pacito and their three children. While she speaks and understands some English, her first language is Tagalog. The plaintiff attended approximately one year of post-secondary education in the Philippines, but had worked as a nanny and in various service industry jobs after moving to Canada. In 2004, she began taking a business program at the Academy of Learning, and it was there that she first met the defendant, Hermenisabel Toca.
- [5] Ms. Toca is also from the Philippines and her first language is also Tagalog. Ms. Toca was enrolled in a medical office assistant program when she met the plaintiff and they became friends. They would socialize with one another while attending the Academy of Learning and they also socialized outside of their education programs, usually playing cards together two or three days per week. Eventually, their husbands met and also became friends. The defendants would help the plaintiff and her family with transportation as they did not have a vehicle. Ms. Toca also introduced the plaintiff to some of her friends, including her friend Leonida Sta. Cruz.
- [6] At the time that the plaintiff first became friends with the defendant Toca, she was also close friends with Nenita Boyer. The plaintiff and Ms. Boyer have known each other since they worked together as nannies in Egypt in 1984. The plaintiff helped Ms. Boyer when she too decided to immigrate to Canada in 1991 and was instrumental in finding employment for Ms. Boyer. Ms. Boyer would occasionally help care for the plaintiff's children when the plaintiff was working and they also liked to play cards together on the weekends.
- [7] On Monday January 8, 2007, the plaintiff and the defendant Toca visited the Oakridge Mall because neither of them was working. While they were window shopping at the mall, the plaintiff decided to check her lottery ticket from the January 6, 2007 draw. When she put the ticket into the automated ticket, it showed that she was a winner. The plaintiff took the ticket to the clerk at the lottery kiosk to collect her winnings, where she discovered that she had won the jackpot of \$4.163 million. The plaintiff retrieved her ticket from the clerk and then went to the Food Court with Ms. Toca to try to calm down and collect her thoughts. From the Food Court, the plaintiff called her husband, Pacito to share her good news. Mr. Rosas either did not believe his wife or did not understand the magnitude of her lottery win because he told her that since she only won \$4 million, he would have to keep working and he went off to work.
- [8] In the meantime, the plaintiff decided to go immediately to the lottery office to collect her winnings and she asked her friend, Ms. Toca to take her. Ms. Toca called her husband, Gener Visaya and Mr. Visaya drove the three of them to the lottery office, where Ms. Rosas was told that she would have to come back on Wednesday.

- [9] On Monday evening, Ms. Rosas and her children stayed at the home of the defendants, while her husband Pacito was at work. During the course of the evening, Ms. Toca called their mutual friend, Leonida Sta. Cruz to come over and play cards. Although reluctant at first, Ms. Sta. Cruz eventually come over to the defendants' home, where she learned about the plaintiff's lottery win and the plan to pick up the money from the lottery office on Wednesday January 10, 2007. Ms. Sta. Cruz testified at trial that during the course of the evening of January 8, 2007, the plaintiff asked her how much debt she had and Ms. Sta. Cruz replied that her debts totalled between \$22,000 and \$25,000. Ms. Sta. Cruz also testified that the plaintiff said that she would "buy Isabel a house".
- [10] On Tuesday January 9, 2007, the defendant Toca took the plaintiff's children to school and then she and the plaintiff went to the salon so that the plaintiff could get her hair coloured. On Tuesday evening, the plaintiff, her husband Pacito and their three children once again spent the night with the defendants and their children in their two bedroom basement suite. On Wednesday January 10, 2016, Ms. Sta. Cruz took the plaintiff's children to school and the defendants drove the plaintiff and her husband to the BC Lottery Corporation office in Richmond, B.C.
- [11] The group remained at the lottery office for much of the day while the plaintiff's lottery win was verified and she was presented to the media. The plaintiff eventually received her winnings and the group left the lottery office at approximately 3:00 pm and proceeded to the plaintiff's bank branch on Georgia Street. The defendant, Visaya was driving his vehicle with Pacito Rosas in the front seat and the plaintiff and the defendant Toca in the back seat. On the way to the bank, the plaintiff called her friend Nenita Boyer and asked her how much she was making per year. When Ms. Boyer responded, the plaintiff offered to "double it" if Ms. Boyer were to quit her job. This was the first conversation that the plaintiff had with Ms. Boyer after she discovered that she had won the lottery.
- [12] When the group arrived at the Royal Bank on Georgia Street, the plaintiff met with the bank manager, Shirley Ma. She deposited her lottery cheque after Ms. Ma had completed her verification process and then the plaintiff requested and received three bank drafts drawn on her winnings. The details of those bank drafts were as follows:

Nenita Boyer

\$100,000.00

Leonida Sta. Cruz

\$ 40,000.00

Hermenisabel Toca

\$630,000.00

- [13] The plaintiff told Ms. Ma that the largest of the three bank drafts was a loan to a friend so that she could buy a house.
- [14] After the plaintiff finished her business at the bank, she handed all three bank drafts to the defendant Toca, with instructions to deliver the two to Ms. Boyer and Ms. Sta. Cruz and then the plaintiff asked that she and her husband be driven to the Century Plaza Hotel where she wanted to spend the night. The defendants delivered the plaintiff and her husband to the hotel and the defendant Toca helped them check in, before leaving with the defendant Visaya to go and deposit her bank draft at their own bank. After making the deposit, the defendant Toca picked up the plaintiff's three children and Nenita Boyer and drove them all back to the Century Plaza Hotel. The plaintiff and her family, Nenita Boyer and the defendant Toca all spent the night at the hotel. The next morning the entire group plus the defendant's two children, flew to Edmonton to stay at the West Edmonton Mall. The defendant Visaya flew to Edmonton the following day to join the group for a few days.
- [15] Shortly after the defendants returned from Edmonton, they entered into a Contract of Purchase and Sale for their current home located at XXXX Dumfries Street, Vancouver for \$700,000. They used approximately \$480,000 from the Advance and the balance of the purchase price came from mortgage financing.
- [16] After the defendants returned from Edmonton, they saw little of the plaintiff over the course of 2007 as she was travelling extensively, with either her family or with her friend, Nenita Boyer. It was not until early 2008 that the plaintiff and the defendant Toca rekindled their friendship and tried to pick up where they had left off, socializing and playing cards together. The defendants continued to provide assistance to the plaintiff with transportation and when the plaintiff purchased a convenience store, the defendant Visaya helped out regularly in the store without any remuneration. Unfortunately, their friendship waned and after 2013, the plaintiff and the defendant Toca did not see one another again until after the plaintiff commenced this action on July 17, 2014.

THE PLEADINGS

- [17] In her Second Amended Notice of Civil Claim (the "Notice of Civil Claim") filed April 26, 2016, the plaintiff alleges that she agreed to lend the defendants \$600,000 to purchase the house at XXXX Dumfries Street, Vancouver and that money was, in fact, used to purchase that property. At paragraph 6 of the Notice of Civil Claim, the plaintiff alleges that:

The parties' agreement with respect to re-payment of the loan is oral. At the time of the loan, the defendant Toca promised to repay the loan in one year. Throughout 2008 to 2010, the defendant, Hermenisabel Guarin Toca, repeatedly promised to repay the loan and the plaintiff accepted that she intended to do so.

- [18] The plaintiff claims judgment against both defendants in the amount of \$600,000 with prejudgment interest from January 10, 2014 as well as various relief in the alternative, including judgment in unjust enrichment, a declaration that the defendants hold a portion of their home on a resulting trust for the benefit of the plaintiff and an order transferring or vesting an interest in the defendants' home being held in trust.
- [19] In the Response to Civil Claim filed by the defendants on August 13, 2014, the defendants allege that the Advance to the defendant Toca was a gift and specifically deny that there was any promise to repay the Advance as a loan. Paragraph 12 of the Response to Civil states that:

The Defendants say that the Plaintiff's claim is filed out of time and they specifically plead and rely upon the Limitation Act [SBC 2012] c. 13.

ISSUES

- [20] The plaintiff admits that \$30,000 of the Advance was a gift to the defendant Toca. The key issue in this case is whether \$600,000 of the Advance was a gift or a loan. Counsel for the parties agree that if the court finds that the entire amount of the Advance was a gift, the plaintiff's claim against the defendants must fail.
- [21] In the event that the court concludes that all or part of the Advance was a loan, it must also determine whether it was a term loan or a contingent loan. This issue is of importance because the plaintiff filed her original Notice of Civil Claim on July 17, 2014, some 7 years and 7 months after the monies were advanced. If this was a term loan repayable one year after the advance, the limitation period began to run on January 10, 2008 and expired before the plaintiff filed her claim. If, however, this was a contingent loan, payable whenever the parties could afford to do so, the plaintiff's claim was filed within the applicable limitation period.
- [22] Finally, in the event that this court determines that \$600,000 of the Advance was not a gift and there was no valid agreement between the parties, it must also determine whether there is a presumption of a resulting trust and whether the plaintiff holds a beneficial interest in the defendants' house at XXXX Dumfries Street by virtue of a purchase money resulting trust.

GIFT OR LOAN?

- [23] It is not in dispute that the plaintiff made the Advance of \$630,000 to the defendant Toca and the plaintiff concedes that \$30,000 of the Advance was a gift to the defendant Toca to pay off her student loans. What is disputed is the characterization of the \$600,000 portion of the Advance and whether it was a gift or a loan. All of the discussions between the parties took place in Tagalog and there was no written agreement between the parties, either in English or in Tagalog.

- [24] The evidence of the plaintiff and the defendant on this issue was difficult to reconcile and was complicated by difficulties with language and translation, the absence of any written evidence and the passage of time.
- [25] The plaintiff's evidence was that the defendant Toca asked her to lend her money so that she could buy a house and then she and the defendant Toca engaged in a negotiation over the amount of the loan while driving in the car from the BC Lottery Corporation to the Royal Bank branch on Georgia Street. The plaintiff said that by the end of the negotiation, she had agreed to loan the defendant Toca the sum of \$600,000. The plaintiff testified that while in the bank waiting to talk to the bank manager about the Advance, the defendant Toca told the plaintiff that she would repay the loan "next year", without giving her a specific date for repayment.
- [26] The plaintiff's evidence about the specifics of her conversations with the defendant Toca was not entirely consistent. She initially testified that the defendant Toca told her that the gift of \$30,000 for her student loans was not enough and the plaintiff then offered to lend \$100,000, \$200,000 and then \$300,000. She said that the defendant Toca responded each time that this was "not enough" and the plaintiff finally said that she would lend her \$600,000 and "that's when she stopped". Later in her testimony the plaintiff said that the defendant Toca said "she needed \$600,000 to buy a house".
- [27] Regardless of how the amount of the Advance was arrived at, the plaintiff testified that it was her intention on January 10, 2007 that \$600,000 of the Advance to the defendant Toca was a loan and that the agreement she reached with the defendant Toca regarding the loan and its repayment was concluded in the lobby of the Royal Bank before Ms. Toca received the bank draft.
- [28] The plaintiff's intention regarding a loan was corroborated by the testimony of the bank manager from the Royal Bank, Shirley Ma. Ms. Ma testified that her bank has certain protocols in place when dealing with lottery winners and in her 20 years of work for the Royal Bank of Canada, she has only had to employ those protocols on two occasions, one of which was for the plaintiff, Enone Rosas. For this reason, the meeting with the plaintiff on January 10, 2007 was an event that Ms. Ma was able to recall in her evidence, because it stood out in terms of its rarity and in terms of the privacy interests of the client. Ms. Ma's evidence was of particular assistance to the Court in that she was the only witness at trial without an interest in the outcome of the proceeding.
- [29] Ms. Ma testified that the plaintiff came into the bank with her husband and another couple. She said that she met with the plaintiff privately in her office and asked the plaintiff to write down the amounts of each of the three bank drafts on a piece of paper. Ms. Ma recalled that one of the drafts was considerably larger than the others and she testified that the plaintiff indicated to her that "the larger one she was lending to a friend for the purchase of a home". Ms. Ma's evidence on this issue was not shaken on cross-examination.

- [30] The defendant Toca's evidence regarding these events was entirely different. Ms. Toca testified that there was no "negotiation" between her and the plaintiff during the car ride from the BC Lottery Corporation to the Royal Bank and she did not at any time promise to repay the \$600,000. Her evidence about her interactions with the plaintiff on January 10, 2007 was also inconsistent. She testified at trial that she did not ask the plaintiff for money or financial help during the car ride to the Royal Bank but that the plaintiff told her while they were lining up at the bank that she was giving her \$600,000. She also testified that she was present when the plaintiff wrote down the amounts of the various bank drafts and handed a piece of paper to Shirley Ma. On Examination for Discovery however, the defendant Toca said that the first time she heard that she was going to get \$600,000 from the plaintiff was when the plaintiff told the bank manager, Shirley Ma that she wanted a bank draft for that amount. Under cross-examination at trial, the defendant said that she thought that the plaintiff was giving her \$600,000 because that was the amount that popped into the plaintiff's head and "this is what I thought before the bank". The defendant Toca then corrected herself and said that the conversation with the plaintiff about her receiving \$600,000 occurred at the bank before the bank manager came into the room.
- [31] The defendant Visaya was present during these events and he testified that he did not overhear any conversations between the plaintiff and the defendant Toca while they were in line at the bank and the only conversation he overheard in the car was the telephone call between the plaintiff and Nenita Boyer. He denied hearing the defendant Toca ask the plaintiff for money or any discussion about student loans. He also denied hearing any discussion between the plaintiff and the defendant Toca about the amount of the bank draft and said that he did not know the amount of the bank draft until the defendant Toca came back to their vehicle after depositing the draft in their bank account at Vancity.
- [32] Essentially, the versions of the dealings between the parties given by the plaintiff and the defendants are irreconcilable. As set out in the case of *Clifford v. Flores* 2004 BCSC 358, the Court must decide whose version of events is most reliable in order to decide the issues. Mr. Justice Cohen noted at paragraph 39 in that case:
- [39] The credibility of the witnesses must be tested against those facts that are not seriously in dispute, and the preponderance of the evidence and the probabilities surrounding the events.
- [40] Although this task is primarily one of fact finding, some legal principles submitted by defence counsel are of assistance:
- a) First, the plaintiff carries both the legal and evidentiary burden of proving on a balance of probabilities, that the alleged oral contract was made.
 - b) Second, the basic contractual principles of offer and acceptance, and certainty of terms are applicable. These principles are summarized in Friedman, *The Law of Contract in Canada* (4th ed.). at pp. 16-17, and 20, as follows:

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the party's intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other parties said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.

Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed, and if so, upon what. This is especially true where a document containing their agreement has been prepared and signed by the parties. If the plain wording of the document reveals a clear and unambiguous intent, it is not necessary to go further.

It is different, however, where the language is not unambiguous but vague and uncertain. In the absence of the requisite certainty and clarity the courts will not declare that a contract exists.

Finally, the Court of Appeal has also provided some guidance in how courts ought to assess the evidence of witnesses when credibility is an issue. In *Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171 (B.C.C.A.) the plaintiff brought an action for libel contained in a letter. The recipient of the letter gave evidence that he did not know the meaning of the defamatory word or the identity of the person referred to in the letter. The trial judge found the letter to be defamatory, but did not expressly state in his reasons that he disbelieved the evidence of the recipient. On appeal, the appellant argued that the evidence of the recipient was uncontradicted and the judge in the course of the trial had commented favourably on the demeanour of the witness. The witness's evidence therefore ought to have been accepted by the trial judge. In dismissing the appeal, at pp. 174 to 175 O'Halloran J.A. commented on how credibility ought to be assessed:

If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors combine to produce what is called credibility... . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the

real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of a quick minded, experienced and confident witness, and of those shrewd persons adept in the half lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say I believe him because I judge him to be telling the truth, is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to demand confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[33] As was the case in Clifford, there are several inconsistencies on the part of the plaintiff and the defendant Toca in relation to their evidence regarding their dealings with one another. However, I have concluded that I should prefer the evidence of the plaintiff on the issue of whether the \$600,000 portion of the Advance was a loan or a gift for the reasons that follow.

1. Although there may have been discussions between the plaintiff, the defendant Toca and Leonida Sta. Cruz on Monday January 8, 2007 regarding the possibility of buying "Isabel a house", these amounted to no more than informal discussions between friends without legal or moral obligation. There was no discussion about what kind of house would be purchased, where it would be located or how much it would cost. The discussions amounted to nothing more than excited friends chatting about possibilities.
2. These discussions, if they occurred, took place two days prior to the plaintiff providing the Advance to the defendant Toca. Even if these discussions were evidence of intention of the plaintiff to buy the defendant Toca a house, there is evidence that the plaintiff's intention had changed by Wednesday January 10, 2007 when she met with the bank manager, Shirley Ma.
3. It is more probable that the plaintiff gave a gift of \$30,000 to the defendant Toca when that gift is considered in the context of other gifts made by the plaintiff to her friends. The plaintiff's evidence was that in relation to the defendant Toca and Leonida Sta. Cruz, she gave them gifts to pay off their debts. She also gave a gift of a similar size to her friend, Gina Torda. These three recipients had all been friends with the plaintiff for approximately the same length of time. The only gift that was significantly larger than the others was the gift to Nenita Boyer, the plaintiff's friend for some 25 years and a person who provided her with child care assistance and was a godmother to one of her children. While there was clearly

tension between the defendant Toca and Nenita Boyer, particularly after the plaintiff's lottery win, I do not accept the suggestion by the defendants that the plaintiff gave the defendant Toca a gift of \$600,000 and then warned her and the defendant Visaya not to tell Nenita Boyer because she would get jealous. Both the plaintiff and Ms. Boyer testified that the plaintiff showed Ms. Boyer a copy of the bank draft in the months following the lottery win and this evidence was not challenged on cross-examination. It is improbable that the plaintiff would show Ms. Boyer a copy of the bank draft if she had told the defendant Toca to keep it a secret.

4. The plaintiff's evidence regarding how the amount of the advance was determined is more credible, particularly in light of the evidence of both parties that there had been no discussion between them about what kind of house the defendants would buy and how much it would cost. At the time of her lottery win, the plaintiff, her husband and children lived in a modest condominium that they had purchased some years earlier and which was subject to a mortgage. The defendants and their children were living in a rented two bedroom basement suite. There was no evidence that the plaintiff knew what kind of house the defendants wanted or that they had discussed the defendants' housing needs either before or immediately after the plaintiff's lottery win. It is therefore is much more probable that the amount of the Advance was determined by the defendant Toca than by the plaintiff.
5. There were significant and numerous discrepancies in the evidence of the defendant Toca, particularly when her evidence at the Examination for Discovery was compared to her evidence at trial. During cross-examination, she was unable to offer any explanation as to why several aspects of her discovery evidence differed from her testimony at trial. I was left with the distinct impression that she was embellishing and tailoring her evidence at trial to portray herself in the best possible light. Some examples of these discrepancies in her evidence are as follows:
 - a. The defendant Toca testified that when the group were at the RBC Georgia Street branch on January 10, 2007 so that the plaintiff could deposit her lottery winnings, the plaintiff wrote down the amounts of the bank drafts on a piece of paper. She went on to say that:

Shirley Ma saw the paper and asked why she was giving a huge amount of money to me and Enone said "she's my best friend and she has the right to receive a blessing from me and without Isabel I might have lost the ticket.

This evidence was contrary to the testimony of the plaintiff and Shirley Ma and was not corroborated by the defendant Visaya who was present. It is also different from the defendant Toca's evidence at her Examination for Discovery held on March 12, 2015. On discovery, the defendant Toca gave the following evidence:

252 Q What did you say when you heard Enone asking the bank managed to release 600- or \$630,000 to you?

A That's what -- as I mentioned. the bank manager was asking her on that time, why you releasing, "why are you giving this huge amount of money to these three persons?"

253 Q And Enone said?

A And Enone said, that "This is --these three persons are all my friend. I would like to share my blessing to them, especially Isabel.

- b. In direct examination at trial, the defendant Toca testified that while she and the plaintiff were lining up in the bank, the plaintiff mentioned to her that she was giving her \$600,000 and this conversation took place while they were waiting for the bank manager to arrive. She was asked by her counsel whether there were any money amounts talked about in the boardroom at RBC bank on January 10, 2007. The defendant Toca responded:

The only one I recall was discussed was the draft to me, the \$600,000 she was giving to me.

She later testified in her direct examination that she did not know how much she was getting until she went to her bank later that day to make the deposit. At the examination for discovery, however, the defendant Toca testified as follows:

226 Q And when you heard Enone say to the bank manager when she wanted the bank manager to release to you \$600,000, was that the first time you had heard that amount of money?

A That's correct

The defendant Visaya testified that he did not hear any numbers with respect to the bank drafts but that the plaintiff had written something down on a piece of paper and gave it to the bank manager.

There were several other instances where the defendant Toca's evidence at trial was either contrary to her evidence on discovery or an embellishment of her evidence on discovery, and in general, I did not find her to be a credible witness.

6. While defence counsel urged me to conclude that "[a] \$600,000 loan without a shred of paper makes no sense", the absence of loan documentation is consistent with the plaintiff's level of sophistication. She has limited education and testified that she had a limited understanding of the true value of her lottery winnings. Although her sole source of income now is rent from her various rental properties, she has no written rental agreements with her tenants.
7. The evidence of the bank manager, Shirley Ma, was compelling in terms of the plaintiff's intention at the time of the Advance. Ms. Ma had good recollection of the events of January 10, 2007 because this type of transaction had only occurred twice in her 20 years at the Royal Bank. She was an independent witness who had no vested interest in the outcome of this proceeding, unlike all of the other witnesses at trial. Her testimony provided clear evidence that the intention of the plaintiff at the time of the Advance was that she was making a loan to the defendant Toca.

- [34] In summary, I accept the evidence of the plaintiff that the Advance consisted of a \$30,000 gift to the defendant Toca and a \$600,000 loan to the defendant Toca. I also note that the evidence of the plaintiff and the defendants was consistent that all of the discussions regarding the Advance were between the plaintiff and the defendant Toca. The defendant Visaya had no part of the discussions and was not the recipient of the Advance, although he clearly received an indirect benefit through his wife. The evidence of the plaintiff was that her negotiations and agreement were with the defendant Toca only and she agreed on cross-examination that the loan was owed by the defendant Toca.
- [35] In light of the conclusion I have reached regarding the characterization of the \$600,000 portion of the Advance, it is not strictly necessary for me to comment on the plaintiff's alternative cause of action that there is a purchase money resulting trust. However, I do wish to make some brief comments about the plaintiff's submission that if the entire Advance was a gratuitous transfer from the plaintiff to the defendants rather than a valid loan agreement, I should conclude that the equitable principle of a purchase money resulting trust would apply. The plaintiff's counsel submitted that the purpose of the gratuitous transfer of \$600,000 was to enable the defendants to purchase a house and therefore the plaintiff has a beneficial interest in the defendants' house by virtue of the presumption of resulting trust.
- [36] The case of *Pecore v. Pecore*, 2007 SCC 17 is the leading decision on the application of the presumption of resulting trust in circumstances of a gratuitous transfer. The presumption is "a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption" (para. 22). It arises when "title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: *Waters' Law of Trusts in Canada* (3d ed. 2005), at p. 362" (para. 20).
- [37] Even if I had concluded that the \$600,000 advanced to the defendants was a gratuitous transfer, a court can only rely on the presumption of resulting trust if the evidence is insufficient to establish the donor's actual intent at the time of the transfer. In this case, there is clear evidence of the plaintiff's intention at the time of the transfer. She testified that she intended the \$600,000 to be a loan to the defendant Toca and there was no evidence that she intended to hold a beneficial interest in the defendant's house. The action of the plaintiff in advancing those monies to the defendant Toca was consistent with the plaintiff being a creditor rather than a purchaser. The evidence in this case would have been sufficient to displace the presumption of a resulting trust.

TERMS OF THE LOAN AGREEMENT

[38] Having concluded that \$600,000 of the Advance was a loan from the plaintiff to the defendant Toca, this court must now determine the terms of the loan agreement. The evidence from the parties is once again at odds, in large part because the defendants allege that the entire amount of the Advance was a gift.

[39] The plaintiff's evidence was that she agreed to lend to the defendant Toca the sum of \$600,000 so that the defendants could purchase a house. The plaintiff testified that the defendant Toca agreed to repay the loan "next year". The plaintiff also testified that she was "not charging interest on the loan" and that her intention was that the defendants would use the money to purchase the house and would be able to accumulate equity or "earn a profit" as the house appreciated in value.

[40] As the court noted in *Jacobs v. Yehia* 2014 BCSC 845:

A loan is a specific form of contract. As such it requires mutual concordance between the parties as to the existence, nature and scope of their respective rights and duties. Like other contract, it may be evidenced orally, in writing, by conduct or by a combination thereof.

[41] Madam Justice Dickson (as she then was) went on to say:

The essential elements of a loan were discussed by Satanove J. in *Lee v. 1137434 Alberta Ltd.*, 2009 BCSC 284. As she noted, they have been described as: i) a principal sum; ii) placed with a borrower; iii) on agreed terms for the payment of interest; and iv) liability on the borrowers part for return of the principal and accrued interest. A loan has also been defined as delivery by one party and receipt by another of money on agreement, express or implied, to repay the money with or without interest: *Lee*, paras 9-10.

If the parties agree a loan shall bear no interest the third essential element is present because there are "agreed terms for the payment of interest" (ie, the loan is interest-free).

[42] I have no difficulty concluding on the evidence that there was a valid loan contract in this case. There was delivery of \$600,000 by the plaintiff and receipt by the defendant Toca of \$600,000 on agreement, expressed or implied, to repay the \$600,000 to the plaintiff without interest. The express or implied agreement that the loan was interest free was part of the plaintiff's gift to the defendant Toca. Not only did she provide her with a significant sum to repay her student loans, but she also gave her an interest-free loan to enable her to buy a house for her family. The interest that would otherwise have been paid on a loan of this size would likely have put the total amount of the gift to the defendant Toca on par with the gifts made to the plaintiff's other friends of similar duration, Leonida Sta. Cruz and Gina Torda.

[43] What is more difficult to determine in this case is the term for repayment. The plaintiff submits that \$600,000 of the Advance was a contingent loan that was to be repaid by the defendants when they were able, without any specific due date. The defendants claim that the evidence before the Court establishes clearly that this was a term loan, repayable one year after the funds were loaned to the defendant Toca.

[44] The only evidence before me regarding the term of the loan is the evidence of the plaintiff. She testified that the defendant Toca promised to repay the loan "next year". The plaintiff was cross-examined rigorously about this evidence.

[45] The plaintiff testified at her Examination for Discovery and at trial through a Tagalog interpreter. During the course of the trial, the Court was advised that the words "next year", "in a year" and "after a year" while subtly different in English, all translate into the same phrase in Tagalog.

[46] At an Examination for Discovery held on March 13, 2015, the plaintiff gave the following evidence:

183 Q Did you talk about how the loan would be repaid?

A All she said was, "I'm going to pay you back after a year."

184 Q Okay. So this is during the same conversation?

Ms. Toca says, "I'll pay you back the \$600,000 after one year"?

A Yes.

185 Q So was it your understanding the agreement was Ms. Toca would pay back the entire \$600,000 after one year?

A Yes.

186 Q Was there going to be any interest on the loan"

A None

187 Q Was there any other terms to the loan agreement that were discussed?

A None.

[47] During cross-examination at trial, the plaintiff admitted that that she was asked those questions and gave those answers and the answers were true. The plaintiff then agreed with the suggestion of defence counsel that there was an agreement between the plaintiff and the defendant Toca that in one year after the plaintiff advanced the money to the defendant, it was due back to her. Defence counsel suggested to the plaintiff that if the \$600,000 was a loan, she gave the bank draft to the defendant Toca and one year later the defendant Toca was supposed to repay the plaintiff. The plaintiff agreed that this was the case.

[48] Given the evident translation difficulties, defence counsel went to great effort during his cross-examination to clarify what the plaintiff meant when she testified that the loan was to be repaid "one year later". This resulted in the following exchange at trial:

Q. Ah..when you were asked questions by Mr. Carter in your examination for discoveries, you may want to go slow here..and when you were asked by your lawyer, my friend Mr. Tedham and when I have been asking you questions, you've been giving answers "in a year", after a year", "next year" and despite how the questions are worded, in your mind what that means is 12 months right?

A. It meant a year.

Q. Right, a year is 12 months.

A. Yes

[49] In his closing submissions, counsel for the plaintiff referred to the evidence that it was the defendant Toca who advised the plaintiff that she would repay her "next year" and submitted that:

It is so obvious that "it goes without saying" that the Defendants would never be able to pay within one year and would need a reasonable amount of time to repay such a large amount.

[50] He further submitted that in the circumstances of this case, it would be reasonable to imply a repayment term that the defendants could repay the loan when they were able to do so. He described the "pay when you can" arrangement as "reasonable and equitable".

[51] With all due respect to plaintiff's counsel, such an implied term flies in the face of the plaintiff's own evidence at trial and on discovery. It is clear from her testimony at trial that her intention at the time she provided the Advance to the defendant Toca was that \$600,000 of the Advance was a loan and that loan was repayable without interest in one year. Despite the translation difficulties, the plaintiff admitted under cross-examination that "in one year" meant 12 months to her. It is also apparent from her evidence that she was aware that it would be difficult for the defendant Toca to repay the loan in 12 months but that remained her intention in terms of repayment. The plaintiff gave the following testimony during cross-examination:

Q. Right, ok, so then you give her the money and one year later she is supposed to pay you back. How was she ever supposed to do that if the money is in the house?

A. I also didn't know. She had to find a way to provide it.

[52] I have concluded from this evidence that, regardless of the difficulties it might pose to the defendant, Toca, the expectation of the plaintiff when she made the loan was that it would be repaid to her one year later, not when the defendant Toca was able to pay.

- [53] The plaintiff's evidence that the loan was repayable in one year is also consistent with the pleadings in this matter. As I have already noted, at paragraph 6 of the Notice of Civil Claim, the plaintiff alleges that:
6. The parties' agreement with respect to re-payment of the loan is oral. At the time of the loan, the defendant Toca promised to repay the loan in one year [emphasis added]. Throughout 2008 to 2010, the defendant, Hermenisabel Guarin Toca, repeatedly promised to repay the loan and the plaintiff accepted that she intended to do so.
- [54] I therefore find that it was an expressed or implied term of the loan agreement that the defendant, Toca would repay the loan to the plaintiff 12 months after the date of the Advance.

IS THE PLAINTIFF'S CLAIM STATUTE BARRED?

- [55] Having concluded that \$600,000 of the Advance was a term loan, repayable by the defendant Toca in one year, this Court must now determine whether the plaintiff's claim is statute barred because it was commenced after the expiry of the applicable limitation period.
- [56] Both counsel agree that the former Limitation Act, R.S.B.C 1996, c. 266, was in effect at this time of this transaction and counsel for the defendants submitted that pursuant to section 3(5) of that Act, the limitation period for an action in debt is six years. He further submitted that the limitation period began to run on January 10, 2008, the date when the loan was due to be repaid and the defendant Toca failed to repay the loan.
- [57] It was also agreed by the parties that, if I concluded that this was a term loan, the limitation period expired on January 10, 2014, approximately 7 months before this action was commenced, unless there was some postponement of the running of time.
- [58] There is no evidence in writing confirming the cause of action or acknowledging the debt pursuant to section 5(2) and (5) of the Limitation Act, R.S.B.C 1996, c. 266 and thus this court must determine whether there was an oral agreement to extend the time for repayment or some other renegotiation of the repayment provisions of the loan agreement.
- [59] The plaintiff's evidence was that in January 2008, the defendant Toca came to see her and told her that she would repay the loan "next year". Under cross-examination, the plaintiff confirmed that it was the defendant Toca who initiated this discussion and volunteered the promise to repay the loan "next year" and the plaintiff agreed with counsel's suggestion that she was "ok with that" because in January 2008, there was no urgency for the money. The plaintiff confirmed that she was "just going to wait".
- [60] The plaintiff also testified that this type of discussion was repeated each year until approximately 2013. She confirmed that the defendant Toca did not make any payments towards the loan or provide anything to the plaintiff in exchange for the plaintiff's agreement to extend the time for repayment beyond January 10, 2008.

- [61] Counsel for the plaintiff acknowledged that a valid forbearance agreement requires consideration from the debtor and a request for forbearance from the debtor, rather than the offer of forbearance from the creditor. He submitted that in this case, the plaintiff and the defendant Toca agreed to change the repayment terms of the loan and thus renegotiated their debt agreement.
- [62] Counsel for the defendants relied on the principle described in the case of *Shook v. Munro et al*, [1948] SCR 539 (SCC) at paragraph 5 where the court noted that:

No doubt a mortgagor and a mortgagee can bind themselves to new times for the payment of the moneys, to be substituted for those provided in the mortgage. The effect would be to postpone the mortgagee's right to payment and extend the mortgagor's obligation to pay interest, and affect the times of both redemption and foreclosure. But the question here is not whether forbearance or a promise of it is good consideration: it is rather whether anything had been done or promised to bind the mortgagees to forbear. If, for instance, the latter had in 1930 brought foreclosure proceedings, could they have been restrained on the ground that the mortgagor was not in default? Hope J.A. says yes, but I am forced to the conclusion that nothing had taken place that could have supported that plea: the forbearance was at most a voluntary abstention from exercising rights by the mortgagees which of itself could not affect the running of the statute.

- [63] This principle was restated more recently in the case of *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156 at paragraph 73:

At common law, a creditor and debtor can agree to forbear enforcement of a debt, and such an agreement would suspend the limitation period for the period of forbearance. In order to achieve this result, the creditor must promise not to enforce the debt, and the debtor must provide some consideration in exchange for this promise. In other words, a creditor's promise to forbear will not suspend the limitation period unless the debtor provides consideration for that promise.

- [64] Counsel for the plaintiff does not take issue with the fact that there is no evidence of any consideration from the defendant Toca for the plaintiff's forbearance but he submits that that plaintiff "never received any consideration at all with respect to the advance, so an amending agreement, whether a "forbearance agreement" or otherwise, could not require additional consideration;" He also suggested that where a creditor and debtor agree to change the repayment terms of the debt, they have renegotiated their debt agreement.
- [65] With all due respect to the plaintiff's counsel, he appears to be conflating the plaintiff's causes of action in this case. His submission is clearly contrary to established legal principles with regard to the plaintiff's primary cause of action that she loaned \$600,000 to the defendant Toca in return for the promise of the defendant Toca to repay that loan without interest in one year. The consideration received by the plaintiff was the promise of the defendant Toca to repay the loan in one year. Even if the defendant Toca told the plaintiff in January 2008 and in each subsequent year until 2013 that she could not repay the loan and would require another year to pay and the plaintiff agreed on each occasion that she could have a further year to repay the loan, the defendant Toca would have had to provide some

additional consideration in return for the plaintiff's agreement to wait an additional year. Without that additional consideration, the plaintiff's agreement to extend the time for repayment was nothing more than a "voluntary abstention" from exercising her rights to enforce repayment of the loan which did not affect the running of the applicable limitation period.

[66] The conclusion that the plaintiff's forbearance was simply a "voluntary abstention" to enforce repayment is also supported by the plaintiff's testimony at trial and on her Examination for Discovery. At trial the plaintiff confirmed during her cross-examination that the defendant Toca was the one who mentioned that she would pay the plaintiff "next year" and the plaintiff was content to wait because there was no real emergency for the money. The plaintiff also confirmed the following evidence given by her at her Examination for Discovery:

407 Q Okay. So finally, nearly seven and a half years after this alleged loan is advanced, we have a lawsuit filed. What took you so long to decide to start legal action?

A Just because of trust. Just because of my trust to her. That's all.

408 Q Okay. What was it that happened - - did anything happen around the summer of 2014 that made you elect to finally start your lawsuit?

A Because it was already too long.

[67] In the absence of a valid forbearance agreement, the limitation period began to run on January 10, 2008 and expired on January 10, 2014. The plaintiff's claim, which was filed July 17, 2014 is statute barred.

CONCLUSION

[68] The plaintiff and the defendant Toca agreed that the plaintiff would loan \$600,000 to the defendant Toca on January 10, 2007.

[69] The terms of the loan agreement were as follows:

- a. The plaintiff agreed to advance \$600,000 to the defendant Toca on January 10, 2007;
- b. The defendant Toca agreed to repay the \$600,000 loan without interest. It was an expressed or implied term of the loan agreement that the defendant, Toca would repay the loan to the plaintiff 12 months after the date of the loan advance.

[70] The defendant Toca did not repay the \$600,000 loan on January 10, 2008, 12 months after the date of the loan advance.

[71] The plaintiff and the defendant Toca did not conclude a valid forbearance agreement.

[72] The limitation period began to run on January 10, 2008 and expired on January 10, 2014. The plaintiff's claim was filed on July 17, 2014 after the expiry of the limitation period.

[73] The plaintiff's claims against the defendants are dismissed.

[74] Neither party specifically addressed the matter of costs in their submissions. If the parties are unable to agree, they may schedule a further application to address that issue.

"M.H. Church, J."

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