IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: Boudreau v. 3255177 Nova Scotia Limited, 2018 NSSM 14

Claim: SCY No.465249
Registry: Yarmouth

Between:

GERALD C. BOUDREAU

CLAIMANT

– and –

3255177 NOVA SCOTIA LIMITED, TIM DEVOUGE AND STARRIA DEVOUGE

DEFENDANT

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: February 8, 2018

Decision: February 16, 2018

Appearances: The Claimant, Kiel Mercer
The Defendant, Michael C. Moore (in writing)

DECISION

Facts

[1] I heard this matter at 1:30 on February 8, 2018. Prior to that time I had a telephone conference with counsel to set the date and all had agreed. On the morning of the hearing I received communication from counsel for the defendant that he would not be attending the hearing but asked that the Court consider and apply the matters that had been submitted in the statement of defence. I confirmed to both counsel that I would hear the claimant's solicitor at scheduled time and I would consider the matters raised by the defendant's counsel in the process of rendering decision.

[2] The claimant agreed to provide a guarantee to support the defendant's business in the amount of $360,000. This came in the form of a guarantee of a line of credit in that amount. In

November 2015 the claimant and the defendants signed a “guarantee agreement”. This agreement provided, among other things, that the defendant would pay a monthly fee in the amount of 1% of the total amount advanced on the line of credit. The agreement also provided that the claimant was to be provided monthly with written reports of all transactions involving the line of credit and monthly income statements for the defendant company. The claimant’s evidence was that he did not receive the statements or reports on any occasion.

[3] On November 27, 2016 the claimant wrote by email to the defendants raising the concerns that he had raised previously that he had not been receiving the appropriate paperwork as provided for by the guarantee agreement. He also raised the fact that the payment of the fee for the provision of the guarantee had not been paid in a timely manner. By this time the claimant was becoming frustrated and stated that he would withdraw the guarantee in accordance with the terms of the written document which provided for two months’ notice unless payments were promptly brought up to date and that he was provided postdated cheques to cover the cost for the following year. The parties had subsequent correspondence within a few days whereby the defendant agreed to pay the outstanding payments for November and December 2016. The payments were made but the postdated cheques were not delivered

[4] The next interaction between the parties occurred around January 9. 2017 when the claimant again reminded the defendant that he had not received the postdated cheques. There were several more attempts to address this issue until 22 February when the defendant Tim Devouge responded in an email indicating that he was not prepared to do an email back-and-forth and he was not prepared to pay” another dime” until RBC decides what they are going to do with the line of credit. From there matters deteriorated further between the parties and no resolution was achieved. No further payments were made.

[5] In July 2017 the bank called the line of credit and the defendant company ceased to operate. The claimant’s evidence was that he was facing having to pay the bank the sum of $360,000.

[6] At the hearing counsel for the claimant acknowledged that the claimant had mistakenly referenced the amount due as $3,500 as opposed to $3,600 and one of his prior emails. He acknowledged that the claimant would voluntarily Limited his claim to $3500 per month.

[7] The defendant did not call evidence nor did his counsel appear at the hearing.

[8] The matters raised by the defence are that due to the claimant’s November 27, 2016 email the defendants had relied on the statements made in that email that the November 2016

monthly fee be paid no later than November 30 and that the claimant receive from the defendant company before December 15, 2016, twelve postdated cheques each in the amount of $3,500. The payments were made, albeit late, on or before December 30, 2017 bringing the payments up to date to that date.

[9] The defendant's counsel invokes the doctrine of estoppel to argue that because these conditions were not fulfilled the guarantee and agreement have been put at an end and that the cancellation clause which provided for two months' notice had thereby been invoked by the claimant. He argues that for this reason the maximum amount that could be awarded would be two months. He also argues that no further liability should be imposed.

Analysis and decision

[10] I have examined the law with respect to estoppel. There are many cases. In Millet v. Murphy, 2011 NSSM 21, adjudicator Parker adopted the summary put forward by Justice Nathanson in Campbell v. Inverness (County) [1990] N.S.J. No. 195.

> Four points ought to be noted from the words of Lord Denning (as he later was).
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> First, in order to support a promissory estoppel, it is necessary that there be a promise which was "intended to be binding, intended to be acted on, and in fact acted on". This has been described as a promise as to the future conduct of the promisor upon which the promisee relies and acts.
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> Second, it is necessary that the promise made "was intended to create legal relations". This may, perhaps, imply that the parties need not have been already bound contractually to each other. A review of the facts of the case reveals that the parties were in fact bound contractually (i.e. landlord-tenant) and, in addition, all of the cases cited by Lord Denning dealt with fact situations in which the parties were bound contractually. The judgment does not expressly state what the law is on this point.
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> Third, "[t]he courts have not gone so far as to give a cause of action in damages" for a breach of the promise. The words appear to preclude a promissory estoppel creating a cause of action. If they do not preclude it, one can perceive that there may be doubt as to whether consideration is essential to the formation of contracts.
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> Finally, it is necessary that the promise be one "which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact acted on". Thus the promisor must intend the promise to induce the promisee to alter his or her position and the promisee must rely upon the promise and alter that position. However, there is some disagreement in subsequent cases as to whether the promisee must, in altering position, act to his or her detriment. [*My emphasis*]

[11] In the case before me I find it impossible to say that the defendant altered his position to his detriment. I find nothing in the words of the email exchange to indicate there was an intention to create legal relations. Perhaps most strikingly I do not see how it can be said that the claimant in this case induced the defendants to change their position or that the defendant changed their position at all. I am unable to conclude that the defendant has made out the essential elements necessary to establish a promissory estoppel. I therefore reject the defence.

[12] At no time did the claimant withdraw his guarantee nor did the defendant request that he withdraw his guarantee. The guarantee remained in place and thus in accordance with contract the fee remained payable. The claimant states that the guarantee remained in place and had the effect of supporting the defendant's line of credit until July 2017 when it was called by the bank. He seeks damages in the amount of $3,500 per month for the months of January to June 2017. I find that he is entitled to judgment in that amount.

[13] I am advised that the claimant incurred no service cost. Therefore costs will be awarded in the amount of $199.35, being the filing fee in this court.

Dated at Yarmouth this 16th day of February, 2018.

Andrew S. Nickerson Q.C., Adjudicator