

Claim No. SCT 370964

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: GFI Solutions PME Inc. v. Jewelpop Inc., 2012 NSSM 30

BETWEEN:

GFI Solutions PME Inc.

Claimant

- and -

Jewelpop Inc.

Defendant

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: March 26, 2012, April 4, 2012, June 12, 2012 and June 13, 2012

Decision: August 13, 2012

Counsel:

The Claimants represented by Counsel Tipper McEwen articulated clerk Shannon McEvenue

The Defendant was represented by Counsel, Megan M. Roberts and Ian MacIsaac articulated clerk

Preamble:

1. This claim involves business software that was provided by the claimant to the defendant for its business and the claimant in its pleadings stated that the defendant bought the software, claims it did not work and now refuses to pay for it.
2. The software programs were a major investment for the defendant which expended well over \$116,000.00.
3. The claimant in its pleadings claimed \$9,768.60 for software which the pleadings indicate was bought by the defendant and who refuses to pay.
4. After two full evenings in court and with the likelihood of several more evening in court, I ask counsel if it would be prudent to discuss a resolution of this matter by the parties involved. After consultation with their respective clients counsel informed the court that their clients were not prepared to settle and the consideration for this was based on principle.
5. **Analysis:**
6. I do not propose to go into a litany of all the facts as relate to the technical names of the programs. What I have done in this particular case is to enter immediately into an analysis which forms the basis of my decision.
7. The final issue before this court involves from the claimant's perspective certain invoices which have not been paid. These invoices relate to services rendered by the claimant plus interest.
8. The claimant is also claiming that the defendant has been provided software which the claimant paid for and provided to the defendant however the defendant has not reimbursed the claimant for that software. The total amount that the claimant is seeking is \$10,226.03 plus interest of \$1037.48 and also interest of \$186.55 for total amount of \$11,673.00.

9. The defendant's position is that all invoices have been paid however it has culled out an amount for software that did not work and maintenance fees on software that did not work.
10. The defendant argues that \$8573.98 should not be owed to the claimant as one of the programs promised never worked and the fees associated with that program should not be paid. That is how the defendant arrived at the amount \$8573.98.
11. Counsel for the claimant argued the contract is clear as it relates to software. Once the software has been purchased and delivered to the defendant the contract requires that it be paid.
12. Counsel for the claimant argues that there are no warranties provided under the contract which requires that the software operates exactly as the defendant wants it to operate. Any warranties regarding the working of the software are provided to the defendant by the manufacture. These would be the only warranties which exist.
13. The defendant argues that part of these software programs did not work and therefore they should not be responsible for paying same.
14. Before I deal with the contract itself I shall give the overall view of what happened.
15. The defendant is a business which over the years has increased its sales from \$100,000.00 to 17 1/2 million dollars. The owner of the defendant company and its CEO is experienced in the field involving the sales of the defendant company's product. The business plan is simple. The defendant has a website for his product. A prospective buyer would contact the defendant to purchase certain items and provide the defendant with the purchase order and purchase the material by way of a credit card. The defendant would then contact FedEx to pick up the product and deliver it to the buyer.
16. The Defendant was using software that was allowing it to implement its business plan. However the software system that the defendant was using was slow and inefficient. The defendant's business was expanding and as a result the defendant was in a position where it wanted to have software that would be more efficient and ultimately allow it to grow as a business.
17. The software being purchased through the claimant comprised of a main module called SAP Business One. This took care of many of the records; ongoing records that is, of the defendant's business. Two other components or modules provided to the defendant by the claimant

involved the application of the defendant's credit card requirements and secondly a module that related to the shipping requirements. The first module was known as Citisys and the latter was known as Enterprise Centralized Shipping or "ECS".

18. The credit card module, Citisys, encountered a number of problems and was not working on the start date for the system to be put in place. Ultimately it was replaced by another software program called "Navigator" which satisfied the requirements of the defendant.
19. The ECS program has never worked for the defendant and it has gone back to its original software program which is cumbersome but allows the defendant to ship through FedEx.
20. Prior to purchasing any software, the defendant and claimant met and a sales presentation was made to the defendant showing the defendant what the Sap Business One software program was capable of doing.
21. There were several stages of implementation ensuring these programs were suitable for the defendant. This involved an explanation of the program to the defendant and then a gathering of data and information about the defendant's business whereupon a demonstration of the business program was provided to the defendant.
22. A proposal of the business plan in summary fashion was put forward to the defendant by the claimant in May of 2010. This proposal outlined the cost of licenses, the cost of annual maintenance plans and the cost of services. The proposal also outlined the work plan, the general estimate of time required for the implementation of the programs up to going live with the system. The defendant signed off on this proposal.
23. The proposal also contains appendices outlining policies, terms and conditions and invoicing policies. This proposal is the contract the parties rely on with respect to the issues before this court.
24. With respect to the claimant's fees the agreement stated that the invoices will be sent out periodically and include out-of-pocket expenses incurred by the claimant.
25. The contract went on to say, invoices are payable upon receipt, interest will be charged on outstanding balances after 30 days at the monthly rate of 1% or 12.68% annually. In the absence of payment within 60 days we reserve the right to stop work until the solution is correct please inform us rapidly of any litigious invoice.
26. The invoices related to services provided have not been contested by the

defendant during this court case and it seems self-evident that they would not be as the defendant was of the view it has paid for all invoices.

27. With respect to software the agreement stated:

28. "A signed copy of this proposal (with your purchase order, if applicable) must be accompanied by a deposit equal to 50% of the value of the software or hardware including all applicable taxes. The balance will be payable upon delivery. Fortsum retains ownership of all software and hardware until they are paid in full. The customer is committing to take delivery of the software and hardware within 10 days after they are received by Fortsum Business Inc.; once the 10 day delay has expired, all remaining balances will become entirely and immediately payable. Expected delivery date will be confirmed upon receiving your acceptance for this proposal. Transport and Courier fees will be billed to you."

29. I note the inclusion of Fortsum Business Inc. in the agreement under a subheading of "Terms and Conditions in the agreement. I shall be raising this notation again shortly.

30. Under the heading Warranties in the agreement it stated:

"The only warranties are those provided by the manufacturers. The software manufacturers offer a limited warranty with the use of their products. Fortsum does not offer any warranty of its own and will not assume any responsibility for direct or indirect damages related to the use of these products. In any circumstances Fortsum's responsibility would never exceed fees invoiced and paid in the context of this mandate."

31. Immediately under the heading "Warranties is a heading "Custom Development" which stated the following:

32. "Notwithstanding that which proceeds, Fortsum is committed to repair properly and without additional expenses the defects (bugs identified within 30 days following the delivery date of the customer program within a fixed priced mandate."

33. I shall make note of one more paragraph in this agreement which comes under the heading "Laws".

34. "The laws from the province of Nova Scotia govern the present document. Any legal procedure related to the present document and/or the resulting

mandate would have to be submitted in the judicial district of Ontario which will have competent jurisdiction in this matter. "

35. It seems or would appear there are two problems that arise here they were not developed within the presentation of this case. One problem is that Fortsum Solutions a member of GFI Solutions Group Inc. appears on the surface to be the contracting party not the named claimant in this case. The Claim has been commenced by GFI Solutions PME Inc. Also the Contract makes reference to Fortsum Business Inc. as the delivering party to the defendant of the software.
36. Further the licensing agreement is between Sap Canada Inc. and the named defendant. Many of the e-mails and correspondence with the defendant are from personnel working for Sap or Fortsum. Blake Barkhouse who provided evidence on behalf of the named claimant and is a key witness in this case, is noted as vice president, Business Development, Fortsum. So I question whether we have the correct party named in this claim.
37. Furthermore the agreement that both parties rely on clearly states that any legal procedure related to the document i.e. the contract or agreement would have to be submitted in the judicial district of Ontario which will have complete jurisdiction in the matter. This would be so even though the laws from the Province of Nova Scotia would govern the document.
38. Therefore on the surface it would appear this court would not be a court of competent jurisdiction to hear this matter.
39. Notwithstanding the above comments it would appear that the parties have acquiesced to the jurisdiction of this court. Further because this matter has taken four full hearing dates I shall render a decision and the parties can decide whether to live with that, appeal the decision or appeal the jurisdiction this court.
40. The defendant has no problem with paying for invoices claimed related to support services and reports. These invoices total \$10,266.03. The interest being claimed on those up to June 13, 2012 was \$1037.48. The Notice of Claim filed in this case indicates interest at \$497.43 which took it up to October of 2011. It was left to the court to determine whether the interest at \$1037.48 is correct. It was not the amount claimed originally and in addition there was no breakdown of that amount now claimed or confirmation that the defendant received monthly invoices showing the accrual of interest. There was no exception made to the \$497.43 and that is the amount that I will use for purposes of this decision. Therefore the total amount that I would determine is owed to the defendant would be \$10,763.46.

41. The claimant never signed off on paying for the two programs that did not work. While the Claimant argues the programs did in fact work the simple fact remains that they did not function as required by the defendant's business. As the claimant told the defendant "saying it works does not mean it works."
42. The claimant certainly was aware through the entire process what was required by the defendant's business.
43. The defendant requested a form of credit for these software programs if they did not function as required and they never did. The amount that should be credited for the programs and maintenance costs works out to \$9337.69.
44. Therefore the amount owing to the claimant would be \$1425.77.
45. I have already expressed the name of the party and the jurisdiction for hearing this matter to be problematic. Therefore I will not be making a formal Order.

Dated at Halifax this 13 day of August 2012