

Claim No. SC.06.043896.00

**SUPERIOR COURT OF JUSTICE  
TORONTO SMALL CLAIMS COURT**

**B E T W E E N:**

**KLARA SOLODAR**

Plaintiff

- and -

**OLENA KAPLUN**

Defendant

**REASONS FOR JUDGMENT**

The trial of this action took place at Toronto on the 12<sup>th</sup> day of December 2007 and the 18<sup>th</sup> day of January 2008, with submissions on July 29, 2008.

**The Claim**

The Plaintiff's claim seeks to recover the sum of \$10,000.00 from the Defendant Olena Kaplun that the Plaintiff alleged she had loaned to the Defendant. The Plaintiff's Claim alleges she "loaned the sum of \$10,000.00 to the Defendant" by means of two cheques payable to "Cash", each in the sum of \$5,000.00 drawn on the Plaintiff's account with the Bank of Nova Scotia and dated the 4<sup>th</sup> days of October and November 2003 respectively. These cheques were given by the Plaintiff to the Defendant in person. No documentation contemporaneous to the delivery of those cheques by the Plaintiff to the Defendant was provided to the court that might assist in understanding the reason or terms upon which these moneys delivered and loaned to the Defendant. These reasons were provided in the Claim where the Plaintiff states she "loaned the sum of \$10,000.00 to the Defendant" and that the moneys advanced were to be repaid "in full one or two months after January 2004". The claim also includes claims for interest and costs.

At trial the Plaintiff stated that the moneys were a loan to fund the purchase of stock by the Defendant to open their new store expected to open before then (pages 22 *et. seq.* of "Proceedings at Trial").

### **The Defence**

The Defendant, Elena Kaplun responded to the Claim by filing a "Defendant's Claim" which has in fact attached thereto a Statement of Defence dated 10 November 2006, and which also incorporates a "Counterclaim" (this title being inserted in handwriting in the Defendant's Claim). The defence in its essence was to the effect that the \$10,000.00 proceeds of the two cheques were used by the Defendant to purchase 400 kilogram of red caviar for the Plaintiff. The Defence and Counterclaim also sought exemplary damages as well as injunctive relief for certain alleged conduct by the Plaintiff meant to demean and offend the Defendant's reputation within "the ethnic community". An amended Defendant's Claim was subsequently filed in which further details of the "Counterclaim" (Defendant's Claim) were asserted. I have chosen to treat the Defendant's Claim as both a Defendant's Claim and Statement of Defence. There being a discrepancy in the spelling of the Defendant's name in the Claim and Defendant's claim, at trial the Style of Cause was amended to reflect the correct name of the Defendant, being Olena Kaplun.

To support these different claims, the Court has the Plaintiff's evidence, the Defendant's evidence and that of her son, Yevgen Kaplun as well as copies of the cheques themselves.

### **Background**

The Plaintiff and Defendant are both immigrants from the former USSR who became friends (according to the Plaintiff) or friendly (according to the Defendant) since coming to Canada.

The Plaintiff ran a day care operation from her home as a business and was also trading on modest scale in caviar, an operation in which she sold caviar to restaurants, stores, shops, friends and individuals from her home. She apparently had access to some frozen storage facilities to deal with this business (Transcripts, Page 18). The Defendant and her husband, assisted by their son Yevgen Kaplun, operated a commercial meat, caviar and fish business and during the period of time that the cheques were advanced to the Defendant were engaged in setting up store to facilitate the expansion of the retail portion of their business.

### **The Evidence**

It was the evidence of the Plaintiff that she gave the two cheques in the amount of \$5,000.00 dated respectively on the 4<sup>th</sup> day of October and 5<sup>th</sup> day of November 2003 to

the defendant. Each cheque was drawn on her bank account and made payable to "cash". It was the Plaintiff's evidence that these cheques formed part of a loan of \$10,000 to the Defendant. The evidence in support of the Plaintiff's claim that the monies advanced by the two cheques constituted a loan and the terms of that loan, as alleged in the Claim is the evidence of the Plaintiff herself. The claim contained no reference to interest and in terms of repayment merely stated that "the Defendant promised to repay the loan in full one or two months after January of 2004".

The fact that the cheques issued to effect the loan were in both cases made payable to "cash" seems unusual. However, at trial the Plaintiff was asked why the cheques were made out to cash by Mr. Martinek, (the then agent for the Defendant) and the Plaintiff stated that ... "if I issue cheque on her name, cheque will be put on hold five days and if I issue cheque on cash she will receive cash immediately". I took this evidence to mean that had the cheque been drawn payable to a business or individual, the Defendant would not have been able to negotiate it with an immediate cash payment to her. Whether, from a view of banking practice this is so or not, is in this case not the issue, but I do accept that this was the belief of the Plaintiff. In fact, it appears the first cheque was cashed immediately with funds immediately provided to the Defendant. The Plaintiff further stated that as consideration for the giving of the loan the Plaintiff was to receive a box of caviar to the value of about \$400.00 from the Defendant, and that she never received this.

The Defendant acknowledged that she received the cheques from the Plaintiff and subsequently negotiated them. However, she denied that the monies thereby advanced constituted a loan. It was her evidence, supported by that of her son, Yevgen Kaplun, that these two cheques provided to her by the Plaintiff were not given as a loan, but were to be used to buy @ 400 kilos of red caviar for use by the Plaintiff as part of her caviar trading business run from her home. Yevgen Kaplun stated that his mother made other purchases for the Plaintiff from time to time and that these purchases were funded by cash provided by the Plaintiff to the Defendant. Yevgen Kaplun stated that he delivered the caviar purchased with the \$10,000.00 provided by the Plaintiff to the Plaintiff at her residence. He stated that the Plaintiff had three freezers in the garage, and the Defendant had earlier stated that the Plaintiff had another freezer in her house. Yevgen Kaplun stated that he in fact "stocked the caviar" by placing the caviar in these freezers. He further testified that the main supplier of Caviar in Toronto that the Defendants dealt with was a firm called ITFC and that they operated a cash business. He stated that in case of the first cheque that ITFC did accept the cheque but that in respect to the second cheque, they did not, and that it was negotiated through the Defendant's bank. There was no direct evidence as to how and where this cheque was negotiated, but apparently it was and the proceeds used to purchase caviar from ITFC.

I found the evidence of Yevgen Kaplun clear, detailed, specific, straight forward, and given unhesitatingly. I found it to be compelling and I accept and prefer it over the evidence of the Plaintiff. His evidence conformed with that given by Olena Kaplun. He described the process whereby the goods were ordered, paid for, obtained and then delivered by him personally to the Plaintiff. This was information within his personal knowledge. I find that the \$10,000.00 was in fact used to purchase @ 400 kilogram of red caviar from ITFC for the benefit of the Plaintiff. I further accept his evidence that he delivered this caviar and personally stocked it in the various freezers found in the premises of the Plaintiff (three in the garage and 1 in the house). I find that the sums advanced to or for the benefit of the Defendant not to be a loan, but payment for goods to be purchased by the Defendant on behalf of the Plaintiff.

Accordingly, I do not accept the evidence of the Plaintiff that the delivery by her of two cheques for \$5,000.00 to the Defendant made payable as cash, when negotiated, constituted a loan of \$10,000.00 to the Plaintiff.

### **FINDINGS**

Having found that the monies advanced were for the purpose of and in fact used to purchase red caviar of a value of \$10,000.00, and that this caviar was purchased by the Defendant (through her son) and delivered to the Plaintiff, it is clear that I reject the Plaintiff's allegation that the cheques were issued as a loan. There having been no loan I do not find it necessary to deal with the issue of the applicability of the Statute of Limitations to the transaction if seen as a loan.

However, had I come to the conclusion that the cheques were advanced as a loan, I was not satisfied with the evidence as to when the loans were due. The mere allegation made in this claim, even if confirmed under oath, did not satisfy me that the loan was due on the date alleged in the claim. The nature of the business relationship between Plaintiff and Defendant was rather vague and ill defined and was hardly "business like". On the basis of the evidence as a whole have been inclined to find that if the advances were a loan, that they were to be payable upon demand. The only clear evidence of any demand is the Claim itself. Thus, any limitation period would run from the date of demand being the date of service of the Claim.

The only other evidence provided to the Court that could conceivably suggest or relate to any demand, would be when Cando Credit was consulted by the Plaintiff (see Schedule "D" to the Claim). However, Cando did not give evidence. However, the only evidence in that respect is the acknowledgement of the Defendant that she received a call from a collection company sometime. That, in the circumstances of this case,

does not amount to a demand. Accordingly, in terms of the absence of a term of a loan, I do not think the Statute of Limitations to apply.

### **DEFENDANT'S CLAIM**

The Defendant did not provide any evidence to support her "Counterclaim", or Defendant's claim, nor did she provide evidence that would support any damages. Accordingly, the Defendant's Claim is dismissed.

### **COSTS**

Lengthy submissions were made as to cost on behalf of the Plaintiff. Having regard to the outcome of the matter some of these would appear now to be moot. A successful party would normally be entitled to costs and accordingly, the Defendant would normally be entitled to costs where, as here, she is successful. I note that both parties had representation. Mr. Krikunez, counsel, represented the Plaintiff throughout and Mr. Tibor Martinek represented the Defendant up to the middle of trial and Ms. Goldlist, counsel, represented the defendant thereafter.

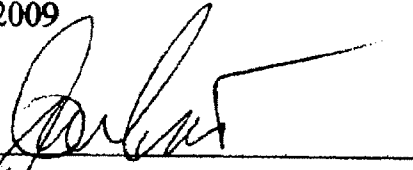
Mr. Krikunez, representing the unsuccessful party would not normally be entitled to costs. However, he claimed costs occasioned by the unnecessary delay caused by the Defendant as set out in his Submissions on Costs dated 8 August 2008. This related to the non-attendance of Mr. Yefim Khazak's attendance for trial. It is not his ultimate non-attendance, but the fact that the trial was adjourned twice (on 12 December 2007 and 18 January 2008) for the purpose of allowing Mr. Khazak to attend. It needs also to be said that the communication provided to the court to support the request for the adjournment was not of sufficient detail or reason, nor from the persons having direct knowledge, that should be provided to the Court. However, what I find troubling is that no explanation was ultimately provided for his non attendance. Is Khazak still ill and unable to attend? If not, why was he not here? Is he deceased? I do think that the Court is entitled to this information, but it has not been provided. In the absence of such information, I do think that Plaintiff is entitled to costs thrown away for preparation and delay. He would be in any event because notice, such as it was, was not given in as timely a manner as it should have been.

In the submissions as to costs of both Mr. Krikunez and Ms. Goldlist as to costs, neither referred to the significant restraints placed upon a Small Claims Court Deputy Judge as to costs. I refer to S. 29 of the Courts of Justice Act (limit of 15% of amount claimed... except where necessary to penalize a party....for unreasonable behaviour...". However, at the end of the day, the Defendant being successful, she is entitled to some costs. I must say that in this respect the defendant was very well served by the able representation by Ms. Goldlist, first as a student-at-law and then as lawyer. At the same

time Mr. Krikunez showed fortitude in fulfilling his duty to represent his client in spite of the delay and clearly unexpected time required to complete the trial. I must confess that in this respect Mr. Martinek contributed in causing this trial to take longer than it did. I am not prepared to award compensation for the costs of transcripts. Although unnecessary for my decision, nonetheless they did make my task easier in coming the decisions I have. However, they were not requested by me or Mr. Krikunez, but necessitated by the Defendant changing representation. Also, I have taken into account that the argument in respect to the Limitations Act which took up much time and contributed to much of the Defendant's counsel's costs, were, in the event, not required.

Accordingly, I assess costs in favour of the Defendant at \$1,500.00 plus disbursements of \$39.10 for a total of \$1,539.00. I do not allow disbursements for the unsuccessful motion. I accept the submissions of the Plaintiff that the defendant was responsible for unreasonable delay in the action and costs arising therefrom to the Plaintiff and fix these at \$300.00 to be offset against costs assessed in favour of the Defendant and will endorse the record to the effect that costs are awarded to the Defendant in the amount of \$1,239.00.00.

These reasons are delivered this <sup>20<sup>th</sup></sup> day of August, 2009



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Jan Poot  
Deputy Judge  
Toronto Small Claims Court