CITATION: Novastar Corporation Inc. v. Amoroso, 2025 ONSC 783
COURT FILE NO.: CV-23-00702870-0000
DATE: 20250204

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
NOVASTAR CORPORATION INC. Plaintiff/Moving Party	*R. Christopher M. Belsito*, for the Plaintiff/ Moving Party
– and –	
MICHAEL AMOROSO and DANIELLE AMOROSO Defendants/Responding Parties	*Mauro Marchioni*, for the Defendants, Responding Parties
	HEARD: December 6, 2024

L. BROWNSTONE J.

Introduction

[1] The plaintiff, Novastar, lent the defendants $250,000 in 2017. The defendants, a married couple (Michael and Danielle), each signed a promissory note for the principal amount of $250,000. The note required monthly interest-only payments of $2,500. Interest was fixed at 12% annually, calculated and compounded monthly.

[2] The note is payable on demand,

[3] The last interest payment was made in either the fall of 2019 or January of 2020.

[4] The claim was not commenced until the summer of 2023.

[5] Novastar seeks summary judgment for the amount owing under the note plus interest, for a total of $450,564.44 as of the date of the hearing.

[6] Michael and Danielle's defence is that the claim is statute barred. Danielle also relies on the doctrine of *non est factum*. The defendants advised the court they were not pursuing the defence of frustration for purposes of the summary judgment motion.

[7] In their written materials, the defendants stated they were seeking a "boomerang" summary judgment dismissing the claim against them. This was not pursued in oral argument, and the defendants only sought an order dismissing the plaintiff's motion and requiring the action proceed to trial.

[8] For the reasons that follow, I grant summary judgment to the plaintiffs. I order the defendants to pay $450,564.44 as of December 6, 2024.

The test for summary judgment

[9] Under r. 20.04 of the *Rules of Civil Procedure*, the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence, or if the parties agree to have all or part of the claim determined by summary judgment and the court is satisfied that it is appropriate to grant it. Rules 20.04(2.1) and (2.2) provide the court with expanded fact-finding powers to make this determination.

[10] In accordance with *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 57, in order to be appropriate for summary judgment, the evidence before the court must be such that a judge is confident that she can fairly resolve the dispute.

[11] The court must first determine if there is a genuine issue requiring trial based only on the evidence before it, without using the extended fact-finding powers in r. 20.04. There is no genuine issue requiring trial if the evidence allows the court to fairly and justly adjudicate the dispute through this proportionate procedure: *Hryniak*, at para. 66.

[12] If there appears to be a genuine issue requiring a trial, the court must determine if the need for a trial can be avoided by using the powers in rr. 20.04(2.1) and (2.2). These powers may be used if it would not be against the interests of justice to do so: *Hryniak*, at para. 66.

[13] The moving party bears the evidentiary burden of showing there is no genuine issue requiring a trial. Parties are required to put their best foot forward: *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11.

[14] I am confident that I am able to find the facts on the materials before me, and that I am able to fairly and justly adjudicate this dispute using this proportionate procedure.

Issue One: Is the claim statute-barred?

[15] Michael and Danielle admit they signed the promissory note dated October 27, 2017. Michael was pursuing an opportunity with a business partner, Mr. Chetti. The funds were advanced to Mr. Chetti's counsel, Mr. Pascuzzi, in trust. Mr. Pascuzzi later distributed those funds, apparently at Mr. Chetti's direction and, according to Michael, without Michael's knowledge or agreement.

[16] None of this is of any moment in this motion because the defendants do not deny that the funds were advanced for their benefit. They admit signing the promissory note. Michael relies solely on a limitation defence. Danielle relies on both a limitation defence and a *non est factum* defence.

[17] The parties agree the promissory note was a demand note. Therefore, the limitation period is governed by s. 5(3) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, which provides that for the purposes of the two-year limitation period, "the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made."

[18] In accordance with s. 4 of the *Limitations Act, 2002*, Novastar had two years from the time a demand for performance was made to commence its claim.

[19] As explained by the Court of Appeal in *Bank of Nova Scotia v. Williamson*, 2009 ONCA 754 at para. 19 in reference to s. 5(3):

> This amendment demonstrates the intent of the legislature that for all demand obligations, a demand is a condition precedent for the commencement of the limitation period. The legislature may be taken to have recognized that this puts the creditor in the position to extend the limitation period by failing to make a prompt demand. However, it creates more certainty in establishing the commencement date for the limitation period.

[20] The question that must be answered, then, is when did Novastar make a demand for the payment of the debt and thereby initiate the running of the limitation period?

[21] A demand must be clear and unequivocal: *Williamson* at para. 20; *Campbell v. Campbell*, 2021 ONSC 3162 at para. 18. The onus is on the defendant to establish that a demand was made: *Talsky v Waxman*, 2016 ONSC 1953 at para. 35.

[22] The plaintiff's written materials argue that the limitation period should be applied flexibly based on "equitable principles". The plaintiff argues that the defendants do not come to court with clean hands, because they made a suspicious conveyance of the matrimonial home from husband to wife, and because they did not assiduously seek the return of their funds from Mr. Chetti.

[23] The plaintiff relies on *602533 Ontario Inc. v. Shell Canada Ltd.* (1998) (ON CA), 37 O.R. (3d) 504 for this proposition. That case does not, however, stand for the proposition that the court can be flexible in its application of limitation periods. Rather, the Court there was prepared to assume that proposition might apply in some circumstances, without deciding it for purposes of the appeal before it. Further, that decision predates the *Limitations Act, 2002*. The Court of Appeal has now clearly determined, applying the *Limitations Act, 2002*, that a limitation period cannot be extended through the application of the common law doctrine of special circumstances unless the transition provisions apply, which they do not here. *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401.

[24] The plaintiff also argued in its written materials that the defendants acknowledged the debt in the relevant time frame and therefore cannot rely on a limitations defence. For an acknowledgement to have legal significance with respect to the limitation period, it must be in writing: s. 13(10) *Limitations Act, 2002*. There is no written acknowledgment in this case.

[25] In oral argument, the plaintiff's primary position was that it first demanded repayment in May 2023, and therefore the claim was commenced within the limitation period. I accept this is the case for the reasons that follow.

[26] The plaintiff's principal states that he prepared a formal letter and attempted to provide it to Michael in May 2023. The letter stated:

> For the last 3 years I requested payment at least 4 times monthly on the loan, plus interest payment as per loan agreement.
>
> I do not want to escalate this matter any further
>
> I recommend Novastar Corporation Inc, register[ed] a second mortgage at 8 Glenwood Cres. within the next 15 days, failing to do so the entire loan and unpaid interest shall be due.
>
> I have consulted a lawyer and will be proceeding accordingly If we are unable to work something out.

[27] The claim was issued about two months later, on July 14, 2023. The plaintiff argues that until May 2023, it had not made a formal demand for repayment. Rather, there were discussions between the parties about the debt, and the plaintiff agreed to wait for repayment given the personal circumstances of the defendants, which included serious illness.

[28] The plaintiff's supplementary affidavit sets out various payment plans that were proposed between the parties, involving the sale of a condominium, or borrowing money from Michael's father, to satisfy the debt. After setting out these potential arrangements, the affidavit states: "This too never came to fruition and was the final straw before I determined litigation was the only route."

[29] The defendants argue that demand on the note was first made in either October 2019 or January 2020, whenever the last interest payment was made. The claim was commenced in July 2023. They say the claim is therefore statute-barred, even allowing for the suspension of limitation periods during COVID-19 in Ontario for 6 months in 2020.

[30] The defendants rely on the following in support of their contention that demands were made more than two years before the claim was commenced.

[31] First, the statement of claim contains the following paragraphs:

> 6. The Plaintiff states that the Defendants first defaulted on the Promissory Note on or about January 2019, by failing to make the requisite interest payment. The Plaintiff states thereafter, it demanded repayment of the Principal and Interest on several occasions, pursuant to the terms of the Promissory Note.
>
> 7. Despite repeated demands, the Defendants have refused and/or neglected to repay the Plaintiff monies due and owing and are thereby in breach of the terms stipulated in the Promissory Note.

[32] In cross-examination, paragraph 6 of the claim was put to the plaintiff's representative, and the following exchange occurred:

> Q. Okay. It indicates here in Paragraph 6 of your Statement of Claim, and you told me you agree with what's contained in it, that on or about January 2019 the Defendants first defaulted on the promissory note, correct?
>
> A. Yes.
>
> Q. I take it your position was, after that default, that the note was due.
>
> A. Yes.

[33] Finally, the plaintiff's affidavit contains the following sworn statement:

> The Defendants first defaulted on the Promissory Note in or about January 2019 by failing to make the requisite interest payment. Thereafter, I demanded repayment on several occasions, to no avail. Attached hereto and marked as Exhibit "D" to this my Affidavit is a true copy of the schedule of payments I recorded. The last payment received by the Defendants was on or about January 2021 [*stated to be an error and should say 2020*] for the amount of $2,500.00. The Defendant, Michael Amoroso, attended at my office located at 600 Bowes Road, unit 35, Concord, Ontario, in and around that time and hand delivered me cash in $100 bill denominations.

[34] The defendants state that the plaintiff's shift from stating that it had made multiple demands to stating on this motion it had made a singular demand is sufficient to raise a genuine issue requiring a trial.

[35] I do not agree. It was the defendants' onus to put their best foot forward, and to give evidence of a clear and unequivocal demand for payment, in furtherance of their limitation defence. The defendants have filed no evidence demonstrating that a demand had been made. The plaintiff's affidavit does not establish that any demand was made after the last payment was received.

[36] In *Williamson*, the motions judge, upheld by the Court of Appeal, found that a letter that contained a condition that if payment was not received, steps for recovery would be taken, did not constitute an unequivocal demand for payment. That letter was contrasted to a letter that stated: "… we hereby demand payment from you", which was found to be a clear and unequivocal demand. While Williamson involved a guarantee, its analysis of what constitutes an unequivocal demand is compelling. I note this view has been applied outside the guarantee context: *Campbell, Talksy.*

[37] The statement of claim does state that the plaintiff demanded repayment on several occasions after the interest payments ceased. The cross-examination on that paragraph established the plaintiff's view that the note was due after default. However, there is a difference between the note being due and a clear, unequivocal demand for payment. The cross-examination does not delve into, and does not establish, any occasion on which an unequivocal demand for payment was made.

[38] The plaintiff's affidavit recounts discussions between the parties. The details are consistent with the conclusion that it was only when it became evident that payment would not be forthcoming that the plaintiff decided to make a formal demand and proceed with enforcement steps.

[39] The defendants dispute the plaintiff's evidence about the discussions about the loan repayment. What the defendants do not do, in any of their evidence, is establish there was a single statement or piece of documentary evidence where the plaintiff unequivocally demanded repayment of the loan. Their motion materials are entirely devoid of such evidence.

[40] I find that the defendants have not demonstrated that the plaintiff made any clear and unequivocal demand for repayment on any specific date. At trial, the defendants would bear the burden of proving the limitation defence. On summary judgment, they are required to put their best foot forward and I am entitled to assume no further evidence would be available at trial.

[41] There is no evidence that any demand, within the meaning of s. 5(3) of the *Limitations Act, 2002*, was made at any time before March 2023. The defendants have put forward no other defence, other than Danielle's *non est factum* defence which I will address below, to their admitted obligations under the note. I find that the plaintiffs have therefore established that there is no genuine issue requiring a trial. There is no evidence supporting the claim that the action is statute-barred and I find that it is not. As this was Michael's only defence, I find that he owes the plaintiff the sums provided for in the promissory note, with interest as provided for in the note, in the amount of $450,564.44 as of the date this motion was argued.

Non est factum

[42] Danielle claims that she had no discussions with Michael or the plaintiff about the promissory note before she signed it. She says she signed it because Michael told her not to worry about it. She claims she did not read or understand the documents and did not receive independent

legal advice. She claims that if she had known she would be personally liable to pay the amount in the promissory note plus interest, she would not have signed the document.

[43] The plaintiff's representative deposed that Danielle had been involved in another transaction between the parties, so that this was not the first time she was involved in their business dealings, and that it would not have loaned the funds to Michael without Danielle co-signing the note.

[44] The defence of *non est factum* is available when a signatory to a document is mistaken as to the nature and character of the document, for example, if Danielle had intended to sign something else, rather than a promissory note. However, the defence is not available when the signatory is merely careless and does not inquire about the consequences of signing a document: *Royal Bank of Canada v. Hussain*, 1997 CanLII 12198. A party cannot be willfully blind and then rely on the defence. Parties must exercise reasonable care when signing documents. Failing to read a document is failing to exercise reasonable care: *Gold Leaf Products Ltd. v. Pioneer Flower Farms Ltd*., 2015 ONCA 365 at para. 8.

[45] Danielle chose to rely on her husband. Although she may not have read the documents she does not describe any improper pressure brought to bear by her husband or anyone else. She failed to exercise reasonable care by not reading the documents. The defence of *non est factum* is not available to her.

[46] I find Danielle is also liable to the plaintiff under the promissory note.

Disposition

[47] The plaintiff's motion for summary judgment is granted. The defendants shall pay to the plaintiffs $450,564.44, plus the remaining pre-judgment, as well as post-judgment interest in accordance with the interest rate in the note.

[48] The parties are encouraged to agree on costs. Should they be unable to do so, the plaintiff may provide costs submissions of no more than three pages double spaced, along with a bill of costs and any offers to settle, within 7 days. The defendants shall have 7 days to respond, with the same page limits. There shall be no reply submissions without leave. These submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

Released: February 4, 2025

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REASONS FOR JUDGMENT

L. Brownstone J.

Released: February 4, 2025