

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Elser v. Celani*,
2024 BCSC 2071

Date: 20241113
Docket: S250508
Registry: New Westminster

Between:

Lisa Elser also known as Lisa J. Elser

Plaintiff

And

Jawaid Celani also known as Cavit Celani

Defendant

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

Counsel for the Plaintiff:

A.J. Carstairs

Counsel for the Defendant:

H. Song

Place and Dates of Summary Trial:

New Westminster, B.C.
March 11 and September 5-6, 2024

Place and Date of Judgment:

New Westminster, B.C.
November 13, 2024

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Introduction

[1] In this summary trial, Ms. Elser seeks judgment for \$330,000, plus interest, for a loan made to Mr. Celani under a written agreement in 2019.

[2] Mr. Celani resists repayment on three grounds. He submits that: (i) the claim is time-barred by the *Limitation Act*, S.B.C. 2012, c. 13; (ii) his repayment obligations were extinguished by a contractual novation in 2020 – in which he, his brother, and Ms. Elser agreed that the loan agreement was extinguished and replaced by a promissory note from his brother to Ms. Elser; and (iii) these proceedings are an abuse of process because Ms. Elser has already sued his brother for this debt in Alberta.

[3] I find that Mr. Celani’s defences fail. In brief, the claim is not time-barred because it was commenced within two years of the loan becoming due and payable. There was no contractual novation because Ms. Elser never agreed to accept the promissory note from Mr. Celani’s brother in full satisfaction and substitution for Mr. Celani’s obligations to her under their loan agreement. Finally, these proceedings to collect on her debt bear no resemblance to an abuse of process.

[4] Ms. Elser is granted judgment for \$330,000 plus outstanding interest under the loan agreement.

Parties

[5] Ms. Elser resides in Port Moody, BC. Her affidavits provide little personal information except that she is a “semi-retired businessperson”.

[6] Mr. Celani resides in Coquitlam, BC. He has worked for many years as a construction contractor, doing business under the name “Westcoast Renovations” and through a company called W. Coast Construction Inc.

Facts

[7] In 2006, Mr. Celani did some construction work for Ms. Elser and her late-husband, Tom Schlegel, on their house in Port Moody. They became friends and visited each other's homes for family dinners.

[8] Over the years, Ms. Elser and her husband made several small, short-term loans to Mr. Celani for expansion of his business, which were repaid without issue.

Loan Agreement

[9] From December 2018 to February 2019, Mr. Celani discussed with Ms. Elser and Mr. Schlegel his need for a large loan to expand his business, and for which he was willing to pay 20% annual interest. Ms. Elser and her husband decided to collapse some of their investments to make the loan and obtain the interest Mr. Celani was offering.

[10] On October 3, 2019, Ms. Elser and Mr. Celani entered into the written loan agreement ("Loan Agreement"). Under its terms, Ms. Elser loaned Mr. Celani \$330,000.00, due and payable on June 6, 2022, with annual, non-compounding interest of 20%. Mr. Schlegel was not made a party because he was ill with terminal cancer.

[11] The key terms were these:

Loan Amount and Interest

1. The Lender promises to loan \$330,000,00 CAD to the Borrower and the Borrower promises to repay the principal amount to the Lender with interest payable on the unpaid principal at the rate of 20% per annum with no compounding, beginning on November 6th, 2019,

Payment

2. This Loan will be Interest Only for 30 months. The monthly interest due is \$5500 on the 6th of each month. If payments are below the monthly required interest, the amount not paid will be added to the principal and the monthly interest recalculated. Amounts above that will be deducted from the Principal and can be used to shorten the duration of the loan. The Principal is due in full on June 6 2022.

Default

3. Notwithstanding anything to the contrary of this Agreement, if the Borrower defaults in the performance of any obligation under this Agreement, then the Lender may declare the principal amount owing and interest due under this agreement at that time to be immediately due and payable.
4. If the Borrower defaults in payment as required under this Agreement or after demand for ten (10) days, the Security will be immediately provided to the Lender and the Lender is granted all rights of repossession as a secured party.

Security

5. This loan is secured by the following security (the “Security”): the Borrower’s share in the restaurant Bartholomew’s Bar 1062 Mainland St, Vancouver, BC V6B 2T

Amendments

9. This Agreement may only be amended or modified by a written instrument executed by both the Borrower and the Lender.

[12] On October 3, Ms. Elser sent Mr. Celani an email reflecting her understanding of some of the terms, including that shortfalls in the monthly interest payments would be added to the loan’s principal, under s. 2 of the Loan Agreement:

Because you want to use the profits, it’s set up so that monthly amounts that fall below the \$5,680 will be added to the Principal.

[13] Also on that day, Ms. Elser made a second loan to Mr. Celani for \$60,000.00, due on February 3, 2020 (“Small Loan”). In part, these funds were for Mr. Celani to buy an interest in a pub business known as the “Bartholomew Bar”. Accordingly, Ms. Elser paid \$41,300 of this \$60,000 directly to the owner of the business on Mr. Celani’s behalf. Under s. 5 of the Loan Agreement, Mr. Celani pledged his share of the business as security.

[14] On the Small Loan, Mr. Celani repaid \$38,500 in January 2020, but made no further payments. I was advised during the hearing that Ms. Elser has abandoned any claim for repayment of the balance of the Small Loan because she did not sue within the two-year deadline in the *Limitation Act* after the debt became due in February 2020.

[15] On the Loan Agreement, Mr. Celani paid the \$5,500 monthly interest for the first three months – October to December 2019 – but has paid Ms. Elser nothing more.

Anthony Celani Becomes Involved

[16] In texts to Ms. Elser in February and March 2020, Mr. Celani claimed to be short of funds, but made numerous promises to soon repay the Small Loan and something towards outstanding interest on the Loan Agreement.

[17] On March 14, 2020, Mr. Celani’s brother, Anthony Celani, called Ms. Elser to say that Mr. Celani had brain cancer and could not work. Ms. Elser’s evidence is that Anthony asked her not to pursue his brother’s debt while he could not work, and not to contact him directly but communicate through Anthony.

[18] On that same day, Ms. Elser emailed Anthony a summary of Mr. Celani’s debts to her:

The \$60K loan he’s paid the first instalment of \$33K. He owes the instalment that was due February of \$30,500 and we had to carry \$10K in credit card debt so he agreed to cover \$500 extra for \$31K.

The larger loan we restructured after he defaulted in September. He paid up to the end of 2019 but has not paid any of the monthly payments this year.

The total outstanding balance now is \$47,500.

Mr. Celani’s Illness

[19] Mr. Celani’s evidence confirms that Anthony visited him in the hospital on March 14, 2020, the day Anthony first contacted Ms. Elser, and the brothers discussed his debt to Ms. Elser.

[20] He deposes that he was not in fact being treated for brain cancer but for epileptic seizures. His evidence is that he had suffered from these seizures since 2018, and was never diagnosed with brain cancer. He says his seizures “adversely affected” his ability to work, and his affidavit attaches a letter from his neurologist, July 12, 2024, saying that his “seizure disorder” was “controlled with the combination of medications by 2020”.

[21] In his evidence, Mr. Celani refrains from specifically addressing whether he actually told Anthony that he had brain cancer, or whether he asked Anthony to tell Ms. Elser that he did. Anthony himself provided no evidence for this summary trial.

Mr. Celani's Agreement with Anthony

[22] Mr. Celani's evidence is that, at the hospital on March 14, 2020, he and Anthony discussed his having lent Anthony money over the years. He deposes that they agreed Anthony would therefore "assume complete liability for my debt" to Ms. Elser. His affidavit put it this way:

9. On or about March 15, 2020, Anthony and I confirmed our verbal agreement and that the Plaintiff agreed to our verbal agreement for Anthony to assume complete liability for my debt to the Plaintiff under the Loan Agreements (the "New Agreement"). The terms of the New Agreement were as follows:

- a. Anthony would issue a promissory note for the amount of my debt under the Loan Agreements to the Plaintiff and become the principal debtor; and
- b. In exchange for Anthony assuming my debt under the Loan Agreement to the Plaintiff, the Plaintiff would not pursue the debt from me.

10. It was at all material times thereafter understood as between the Plaintiff, Anthony, and I that Anthony had assumed my debt to the Plaintiff under the Loan Agreements. On August 9, 2020, I had met the Plaintiff in a park in Coquitlam, and she advised me that Anthony had been "taking care" of the debt and had been great with her. I believed that was true.

...

14. In response to the Plaintiff's allegations in her three affidavits that I either lied, concealed, or otherwise did not have a medical disability at all material times, I deny these allegations. Since February of 2018, I have been diagnosed with and suffered from a medical disability, and I have advised the Plaintiff of that many times.

15. In response to paragraph 30 of the Plaintiff's first affidavit, I dispute that that the New Agreement contained a term that the Plaintiff would only not pursue me for the debt under the Loan Agreement whilst I was suffering from "the Disability". That was never a term of the New Agreement, and, in any event, I have always suffered a disability.

Anthony Fails to Repay Ms. Elser

[23] On March 16, 2020, Ms. Elser emailed Anthony to offer Mr. Celani a lower rate of interest while he was ill and could not work. Anthony did not respond.

[24] On March 24, 2020, she emailed Anthony an accounting that showed Mr. Celani owed her \$47,000 under the two loans. Her email said: “Are you able to put a plan together with us for repaying the loans so it’s fair to Jaswaid [i.e. Mr. Celani] but that we can count on? Not knowing day to day, week to week if the money is coming is very stressful” (emphasis added).

[25] On August 9, 2020, Ms. Elser and Mr. Celani met in a park near his home. On the evidence, this is the only time they have met since 2019. Ms. Elser’s evidence is that, when they spoke a few days before to arrange the meeting, Mr. Celani told her he was praying to get better and get back his normal life, he missed going to work, and he was not seeing anyone other than doctors and his kids.

[26] Ms. Elser deposes that, when they met in the park on August 9, 2020, Mr. Celani was completely bald and clean-shaven, which she assumed to be from his cancer treatment. She gave him some homecooked meals and they chatted. Mr. Celani told her he was too ill to work, but they did not discuss his illness or his debts to her. Anthony had asked her to avoid those topics so as not to stress him. She continued to believe that he could not work because of his brain cancer.

[27] In his evidence quoted in para. 22 above, Mr. Celani acknowledged the meeting on August 9, 2020. But he did not respond to Ms. Elser’s evidence about his appearance or their discussions about his not working and seeing only doctors and family.

[28] Through the fall of 2020, Anthony continued to ask Ms. Elser not to pursue Mr. Celani for his debts, and promised to cover some of Mr. Celani’s payments in the meantime. As a result, Ms. Elser continued to refrain from contacting Mr. Celani.

[29] On October 13, 2020, Ms. Elser texted Anthony about needing to make a repayment demand on Mr. Celani for tax purposes:

We need to talk about what happens if this isn't repaid really soon. In order to claim an unrecoverable debt we're going to have to amend our 2019 tax returns and send Jawaid [i.e. Mr. Celani] a registered letter. We REALLY

don't want to do that but we're midway through October and no closer to getting repaid.

[Emphasis added.]

Anthony's Promissory Note

[30] In October 2020, Ms. Elser asked Anthony for a promissory note, which she told him was on the advice of her tax accountant. Her evidence is that she was hoping to write off the overdue debt from the Small Loan as a bad debt.

[31] In November 2020, Ms. Elser emailed Anthony that the amount of the promissory note should be \$450,000, as this was her calculation of what Mr. Celani would owe her by early 2021 when the promissory note was due.

[32] On November 10, 2020, Anthony gave Ms. Elser a signed promissory note for \$480,000, payable on or before January 15, 2021 ("Promissory Note"). Having made it for \$30,000 more than she requested, he asked her to loan him the additional \$30,000 but she refused, though she did send him \$500 for his legal fees.

[33] The key paragraph of the Promissory Note says this:

FOR VALUE RECEIVED, the receipt of which is acknowledged, Anthony Celani, the undersigned, has assumed the loan taken by Jawid Celani and hereby promises to pay to the order of Lisa Elser and Charles Thomas Schlegel, ... the principal sum of Four Hundred Eighty Thousand (\$480,000.00) Dollars shall become entirely due and payable on January 15, 2021 (the "Due Date").

[34] Ms. Elser deposes that she agreed with Anthony that she would not pursue Mr. Celani for his debts while he suffered from his cancer and could not work, if Anthony paid her the amount under the Promissory Note by its due date of January 15, 2021. She deposes that, at the time, Anthony told her the Promissory Note was "his guarantee to us that he would pay us the money he owed us and the money the Defendant had borrowed from us if the Defendant continued to be unable to pay us because he was unable to work due to the brain tumour." Her evidence is that she agreed to continue "to forbear pursuing the Defendant for the Debt whilst he allegedly battled the Brain Cancer and allegedly could not work."

[35] Ms. Elser's affidavit includes hundreds of texts between her and Anthony over the next eighteen months or so, which can only be described as her repeatedly begging him for money as her finances crumble and her husband succumbs to cancer. For his part, Anthony's emails strung her along, constantly suggesting he was about to pay something and then giving excuse after excuse for why he did not.

[36] By mid-January 2021, Anthony's Promissory Note was overdue, and so Ms. Elser asked him "for a further note in forbearance of suing the Defendant, but he refused and stated that it was the Defendant's Debt".

[37] Mr. Schlegel died in February 2021.

[38] By September 2022, Ms. Elser was resigned to the fact that Anthony was never going to pay her anything and she would have to sue him on the Promissory Note. In his texts, Anthony told her the debt remained his brother's, not his. For example, on September 2, 2022, he wrote to her:

U can do what ever u like ! If u push me one more time we will be DONE !! I'm not freaking out and I'm not threatening u! So one more time I don't owe you this money but I can give u this money! Do u understand the different?! I guess not

...

If I back off u would never get anything from joe. Let's see the end of the month don't push me there Lisa

[39] On September 21, 2022, as Ms. Elser prepared her lawsuit, she emailed Anthony to again say that she would accept a new promissory note on certain terms. The record indicates that Anthony forwarded her email to Mr. Celani. Her email stated in part:

I'm still treating this as a friendly situation. I don't want to harm you or your family. I just want to stop being harmed since more than two years of non-payment have harmed me.

[40] Anthony responded the next day saying it was Mr. Celani who got her money and with whom she still had the Loan Agreement:

You gave your money to Joe, not me. I give you the promise note as your request for your accountant for taxes which I have your text in that regards!

There's nothing to be settled with us! ... You have also a contract with Joe from 2019 which I was not there nor I knew you back then.

[Emphasis added.]

[41] Anthony sent another text later that day:

I helped Joe while he was in hospital! If he was not around it would be a different matter but he's well, healthy, walking around, laughing at me! He's responsible for his actions. Ask him!

Alberta Litigation

[42] By a Statement of Claim, filed on October 5, 2022 in the Court of King's Bench of Alberta, Ms. Elser sued Anthony on the Promissory Note for \$480,000 plus interest. She sued in Calgary because that is where Anthony resided.

[43] Her evidence is that she sued only Anthony, and not Mr. Celani as well, because she still thought "he was battling cancer and could not work, and I had promised not to sue him whilst he was too ill to work."

[44] Her Alberta Statement of Claim stated in part:

3. Pursuant to two personal loan agreements dated October 3, 2019, Ms. Elser and her husband loaned a total of \$390,000.00 to the Defendant's brother, Jawaid Celani, with interest accruing at 20% per annum (the "Loan"), the earlier of which was repayable by February 3, 2020.
4. Jawaid Celani failed to repay the Loan in accordance with the terms of the Loan.
5. As of November 10, 2020, the interest owing on the Loan was \$86,120.55, and the total amount owing on the Loan, inclusive of interest, was \$476,120.55.
6. On November 10, 2020, the Defendant, through his legal counsel, assumed the Loan and provided Ms. Elser and late husband with a promissory note (the "Promissory Note") for \$480,000.00 ("Principal Sum").
7. Pursuant to the Promissory Note, the Defendant agreed:
 - a. To assume the Loan;
 - b. To pay the Principal Sum to Ms. Elser and her husband by January 15, 2021; and
 - c. That any payments would first be applied to the interest with the balance, if any, to be applied to the Principal Sum.

8. In consideration of the Defendant's assumption of the Loan and the Promissory Note, Ms. Elser and her husband agreed to not commence any proceedings against Jawaid Celani to recover the Loan.

...

14. Contrary to the terms of the Promissory Note, the Defendant has failed to make any payments as required under the Promissory Note and the full amount owing on the Promissory Note is due and owing.

[Emphasis added.]

[45] Anthony's statement of defence, filed October 19, 2022, said that his brother had lied to him about having cancer and was responsible for the loan. Ms. Elser's evidence is that this was the first time she understood that Mr. Celani's brain cancer might not have been true.

[46] On January 23, 2023, the Alberta court granted judgment to Ms. Elser against Anthony for \$480,000, plus statutory interest, based on Anthony's acknowledgement that he had signed the Promissory Note. The transcript includes Anthony's submission that he did so because his brother duped him about his cancer. Anthony submitted that "He lied about his tumour. He lied about being sick or dying".

[47] Ms. Elser's evidence, uncontested by Mr. Celani, is that she has been unable to collect anything from Anthony on her Alberta judgment.

These Proceedings

[48] By letter to Mr. Celani of April 14, 2023, Ms. Elser demanded payment of \$466,321. On April 18, Mr. Celani's lawyers responded by referring to paragraph 8 of the Alberta Statement of Claim, which pleaded her agreement not to pursue Mr. Celani, and said that any proceedings brought against Mr. Celani would therefore be an abuse of process.

[49] Ms. Elser filed her Notice of Civil Claim in these proceedings on August 17, 2023.

Analysis

[50] Both sides took the position that Ms. Elser's claim is suitable for determination by summary trial.

[51] I agree that the facts can be found by which to determine the case. The essential facts are uncontested and the key issues are questions of law, determinable under Rule 9-6(5) of the *Supreme Court Civil Rules*. Given that, plus the amounts involved and the parties' desire for decision by summary trial, decision in this manner is clearly in the interests of justice.

Key Findings of Fact

[52] There is no dispute that Mr. Celani has repaid Ms. Elser only \$16,500 under the Loan Agreement, made up of \$5,500/month from October to December 2019. It is also uncontested that she has recovered nothing from Anthony under her Alberta judgment against him.

[53] Ms. Elser's affidavits make clear that, for years, she was patient, kind and generous towards Mr. Celani, while she thought he had brain cancer and could not work, and that his failure to repay what he owed caused her terrible financial stress while she dealt with the terminal illness of her husband .

[54] Despite the lack of clarity surrounding Mr. Celani's medical condition, and whether he misled Anthony and Ms. Elser about it, three things are clear on the evidence.

[55] First, in March 2020, Anthony told Ms. Elser that Mr. Celani had brain cancer and could not work.

[56] Second, Ms. Elser believed this from around March 2020 until October 2022, and that is why she did not pursue him on his debts to her under the Loan Agreement and the Small Loan. Ms. Elser's evidence in that regard is uncontradicted, and there are references in her correspondence with Anthony to

Mr. Celani's brain tumour, his inability to work, and her sending Anthony articles for him about brain cancer.

[57] Third, Ms. Elser's affidavit contains much evidence, gathered after the fact, of Mr. Celani doing construction work throughout 2020-2022, which Mr. Celani does not deny in his evidence.

[58] I accept Ms. Elser's evidence about the terms of her arrangements with Anthony about Mr. Celani's debts. That is, I accept that her initial agreement with Anthony was that, if Ms. Elser held off from pursuing Mr. Celani for his debts to her while he was sick and could not work, Anthony would make some payments to her towards those debts. I also accept her evidence that, when Anthony gave her the Promissory Note, in return she agreed to continue to forbear from pursuing Mr. Celani while he battled his cancer and could not work. Ms. Elser's evidence on these points is consistent with her correspondence with Anthony at the time, and consistent with Anthony's pleadings and submissions in the Alberta litigation.

[59] Her evidence on these points is also uncontradicted. Mr. Celani's evidence does not suggest he ever discussed with Ms. Elser the terms of her agreements with Anthony or how those agreements affected his debt to her under the Loan Agreement.

[60] His evidence, quoted in para. 22 above, is that he and Anthony agreed Anthony would "assume complete liability" for his debt, and, in exchange, Ms. Elser "would not pursue the debt from me." He also deposes that "It was at all material times thereafter understood as between the Plaintiff, Anthony, and I that Anthony had assumed my debt to the Plaintiff under the Loan Agreements."

[61] I find that this evidence from Mr. Celani about what Ms. Elser had agreed to is, at best, his subjective understanding based on discussions with Anthony. There is no admissible evidence to suggest that Ms. Elser ever actually ever discussed, let alone agreed to, terminating or extinguishing Mr. Celani's debt to her under the Loan

Agreement, or agreed that she would never pursue him for that debt, and I accept her evidence that those were not terms she ever agreed to with Anthony.

Is the Claim Time-Barred?

[62] I find Ms. Elser’s claim is not time-barred under the *Limitation Act* because, on the express terms of the Loan Agreement, it did not become due and payable until June 6, 2022, which is well within two years of the claim being filed on August 24, 2023.

[63] The relevant sections of the *Limitation Act* are:

Basic limitation period

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

...

General discovery rules

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[64] Mr. Celani argued that time began to run, not in June 2022, when the debt became due, but in January 2020, when he stopped making the interest payments called for under s. 2.

[65] I disagree. Under the terms of the Loan Agreement, his failure to make those interest payments did not make the loan due unless and until Ms. Elser made a declaration to that effect.

[66] Under the wording of ss. 2 and 3 of the Loan Agreement, Mr. Celani's failure to make the interest payments gave Ms. Elser a choice. She could either (a) rely on this default to declare the principal and interest to be immediately due and payable, or (b) not make that declaration, in which case the unpaid monthly amounts were to be added to the principal and the monthly interest recalculated.

[67] To repeat these provisions for convenience:

Payment

2. This Loan will be Interest Only for 30 months. The monthly interest due is \$5500 on the 6th of each month. If payments are below the monthly required interest, the amount not paid will be added to the principal and the monthly interest recalculated. Amounts above that will be deducted from the Principal and can be used to shorten the duration of the loan. The Principal is due in full on June 6 2022.

Default

3. Notwithstanding anything to the contrary of this Agreement, if the Borrower defaults in the performance of any obligation under this Agreement, then the Lender may declare the principal amount owing and interest due under this agreement at that time to be immediately due and payable.

[Emphasis added.]

[68] By these provisions, the Loan Agreement made the loan what is sometimes called a "contingent" or "delayed-demand" loan, meaning a loan that is to be repaid on the earlier of a future specified date or the occurrence of a future specified event (*Kong v. Saunders*, 2014 BCCA 508, para. 18).

[69] When a loan is to be repaid at a particular time in the future, the limitation period does not begin to run until that time specified (*Ewachniuk Estate v. Ewachniuk*, 2011 BCCA 510, at para. 93). The limitation period for contingent loans begins to run on the repayment date or the occurrence of the contingency. This is because an action for repayment of the loan cannot be brought prior to the repayment date or the occurrence of the contingency (*Kong* at para. 19).

[70] In this case, this loan was to be repaid on the earlier of June 6, 2022, or a default by Mr. Celani and declaration by Ms. Elser that the principal and interest were immediately due and payable. On the evidence, the latter never occurred.

Ms. Elser never declared the principal and interest to be immediately due and payable because of Mr. Celani's defaults. Therefore, the limitation period did not begin to run until the due date of June 6, 2022.

[71] Ms. Elser's evidence, which I accept, is that she understood that under the Loan Agreement, Mr. Celani could choose not to make the interest payments, in which case they would be added to the principal. As she points out, she had sent him a note to that effect in October 2019, explaining that the consequences would be that the unpaid interest was added to the principal amount of the loan.

[72] Mr. Celani argues that Ms. Elser demanded repayment of the loan on February 21 and April 9, 2020, and therefore time began to run on her claim then. Their February communications said this:

2020-02-21, 3:48 PM

[Lisa Elser]

Jawaid we're hurting

We're owed 2 months interest (Jan and Feb) plus 30500 for the last payment on the emergency loan

We don't need all of it but we sure need a bunch

And I hate feeling like I'm having to chase you down. But we can't pay our bills and I'm struggling to sell things I don't want to have to sell

...

Jawaid when. You've pushed the date out several times now

2020-02-21, 3:53 PM

[Lisa Elser]

I want to throw up. We took all our cash to give you in the fall. We'd have to sell off investments

2020-02-21, 3:55 PM

[Jawaid Celani]

I will be back towards end of next week. I will bring our account current. The balance of emergency loan as well as the interest for Jan and February .

2020-02-21, 3:56 PM

[Lisa Elser]

That means I will not be able to pay off the credit card and will have interest on 15k

2020-02-21, 3:57 PM

[Lisa Elser]

I'm sorry to be so upset. I never again wanted to be in this financial situation and it's stressing me out

2020-02-21, 3:59 PM

[Jawaid Celani]

I understand, you have a right to be upset. Once I am back , I will bring our account to currant and once we are current, your payments will be back to normal starting March.

2020-02-21, 3:59 PM

[Lisa Elser]

Ok. Can you cover our interest? I haven't owed on a card in over 20 years.

2020-02-21, 4:00 PM

[Lisa Elser]

It's going to be like 500

2020-02-21, 4:00 PM

[Jawaid Celani]

Yes I will pay the interest .

2020-02-21, 4:02 PM

[Lisa Elser]

Thank you. Please pays us before March. I know you're in a tough place with your mom and I understand. It's that we literally gave you all the money I needed to run my business and now that's all on a card

2020-02-21, 4:04 PM

[Jawaid Celani]

I sincerely apologize for all the stress and inconvenience. I did not expect to be here as long as I have .

I will .

2020-02-21, 4:04 PM

[Lisa Elser]

I know. Just please be sure that no matter what we're whole before March

We love you. You know that

2020-02-21, 4:06 PM

[Jawaid Celani]

Again I apologize and feel horrible to stress you.

[73] Their April communications said this:

2020-03-31, 9:52 AM

[Anthony Celani]

What's the fill amount he owes u please

2020-03-31, 9:55 AM

[Lisa Elser]

47k plus 330k

47 is what's back due. 330 is the principal

2020-03-31, 10:07 AM

[Anthony Celani]

Is 47 with the interest?

2020-03-31, 10:08 AM

[Lisa Elser]

That's interest on the main loan from Jan - March plus the rest of the 60k loan from oct

2020-03-31, 10:09 AM

[Lisa Elser]

31 is from the October loan. The rest is interest overdue. I'm not add anything extra for the lateness or our CC interest or pension fee

...

2020-04-09, 4:57 PM

[Lisa Elser]

Any joy? I feel [terrible] about this, but I need to ask for the now overdue April payment if this stretches into next week. Tomorrow is a holiday. We've had to apply for the cerb payments bc my business is effectively closed until at least June. We already had to take \$ from our investments

2020-04-09, 4:58 PM

[Lisa Elser]

I know you're doing everything you can. We're just increasingly hurting

[74] In my view, in neither communication did Ms. Elser give notice of default or declare the principal and interest due and payable. Her communications certainly never reached the "clear and unequivocal" level required for a demand to trigger the running of a limitation period (*Campbell v. Campbell*, 2021 ONSC 3162, paras. 17-18; *Smith v Uhersky*, 2019 ABQB 761, paras. 19-20).

[75] In the February messages, initially Ms. Elser asked for January and February interest payments and repayment of \$30,500 under the Small Loan. Later, she asked only for \$500 to cover the interest on her credit card debt.

[76] In the April messages, she advised of the full amount owing under the Loan Agreement, but never said she was giving notice of default or demanding payment in full. Furthermore, these messages were to Anthony, with no suggestion they were to be communicated to Mr. Celani, and it was Mr. Celani to whom she had to give notice of any s. 3 declaration under the Loan Agreement.

Was There a Novation?

[77] Novation is a trilateral agreement by which an existing contract is extinguished and a new contract brought into being in its place. Because consent is key, novation may not be forced upon an unwilling creditor. In the absence of an express agreement, the court should find novation only if the circumstances are compelling (*National Trust Co. v. Mead*, [1990] 2 S.C.R. 410, at 426-27).

[78] The parties agree that the following is required to establish novation:

- i. The new debtor must assume the complete liability;
- ii. The creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor;
- iii. The creditor must accept the new contract in full satisfaction and substitution for the old contract; and
- iv. The new contract must be made with the consent of the old debtor.

See *Community Futures Development Corp. v. Dore River Forest Products Ltd.*, 2016 BCSC 1036, at paras. 45-47.

[79] A party wishing to establish novation has the onus of proving all four points (*Community Futures* at para. 47).

[80] In my view, novation fails on points (i), (ii) and (iii).

[81] Starting with (ii) and (iii), on the evidence, Ms. Elser never agreed that Anthony was taking responsibility for Mr. Celani's debt to her in full satisfaction and substitution for Mr. Celani's obligations under the Loan Agreement. In other words, she never agreed that Mr. Celani's obligations to her under the Loan Agreement were being extinguished.

[82] Rather, Ms. Elser's uncontested evidence, which I have accepted, is that her agreement with Anthony was that she would forbear against Mr. Celani while he was ill and not working, so long as Anthony would agree to also be responsible for paying his brother's debt. Her evidence and the communications between her and Anthony indicate their mutual understandings that Mr. Celani was still liable for the debts under the Loan Agreement (see paras. 24-41 above).

[83] As counsel for Mr. Celani conceded, there is no evidence of an express agreement by Ms. Elser that Anthony's promise to pay would extinguish Mr. Celani's debt to her under the Loan Agreement. In fact, there is no evidence that extinguishing Mr. Celani's debt, or releasing him from his liability to her, was ever raised with Ms. Elser by Anthony or anyone else, let alone agreed to by her. Mr. Celani never communicated with Ms. Elser about the arrangements reached between Anthony and her regarding the Loan Agreement. He has no admissible evidence to give about whether Ms. Elser ever actually agreed to extinguish his debt to her.

[84] Regarding (i), there is a more technical point, which is that Anthony never assumed the complete liability under the Loan Agreement. His Promissory Note does not include the 20% interest obligation in s.1 of the Loan Agreement. This was recognized by the Alberta court, which awarded Ms. Elser interest under their pre-judgment interest statute, because – as Alberta counsel for Ms. Elser pointed out and the court accepted – “the contractual rate entered into with the brother [Mr. Celani] doesn't apply to [Anthony] in any event”.

[85] Mr. Celani relied on two aspects of the case to argue that the overall circumstances suggested that a novation did occur.

[86] First, the Promissory Note says that Anthony “has assumed the loan taken by Jawaid Celani”. In my view, this indicates only that Anthony has agreed to be responsible to Ms. Elser for this loan, up to the amount of \$480,000. But neither the terms of the Promissory Note, nor the parties’ communications surrounding it, suggest that, in exchange, Ms. Elser agreed to extinguish Mr. Celani’s liability to her under the Loan Agreement.

[87] As stated by the Court of Appeal in *Prospect Mortgage Investment Corp. v. Van-5 Developments Ltd.*, [1985] B.C.J. No. 2472, novation is a question of fact, having regard to all the circumstances, and does not follow just from documentation whereby a new debtor agrees to assume the original debtor’s liability:

[43] Because novation is essentially an issue of fact, it would be wrong in principle to say, as a generalization, that assumption agreements or extension agreements, or other particular classes of documents, do or do not create a novation. The question must be decided in each case having regard to all of the circumstances of which the language in the new contract is only one.

[88] Second, Mr. Celani relied on the fact that Ms. Elser sued Anthony in Alberta and not Mr. Celani as well, and that she included the following paragraph in the Alberta Statement of Claim:

8. In consideration of the Defendant’s assumption of the Loan and the Promissory Note, Ms. Elser and her husband agreed not to commence any proceedings against Jawaid Celani to recover the Loan.

[89] In my view, this pleading is ambiguous. It can be read to refer only to Ms. Elser’s agreement that, in exchange for Anthony agreeing to also be responsible for Mr. Celani’s debt, she agreed not to sue Mr. Celani at that time. In other words, she agreed not to commence a lawsuit against Mr. Celani at the time, because of Anthony’s Promissory Note and because she understood he was sick and not working. But that is not the same thing as agreeing never to sue him even if Anthony did not repay her and Mr. Celani recovered.

[90] I have accepted Ms. Elser’s uncontested evidence – supported by the contemporaneous correspondence between her and Anthony – that her agreement

with Anthony was that she would forbear against Mr. Celani only while he was ill and not working, and so long as Anthony would agree to also be responsible for paying his brother's debt. I have also accepted her uncontested evidence that she continued to believe that Mr. Celani was ill and not working when she commenced her Alberta lawsuit. Even if this pleading were interpreted to suggest Ms. Elser had agreed to something more regarding Mr. Celani's debt to her, I have found on the evidence that she did not in fact agree to anything more.

[91] For these reasons, Mr. Celani has not established a novation whereby his obligations to Ms. Elser under the Loan Agreement were terminated.

Is There an Abuse of Process?

[92] Mr. Celani argues that Ms. Elser's claim should be dismissed as an abuse of process because it was inefficient for her not to have sued him in the same proceedings as Anthony. He provided no precedent for dismissing a case on that basis in circumstances bearing any resemblance to this case.

[93] Mr. Celani relies on the following summary of abuse of process from the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63:

37 ... [T]he doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute".

... It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[Citations omitted.]

[94] Ms. Elser is not attempting to relitigate a claim already determined by the court. Mr. Celani's liability was not in issue in the Alberta proceeding. Nor was the Alberta court asked to consider the Loan Agreement or the issue of novation. The liability of Anthony and Mr. Celani arose from different contracts, with different parties. I see no inconsistencies between the key findings in Ms. Elser's Alberta

judgment – that Mr. Anthony had signed the Promissory Note and so was liable under it – and the findings and remedies sought here. The Alberta court made no findings regarding the Loan Agreement.

[95] As stated by our Court of Appeal in *Iaci v. Martorana*, 2014 BCCA 281, para. 25, “It is well settled law that a plaintiff may choose to sue separately on a guarantee or on the debt. Success on a guarantee does not bar a separate action on the debt if there remains a shortfall.”

[96] In my view, Ms. Elser seeking repayment from Mr. Celani under the Loan Agreement bears no resemblance to a misuse of the court’s procedure.

Conclusion

[97] Mr. Celani is ordered to pay Ms. Elser \$330,000, plus outstanding interest calculated under ss. 1 and 3 of the Loan Agreement. This calculation should take account of the \$16,500 paid in October to December 2019.

[98] If the parties are unable to agree on the interest calculation, that issue may be determined on application to a Registrar under Rule 18-1, and the results certified by the Registrar so as to be binding on the parties.

[99] Regarding costs, Ms. Elser’s notice of application seeks costs under the terms of the Loan Agreement, which says:

Costs

7. All costs, expenses, and expenditures including, without limitation, the complete legal costs incurred by enforcing this Agreement as a result of any default by the Borrower, will be added to the principal then outstanding and will be immediately paid by the Borrower.

[100] Subject to the parties wishing to make submissions on this issue, my view is that costs should be awarded to Ms. Elser in the terms of this clause, and so Ms.

Elser would have her actual, reasonable legal costs in these proceedings on a solicitor-client basis.

“Coval J.”