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Docket: CI 24-01-45188
(Winnipeg Centre)
Indexed as: Mansaray v. Kashin et al.
Cited as: 2025 MBKB 126

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DR. MARCELLA MANSARAY,)	<u>Kara M. Bashutski,</u>
)	for the plaintiff
plaintiff,)	
)	
- and -)	<u>Cory A.M. Tokar,</u>
)	for the defendants
DR. ROBERT KASHIN, ROBERT S. KASHIN)	
OPTICAL LTD., operating as KOG EYECARE,)	
and the said KOG EYECARE,)	
)	JUDGMENT DELIVERED:
defendants.)	October 20, 2025

McCARTHY J.

[1] This decision relates to a claim by the Plaintiff, Dr. Marcella Mansaray ("Dr. Mansaray"), against the Defendants, Dr. Robert Kashin (Dr. Kashin) and Robert S. Kashin Optical Ltd., operating as KOG Eyecare ("KOG"), for unpaid fees relating to optometrist services provided by Dr. Mansaray as an independent contractor for the Defendants.

[2] After consideration at a Pre-trial Conference on January 16, 2025, the issues set out in Dr. Mansaray's Statement of Claim were set down for determination by way of

Summary Judgment. This decision reflects a final determination of all issues set out in the Statement of Claim following that hearing.

[3] Issues set out in the Defendant's Counterclaim have been set for trial and are not dealt with in this decision.

PRELIMINARY MATTERS

[4] By way of preliminary matters, at the outset of the hearing the Plaintiff indicated her consent to proposed amendments to the Defendants' Counterclaim.

[5] The Defendants raised a second preliminary issue with respect to portions of the Plaintiff's affidavit material, suggesting that little or no weight should be attributed to four paragraphs of the Plaintiff's affidavits.

[6] Specifically, with respect to Dr. Mansaray's affidavit affirmed April 15, 2025, the Defendants argued that paragraph 6, which addressed incorporation of optometrist practices, contained expert and opinion evidence, was scandalous and argumentative, and contained conclusions of law and fact. With respect to that evidence, Dr. Mansaray made reference to a 2021 change in the legislation governing optometrist practices and her understanding that optometrists had been unable to incorporate their practices prior to that change. In my view, this was not intended to be an expert opinion, but rather was information within the knowledge of the Plaintiff as a practicing optometrist at that time and evidence to support her knowledge and belief of the requirements. This evidence is not inadmissible and will be considered to the extent that it is relevant.

[7] The same arguments were made with respect to paragraph 32 of that affidavit. With respect to that paragraph, I agree that the content constitutes legal argument, rather than evidence and as such I have attributed no weight to that paragraph.

[8] With respect to paragraph 3 of Dr. Mansaray's affidavit affirmed May 6, 2025, the Defendants argued that the content was scandalous on the basis that it contained information that was irrelevant and argumentative. With respect to that evidence, Dr. Mansaray stated that she was not responding to all allegations in detail because some related to issues not before the Court on Summary Judgment, however, she made the general statement that she denied the evidence of the Defendants. In my view, this is not scandalous or inadmissible evidence, however, due to the lack of any specific basis for her denial, very limited weight can be attributed to that paragraph.

[9] And finally, with respect to paragraph 15 of Dr. Mansaray's affidavit affirmed May 6, 2025, the information contained therein is responsive to paragraph 34 of Dr. Kashin's affidavit sworn April 24, 2025, and, therefore, may be considered by the Court to the extent that it is relevant. The issue of whether the email constitutes defamation will be addressed at trial.

AMOUNT DUE TO DR. MANSARAY

[10] Pursuant to the Statement of Defence filed by the Defendants, it was conceded that monies were due to the Plaintiff with respect to services provided under an independent contractor agreement.

[11] The issue in dispute by the time of the Summary Judgment hearing was no longer how much money was due to the Plaintiff, but rather whether any amounts were also

payable in favour of the Defendants and whether those amounts should be set-off against what is owing to the Plaintiff.

[12] Specifically, at the outset of the hearing the Defendants confirmed that the \$36,637.50, being the amount sought by the Plaintiff, was no longer in dispute and that that amount was due to Dr. Mansaray, subject to reduction for set-offs.

[13] The specific set-offs being claimed by the Defendants were: first, for loss suffered as a result of the Plaintiff's failure to give required, or appropriate, notice of her resignation; and second, for the Plaintiff's failure to mitigate her loss by accepting all e-transfers from the Defendants. The specific amount of the e-transfers that were not accepted were still in dispute with the Plaintiff asserting it was \$8,205.49 and the Defendants asserting the total was \$12,078.82.

[14] With respect to the amount owed to the Plaintiff, I am satisfied based upon the Plaintiff's evidence, and the Defendants' agreement, that the Plaintiff is owed \$36,637.50, less any set-offs determined below.

NOTICE

[15] The Defendants acknowledge that there was no written agreement between the parties as to any required notice of an intention to resign. However, they assert that notice was a term of their agreement. Other than this assertion, there was no evidence led by the Defendants as to any specific discussion relating to notice, or the specific terms of the purported agreement reached. The Defendants did not even depose as to how long the notice requirement was agreed to be. There was also no mention of that term

included in any of the emails between the parties, which were intended to reflect what had been agreed.

[16] The Defendants argued that if no such agreed upon term is found, the Court should either find that such a condition was implied in the contractual arrangements between the parties, or should impute a requirement for reasonable notice.

[17] The Plaintiff denies that any such term was ever discussed or agreed upon and argued that such a term should not be implied or imputed on the facts of this case. She further stated that, even if such a condition was implied, or imputed by the Court, it would be both unfair to the Plaintiff and contrary to the principles of contract law to enforce a notice provision against the Plaintiff after the Defendants had already breached the contract. She points out that by the time Dr. Mansaray resigned, the Defendants had already clearly been in breach of their contractual obligations by failing to account to her and pay her for services rendered.

[18] Based upon the evidence filed in support of the Summary Judgment motion, I accept the position of the Plaintiff that no requirement for notice, or specified notice period, had been agreed upon between the parties. There is no such agreement reflected in the email communications between the parties and there was no evidence from Dr. Kashin that persuaded me that such a term had been discussed and agreed upon.

[19] Further, I agree with the Plaintiff's submission that even if such a notice requirement had existed, was found to be implied, or was imputed by the Court, such a requirement would have been negated by the Defendants' breach of their contractual obligations to pay the Plaintiff for services rendered prior to her resignation.

[20] In my view, the Defendants' position that the Plaintiff was or should have been required to continue to provide services for which she was not being paid, for another two weeks to three months, is entirely unreasonable and has no basis in law. By the time of her resignation, Dr. Mansaray had already repeatedly drawn her concerns with respect to inadequate accountings and amounts outstanding to the attention of the Defendants. When they continued to fail to provide full and regular accountings of amounts due to her, and to pay the full amounts due, she was entitled, in my view, to withdraw her services without further notice.

[21] I am not persuaded by the Defendants' submissions that there was a similar breach by the Plaintiff of any obligation to account to the Defendants with respect to the amounts she believed were owed to her. She may have had an obligation to account to the Defendants with respect to Manitoba Health payments which she received directly, however, there is no allegation before the Court that she failed to do so, or that any amounts due to the Defendants were not paid, or credited, as required.

[22] With respect to all other fees collected by KOG, the evidence was that all such fees were collected by Dr. Kashin's management corporation for services provided by the optometrists at their various locations. The parties' agreement was that Dr. Mansaray would receive various percentages of any fees collected for services that she provided. It was KOG who maintained the accounting records with respect to services billed and fees collected on behalf of the optometrists, and therefore, it was KOG who was responsible for accounting to the Plaintiff with respect to what fees had been collected for services she had provided, and what her share of those fees was calculated to be. The Defendants

were also responsible to pay those amounts promptly in compliance to the agreement between the parties.

[23] The suggestion that Dr. Mansaray should have just accepted amounts paid to her by way of e-transfer, without regular and accurate accountings, is not reasonable. How much was billed and collected, and for which services, was information maintained by KOG as part of their management function. Dr. Mansaray was entitled to trust and to rely upon the KOG records and to expect that if she raised concerns about missed amounts, or the failure to account, those concerns would be addressed. Even if she had been prepared to accept some payments without reconciliation in the past, she was not required to continue to do so, and particularly once she had identified errors or missed information in the accountings that were provided.

[24] It was Dr. Mansaray's evidence that she started in 2019 and that over time payments and accountings were increasingly delayed. By 2023 she deposed that the amounts paid were often incorrect and were rarely accompanied by a reconciliation to support amounts paid. When she finally received an accounting in December of 2023 for all amounts earned between January and November of that year, she again identified errors in the accounting. She also did not receive payment for amounts due to her at that time.

[25] It was also Dr. Mansaray's evidence that upon raising concerns about errors and missing reconciliations she was advised by Dr. Kashin that those problems were related to short staffing issues. In response, Dr. Mansaray deposed that she offered to accept

monthly payments, rather than every two weeks. Dr. Kashin disputed that she had made such an offer.

[26] With respect to the Defendants' evidence, Dr. Kashin also made no attempt to explain why he was unable to reconcile payments to Dr. Mansaray over a period of 11 months. He also did not dispute that payments were late and that there was no agreed upon accounting, even in the two years since the Plaintiff's resignation, until days prior to the contested hearing.

[27] Rather, the Defendants argued that the accounting errors pointed out by Dr. Mansaray were for small amounts, and that she had failed to provide her own accountings to support her allegations that the amounts paid were not accurate.

[28] As I have already stated, in my view, the obligation to account for fees received and paid out was the Defendants' obligation. Dr. Mansaray was hired as an independent contractor to provide optometry services at more than one location managed by Dr. Kashin's management corporation. Her contractual obligation was to provide the services as agreed and the Defendants' obligation was to account for and pay her for those services.

[29] With respect to the evidence before the Court, one particular email exchange between the parties was of particular note. On May 10, 2023, Dr. Mansaray sent an email to Dr. Kashin which outlined quite specific concerns with respect to the April 2023 reconciliation she had received by email on May 4, 2023. It included information such as the dates and specific charges that she felt were missing from the reconciliation. That email was not responded to, and as a result Dr. Mansaray chose not to accept e-transfer

payments sent to her by KOG, which she believed were for incorrect amounts. It was not until August 16, 2023, when Dr. Kashin realized that Dr. Mansaray had not accepted an e-transfer, that he emailed her about the payment. In response she directed him to her email of May 10, 2023. On August 24, 2023, Dr. Kashin finally emailed back a response to the accounting issues she had raised in May, within six days of having received the April reconciliation. His response neither recognized nor apologized for his delay in responding to issues she had raised three months earlier, but rather unilaterally imposed a condition that any accounting issues be raised by her within 14 days of receiving an accounting.

[30] Further, while the Defendants raised in their submissions on Summary Judgment that a number of the accounting problems raised by Dr. Mansaray were for very small amounts, they also conceded that at the time of her resignation she was owed over \$36,000.00 for services she had provided and not been paid for. Even if she had accepted all of the e-transfers the amount due to her would have been at least \$24,000.00.

[31] In the circumstances, I find that there was a clear breach of the Defendants' contractual obligations to account to, and pay, Dr. Mansaray for her services. There was no corresponding breach by Dr. Mansaray of any obligation to provide any additional notice to the Defendants prior to her resignation because her resignation happened after the contract had already been breached.

[32] As a result, I find that there is no amount due to the Defendants as a set-off, or otherwise, relating to the Plaintiff's failure to give formal notice of her intention to resign.

FAILURE TO MITIGATE

[33] Much of the above evidence is also the basis for my findings with respect to whether the amount due to the Plaintiff should be reduced for her alleged failure to mitigate her losses.

[34] With respect to this issue, the Defendants argued that Dr. Mansaray failed to mitigate her loss by refusing to accept e-transfers from the Defendants in the total amount of approximately \$12,078.82. The Defendants argued that they did not at any point indicate to Dr. Mansaray that acceptance of amounts they sent to her by e-transfer would be an acknowledgment that the amount paid was correct. They argued that by refusing to accept amounts transferred to her she has foregone any entitlement to those amounts, and that, as a result, the amount found by the Court to be owed to her should be reduced by the amounts advanced and not accepted.

[35] The Plaintiff argued that the amounts due to her were earned by providing services pursuant to her contract with the Defendants. She argued that declining to accept e-transfers of amounts that were not properly reconciled, or that she felt were incorrect, does not extinguish the debt owed to her.

[36] With respect to this issue, I find that there is no basis for finding that the Plaintiff's refusal to accept amounts that she believed were incorrect, or which were not accompanied by supporting reconciliations, was unreasonable. While the Defendants argued that they did not at any point indicate that the payments were made on a take it or leave it basis, that position does not address any perceived, or even legitimate, concern that the Plaintiff may have had that the Defendants would later argue that she accepted

the amounts so she agreed they were correct. In fact, in the circumstances as they progressed over time that seems to me to have been a very legitimate concern. Even since the commencement of litigation the Defendants have failed to pay amounts which they acknowledge are owing. Such payments could have been made through counsel, on a without prejudice basis, but that was not done. The Defendants also failed, or refused, to acknowledge the correct amount owing until just prior to the scheduled Summary Judgment hearing. The facts suggest that the Plaintiff was warranted in doubting the good faith intentions of the Defendants.

[37] The amount due to the Plaintiff in this case is a debt due to her pursuant to contractual obligations of the Defendants to pay her for services rendered. I am not persuaded that there is any basis at law to find that Dr. Mansaray's refusal to accept partial payment of this debt extinguished any portion of it. There was, therefore, no failure of an obligation to mitigate and no basis upon which to reduce the amount due to the Plaintiff.

INTEREST

[38] The Plaintiff seeks interest on the damages due to her as set out in paragraph 16 of her Statement of Claim. It is her position that the payment for her services was due to her on a prompt basis after provision of the agreed upon services, and that she should be awarded judgment for all amounts due to her, plus interest, for the failure by the Defendants to properly account to her, and pay her, as required.

[39] The Plaintiff seeks interest from the point at which the fees had been earned to the date of judgment.

[40] The Defendants take the position that the Plaintiff made the choice not to accept payments provided, and that that choice should prevent her from collecting interest on amounts she could have received earlier.

[41] With respect to the Defendants' position, while I acknowledge that Dr. Mansaray could have accepted a portion representing approximately one third of the amount due to her at an earlier time, I have already determined that her reluctance to do so was not unreasonable in the circumstances. Further, despite knowing that amounts were due to the Plaintiff, the Defendants made no effort to properly reconcile the amounts due until just prior to the Summary Judgment hearing, more than two years after the services were rendered by the Plaintiff. They also made no attempt to pay amounts acknowledged as due through counsel. I am not prepared to penalize Dr. Mansaray for their failure to do so.

[42] The Defendants in this case benefited from the services provided by the Plaintiff, both by receiving 70% of the fees Dr Mansaray earned shortly after her services were rendered, and by retaining Dr. Mansaray's share of the fees collected for over two years. Dr. Mansaray, on the other hand, has been deprived of her money, and has had to pursue litigation to recoup her loss.

[43] Based upon the evidence before the Court, I am satisfied that the Plaintiff should be entitled to interest as requested in her Statement of Claim on all unpaid amounts.

[44] This judgment will also bear post-judgment interest at the Court of King's Bench rate.

PERSONAL LIABILITY OF DR. KASHIN

[45] The Plaintiff has claimed against both Dr. Kashin personally, and against his management corporation. It was her position that she understood at all relevant times that she was contracting with Dr. Kashin, and that contracting to provide services for a corporation was never mentioned when the arrangements were made.

[46] In response to the Plaintiff's claim, Dr. Kashin argued that he did not contract personally with the Plaintiff, and that there is no basis upon which to find him personally liable for amounts due to the Plaintiff.

[47] With respect to those arguments, I make the following observations.

[48] First, it was Dr. Kashin whom Dr. Mansaray had met at an optometry conference, who initially reached out to Dr. Mansaray to inquire whether she would like to do more work in Winnipeg. Also, the initial correspondence with respect to Dr. Mansaray providing optometry services as an independent contractor was with Dr. Kashin at his personal email address. Later communications about accounting and payment issues were also with Dr. Kashin at his personal email address. The content of the initial emails suggest that the Plaintiff would be providing services for KOG Eyecare, but no mention was made of a corporation.

[49] Dr. Mansaray's evidence was that it was her understanding in 2019 that optometrists could not offer professional services through a corporation. She provided evidence to support her understanding in that regard.

[50] Dr. Kashin did not offer evidence to the contrary. His evidence was that in 1991 he incorporated Robert S Kashin Optical Ltd., which is a management company carrying

on business under the name KOG Eyecare. Dr. Kashin deposed that he does not carry on business as KOG Eyecare in his personal capacity.

[51] In further support of his position that he had no contractual obligations to the Plaintiff, Dr. Kashin relied upon a 2019 T4A issued to Dr. Mansaray by his management corporation and upon a blank independent contractor contract from 2021. However, he acknowledged that Dr. Mansaray did not sign such a contract.

[52] With respect to this issue, I note that legally speaking a business name, such as KOG Eyecare, can relate to a business or professional practice that is either an incorporated or an unincorporated entity. Therefore, reference to that business name in emails between the parties could have been referring to a business name, business location, an unincorporated professional practice, or a corporation. Reference to "KOG Eyecare" in this case does nothing to clarify whether Dr. Kashin's professional optometry practice, or his management corporation, were being referred to.

[53] In addition, I note that the billing arrangement agreed upon between the parties in 2019 was to have Dr. Mansaray personally bill and receive Manitoba Health fees related to services she was providing, rather than having KOG bill and collect for those services. I would have expected that billings for all of her services would have gone through the corporation if that was who she had contracted with to provide optometry services. This fact, while certainly not definitive, is more consistent with the Plaintiff's position that she had not contracted solely with the management corporation.

[54] And finally, the fact that she was paid by Dr. Kashin's management corporation is not determinative of who she had contracted with to provide services.

[55] Overall, I find that the evidence supports Dr. Mansaray's position that the contract which was entered into in 2019 was between Dr. Kashin and Dr. Mansaray in their professional capacities as optometrists. I am satisfied that KOG was only involved for the purpose of providing management services which included managing a portion of the fees collected on behalf of, and due to, the Plaintiff for services she provided. There is no evidence that Dr. Mansaray was ever advised, or ever agreed to, contract solely with the management company, or that Dr. Kashin ever indicated to her that he was acting solely in his capacity as an agent of Robert S. Kashin Optical Ltd. Such an arrangement would have had to have been explicit, and clearly entered into, to allow Dr. Kashin to escape personal liability for obligations under the contract.

[56] In the circumstances, I find both Defendants jointly and severally liable to the Plaintiff in the amount of \$36,637.50, plus interest as set out above.

COSTS

[57] The Plaintiff is entitled to the costs of her successful claim. If the parties are unable to agree upon costs, they may file written submissions or set time for further oral submissions.

McCarthy J.