

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street, Room 256 Denver, Colorado 80202	FILED Document CO Denver County District Court 2nd JD Filing Date: May 14 2009 4:29PM MDL Filing ID: 25195766 Review Clerk: Janice Bolls
Plaintiff: GARY DILLABAUGH v. Defendant: JOHN J. ELLERTON	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<i>Attorneys for Plaintiff:</i> Gary C. Davenport Krista L. Tushar McGloin, Davenport, Severson and Snow Professional Corporation 1600 Stout Street, Suite 1600 Denver, Colorado 80202-3103 Phone No.: 303.863.9800 FAX No.: 303.571.1600 Email: garyd@mdsslaw.com kristat@mdsslaw.com Atty. Reg. Nos. 5211; 28106	Case No. 08CV2877 Div. 5
<p style="text-align: center;">FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT</p>	

THIS MATTER came before the Court for trial on April 6-7, 2009. The Plaintiff, Gary Dillabaugh, was represented by counsel, Gary C. Davenport, of McGloin, Davenport, Severson & Snow. Defendant, John J. Ellerton, was represented by counsel, Jack R. Luellen, of Beatty & Wozniak, P.C. The Court, having considered the pleadings, testimony, and arguments of counsel and trial record as a whole, and thus being advised in the premises, finds, concludes and Orders as follows:

STIPULATED FACTS

The following facts are stipulated to by the parties:

1. Prior to December 31, 2001, Plaintiff loaned money to the Defendant and, after credits were taken by agreement against the amount of the loan for the purchase of shares of stock in Sefton Resources, Inc. ("Sefton"), there was a balance due pursuant to the parties' letter agreement of \$65,661.88.
2. Plaintiff made numerous loans to the Defendant during the period March 18, 2002 through June 30, 2005, in the total principal amount of \$325,991.70.
3. At present, the principal due from the Defendant to Plaintiff in the amount of \$391,653.58 is for monies lent directly by Plaintiff to the Defendant.
4. Pursuant to an agreement reached by Plaintiff and the Defendant, Plaintiff assumed the Defendant's obligation to pay one note to Wells Fargo Bank in the total amount of \$17,081.48.
5. Despite such demand, no payments have been made by the Defendant to Plaintiff.

STIPULATED AND ADMITTED EXHIBITS

The parties stipulated into evidence Plaintiff's Exhibits 1 through 8 and 10 through 28 and Defendant's Exhibits B through H and J through S. Defendant's Exhibit A was not offered. Plaintiff's Exhibit 9 and Defendant's Exhibit I were offered and admitted into evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The loans made by Plaintiff Dillabaugh to Defendant Ellerton were personal loans between the parties. Evidence of the personal nature of the loans is contained in, among others, Exhibits 12-2, E and D. Furthermore, there are references in the emails between the parties, including in Exhibit 12, to the deal being between the parties, specifically, a "deal between us".

2. There is no evidence of any reference in the Sefton records of the amount of funds loaned by Plaintiff Dillabaugh to Defendant Ellerton being used by the corporation Sefton.

3. Testimony was heard by former board members of Sefton, Norm Thacuk and Karl Arleth, that had the board been aware of any transactions whereby Defendant Ellerton would receive an offset against personal loans made to him by Plaintiff Dillabaugh for benefits provided to Plaintiff Dillabaugh by Sefton, that it would have been reflected in the corporate records, and there are no records reflecting the same.

4. The due dates for all of the loans was upon demand and, in support thereof, the Court cites *Hays v. Arbuckle*, 72 Colo. 328, 211 P. 101 (1922), and *Nissen v. Dews*, 43 Colo. App. 288, 603 P.2d 966 (Colo. App. 1979), which stand for the proposition that if there is no agreement by the parties as to the due date for loans, that they are due upon demand.

5. Demand was made for payment of all outstanding loans by Plaintiff Dillabaugh to Defendant Ellerton on September 7, 2007.

6. In regard to the letter agreement which is Exhibit 7, interest was to accrue on the agreed upon \$65,661.88 at a rate of 12.5%, and was to accrue from the date of the letter agreement, December 31, 2001.

7. In regard to interest on the balance of the loans made between March 18, 2002 and June 30, 2005, that there was no agreement for an interest rate of 10% between the parties, and, therefore, as a matter of law, the legal rate of 8% applies to the loans pursuant to C.R.S. Sec. 5-12-102 and *Salazar v. Taylor*, 18 Colo. 538, 33 P. 369 (Colo. 1893), which rate is to accrue from the date the loans were made.

8. In regard to the stipulated Wells Fargo note that was paid by Plaintiff Dillabaugh at

Defendant Ellerton's request, interest shall accrue at 8% from the date the payments were made by Plaintiff Dillabaugh on the Wells Fargo loan.

9. In regard to the Oatley Note, the Court finds that Defendant Ellerton received a benefit as a result of the assumption of the Note by Plaintiff Dillabaugh at Defendant Ellerton's request and that repayment of that Note that was assumed by Plaintiff Dillabaugh was Defendant Ellerton's personal obligation to repay. There is no evidence that Sefton had any obligation to reimburse Plaintiff Dillabaugh for the assumption of the Oatley Note obligation.

10. In regard to Exhibit 11, the Court finds that the handwritten sheets of Defendant Ellerton are consistent with the other exhibits regarding the loans made, and that in preparing Exhibit 11, Defendant Ellerton was attempting to figure out the amount owed to Plaintiff Dillabaugh. Furthermore, Exhibit 11 contains a reference to the Oatley Note and therefore, Defendant Ellerton was acknowledging his personal obligation to Plaintiff Dillabaugh regarding the Oatley Note. Therefore, there is \$43,000.00 owed by Defendant Ellerton to Plaintiff Dillabaugh at the rate of 8% from the date that Plaintiff Dillabaugh paid the Oatley Note.

11. In regard to the stock of Sefton that was transferred by Plaintiff Dillabaugh to Defendant Ellerton's children in the amount of 45,000 shares, the Court finds that Defendant Ellerton's testimony was not believable and that Plaintiff Dillabaugh's testimony was credible and thus the Court concludes that Plaintiff Dillabaugh was requested by Defendant Ellerton to transfer the shares of stock to Ellerton's children and that Defendant Ellerton agreed to reimburse Plaintiff Dillabaugh for those shares of stock. This is furthermore consistent with Plaintiff Dillabaugh's willingness and ability to provide funds to Defendant Ellerton upon request. Therefore, the Court finds that Defendant Ellerton owes Plaintiff Dillabaugh \$1,800.00 for the 45,000 shares of stock of

Sefton transferred to Defendant Ellerton's children, which stock is valued at \$0.04 per share. Interest at 8% shall accrue on the \$1,800 owed from April 7, 2009 until paid.

12. The Court finds that there was no agreement between the parties as to any of the setoffs of credits requested by Defendant Ellerton. Moreover, in e-mails between the parties, specifically those in Exhibit 12, Plaintiff Dillabaugh rejected Defendant Ellerton's request for credits or offsets.

13. Similarly, in Exhibit I, which were the handwritten notes prepared by Defendant Ellerton, there is no reference to credits whatsoever. Likewise, there is no reference to credits in Exhibit 12-8 which is the e-mail from Defendant Ellerton and e-mail from Plaintiff Dillabaugh on February 11 and 12, 2008.

14. Regarding Exhibit 10, which is the Promissory Note dated December 31, 2002 from Defendant Ellerton to Plaintiff Dillabaugh, the Court finds that Defendant Ellerton is not credible in regard to his testimony that such Note represents evidence of a credit against loans that were made by Plaintiff Dillabaugh to him, particularly since it was never mentioned in any of the parties' negotiations, and thus gives the Promissory Note no weight or import.

15. Furthermore, the Court finds the Promissory Note represented by Exhibit 10 was subsumed by the parties' stipulation concerning the amount loaned and due by Defendant Ellerton to Plaintiff Dillabaugh.

Attorneys' Fees

16. Plaintiff Dillabaugh has made a claim for attorneys' fees based upon the contention that the defense to the payment of the loans asserted by Defendant Ellerton was frivolous and groundless.

17. The Court finds that the defenses asserted to not give rise to the criteria of frivolous and groundless and therefore DENIES Plaintiff's claim for attorneys' fees.

JUDGMENT

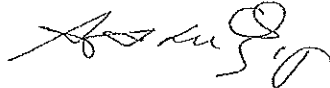
Based upon the foregoing Findings of Fact and Conclusions of Law, THE COURT ENTERS the following judgment in favor of the Plaintiff, Gary Dillabaugh, and against the Defendant, John J. Ellerton:

- A. \$65,661.88, plus interest at the rate of 12.5% from December 31, 2001.
- B. \$325,991.70, plus interest at the rate of 8% from the date each loan was made;
- C. In regard to the Wells Fargo Note, \$17,081.48, plus interest at the rate of 8% from the date the payments were made regarding the Wells Fargo Note;
- D. On the Oatley Note, \$43,000.00, plus interest at the rate of 8% from the date the Oatley Note was paid;
- E. \$1,800.00 regarding the Sefton stock transferred by Plaintiff Dillabaugh to Defendant Ellerton's children, plus interest at the rate of 8% from April 7, 2009;
- F. Plus costs in the amount of \$823.15;

for a total judgment of \$ 802,504.56 through May 4, 2009. (See attached computation, which is the Revised Exhibit 28 deleting 10% interest and inserting 8% per the Court's Order, and which reflects the amount of principal and interest due through May 4, 2009 based upon the revised interest rate).

DATED: May 14, 2009, *nunc pro tunc* April 7, 2009.

BY THE COURT:



Robert L. McGahey, Jr.
District Judge

Approved as to Form:

Jack R. Luellen (Original signature on file)

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ATTORNEYS FOR PLAINTIFF GARY DILLABAUGH

Revised Exhibit 20
Interest Rate At 8%

Everton Loans

	Date of Loan	Amount of Loan	Interest Rate/Amount	Number of months	Amount owing as of 5/1/2000
	2001-12-31	\$85,881.88	12.50%	89	163,859.41
	2002-03-18	\$58,600.00	8.00%	87	103,282.15
	2002-03-26	\$25,000.00	8.00%	87	44,071.41
	2002-04-14	\$200.00	8.00%	86	351.04
	2002-04-22	\$4,000.00	8.00%	86	7,020.56
	2002-05-18	\$4,500.00	8.00%	85	7,844.92
	2002-05-20	\$5,000.00	8.00%	85	8,707.23
	2002-05-20	\$15,000.00	8.00%	85	28,121.78
	2002-06-05	\$3,500.00	8.00%	84	6,073.99
	2002-06-14	\$18,881.70	8.00%	84	29,258.03
	2002-08-21	\$1,500.00	8.00%	84	2,593.81
	2002-08-29	\$2,000.00	8.00%	84	3,452.47
	2002-08-12	\$50.00	8.00%	82	85.51
	2002-08-12	\$3,000.00	8.00%	82	10,280.15
	2002-09-10	\$300.00	8.00%	81	608.78
	2002-09-25	\$2,000.00	8.00%	81	5,081.01
	2002-09-27	\$40,000.00	8.00%	81	57,748.19
	2002-11-06	\$2,500.00	8.00%	79	4,195.93
	2002-12-13	\$2,500.00	8.00%	78	4,181.88
	2003-01-04	\$500.00	8.00%	77	828.45
	2003-01-13	\$200.00	8.00%	77	330.74
	2003-01-16	\$1,500.00	8.00%	77	2,044.94
	2003-01-17	\$500.00	8.00%	77	825.82
	2003-02-05	\$2,000.00	8.00%	76	3,290.91
	2003-02-10	\$5,000.00	8.00%	76	8,217.52
	2003-02-19	\$1,500.00	8.00%	76	2,459.99
	2003-03-05	\$2,000.00	8.00%	75	3,270.88
	2003-03-10	\$1,700.00	8.00%	75	2,778.13
	2003-04-01	\$7,500.00	8.00%	74	12,189.74
	2003-04-01	\$50,000.00	8.00%	74	48,788.89
	2003-04-11	\$500.00	8.00%	74	810.85
	2003-04-16	\$1,500.00	8.00%	74	2,429.91
	2003-04-23	\$500.00	8.00%	74	808.97
	2003-04-24	\$300.00	8.00%	74	486.08
	2003-04-29	\$500.00	8.00%	74	807.64
	2003-05-05	\$200.00	8.00%	73	322.58
	2003-05-11	\$600.00	8.00%	73	988.72
	2003-05-19	\$500.00	8.00%	73	804.20
	2003-05-30	\$500.00	8.00%	73	802.30
	2003-06-30	\$20,000.00	8.00%	71	31,871.40
	2003-08-27	\$400.00	8.00%	70	629.57
	2003-09-28	\$3,000.00	8.00%	69	4,800.54
	2003-10-01	\$1,500.00	8.00%	68	2,342.63
	2003-10-03	\$750.00	8.00%	68	1,170.34
	2003-10-05	\$500.00	8.00%	68	638.78
	2003-10-08	\$400.00	8.00%	68	623.79
	2003-10-15	\$1,000.00	8.00%	68	1,567.07
	2003-10-15	\$300.00	8.00%	68	467.13
	2005-06-30	\$50,000.00	6.00%	47	87,933.65
		\$391,853.58			\$700,531.47
Wells Fargo	2002-09-30	5,424.18	8.00%	80	9,178.54
	2003-06-30	9,298.58	8.00%	71	14,617.89
	2004-02-28	2,306.78	8.00%	64	3,585.08
		17,081.48			27,558.51
Outlay Note	2002-12-01	48,000.00	8.00%	78	71,770.67
Sefton Stock	2009-04-07	1,800.00	8.00%	2	1,813.58
Awarded Costs	2009-04-07	823.15	8.00%	2	829.36
			Grand Total		\$802,504.56