SUPREME COURT OF NOVA SCOTIA
Citation: *Halifax Biomedical Inc. v. Salazar*, 2020 NSSC 402

Date: 20200615
Docket: PtH. 495409
Registry: Sydney

Between:

Halifax Biomedical Inc.

Appellant

v.

Guido Pena Salazar

Respondent

Judge:	The Honourable Justice Patrick J. Murray
Heard:	June 4, 2020, in Port Hawkesbury, Nova Scotia
Written Decision:	June 15, 2020
Counsel:	Adam Rodgers, for the Appellant, Halifax Biomedical Inc. Wayne MacMillan for the Respondent, Guido Pena Salazar

By the Court:

Introduction

[1] This is an appeal from a decision and order rendered by the Small Claims Court Adjudicator, Ms. Bryna Hatt, on December 11, 2019. In her ruling, Ms. Hatt decided that the Claimant, Mr. Guido Salazar, an engineering consultant was owed $20,465. in unpaid invoices for the 18 month period between September, 2017 and April, 2019, for services rendered by him to the Appellant, Halifax Biomedical Inc.

[2] The Appellant, Halifax Biomedical Inc. (HBI) appeals the Adjudicator's decision, citing two grounds of appeal: 1) Error of law and 2) Failure to follow the requirements of natural justice.

Grounds of Appeal

[3] The particulars of the error or failure which form the Grounds of appeal are:

> 1. The Adjudicator incorrectly found that the invoices presented by the Respondent were legitimate, despite the lack of, or insufficient, evidence expected of a consultant in the position of the Respondent, that the Respondent performed certain, or any, work for the Appellant.
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> 2. The Adjudicator incorrectly determined that there was a contractual relationship between the parties for the work claimed to have been performed by the Respondent.

Background

[4] HBI had at the material time been working on a prototype to aid in spinal stability. Mr. Salazar, an electrical engineer, was acting as a consultant on this project. He worked closely with and reported directly to HBI's vice president, Spinal Diagnostics, Mr. Giphart.

[5] HBI's sole witness was Mr. Chad Munro. HBI and Mr. Munro took the position that: 1) the invoices claimed by Mr. Salazar were not valid, because they were not authorized or agreed to by HBI; and 2) HBI also defended on the basis that payment could not be made because the work performed had not been properly documented asserting that detailed accounting of the time spent was requested of Mr. Salazar, but not provided.

[6] By way of background, HBI submitted that it is ISO certified. This means it is a company that has established policies and procedures to substantiate their work product, procedures, by maintaining proper documentation. This provides accountability and an underlying basis for the decision making process within a company. Included in these processes is accountability in relation to invoicing and the payment of same by the company.

[7] As HBI performs research and development, validation of the work performed, improvements made, including hours spent, is required to enable it to obtain tax credits which are available to the company. This is but one reason, submits HBI, for proper invoicing by its consultants.

[8] The Appellant submits, the breakdown and information was required of Mr. Salazar but not provided. In the result, HBI has argued that payment of Mr. Salazar's invoices could not be justified. HBI referred to several of the Exhibits, and in particular, Exhibits #12, #9, and #2, to show that Mr. Salazar was required to provide documentary evidence of his work.

Standard of Review

[9] This is an appeal. It is not a new trial on the merits. The Appellant must show that the Adjudicator erred, in the manner set out in the Notice of Appeal. The onus is on the Appellant to establish that the Adjudicator committed an error of law or conducted the hearing in such a way that the Appellants were denied natural justice.

[10] In ***Brett Motors Leasing Ltd. v. Welsford***, (1999), 181 N.S.R. (2d) 76, [1999] N.S.J. No. 466 (S.C.), Saunders, J. (as he then was) provided a clear and concise summary of the standard of review in a Small Claims Court Appeal at paragraph 14:

> [14] The jurisdiction of this court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or where a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the

> conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[11] This summary of the standard of review has been repeatedly accepted in this province by this Court sitting as an appeal court. I do so here.

[12] The submission of the Appellant is that the learned Adjudicator committed a palpable and overriding error. HBI submits the Adjudicator mistook, or misinterpreted the communication between the Appellant and Mr. Salazar, as acceptance of the work by HBI. The Appellant submits it was willing to pay the invoices, but first required they be validated.

[13] Thus, HBI says, this misinterpretation of the communication amounted to a clear and obvious error. Because it goes to the core of the issue, HBI states the error was overriding on the part of the Adjudicator.

[14] In its Factum the Appellant's submission is summarized at paragraphs 18 and 19, as follows:

> 18. Throughout the email communications between the parties, Mr. Munro continued to express the genuine hope that matters could be resolved. Had the Respondent provided the records substantiating his efforts, as would typically be provided by consultant, and particularly an electrical engineering consultant in the medical technology filed, Halifax Biomedical would have paid the invoice. Mr. Munro testified that the company was in a financial position to do so.
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> 19. The Adjudicator appears to have considered Mr. Munro's continued willingness to communicate with the Respondent as an acknowledgment that he accepted the work product as presented. This is a palpable and overriding error, given the reasonable interpretation of the course of events, within the context of a research and development project.

[15] HBI also submitted that the work was never authorized or approved as there was no agreement between the parties. In short, there was no contract and therefore, no mutually agreed upon basis for the work claimed to have been performed, and therefore the Adjudicator erred in concluding there was a contractual relationship, as set out in (No. 2) of the Notice of Appeal.

Respondent's Position on Appeal

[16] The Respondent's counsel referred to the case of ***Paine v. Air Canada***, 2018 NSSC 215, citing paragraphs 14 and 15 as follows:

> [14] Determinations of credibility and the weight to attach to the evidence are not questions of law. The Nova Scotia Court of Appeal, in *McNaughton v. Ward*, 2007 NSCA 8, held:
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> > 34 While the appellant casts all of the grounds of appeal as errors "in law," the first three are, with respect, conclusions that derive from the trial judge's factual findings, assessment of the witnesses, and evaluation of the evidence. These are functions well within the jurisdiction of the trial judge, who enjoys a significant advantage in seeing and hearing the witnesses first hand. Such determinations draw a high degree of deference and will not be disturbed on appeal absent palpable and overriding error. As directed in such cases as *Housen, supra*, and *H.L. v. Canada (Attorney General)*, 2005 SCC 25, "palpable" refers to a mistake that is clear, in other words, plain to see; whereas "overriding" is an error that is shown to have affected the result. Both elements must be demonstrated. We, sitting as an appellate court, will not interfere with a trial judge's findings of fact unless we can plainly discern the imputed error, and the mistake is such that it discredits the result.
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> [15] That findings of fact are accorded a high degree of deference was reinforced in *Davison et al v Nova Scotia Government Employees Union*, 2005 NSCA 51:
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> > 61 Findings of fact will not be reversed on appeal unless the trial judge made a palpable and overriding error. The same degree of deference is paid to inferences drawn from the evidence and to all of the trial judge's findings whether or not they are based on findings of credibility: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, per Iacobucci and Major, JJ. at paras. 10 and 23 to 25.
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> > 62 The "palpable and overriding error" standard underlines that a high degree of deference is paid on appeal to findings of fact at trial. An error is palpable if it is one that is plainly seen or clear. An error is overriding if, in the context of the whole case, it is so serious as to be determinative in the assessment of the balance of probabilities with respect to that factual issue: *see Housen v. Nikolaisen, supra*, at paras. 1 to 5 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 78 and 80. Thus, not every misapprehension of the evidence or every error of fact by the trial judge justifies appellate intervention. The error must not only be clear, but "overriding and determinative."

[17] The Respondent submits that the Appellant is asking the Court to go outside the facts as found by the Adjudicator to make different findings of fact. This is not the function of the Court hearing an Appeal from the decision of a Small Claims Court Adjudicator.

[18] The Respondent submits that Mr. Munro was the Appellant's only witness. The Adjudicator found he was not directly involved in monitoring the Respondent or his work. The Respondent submits in these circumstances it is not surprising that the Adjudicator made findings of fact in favor of Mr. Salazar. The record supports that the Appellant continuously led him to believe his invoices would be paid. In the result the Adjudicator made no error of law in finding that the Respondent legitimately performed services for which payment was due.

[19] In the result, the Respondent says, this is not a case where there has been a clear error in interpreting any evidence or where there is no evidence to support the conclusions reached. Further, the Respondent says the Adjudicator did not misapply or misinterpret the evidence in any material respect thereby producing an unjust result.

Decision of this Court

[20] The Adjudicator considered and analyzed the evidence in a logical and orderly fashion.

[21] The Adjudicator made findings of fact that should not be disturbed on appeal except for a palpable and overriding error. These are determinative of the outcome of the case at trial.

[22] The Adjudicator had the opportunity to observe the witnesses at trial firsthand and assess their credibility. There is no transcript of the hearing but there are numerous Exhibits.

[23] There are some 25 exhibits filed as part of the trial record. Each one was submitted by the Respondent, Mr. Salazar. All of the exhibits were relevant to the issue being litigated, namely whether the invoices were authorized and approved by HBI and whether they contained sufficient information.

[24] In the stated case the Adjudicator referred on numerous occasions to the exhibits presented by the Respondent in support of his clam for payment of unpaid invoices for the 18 month period between September of 2017 and April 2019.

[25] At paragraph 44 of the stated case, the Adjudicator made numerous findings of fact which included the following:

> g) For 18 months (September 2017 - April 2019) Mr. Salazar frequently (as observed in the exhibited emails and his testimony) inquired about payment, and

> the Defendant continued to promise payment and provide reassurance it would be forthcoming;
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> h) None of the responses from the Defendant from October 2017 until April 2019 indicate any inadequate work, in adequate invoicing or inadequate detail;
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> m) In April, 2019, Mr. Salazar advised he would take the Defendant to Small Claims Court in order to receive payment of his outstanding invoices. This was the first time the Defendant advised Mr. Salazar of their invoicing issues, which I accept Mr. Salazar understood to be another delay tactic;
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> n) The only evidence provided demonstrates Mr. Salazar as a prudent consultant who performed his work and kept in communication with the Defendant's VP of Spine Diagnostics and with Mr. Munro, the owner of the Defendant's company; and
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> o) Mr. Munro was unable to provide any evidence to suggest that the work outlined by Mr. Salazar was not competed or was not satisfactorily completed, testifying he was not intimately involved in who was doing what work on the x-ray project.

[26] Ultimately on the main issue of whether the invoices were valid and legitimately owing to Mr. Salazar by the Appellant she concluded at paragraph 45 that:

> 45. Based on the findings of fact, I accept that Mr. Salazar was a consultant hired and performed authorized work and invoiced accordingly. Mr. Salazar invoiced on a timely basis. At no time prior to Mr. Salazar's threat of litigation in April 2019, did the Defendant challenge or raise any concerns with the invoices. By April 2019, Mr. Salazar had gone 18 months without his invoices being paid.

[27] She further found that the agreement signed on May 2018 was not disputed and that the undisputed purpose of this agreement was to enable the company to pay Mr. Salazar's invoices.

[28] The error of law alleged on appeal is that the Adjudicator mistook the communication by HBI with the Respondent for their agreement to pay the invoices.

[29] On the whole of the stated case, I see no basis upon which to allow the appeal. I find no error of law was made by the Adjudicator. Her conclusion was based on the evidence she heard and on the conduct of the parties which demonstrated a clear intent, well supported by over two (2) dozen documents which substantially corroborated her decision that the invoices were properly owed to Mr. Salazar by HBI.

[30] Further examples of this are contained in her findings at paragraphs 44(i); (j):

> i) The Defendant has internal procedures and processes (as testified to by Mr. Munro) for its consulting services and invoicing. As such, it attempted to "back fill" or re-write history by issuing a contract in May 2018 reflecting consulting services from August 2017 to August 2018;
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> j) This contract was presented to Mr. Salazar in May 2018, as the required document holding up the payment of his outstanding invoices;

[31] Having considered the grounds of appeal in the context of the entire record, I find the appeal is without merit. The Adjudicator made no palpable or overriding error in her decision. On the contrary, she provided an excellent summary of her findings at trial.

[32] In the result, the appeal is dismissed.

Murray, J.