*Mascarenhas & May v. 892612 N.W.T.*, 2001 NWTSC 40

Date: 2001 05 28
Docket: S-0001-CV2000000058

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JULES MASCARENHAS

Plaintiff

-and-

892612 N.W.T. Ltd. (carrying on business as MacKENZIE DENTAL CLINIC) and PATRICIA McDERMOT (also known as PATRICIA JACKSON)

Defendants

S-0001-CV2000000059

AND BETWEEN:

NATASHA MAY

Plaintiff

-and-

892612 N.W.T. Ltd. (carrying on business as MacKENZIE DENTAL CLINIC) and PATRICIA McDERMOT (also known as PATRICIA JACKSON)

Defendants

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Application by plaintiffs for summary judgment. Granted.

Heard at Yellowknife, NT on May 18, 2001
Reasons filed: May 28, 2001

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Plaintiff: Louis M. Walsh
Counsel for the Defendants: Nathan E. Paul

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REASONS FOR JUDGMENT

[1] Each of the plaintiffs in these two separate proceedings move for summary judgment against the corporate defendant, 892612 N.W.T. Ltd. Since these applications raise similar issues this one set of reasons will address both.

[2] In each case the plaintiff is a dentist who contracted to provide dental services at the defendant's clinic. The contracts were the same. The dentist was to be paid a percentage of the revenue earned by the clinic for services performed by the dentist for the clinic's clients. In each case the plaintiff has left the clinic and now claims for

money received by the clinic for services performed but not remitted to the plaintiff. The plaintiff Mascarenhas claims that $14,138.91 has been withheld from him; the plaintiff May claims the sum of $13,859.76.

[3] The Statement of Defence filed in each case can be simply described as blanket denials. There are few if any particulars pleaded by way of defence. The pleadings simply put the plaintiffs to the strict proof of their claims. Affidavits have been filed, however, on behalf of the defendant in each action. These affidavits raise a number of points that are not mentioned in the defendant's pleadings.

[4] In each case the defendant acknowledges that it is withholding the amount claimed from the plaintiff. It is admitted that a portion of the amount claimed is owing to each plaintiff. These admissions by themselves would entitle the plaintiff in each case to judgment for the amounts admittedly owing: see Rule 181. But the plaintiffs argue that they are entitled to summary judgment for the full amounts claimed since the material put forth on behalf of the defendant raises no genuine issue for trial.

[5] With respect to the Mascarenhas claim, the defendant puts forth the following arguments:

(a) The defendant claims that the sum of $6,972.00 should be deducted for what is called "lost production". It is based on what the defendant says were days taken off by the plaintiff in excess of the allowable limit. The contract stipulates that the dentist is entitled to "four weeks holiday or leave" during the last year of the term of the contract. The defendant says this equates to 20 working days and that the plaintiff took 26 days off. But, as noted by the plaintiff, seven of these days were Fridays (his day off) or Saturdays and Sundays (when the clinic was closed). More significantly, there is nothing in the contract that speaks to charging back to the dentist some prorated portion of an estimated monthly revenue figure as "lost production". The very concept fails to make sense since the only income earned by the dentist is based on actual billings (not some daily salary). There is no basis in the contract for this deduction, nor is there evidence to show how the estimates were calculated, nor is it pleaded in the Statement of Defence.

(b) The defendant claims a deduction of $1,815.52 for the cost of what it calls "remedial work". In support the defendant points to the contractual obligation upon the dentist to "indemnify and save harmless" the clinic from all claims. It is also alleged that it was standard practice for the clinic to withhold funds from a departing

dentist to cover potential claims. There are a number of difficulties with these assertions. First, the contract speaks of the dentist indemnifying the clinic for claims arising from "any wilful, reckless or negligent act or omission" committed by the dentist. There is nothing in the evidence to establish that the "remedial work" claimed here comes within that description. Second, there is nothing in the contract authorizing the clinic to actually hold back funds for potential claims nor is there any evidence that this particular dentist agreed to such an arrangement. Third, and once again, this point is not pleaded.

(c) The defendant also claims a set-off for "loans" totalling $1,100.00 made to the plaintiff to assist with some household purchases. The plaintiff says he never borrowed money from the defendant. In a subsequent affidavit filed on behalf of the defendant, the amount was reduced to $1,000.00 and the claim supported by a photocopy of a cheque dated June 29, 1999, to one "Treena Mercado" which the defendants says was to assist the plaintiff with accommodation expenses. No other information is provided. This claim is one for a set-off and, if it had been pleaded, I may have been inclined to say that there was a factual issue to be determined at trial. But it was not pleaded. If there is to be an issue for trial then that issue should be identified in the pleadings. Here there are only bare denials of the plaintiff's claim. That is insufficient both as a pleading or in response to a summary judgment motion. As a set-off it is not available in the absence of pleading it: see Rules 95(2) & 95(4). It is, of course, still available to the defendant as a separate claim.

[6] With respect to the May claim, the defendant alleges as follows:

(a) The defendant claims a deduction for "lost production". The contract is in exactly the same form as that in the Mascarenhas case so my comments above respecting a deduction for lost production are equally applicable here.

(b) The defendant claims a further sum for "claims" for remedial work. Again it relies on the indemnity clause in the contract and some alleged arrangement with the dentists generally respecting the withholding of funds. My comments above respecting this deduction apply here as well.

[7] On a summary judgment application, the onus is on the moving party to establish that there is no genuine issue for trial. There is no onus on the responding party. The authorities state, however, that where the evidence presented by the moving party *prima facie* establishes that there is no genuine issue for trial, then there is an

evidentiary burden on the responding party to respond with evidence setting out specific facts showing that there is a genuine issue for trial. The responding party may not rest on unsupported allegations, bare assertions, or mere denials. The motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial: see, for example, *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at 267-268.

[8] In this case, having regard to all of the evidence presented on these motions, I am satisfied that there are no genuine issues for trial. Accordingly, summary judgment will issue in each case.

[9] The plaintiff Mascarenhas will have judgment against the corporate defendant for the sum of $14,138.91 plus his party-and-party costs. The plaintiff May will have judgment against the corporate defendant for the sum of $13,859.76 plus her party-and-party costs.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 28th day of May, 2001.

Counsel for the Plaintiffs: Louis M. Walsh
Counsel for the Defendants: Nathan E. Paul

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