

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Miller Lake Learning Services Inc. v. Latta, 2010 NSSM 76

Miller Lake Learning Services Inc.

Claimant and Defendant by Counterclaim

-and-

Kimberly Latta and Bedford Learning Center Inc.

Defendants and Claimants by Counterclaim

-and-

Toby Humphreys

Defendant by Counterclaim

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: October 12, 13th and 14th 2010

Decision: December 7, 2010

Counsel:

Mervyn Valadares Counsel for the Claimant.
The Defendants were self represented

Parker:-This matter came before the Small Claims Court following a protracted nine-day trial before another adjudicator of the Small Claims Court in which the issues set out in the original claim was never resolved. The parties wished that the matter between them be resolved and as a result this matter was brought forward in the Small Claims Court before another adjudicator.

The Claim

The claimant in its pleadings alleged it entered into an agreement with Bedford Learning Center Inc. and Kimberly Latta for permission to use Kimberly Latta's Intellectual Property.

The claimant stated that "it became apparent that some of the material provided by the(Defendant) belong to another company called SpellRead". The claimant stated "that the program(The Claimant) purchased was in fact property of SpellRead and did not belong to(the Defendant)" the claimant stated that it was concerned it would be open to an action by SpellRead so it dissolved the relationship with the defendant under the agreement.

The claimant stated it paid the defendants \$20,000.00 and since this was not the defendants' intellectual property to sell, the claimant can no longer offer the program which the business is based upon.

The claimant alleges that defendants did not live up to the terms of the agreement and never owned a copywrite of the intellectual property that the defendants alleged they own.

The Defence

The defendant Kimberly Latta stated she "is the original author and creator of the Exceeding Reading Program and the defendant Bedford learning Center Inc. is indeed the owner and has every right to license, certify and authorize its use. The defendants stated that the claimant is in violation of the agreement.

The defendants counterclaim for general damages and unpaid royalty fees.

The agreement referred to in the pleadings was entered into on March 3, 2008. Parties to the agreement were the claimant Miller Lake Learning Services Inc.("ML") and Bedford Learning Center Inc. and Toby Humphreys and Kimberly Latta.

The agreement is entitled "Exceeding Reading License Agreement". Pursuant to the agreement Toby Humphreys and Stan Humphries agreed to the price of \$20,000.00 for the purchase of the Fall River Exceeding Reading territory and Exceeding Reading License Agreement.

Under the agreement the claimant and Humphreys have permission to use the Exceeding Reading Program and use of selected manuals/materials to carry out instruction and assessment proposed within the designated territory. There are a number of benefits the claimant will receive during the life of the agreement.

The agreement also in its first article stated "provide Latta (Bedford Learning Center Inc.) with 60 days notice of your intention to terminate your relationship with Latta(Bedford Learning Center Inc.).

Article 3 of the agreement stated *inter alia*, "The Exceeding Reading Intellectual Property has been developed by Latta and is owned by Latta and The Bedford Learning Center Inc."

Article 7 of the agreement stated that "Latta (Bedford Learning Center Inc.) reserves the right to impose a royalty fee not exceeding \$500.00 monthly to Humphreys' Fall River location. Monthly royalty will not begin until March 3, 2009 and will not begin without at least three months notice to Humphreys by Latta.

Analysis:

The claimant's main argument lies within them *Maxim Nemo Dat Qui Non Habet* - he who hath not cannot give.

The claimant brought forward a witness Sarah Arnold who had several years experience using the SpellRead program and in the training of numerous instructors in using the SpellRead program. Ms. Arnold was given the task by the claimant to compare the SpellRead program with the manuals from the Exceeding Reading Program. Ms. Arnold was of the view that every component and their order and structure in both the SpellRead program and the Exceeding Reading Program were the same. She stated that the syllables used in each program are the same and even the words used as examples in the programs are the same. Ms. Arnold stated concepts of consonants; vowels were used at the same time and in the same way in the Exceeding Reading Program and the SpellRead program. Exceeding Reading Program also used the same games as SpellRead. The bottom line was that 95% of the Exceeding Reading Program was similar to the SpellRead program.

Ms. Arnold said she absolutely had a concern that Latta is using SpellRead.

Ms. Arnold said she was aware that there are hundreds of reading programs which have some elements and some differences from Kay McPhee's SpellRead program. Ms.

Arnold did say she was not familiar with other programs as she was with SpellRead. Ms. Arnold also stated you could not develop the Exceeding Reading Program in one year.

Megan Courtney was brought forward by the claimant as a rebuttal witness. Ms. Courtney a certified schoolteacher currently substituting in Nova Scotia with the Halifax School Board and the Chignecto School Board worked with Kimberly Latta in May 2007 and in June 2008 was certified when Toby Humphreys took over the Fall River center. She used "flashcards" at the center and there were a few SpellRead cards in each pack.

Kimberly Latta:

Ms. Latta has an experienced background in teaching. She took three years honors English, then transferred to a bachelor of education program but did not finish her practicum. She had an early childhood certificate, and did work for four years involving educational proposals, worked at SpellRead for a year and traveled to Cornell to obtain a reading program and studied a "LIPS" program in California. Her testimony was that she spent two years researching and putting together the Exceeding Reading Program.

There were some suggestions that SpellRead was prepared to take legal action against the defendant however there is no evidence that this came to fruition. The claimant's claim is that the material purchased by the claimant belong to another company thus invoking the principle *Nemo Dat Qui Non Habet* loosely translated: you cannot sell what you do not own. Certainly there was no court action that this court is aware of commenced by the owners of SpellRead prohibiting the defendants from using the materials contained in the Exceeding Reading Program. There is no evidence to show that the defendants could not sell what they sold to the claimant. There is no evidence that the defendants were prohibited from using the Exceeding Reading Program by themselves or by anyone they authorized to use the program.

The claimant took the approach of trying to show the materials that were involved in the agreement were in fact the same as or 95% the same as SpellRead materials and therefore this court should return the claimant's \$20,000.00. The claimant tried to show the defendant could not have produced this program in such a short period of time. The defendants dispelled this notion by showing how their Exceeding Reading Program was similar but pointed out differences and the defendant Latta showed how she had the exposure to various programs and knowledge to develop her own program which she admitted was similar to hundreds of other programs. The claimant tried to show the defendant has copied a SpellRead writing program leaving the inference that this was indicative of the defendant copying the SpellRead materials. The defendant dispelled this notion and explained how they were in possession of materials for their daughter. Further the writing program is not part claim. The claimant also purchased more than a reading program from the defendant.

The onus is on the claimant to prove its allegations and they have not done so in line with the civil standard.

The claimant also purchased an ongoing business and the area for which they could carry on their business. Unfortunately for the claimant there was no penalty clause for unilateral termination by the claimant or repayment clause for part of the purchase price if the agreement was terminated early which I suggest was the case here. Ms. Latta and Bedford Learning Center Inc. in a counterclaim are seeking royalty fees in the amount of \$3600 pursuant to the Exceeding Reading License Agreement. Ms. Latta in her testimony stated that when she told Ms. Humphreys that she would be seeking royalties in March of 2009 that is when this Humphreys determined to end the agreement. According to Ms. Latta's testimony, in January Toby Humphreys said she liked everything and in March she terminated the contract. There is no evidence that she continued on using the Exceeding Reading Program after the decision was made not to continue with the program for fear of action would be taken against the company. There is nothing in the contract which would make the defendant by way of counterclaim responsible for any royalties. Further the royalty is not stipulated as an exact amount even if it were to be

imposed in law. There is nothing in the contract which imposes a penalty upon Miller Lake Learning Services Inc. or Toby Humphreys for early termination. Further there is no provision in the contract to allow a refund to the claimant partial or full as a result of early termination.

It Is Therefore Ordered that the claim against Kimberly Latta and Bedford Learning Center Inc. is dismissed with no order as the costs **And It Is Further Ordered** that the counterclaim claim against Toby Humphreys is dismissed with no order as the costs