
CANADA / JUDGMENT

Rosas v. Toca

2016 BCSC 2319

COURT

Supreme Court of British Columbia

DECIDED

6 July 2016

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2016 BCSC 2319 Rosas v. Toca

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rosas v. Toca,

2016 BCSC 2319

Date: 20160716

Docket: S156337

Registry: Vancouver

Between:

Enone Rosas

Plaintiff

And

Hermenisabel Guarin Toca and Gener Pentecostes Visaya

Defendants

Before: The Honourable Madam Justice Church

Ruling: No Evidence Application

Counsel for the Plaintiff:

K. Dotten;

G. Tedham

Counsel for the Defendant:

D. Moonje

Place and Date of Trial:

Vancouver, B.C.

June 28, 29 & 30, 2016

July 4, 5 & 6, 2016

Place and Date of Judgment:

Vancouver, B.C.

July 6, 2016

- [1] THE COURT: After five days of trial and at the close of the plaintiff's case, the defendants brought a no evidence motion pursuant to Rule 12-5(4) to dismiss the plaintiff's action. The application was heard by me earlier today and at the conclusion of submissions I adjourned until this afternoon to give my decision.
- [2] In terms of the background of this matter, the plaintiff's claims against the defendants arise from events that occurred in early January 2007 after she won 4.163 million dollars in the lottery. On January 10th, 2007, the day that she picked up her cheque from the Lottery Corporation, the plaintiff deposited the funds into her account and then used those funds to obtain a number of bank drafts for her friends. She obtained bank drafts of \$40,000 and \$100,000 for her friends, Leonida Sta. Cruz and Nenita Boyer, and a bank draft for \$630,000 for the defendant, Hermenisabel Toca.
- [3] It is the characterization of the bank draft that was given to Ms. Toca that is at issue in this trial. In her second amended notice of civil claim, the plaintiff alleges that \$30,000 of the bank draft was a gift to Ms. Toca, and the balance of \$600,000 was a loan to enable Ms. Toca and her husband, the defendant, Gener Visaya, to buy a house, which they in fact did shortly thereafter.
- [4] The plaintiff alleges that the agreement between the plaintiff and the defendant, Toca, was entirely oral and that it was a contingent loan, repayable when the defendants were able to do so, and in any event, within a reasonable time. The plaintiff also advanced alternative claims against the defendants, including unjust enrichment and resulting trust.
- [5] A response to civil claim filed by the defendants alleges that the entire amount of the \$630,000 bank draft was a gift from the plaintiff and that there was no promise to repay made by the defendant, Toca, at any time. The defendants also allege that the plaintiff's claim was filed after the expiry of the applicable limitation period under the Limitation Act. It is essentially this last allegation that forms the basis of the defendant's no evidence motion.

- [6] Rule 12-5(4) provides that at the close of the plaintiff's case the defendant may apply to have the action dismissed on the ground that there is no evidence to support the plaintiff's case. The test to be applied on a no evidence motion was stated by Madam Justice Huddart for the British Columbia Court of Appeal at para. 35 of the case of *Roberges v. Huberman* [1999] 62 BCLR (3rd) 385 where she noted:

It is for the judge to determine whether there is some evidence on each element of the cause of action required to be proved by the plaintiff; it is for the jury to determine whether that evidence is sufficient to justify a verdict for the plaintiff. The judge is not to decide whether the evidence on each of those elements meets a minimum standard unless the motion is one of insufficient evidence under Rule 40(10).

- [7] This test was recently reaffirmed by the BC Court of Appeal in the case of *Brule v. Rutledge* [2015] BCCA 25. In considering a no evidence motion, as opposed to an insufficient evidence motion, the weight of evidence and the credibility of witnesses are not to be considered. The evidence is to be assessed only to the extent that is required to determine that it amounts to more than mere speculation. Where there is more than one cause of action asserted by the plaintiff, Rule 12-5(4) cannot be employed to dismiss one cause of action alone. Those principles are enunciated in the case of *Bingo City Games Inc. v. British Columbia Lottery Corporation* [2004] 34 BCLR (4th) 327.
- [8] The defendants allege that the evidence adduced by the plaintiff thus far in the trial supports the defendant's theory that if, in fact, there was a loan, it was a demand loan that was payable one year after January 10th, 2007, and accordingly, the six-year limitation period began to run on January 10th, 2008, the date for repayment. If that is the case, the plaintiff's claim, which was filed July 17th, 2014, was filed after the expiration of the limitation period and is, therefore, statute barred. The defendants say further that although the plaintiff gave evidence that the defendant told the plaintiff in January 2008, and in subsequent years that she would pay her next year, there was no consideration offered by the defendant, Toca, for this promise, and thus, it was not valid forbearance. Accordingly, the defendant suggests that any such promises made by the defendant, Toca, did not extend the limitation period in any way.
- [9] In support of these submissions, defence counsel referred me to some of the plaintiff's evidence on cross-examination with respect to whether there was a loan agreement, and if so, when it was agreed that the loan was to be repaid. He referred to the plaintiff's evidence that the defendant, Toca, told her that she was "going to pay you next year", and that the plaintiff's expectation was that one year later the defendant, Toca, would repay her. He also relied on the plaintiff's agreement with a question posed by defence counsel that "it was a straight IOU".

- [10] It was further submitted on behalf of the defendants that while the plaintiff gave evidence that the defendant, Toca, requested an extension of the time to repay on several occasions between January 2008 and 2010, she also testified that she received nothing in return from the defendant, Toca, and thus, there was no consideration provided by the defendants for the plaintiff's forbearance.
- [11] With regard to the plaintiff's alternate allegations of resulting trust or quantum meruit, defence counsel submits that the plaintiff's evidence was that this was a loan agreement or a simple IOU and that, therefore, the law of equity does not apply.
- [12] In response, plaintiff's counsel submitted that the evidence adduced by the plaintiff thus far, when taken as a whole, provides some evidence on the elements of the various causes of action advanced by the plaintiff and that, therefore, the no evidence motion should be dismissed. He pointed to the plaintiff's evidence in direct examination that although the defendant, Toca, said that she would repay the loan next year, there was no discussion between the parties about a specific date for repayment.
- [13] He also submitted that the evidence of the plaintiff relied on by defence counsel is not necessarily inconsistent with the plaintiff's allegation that this is a contingent loan. He submitted that in the absence of a specific date for repayment, a statement by the defendant, Toca, that she would pay the plaintiff next year, particularly when the plaintiff was aware of the defendant's modest circumstances and possible inability to pay, could be construed as a promise by the defendant, Toca, to repay the loan when she was able to do so.
- [14] There are some additional difficulties with the plaintiff's evidence in relation to translation. The plaintiff testified using a Tagalog interpreter. She testified that her discussions with the defendant, Toca, all took place in the Tagalog language. This fact becomes significant due to the fact that the terms "in a year", "next year", "in one year" and "after a year", while subtly different in English, apparently all translate the same in Tagalog.
- [15] Despite those translation difficulties, defence counsel invites me to consider the testimony of the plaintiff and conclude that her use of some of those phrases can only mean that the loan had a due date of twelve months after the date of the advance and that, therefore, it was a term loan. He relied on portions of the plaintiff's testimony at the examination for discovery, as well as the trial, including the following exchange:

Q And then you gave her a draft and your expectation was one year later she is supposed to repay you?

A Yes.

- [16] With regard to that testimony, defence counsel submits that this is an admission from the plaintiff regarding her expectation that the loan was to be repaid in one year. Evidence that suggests that it was a term loan. I note that the plaintiff also gave other testimony on this issue, which included the following exchange with defence counsel:

Q In your mind, did you expect the money to be paid back in one year?

A I doubt. I knew she could not pay me right away.

Q You knew that she would never be able to pay you back \$600,000 in a year, they lived in a basement suite and made next to no money. How could they pay you back?

A She said she was going to use it to buy a house.

Q How would she pay you back if the money was in the house?

A I did not know.

[17] Although on one hand the plaintiff agreed with defence counsel that her expectation was that the loan was to be repaid one year later, she also testified that she knew that the defendant, Toca, could not pay her "right away".

[18] In relation to the translation difficulties with the Tagalog language, defence counsel submitted that the plaintiff explained what she meant in the testimony referred to by defence counsel, specifically when she referenced twelve months in the following excerpt from her testimony in cross-examination:

Q So the first year had passed and the money was now due to you, right?

A For me I consider the next year a period of twelve months of that year.

[19] The answer of the plaintiff in this exchange was not actually responsive to the question asked by defence counsel and I do not agree with his submission that the plaintiff was explaining what she meant when using these terms interchangeably. In fact, it is not clear from the words used by the plaintiff whether she meant twelve months from the date of the advance, or the entire twelve month period in the following year. This exchange perhaps highlights some of the difficulties with respect to the inability of the interpreter to translate into Tagalog the subtle differences in the language used in English.

[20] The defendant's submission does not account for the plaintiff's apparently contradictory evidence on direct examination that there was no discussion about a specific date when the defendant, Toca, would repay the money. This evidence, taken together with the plaintiff's testimony that she knew that the loan could not be repaid right away could, if accepted, provide some support for the plaintiff's position that this was a contingent loan.

[21] As defence counsel pointed out in his submissions, if the court finds that it must weigh the evidence to assess the Limitation Act issue, then this application must be dismissed. I find myself in that very position. The plaintiff's evidence meets the threshold of reasonableness such that a properly instructed trier of fact could find in favour of the plaintiff. The apparent contradictions in her testimony on cross-examination that the defendants rely on with respect to the Limitation Act argument require that I weigh the evidence and assess credibility, something that I cannot do on a no evidence motion.

[22] Accordingly, the defendant's application under Rule 12-5(4) is dismissed.

"The Honourable Madam Justice Church"

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