SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Kellogg v. Zwicker*, 2022 NSSM 55

Date: 20221031
Docket: SCBW 513897
Registry: Bridgewater

Between:

Paul James Kellogg

Claimant

- and -

Djasinda Zwicker

Defendant

REASONS FOR DECISION AND ORDER

Adjudicator: Eric K. Slone

Heard: October 24, 2022, via zoom in Halifax, Nova Scotia

Appearances: For the Claimant, self-represented
For the Defendant, self-represented

BY THE COURT:

[1] The Claimant owned and operated a gift shop known as "Comfort & Joy" in downtown Lunenburg, Nova Scotia, which he purchased in 2016. The Defendant worked for him for several years, ultimately becoming store manager. In July of 2019 the two of them arrived at an agreement whereby the Defendant would take over and acquire the business, over time. The idea was "lease to own," a concept probably better suited to the purchase of a car or a home than to the purchase of a business.

[2] It is unclear whether the seller was Paul Kellogg, or his company Artisan Nova Scotia Ltd. If as it appears that the latter was intended, then technically this claim was brought by the wrong legal entity, though such an irregularity would have been curable.[1]

[3] A one-page agreement was drafted, clearly not by a lawyer. Some of the terms are clear, while many necessary terms are simply not addressed, or perhaps implied.

[4] The terms that are clear to me are these:

a. The total price to be paid, over time, including HST and interest was $143,750.00.[2]

b. There was a $5,000.00 down payment, leaving $138,750.00 to be paid in equal instalments of $2,312.50 over 60 months, beginning on September 15, 2019.

c. The purchase price was said to be for stock (inventory) and fixtures. The Claimant did not have any legal rights to the name, was not 1The identity of the Defendant also refers to something called "Hunni Beez Retail Unique Ideaz" which does not appear to be a legal entity, so it does not raise any important question for the court.2I note that the agreement purports to charge HST on the interest charges, which type of charges do not attract HST purporting to sell the name, and the Claimant was under no obligation to use that name. It was implicit that the Defendant would be taking over the lease from the owner of the building, and that she would enjoy the goodwill associated with the store and its location.

d. The agreement contemplated that should anything happen to the

Claimant, his estate would assume his obligations.

[5] The agreement leaves other questions open, reinforcing my view that the lease to own model was a dubious fit:

a. What would happen if the business failed, or the Defendant could not continue making payments? What rights did the Claimant have to retake the business? What type of financial accounting would have to take place?

b. What rights did the Defendant have to dispose of fixtures? Clearly, she would have the right to sell inventory, as that is the only way the business generates revenues. But what would have been her obligation to keep the inventory at any particular level? What might have stopped her from liquidating the inventory, which (as far as I know) she did <u>not</u> do?

[6] This claim arises, in part, as a casualty of the Covid pandemic. Gift shops are already something of a seasonal business, but when the pandemic hit in early 2020 the business was shuttered for months at a time under public health directives. At other times, when it was allowed to open, sales were poor. Eventually, in June 2021 the Defendant ran out of resources and had to let the business go.

[7] The Claimant contends that the Defendant did not work hard enough to make the business successful, but I do not believe that is a fair assessment. Moreover, it is irrelevant for my purposes.

[8] The Claimant was not obligated to step in and take over the business, but it was reasonable for him to do so given how much money was still owed under the agreement.

[9] The Defendant says that she did a walkthrough with the Claimant at that time, and he seemed content with the state of the business. She did not anticipate any money changing hands. She had made somewhere between $20,000.00 and $30,000.00 in payments since the start of the agreement. She did not expect any money back, nor did she expect to owe any money.

[10] There was no evidence before me as to how much money the Defendant made, or lost, during her less than two years of operation.

[11] As such, it came as a bit of a shock to her when the Claimant started this

claim in April 2022 seeking $21,735.00 in damages for what he claims are fixtures that the Defendant removed from the store. In the alternative, he claims for the return of these fixtures which he believes that she still possesses.

[12] The Defendant testified that she only sold one fixture, an antique style hutch, that had a price tag on it (i.e., was explicitly for sale) when she took over the store. She testified that the Claimant seemed content with the state of the store when he took it over, and that all of the other allegedly missing fixtures were there at that time. She denies having removed any of them from the premises.

[13] To the extent that this is a matter of credibility, I prefer the evidence of the Defendant. I believe her evidence that she sold a piece that was for sale, and that she did not sell or take away any other fixtures. I conclude that the Claimant must be mistaken.

[14] Even if she had sold a few fixtures, the agreement is somewhat ambiguous as to her right to do so. This is apparently a large store, and it was somewhat within the Defendant's discretion as to how to display merchandise.

[15] In the end, I conclude that the Claimant has not established a right to have items returned to him, or for compensation for any such items. The question of the correct identity of the Claimant is also, therefore, a moot point.

[16] I might add that everyone here is a victim of the pandemic, and I am comfortable that the losses should rest where they have fallen.

ORDER

[17] In the result, the claim is dismissed.

Eric K. Slone, Adjudicator