

2019

SCC No. 491094

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Clute v. Bobbett*, 2019 NSSM 77

BETWEEN:

APRIL CLUTE

CLAIMANT/DEFENDANT
by COUNTERCLAIM

and

LISA BOBBETT

DEFENDANT/CLAIMANT
by COUNTERCLAIM

REASONS FOR DECISION

BEFORE:

A. Robert Sampson, Q.C., Adjudicator

DATE OF HEARING: Hearing held at Sydney, Nova Scotia on October 23, 2019

DECISION RENDERED: November 19, 2019

APPEARANCES:

For the Claimant: Counsel – Stephen Jamael

For the Defendant: Counsel – Candee J. McCarthy

Witnesses:

April Clute - Claimant

Lisa (Kolchetski) Bobbett - Defendant

BY THE COURT:

1. This claim was commenced by a Notice of Claim filed with the court on August 15, 2019 and heard on October 23, 2019. A Defence and Counterclaim was filed on September 12, 2019. No written Defence was filed to the counterclaim. At the outset the court inquired whether either party was requesting an exclusion of witnesses. As it turned out evidence was only given by the Claimant and

Defendant and therefore the issue of exclusion became moot. Further, at the conclusion of the hearing, counsel for the Claimant requested time to follow up with a written submission to the court. This was granted, however, subsequently counsel contacted the court advising they no longer wished to submit any final comments in writing. Counsel for the Defendant was contacted and confirmed they too did not wish to submit anything further.

2. This claim arises out of a contract dispute between the parties relating to the purchase and sale of an unincorporated business operation owned by the Defendant known as “Beautiful Dayz Ahead” (“the Business”). The Claimant claims \$4275.00 plus costs and nominal general damages (\$100.00) for breach of contract and failure to provide trust funds to the Claimant at the time of sale. In a written Defence and Counterclaim the Defendant fully denies the claim. In the written Defence the Defendant acknowledges that a Promissory Note was signed by the parties however alleges that it was drafted and signed by the Defendant under duress and therefore voidable at the Defendant’s discretion. The Defendant further states that there never was any promise to transfer or pay over “trust funds” to the Claimant and that the business was sold “as is” for the agreed upon amount of \$5000.00.

3. The Counterclaim essentially states that the contract between the parties had been breached by the Claimant and/or was voidable at the Defendant’s discretion and therefore all monies owing together with interest should immediately become due and payable or otherwise be paid by way of regular monthly payments together with interest. The amount claimed is \$5000.00.

4. At the outset the court reviewed the general procedure to be employed in hearing the claim, the role of each party and how evidence was to be received including the opportunity of both parties to provide their “side of the story”, that each counsel would be afforded a chance to question the witnesses and further that at the end of the evidence each would be afforded a chance to sum up their positions based on all the evidence presented.

5. The court is appreciative to both counsel for the organized manner in which the documents relating to each of their client’s positions was presented to the court. In addition to the court file materials which included the pleadings of the Claimant, Defence/Counterclaim by the Defendant and service documents, there were five exhibits in total (some of which contained multiple pages) tendered to the court which will be referred to throughout this decision.

6. Finally, from the court's introductory summary of this matter, based on the pleadings of the parties and the evidence and exhibits received by the court this matter can clearly be identified as a "contract dispute". The evidence confirmed that each participated in discussions and communications in early summer of 2018 that led to the conclusion of a "verbal contract" surrounding the sale of the business. As part of the terms of contract the Defendant agreed to accept terms of payment of the purchase price and those terms were reduced into writing by way of a Promissory Note (the "Note"), drafted by the Defendant and signed by both parties on July 30th, 2018 (Exhibit 1). This document (Note) does not reference in any way the details of the transaction/business that was sold but from the evidence I am satisfied that its origins arose as a result of the sale of the business between the parties. I am further satisfied that it evidences the promise by the Claimant to pay to the Defendant the sum of \$5000.00 without interest, said sum to be paid in full no later than July 24th, 2020. The court is also satisfied from the undisputed evidence of both parties that as at the time of the hearing the only payment that had been made on the Note was \$250.00, paid by the Claimant in August 2018.

BACKGROUND

7. The evidence confirms the business known as "Beautiful Dayz Ahead" was formed by the Defendant back in 2016 and until the time of sale in mid-2018 she operated it as a sole proprietorship. The "business" was essentially an event decorating business of which 95% dealt with weddings functions. The Defendant confirmed that her son had suffered a medical condition in early 2017 and as a result she was under a great deal of family pressure and felt she could not devote the time required to continue its operation. She testified that she had become acquainted with the Claimant in recent years through the Claimant's employment at the Membertou Trade and Convention Centre dealing with events. A large amount of the services provided by the business took place at that venue. The parties became friends and the Defendant stated that she first approached the Claimant to see if she was interested in purchasing her business back in 2017 after her family problems first arose. The evidence confirms that the Claimant was not in a position to purchase at that time so a sale arrangement was made with another individual. The Defendant stated that while that transaction was not concluded, the terms of sale were exactly the same as those later entered into with the Claimant except for the "terms" of payment of the purchase price of \$5000.00.

8. The evidence of the parties was that in July 2018 the Defendant again reached out to the Claimant by email (see Exhibit 2-A) to see if she wished to reconsider purchasing the business. The Claimant was aware of the personal struggle

the Defendant was going through at the time and thus her desire to sell the business for that reason. The evidence of the Claimant was that she was excited about the possible opportunity to own and operate the business but had tried a few times to secure the purchase monies with no luck. Her evidence also confirmed that she was concerned with her existing employment position with Membertou and felt it would give rise to a conflict situation and she would be forced to resign. The evidence confirms that the purchase price of \$5000.00 was on the table so to speak from the outset. All of these factors were known and discussed between the parties. In response to the July 18th email/offer the Claimant responded the following day (July 19th) thanking the Defendant for again reaching out to her and that she wanted to purchase the business and she was going to again seek approval for financing (see Exhibit 2-C). Over the following days the parties arranged to transfer the business name at Access Nova Scotia and with the Defendant's permission the various brides of pending contracts were contacted by the Claimant and announcements of the "new owner" were posted on Facebook by the Claimant. The Defendant's spouse, Darryl, began to transfer the inventory to the Claimant. The Defendant referenced specifically a meeting she and the Claimant had on her back deck in late July 2018 where she handed over all of her files which included each individual invoice (see Exhibit 3).

9. However, the evidence suggests that the parties got somewhat ahead of themselves as the Claimant's efforts to obtain financing for the purchase was turned down. As a result and having regard for the transfer progression that had occurred and noted above as well as the desire by the Defendant for the Claimant to take over the business, through their discussions it led to the Defendant taking the initiative to offer to accept payment "over time" which would allow the Claimant to immediately acquire the business and fulfill a series of pending contracts. The evidence of the Defendant was that she had also been led to believe that the Claimant would have to resign from her current position at Membertou and had expressed concerns about her ability to afford taking the business on. The evidence suggests this, at least in part, was the background reason which led the Defendant to prepare the Note and accept the flexible terms set forth in the Note.

10. From all of the evidence I am satisfied that there was a verbal contract for the sale of the business entered into between the parties. I am satisfied that the essential terms of the contract were certain and represented the sale of the existing business which include a number of existing bookings for weddings that spanned through the balance of 2018 and into 2019. Exhibit 3 included 18 invoices representing anticipated contracts that were to be included/assigned to the Claimant for various events. The name of the contracting parties, nature of the

event, date, location and an outline of services to be provided as well as the anticipated cost and deposit paid or to be paid is set out on these documents. Also included was the business name and “all” inventory as set forth on the handwritten lists set forth in Exhibit 4 which was fully paid for and held by the Defendant.

THE ISSUE

11. The principal issue surrounding this dispute relates to the deposits that had been paid to the Defendant prior to the sale of the business. The Claimant’s evidence confirmed that the reference to “trust funds” set forth in the claim is intended to refer to these deposit payments that had been received by the Defendant at the time the customer secured their arrangement to hire the business for an upcoming event. More directly, the Claimant’s position is that these funds (deposits) which by evidence (Exhibit 3) totalled \$6578.00 were to be transferred from the Defendant to the Claimant as these funds represented “deposits” for work/services not yet provided and the commitment to carry out such work was assumed by the Claimant. In direct contrast, it was the Defendant’s position that all of the invoice information was given to the Claimant in connection with their discussions leading up to their contract and at no time was there any suggestion that the deposit monies received by the Defendant were to be paid to the Claimant. The Defendant stated that she had only recently started the business and it was her practice that all deposit monies received were spent buying inventory required to carry out their commitments to the customer. She stated it was for that reason she held a significant amount of current inventory in spite of the fact that the business had only been started back in 2016. She concluded in her evidence that all of her inventory was turned over to the Claimant and essentially, the value of the inventory would have represented in part where the deposit monies had been spent. Therefore, the Defendant’s position was that, in addition to assigning over the existing contracts for future work, the deal was that the Claimant would receive the entire inventory of the business which the Defendant estimated to amount to approximately \$21,000.00 (see inventory list Exhibit 4) in return for the payment of the purchase price of \$5000.00 as evidenced by the Note.

CLAIMANT’S POSITION

12. The Claimant confirmed that she did not obtain any legal representation in connection with this transaction nor did the Defendant. The Claimant stated in her evidence that she “did not think about trust money issue when this was being put together”. She acknowledged it was essentially a verbal contract and that they trusted each other. She further confirmed that it was late in the transaction that she

learned she was not able to secure the loan to purchase the business outright. She stated that the Defendant had drafted the Note and that she did not have any say in its wording. In her evidence she stated she was satisfied that she was buying value. It was the Claimant's evidence that she intended to resign from her employer and after she did so her employer was prepared to allow her to continue. She became aware of this after the transaction was completed and the terms of the Note entered into. She testified that while she could not recall there being any discussions around the issue of "deposits" leading up to the conclusion of the transaction, she believed all of the deposit monies that had been paid for work not yet completed and being assumed by her were to be transferred to her account. Her only recollection of any conversation about the deposits is with reference to a subsequent conversation she recalled having with the Defendant "at the end of her driveway" where the issue came up and she was assured they would be transferred to her.

13. Although there was no "paper" evidence the Claimant confirmed that she had texted the Defendant stating that she was going to make payments towards the purchase price from her anticipated income tax refund although this did not occur. She acknowledged the email exchange (Exhibit 2) between the parties which occurred on July 18, 19, 21 and 22. This series of email exchanges appear to be the only written documents, other than the Note itself, which references some details of the transaction. Although none speak directly about the transfer of deposits or any reference to trust funds, it was the Claimant's position that the Defendant told her in a conversation which allegedly occurred at the end of the Defendant's driveway that she would be transferring the deposit funds to her. Further the Claimant's position was, with reference to the email on July 23rd (Exhibit 2-E), she believed the reference to Darryl (Defendant's spouse) transferring money to her was with reference to "all" deposit monies. When questioned by the Court as to how the value of her Claim was calculated she stated that it represented the difference between the deposit monies collected by the Defendant and the amount of the monies she owed the Defendant. Finally, the Claimant acknowledged Exhibit 5 which represented a lengthy email she had received in September 2018 from the Defendant's spouse. She felt the email was threatening as it suggested that she had taken advantage of the Defendant at the time of the transaction and should pay the money (purchase price) immediately. In that email at page 9, although the words "deposit" or trust funds" are not used it is clear that reference is being made to the money received that was re-invested back into the inventory which the Claimant had received.

DEFENDANT'S POSITION

14. The Defendant's position was that the deposit monies were never stated to be handed over to the Claimant. She testified that her practice had always been to use all deposit funds to purchase the inventory required for the assignment as well as ongoing additional purchases and therefore these monies were re-invested into the business and the value was represented by the inventory that was transferred to the Claimant at the time of sale. She testified that at the time of the transaction she was not well as she was dealing with a number of issues both personally and with family. She testified that she was both excited yet concerned with the Claimant taking over the business largely because she believed she was giving up her current employment with Membertou. She stated that because the transaction had progressed so far by the time in July 2018 when the Claimant advised her that she could not secure financing, she crafted the Note and presented it to the Claimant suggesting she should take it to a lawyer if she wished. She testified that the Claimant wanted some form of "paper" evidencing that she owned the business and that also contributed to having the Note prepared. She testified she trusted the Claimant in making this arrangement to pay and wanted to ease the pressure as she assumed and operated the business.

15. The Defendant clarified her position on what the wording was intended to represent in the July email exchange with the Claimant. With specific reference to her July 18th and 19th emails where she speaks of the purchase price being immediately reduced by \$2000 she was referencing the "profit" of three contracts being transferred to the Claimant for August/September where her profit would be in the range of \$2000. She referenced the three contracts by profit amounts, each of which corresponded with invoices in Exhibit 3. The number/amount used in each case was net of the deposit amount which the Defendant was stated to have received and therefore such deposit was not to the credit of the Claimant. The Defendant testified that at no time did she have a discussion with the Claimant about returning the deposit nor did she receive any communication, phone, email or otherwise from the Claimant or anyone on her behalf claiming the deposit monies until this action was commenced. She believed this action was commenced because the Claimant does not wish to honor her promise to pay the Note. The Defendant acknowledged Exhibit 5 which was a lengthy email which her spouse, Darryl, had sent in September 2018 to the Claimant without her knowledge.

DECISION

16. It is worthy of note that seldom in dealing with disputes of this nature is anything simply black or white. While many aspects of the evidence of both sides remain undisputed and/or confirmed by a document, clearly in the end the court is

called upon to assess issues of credibility of each party not only as it relates to the actual evidence that each has presented to the court but also an assessment of their ability (or willingness at times) to recall with accuracy what may have taken place, when, where and what, if anything, may have been said. As previously confirmed, the court finds that a verbal contract for the purchase and sale of the business was entered into. This dispute relates to one of the terms of the contract relating to the purchase price. The issue is whether the deposit monies that had been paid to the Defendant on contracts agreed to be assumed by the Claimant were intended to be transferred to the Claimant. From the evidence there is no dispute between the parties that the purchase price was \$5000.00 as evidenced by the Note together with the assumption of a number of pending contracts as well as all of the inventory as set forth in Exhibit 5. By the Claimant's own evidence she was satisfied that she received value.

17. As noted, although there does not appear to be any direct and for certain written evidence which address this deposit issue, I do find there are two pieces of collateral evidence which lend support, for certain to what the Defendant believed. First, there is the series of July emails (Exhibit 2). I find that the Defendant's reference to what the Claimant hopes to gain from profits immediately after the deal closes confirms that the profit the Claimant could expect was net of deposits. I note that the Defendant's spouse witnessed the Note and this, together with his September email (Exhibit 5) to the Claimant lends support to the fact that he was most likely aware of the terms of the transaction. At page 9 the Defendant's spouse clearly recounts the benefits of the deal the Claimant had received and references the fact that previous monies received (deposits) were re-invested into the business by way of inventory and the fact that the Claimant would have the immediate benefit of being able to use this inventory for some of the assumed contracts. Beyond this specific reference the court finds little relevance to anything else in this email other than a plea for immediate payment of the Note on behalf of the Defendant.

18. Often when a court is called upon to make a determination of what the parties may have intended as part of a transaction, beyond assessing what may have been said or documents exchanged between the parties, it is equally important to assess what was not said or exchanged. In this instance, I find it telling that there is absolutely no evidence from the Claimant suggesting that she made any attempt to clarify this issue nor to advance any claim either by phone, email or otherwise to the Defendant requesting the return of the deposit monies prior to this action now before the court. The court appreciates the Claimant's honesty in stating in her evidence that the issue of deposits was simply not thought of or

discussed by her at the time of the transaction. However, logic would suggest, as she began fulfilling the contracts she had assumed following the close of the transaction, that this issue would have surfaced immediately. Therefore, it begs the question, if the Claimant truly believed she was to have received the deposits held by the Defendant then why did she not say or do anything until approximately one year later?

19. At the time of the hearing the court was required to lead the Claimant through the exhibit evidence and notably the invoices set forth in Exhibit 3 for purposes of calculating exactly what amount of deposits were in issue. That amount was determined to be \$6578.00. The court then asked the Claimant to explain how she calculated the amount of their claim and while her evidence was clear that it was intended to represent the difference between the total outstanding deposits held by the Defendant against the balance of the Note outstanding, the amount claimed simply does not equate.

20. The court acknowledges the fact that the Defendant was the drafter of the Note. However, the court further finds that the terms of the Note are not in issue. While both the Defence and Counterclaim suggest that the Defendant was under some form of duress and/or had been misled by the Claimant's possible loss of employment, I find there is simply insufficient evidence to warrant any ruling on these grounds. Having considered all of the evidence I am satisfied that there was no misrepresentation by either party nor was there any mistake as to the terms of this contract. What this boils down to, again based on the evidence or lack of, is that it had been made clear by the Defendant to the Claimant that these monies were represented in the value of the inventory that was included in the transaction and delivered to the Claimant. I find that the terms of the contract were sufficiently certain in this regard. Therefore the Claim is dismissed.

21. As for the counterclaim which essentially was asking for a ruling whereby the balance of the monies owing under the Note should become immediately payable, I dismiss this claim as well. I find the terms of the Note are sufficiently certain and remain in effect. Under those terms of repayment the Claimant must pay the balance owing in full by July 24th, 2020. So as to remove any doubt in this regard, I find that the Defendant is entitled to payment in accordance with the Note dated July 30th, 2018 as set forth in Exhibit 1.

DATED at Sydney, Nova Scotia this 19th day of November, 2019.

A. ROBERT SAMPSON, Q.C.

Adjudicator