IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Dixon v. McNicol*, 2019 NSSM 45

Claim: SCY No. 478896
Registry: Yarmouth

Between:

GARY ROLAND DIXON

CLAIMANT

– and –

IAN JOHN MCNICOL

DEFENDANT

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: July 12, 2019 and August 26, 2019

Decision: September 10, 2019

Appearances: Mary Jane McGinty for the Claimant,
Rubin Dexter for the Defendant

DECISION

Facts

[1] I heard evidence on behalf of the Claimant from Ernest Boudreau who is a Chartered Professional Accountant and who was the only witness for the claimant. On behalf of the Defendant I heard evidence from Shelley Nickerson and the Defendant, Mr. McNicol.

[2] I found all of the witnesses to be forthright and truthful, yet understandably speaking from their knowledge and perspective. I do not find it necessary to make any findings of credibility in the sense that I must resolve contradictory evidence.

[3] I point out that in the initial defence, a limitations of actions defence was raised. However, at trial counsel for the defendant confirmed that she was not relying on the limitation defence and that I should proceed to hear and determine this matter. I also inquired of counsel whether there was any issue that Shelley Nickerson was a duly authorized agent for Mr. McNicol, and that she did have the authority to bind Mr. McNicol in the negotiations of relevance to this proceeding. Both counsel agreed that Ms. Nickerson was clothed with that authority at all relevant times.

[4] I wish the parties to know that I have carefully reviewed my notes of the evidence given and examined the documents carefully. I have considered the submissions. If I do not make reference to any particular piece of evidence it is because I do not consider it essential to my decision.

[5] It is clear from the evidence, that these parties, or corporate entities which they each controlled, or family members of theirs, had been business associates in a business called Tusket Motor Sports. Unfortunately, this business failed and the parties had a falling out, apparently not only with respect to this business, but also with respect to other business arrangements between them.

[6] In my view, although the viva voce evidence shed some light on the context, my task is essentially to analyse the correspondence which went back and forth between these two parties (or their agents) and to determine whether or not there was a contract, and if so, what its terms were.

[7] On May 31, 2016 the Defendant, Mr. McNicol, had sent a general inquiry to Mr. Boudreau seeking scenarios to resolve matters between them relating to Tusket Motor Sports and Stork (an entity owned by one the parties' spouse). On June 4, 2019 the Defendant Mr. McNicol sent an email to Mr. Boudreau in which he asked Mr. Boudreau for a proposal as to "how to settle the TMS, stork things", and sought the best tax strategy to accomplish that. In response to this, Mr. Boudreau forwarded to Mr. McNicol a document entitled schedule of "closing indebtedness" and another document called "closing out strategy". The documents sent by Mr. Boudreau attempted to reconcile monies invested in Tusket Motor Sports by the parties either personally, or through companies controlled by them. The documents relevant to the foregoing are found at Exhibit D – 2, Tabs 1 and 2.

[8] On May 31, 2016 an invoice from Garian Construction to Dixon's Marina, companies related to the respective parties, was sent to Mr. Dixon. I note that in above-noted correspondence there is no mention of the alleged debt arising from this invoice.

[9] On June 6, 2016 and June 7, 2016 there is an exchange between Mr. Boudreau and Mr. McNicol (Ex D-2, TAB 4), the relevant portion of which included a document outlining various possible settlement options between these parties. Mr. Boudreau specifically says in his email that there had been a prior telephone conversation between he and Mr. McNicol and he also specifically says in that email, he has not shared these numbers with Mr. Dixon in order to allow Mr. McNicol time to study and formalize an offer.

[10] On June 10, 2016 Shelley Nickerson, who is the office administrator for Mr. McNicol, becomes involved. (Ex D-2, TAB 6) There then ensues a discussion between Ms. Nickerson and Mr. Boudreau as to the interest in respect to various loans. (Ex D-2, TAB 4)

[11] There is a document at Ex D-2, TAB 5 which is entitled "PRESENTATION 2" which Mr. Boudreau says, in his viva voce evidence, was sent to Mr. Dixon. This had also been sent to Mr. McNicol, because in an email at Ex D-2 Tab 8, Ms. Nickerson asked for some clarification about it. Then on June 28, 2016, Ms. Nickerson writes to Mr. Boudreau (Ex D-2, TAB 9) "Ian has reviewed the possible settlement offers presented to him and decided to proceed with presentation 2". She then goes on to make comments with respect to adjustments to that proposal with respect to interest that should be paid.

[12] On August 5, 2016 Ms. Nickerson writes to Mr. Boudreau and says:

> "I have attached a revised presentation as per our phone conversation for you and Gary to review."
>
> "If all parties are in agreement with the attached presentation then we can move forward with the closing of TMS and preparing the final financial statements."

[13] This correspondence is to be found at Ex D-2, TAB 13 along with the revised PRESENTATION 2 which results in a "net amount owed to Gary and 32266957 NS Ltd" in the amount of $21,100.

[14] At Ex D-2, TAB 14 Mr. Dixon wrote to Mr. Boudreau that he was satisfied with the proposed settlement "PRESENTATION 2" but raised the question of Mr. McNicol contributing to his legal bill and wanted confirmation that any liability he would have with respect to the Credit Union loan would be formally released. The response to this is found at Exhibit C-1 Tab 1. Ms. Nickerson replies that she has been in touch with the Credit Union to make the necessary arrangements and she responds "as far as legal bills it is best if each pay their own". On August 15, 2016 Mr. Boudreau confirms to Ms. Nickerson that he had spoken with Mr. Dixon and that Mr. Dixon is agreeing to proceed as Ms. Nickerson had suggested above.

[15] There are some elements of Mr. McNicol's own evidence which are of relevance. He acknowledged that there was no reference in the correspondence to liabilities as between Garian Construction and Dixon Boatbuilding. He further acknowledged that he did not have knowledge of whether Mr. Dixon was aware of the earlier correspondence whereby Mr. McNicol was seeking a settlement of a much broader range of issues. He also confirmed that he did, in fact, act on the alleged agreement, took the allowable loss for tax purposes, and approved of the final financial statements of Tusket Motor Sports.

[16] It is also apparent from both the evidence of Mr. McNicol and the evidence of Ms. Nickerson that their expectation was that the $21,100 was to be applied as a set off or credit to the account that Dixon Boatbuilding owed to Garian Construction.

Argument

[17] Ms. McGinty argues that I should hold that there was never any meeting of the minds between these parties. She says that there was no *consensus ad idem*. She argues that Mr. Boudreau was specifically told that Mr. McNicol was looking for a settlement of all issues between these parties and was looking for a tax plan. In support of this she cites the document at Tab 2. She submits that this arrangement should be considered as part of a more global settlement of the affairs between these parties and that no global settlement had occurred.

[18] She argues that because "PRESENTATION 2"is essentially just a schedule to be inserted into a larger agreement, that no agreement had actually been concluded. She

suggests that this was the reason that on May 31, 2016 a copy of the invoice of Garian Construction was requested.

[19] She also argues that since the figure in the final version of PRESENTATION 2 refers to monies owed to both Mr. Dixon and 32266957 NS Ltd and that the numbered company is not a party to this action, I should deny judgement. All parties agreed that that numbered company is in fact owned and controlled by Mr. Dixon's spouse.

[20] Mr. Dexter on behalf of the claimant argues that this is a simply a matter of contract formation. There was an offer and there was an acceptance. He says the offer was made on August 5, 2016 and after some minor back-and-forth, accepted on August 15. He says that there is nothing more to the matter. He puts forward an argument that essentially says that the Defendant is estopped from denying the agreement because he acted on it.

[21] Mr. Dexter also argues that these parties were negotiating a settlement of the affairs relating to Tusket Motor Sports and were essentially not considering the formalities of what entities put what money in. They were two businessmen settling affairs between them as to Tusket Motor Sports. He argues that if Mr. Dixon's wife's company is a third-party beneficiary, that does not detract from the fact that these gentlemen had made an agreement.

Law and Analysis

[22] Both parties agree that the decision of the Nova Scotia Court of Appeal in **Halifax (Regional Municipality) v. Canadian National Railway Company, 2014 NSCA 104** correctly states the law that I am to apply. I consider the following passages from the decision of Justice Fichaud as relevant and informing my decision:

> [57] The search for agreement focusses primarily on "the mutual and objective intentions of the parties as expressed in the words of the contract". Surrounding circumstances, consisting of "objective evidence" that "was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting", may "deepen a decision-maker's understanding" of the consensual meaning that is expressed in the written contract. The purely subjective intentions of the parties, on the other hand, are not pertinent. (Sattva, paras 57-59).

....

[61] In *The Law of Contracts*, 2nd ed (Toronto: Irwin Law Inc., 2012), p. 527, Professor John D. McCamus elaborates:

> The mere fact that one party suffers from a misunderstanding of one or more of the terms of an agreement does not necessarily lead to the conclusion that no *consensus* has been achieved. Where the other party correctly understands the meaning of the agreement, a *consensus* may be achieved on the basis of the objective theory of contract formation. *Notwithstanding the misunderstanding, the other party to the agreement may be entitled to rely on the mistaken party's objective manifestation of assent as a basis for the creation of a valid and binding consensus.* As Blackburn, J. observed in *Smith v. Hughes* [(1871), L.R. 6 Q.B. 597 (Div. Ct.)]: "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." *Thus, even where a consensus may be said to fail at a subjective level, the consensus may be achieved on an objective basis and the contract so created is an enforceable one.* A *consensus* may fail, however, where each party has a different understanding of a term that is so ambiguous or vague or imprecise that neither party can insist on his or her own meaning as being the true or correct meaning of the term of which the other party has objectively assented. In such a circumstance, the common law of contract formation holds that no enforceable contract has been created. Similarly, a *consensus* will fail where one party is aware of the other party's mistaken understanding of a particular term. Again, the lack of *consensus* leads to the conclusion that no contract has been created at common law. ... [Emphasis added]

[23] I find that there was a contract formed. I consider the email of August 5 to be an offer. I find that the exchange among Ms. Nickerson, Mr. Boudreau and Mr. Dixon to be simply a clarification or fine tuning of the terms the offer. I further find that the offer was accepted on August 15.

[24] While Mr. McNicol may well have thought he was dealing with part of a negotiation to settle a much larger scope of the affairs between he and Mr. Dixon, I find nothing in

the documentation that indicates that he communicated that to Mr. Dixon, either through Mr. Boudreau or through Ms. Nickerson. As pointed out by Justice Fichaud I cannot delve into what Mr. McNicol, or indeed Ms. Nickerson, may have subjectively thought.

[25] I do not find merit in the argument that requesting the Garian invoice sheds any light on this. There is no evidence which tells me why this was requested. It may simply have been to see where things stood and it is not referenced in any subsequent correspondence.

[26] With great respect, I cannot accept Ms. McGinty's position that we are dealing with only a schedule which is intended to be placed in some greater agreement. I have already indicated that my view is that the exchange of emails between August 5 and August 15 is in fact the agreement. In my view "PRESENTATION 2", whether you call it a schedule or part of the agreement, is in fact part of what was agreed to.

[27] I found Ms. Nickerson to be a thoughtful, precise and competent woman. I am satisfied that if she had been instructed by Mr. McNicol to make an offer conditional on the settlement of larger issues, she would have specifically said so in her correspondence. I am satisfied that she conveyed precisely what she was directed to convey. There is no reference in any of her correspondence that allows me to take the interpretation that the correspondence does not mean precisely what it says or that the "PRESENTATION 2" as modified by Ms. Nickerson is somehow not, from the clear words of her communications, an integral part of the agreement made.

[28] I am required to take the words used in the communications between these parties, including the communications made by Ms. Nickerson, who is the acknowledged agent for Mr. McNicol with authority to bind him, in determining the existence of the contract and in finding its terms. With great respect to the skilful argument of Ms. McGinty, I simply cannot agree with her position. Were I to do otherwise, I would be importing terms into the contract that Mr. Dixon was not aware of, did not assent to, and would not form part of the contract when viewed by a dispassionate objective observer.

[29] The point which has caused me some pause, is the fact that the debt is said to be owed, at least in part to the numbered company, which I am advised is in fact controlled by Mr. Dixon's spouse. After reflection, I am persuaded that Mr. Dexter's position is

correct. These parties negotiated a settlement of their affairs relating to Tusket Motor Sports, and various entities on both sides related to one party or the other were involved in that process. I know of no authority, and Ms. McGinty did not submit any, that states that it is not possible for third party to be the beneficiary of the contract.

[30] I decline to address the estoppel argument put forward by Mr. Dexter because it is not necessary to do so given what I have already decided.

[31] I wish to thank counsel for their helpful assistance in the conduct of the case.

[32] In the result, I am prepared to grant judgement to the Claimant in the amount of $21,100 together the with costs of the filing fee in the amount of $199.35. I do not find an invoice for service in the file. I will allow Mr. Dexter seven days from the filing of this decision, to either advise that he does not have costs for service, or to produce an invoice from the process server, before I issue the formal order.

Dated at Yarmouth, Nova Scotia, this 10th day of September, 2019.

Andrew S. Nickerson Q.C., Adjudicator