

Claim No: 284831

Date:20071130

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: K & B Survey Services v. Hunter Surveying Ltd., 2007 NSSM 94

BETWEEN:

Name K & B Survey Services Claimant 1

Name William McFarlane Claimant 2

Name Hunter Surveying Limited Defendant 1

Name Mr. Allen Hunter Defendant 2

Name Mr. Nicholas Dearman Defendant 3

Revised Decision: The text of the original decision has been revised to remove addresses of the parties on March 26, 2008. This decision replaces the previously distributed decision.

DECISION

SUMMARY OF RELEVANT EVIDENCE

- (1) The Claimants claim the sum of \$621.70 plus costs from the Defendants.
- (2) In the Notice of Claim Form, there are two named Claimants, K & B Survey Services (K & B) and William McFarlane (McFarlane), and three Defendants, Hunter Surveying Limited (Hunter Surveying), Allen Hunter (Hunter), and Nicholas Dearman (Dearman).

- (3) McFarlane is a self-employed survey technician. He was employed with various other companies then commenced his own business, K & B, in July 2007.
- (4) After starting his own business, he commenced soliciting work. He contacted Hunter and the two agreed to meet. They discussed possible business opportunities around the end of July and the two of them agreed to commence a business relationship.
- (5) McFarlane told Hunter that he was waiting for the arrival of a Leica surveying instrument which he had ordered from Germany, and Hunter understood that. McFarlane provided to Hunter a summary of the fees and expenses that he would be charging for jobs.
- (6) On Tuesday, August 7, 2007, McFarlane and Hunter met at a job site at 1126 Beaver Bank Road. This was the first job for McFarlane in his new business. The parties walked the site and Hunter showed McFarlane the legal survey evidence that he wanted located. McFarlane was hired to do the field work on the project.
- (7) McFarlane advised Hunter at that time that his assistant had not shown up at the job site. He had what he described as a back up assistant who he picked up in Dartmouth later that day. The back-up assistant had no previous experience in the survey business.
- (8) McFarlane was provided with the starting coordinates and commenced the job. The job was not completed until the following day.
- (9) On Friday, August 10, 2007, McFarlane brought a copy of his field notes, a disc containing files of the survey fieldwork, a print-out of the GSI file, and print-out of the ASCII file, and a disc containing the GSI data. Dearman testified that there were no ASCII files on the disc.
- (10) Dearman was unable to upload the GSI files on his Microsurvey Software so he was unable to upload the data to his computer. He contacted McFarlane, and McFarlane was asked to provide ASCII data and subsequently, McFarlane delivered another disc containing the ASCII data.
- (11) Dearman testified that he had asked Hunter to provide the ASCII data in the following format, namely, point number, northing, easting, elevation, description, however, the

information on the disc received from McFarlane contained the ASCII files in another format.

- (12) McFarlane was contacted again, and it was requested that he provide the data in the proper format. On August 13 in the evening, one disc was delivered to Dearman's home with an ASCII file in a different format and a second disc was delivered to Dearman's home on the morning of August 14 with the ASCII file in the requested format. Dearman testified that he was able to use the information at this point in the format in which it had been provided by McFarlane.
- (13) A difficulty arose, however, when Dearman commenced to input the Data into the software. He found that some information was missing and some points were plotting in the incorrect position, for example, a driveway was shown to be located partly across the highway and shed corners were located upon the highway. Also, the shed corners were labeled as topographical features in the data, however, in the field notes, they were identified as shed corners.
- (14) Dearman contacted McFarlane on the evening of Tuesday, August 14, and told him of the problems. McFarlane did not dispute the problems and in fact offered to do the survey work over again on the upcoming weekend. Dearman told him that they needed this done as soon as possible. McFarlane offered to do it on Thursday, August 16. Dearman advised that he would speak to Hunter and get back to McFarlane as soon as possible. On the morning of August 15, Dearman and Hunter had a discussion and, at that time, it was decided that they did not have any confidence in the work that McFarlane had provided to them so far. They decided to advise McFarlane that they would redo the survey work themselves. This was done later that day. McFarlane requested a letter and a letter was provided to him.
- (15) The letter is dated August 15, 2007, from Hunter to McFarlane and states in part as follows:

“The data we received from you is not correct. The driveway plots in the road and some of the other points you located don't seem to be close to the coordinates from previous surveys.

I believe that your ASCII file is not correct. You may have not used the right backsight from one of your setups. Perhaps part of the problem was caused because you were using a new instrument.

We do not have the recorded angles and distances and can not work with the data to correct the problem.”

- (16) It was decided that McFarlane would not be paid for his services as Hunter Surveying was not able to use them for their purposes.

ISSUES

- (17) The issues in this proceeding are as follows:
- (a) Whether Hunter Surveying is liable to the Claimants for any or all of the sums being claimed;
 - (b) Whether the individual Defendants are liable to the Claimants for any or all of the sums being claimed;
 - (c) Are any or all of the Defendants liable to pay costs to the Claimants in respect of this claim.

FINDINGS

- (18) I accept McFarlane’s qualifications to perform the services of a survey technician, including the fieldwork. I am satisfied based upon the evidence of his previous training and experience that he is qualified to do the work that he was contracted to do in this case.
- (19) I also accept that McFarlane did in fact complete the survey fieldwork in connection with the project for which he was retained in respect of the property at 1126 Beaver Bank Road and that the survey fieldwork included preparation of the survey data and field notes. Also, I find that the survey fieldwork was delivered to Hunter Surveying by no later than August 14, 2007.

- (20) I find that there was a verbal contract between the Claimants and the Defendant, Hunter Surveying, to hire McFarlane for this specific project and that rates that had been quoted, and I find that the rates quoted are the same rates as those which are found in the invoice submitted to Hunter Surveying on August 8, 2007.
- (21) I find, however, that the survey fieldwork which McFarlane provided to Hunter Surveying was flawed since when it was mapped out, it led to absurd conclusions such as the driveway and sheds being across a paved roadway. As such, the data was clearly erroneous and as of August 14, 2007, was not in a form that was useful to Hunter Surveying.
- (22) Both parties in their evidence provide a number of theories about what occurred. These theories included the following:
- (a) McFarlane's Leica instrument was not working properly or had not been calibrated properly;
 - (b) The Leica instrument was new and the settings were different as it was from Germany;
 - (c) The software which Hunter Surveying was using was inadequate or not used properly by Dearman in regards to the Leica instrument used by McFarlane;
 - (d) McFarlane used the wrong backsight from one of the setups;
 - (e) McFarlane was provided with incorrect starting coordinates by Hunter Surveying.

ANALYSIS

- (23) It is reasonable in my opinion to imply a term in the contract that the data to be provided by the survey technician to the surveyor must be in a readable and usable format. This type of implied condition is necessary, in my view, for reasons of business efficacy.
- (24) In this case, however, the data provided by McFarlane to Hunter Surveying was flawed.

- (25) The issue, therefore, boils down to a determination of whose responsibility it is to ensure that the data being provided is correct and in a readable and usable format.
- (26) There is insufficient evidence from which I can conclude that the starting coordinates provided by Hunter Surveying to McFarlane were erroneous. I accept Dearman's evidence that he provided starting coordinates from another project in accordance with the common practice.
- (27) I am unable to conclude from the evidence that there was any problem with the software used by Hunter Surveying in this case or that Dearman was not familiar with how to use the software. Although he had not used the software before in relation to a Leica instrument and was not himself familiar with the Leica instrument, he was familiar with the process of converting the data to a usable form regardless of which type of instrument was used and able to work through the various steps as required by the computer software. I find in fact that he did so in this case.
- (28) In the absence of a proven error on behalf of the surveyor, then in my view, it is the responsibility of the survey technician to deliver the data in a correct, readable, and usable format to the surveyor.
- (29) When considering all of the evidence, it would appear that the most likely possibility is that an incorrect starting coordinate was used as suggested in the August 15, 2007, letter from Hunter to McFarlane. I accept Dearman's evidence that it appeared that while the driveway was shown in the wrong position, nevertheless, the shape of the driveway was correct. Since I am unable to conclude from the evidence that Dearman did not follow the usual procedure in providing the starting coordinates to McFarlane, then the only reasonable conclusion that can be reached is that the error was caused by McFarlane or his inexperienced assistant.
- (30) While I accept that McFarlane offered to redo the survey work when he spoke to Dearman on August 15, I do not find it an unreasonable position on behalf of Hunter Surveying that they felt that they could not rely upon the work that had been done to date and wanted to complete the work themselves and in fact did so the following weekend.

- (31) I am not persuaded that McFarlane has proven on a balance of probabilities that any of the Defendants made an error which led to the difficulties that arose. Obviously, the data collected by Dearman and Hunter subsequent to August 15 was different than the data provided by McFarlane as they were able to complete the survey work using their own data. The inescapable conclusion is that there was an error in the data provided by McFarlane.

LIABILITY OF INDIVIDUAL DEFENDANTS

- (32) There is no evidence that the services of the Claimants were contracted by the individual Defendants, however, to the contrary, all of the evidence points to the Claimants being retained by the corporate Defendant. At all times, both Hunter and Dearman were acting on behalf of the corporate Defendant, Hunter Surveying, and this is admitted by McFarlane. For these reasons, the action is dismissed as against the individual Defendants.

COSTS

- (33) As the action will not succeed for the reasons set out in this decision, the Claimants shall not be entitled to recover any costs from the Defendants.

SUMMARY

- (34) The claim is dismissed.

Dated at Dartmouth, Nova Scotia,
on November 30, 2007.

Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)

