

**CITATION:** 542491 Ontario Limited v. 8240631 Canada Inc., 2023 ONSC 4095

**COURT FILE NO.:** CV-15-522765

**DATE:** 20230710

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** 542491 ONTARIO LIMITED and DONALD FOSTER

Plaintiff

And

8240631 CANADA INC. carrying on business as INNOVATION CLIC

Defendants

**BEFORE:** Justice Papageorgiou

**COUNSEL:** Dewar, M, for the Plaintiffs

**READ:** July 7, 2023

**ENDORSEMENT**

**Overview**

[1] The plaintiffs plead that they were the exclusive sales agents of the predecessor of the defendant Presentoirs Clic Inc., since 2002. Presentoirs made an assignment in bankruptcy on February 4, 2014 and the plaintiffs plead that they continued to provide these services through Innovation CLIC, who continued the same business.

[2] The plaintiffs plead that soon after Innovation took over this business, it first changed the plaintiffs' commission structure and then took steps which terminated the plaintiffs' retainer altogether.

[3] The plaintiffs commenced this action against the defendant.

[4] Over the last many years, the plaintiffs have attempted to move this matter along but Innovation has obstructed the prosecution of this matter.

[5] Eventually, on March 29, 2022 Associate Judge Robinson struck out Innovation's Statement of Defence. Innovation has not appealed this order or sought to set it aside.

[6] Mr. Foster noted Innovation in default on December 22, 2022. He brings a motion for default judgment which was duly served on Innovation in accordance with Dineen J.'s Order dated April 27 2023. Innovation has failed to respond to this motion.

## **The Issues**

[7] The main issues before me are:

- Do the materials provide a basis for a finding of liability?
- If so, what are the damages to which the plaintiffs are entitled?
- If not, what are the deficiencies in the materials which must be addressed?

## **Analysis**

### **Issue 1: Do the materials provide a basis for a finding of liability?**

#### **Consequences of noting in default**

[8] Pursuant to r. 19.02, having not defended the proceeding, the defendant is deemed to admit the truth of all allegations of fact made in the of Claim.

[9] However, pursuant to r. 19.06 a plaintiff is not entitled to judgment on a motion for judgment or at a trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

[10] As well, the plaintiff must still prove its damages.

#### **The test on a motion for default judgment**

[11] The test on a motion for default judgement was set out in *Elekta Ltd. v. Rodkin*, 2012 CarswellOnt 2928 (ONSC) as follows: A. What deemed admissions of fact flow from the facts pleaded in the Statement of Claim? B. Do those deemed admissions of fact entitle the plaintiffs, as a matter of law to judgement on the claim? C. If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitled it to judgement on the pleaded claim?

#### **The deemed admissions**

[12] The Statement of Claim contains the following deemed admissions relevant to the issue of liability:

- The plaintiffs were the exclusive sales agents for Innovation's predecessor Presentoirs Clic Inc, since 2002. They earned 10 % commission for all new business and 8 % commission for repeat customers. (para 4)
- Presentoirs made an assignment in bankruptcy on February 4, 2014. (para 6)

- Innovation was incorporated and assumed Presentoirs' business shortly thereafter. (para 6)
- The plaintiffs continued to provide sales agency services to Innovation seamlessly. There was no interruption in the function or the services provided by the plaintiffs as a result of the bankruptcy. (para 6)
- The plaintiffs introduced Innovation to a new client Labatt's and they were paid 10 % commission in accordance with the same arrangement which they had with Presentoirs. (para 7)
- By letter dated April 29, 2014, Innovation arbitrarily and summarily purported to alter the plaintiffs' compensation structure to a sliding scale based upon the quantum of sales, with a lower commission rate applicable to higher sales contracts. The effect of these changes was that the plaintiffs' commission income was reduced. (para 8)
- The April 29, 2014 letter from Innovation also advised that the business relationship with the plaintiffs would be terminated on December 31, 2014. (para 8)
- Then, in August 2014 the plaintiffs were instructed to cease all contact with any of Innovation's clients which stymied the plaintiffs' ability to perform their responsibilities constituting a breach of contract.
- The plaintiff pleads that "this direction constituted a fundamental breach of the contract of employment between the plaintiffs and the defendant or in the alternative, the independent contractor relationship." (para 12)

**What judgment do the deemed admissions entitle the plaintiffs to?**

[13] The deemed admission do not entitle the plaintiffs to any judgment for wrongful dismissal damages based upon reasonable notice, because based upon the Statement of Claim, it is unclear whether the relationship which the plaintiffs had with Presentoirs and Innovation was an employment relationship, an independent contractor relationship, or a dependent contractor relationship. The plaintiffs have cited *Fisher v. Hirtz*, 2016 ONSC 4768 at para 1, where Perell J. reviews the law identifying these three possible categorizations: employee, independent contractor, and dependent contractor. He concludes that if a party is an independent contractor, no notice is required.

[14] Mr. Foster does say in his affidavit that he was an employee, but he does not cite any facts that would assist the court with that determination in accordance with the test set out in *Fisher*. As well, if that is the case, it is unclear why the Statement of Claim also sets out Mr. Foster's numbered company as a party.

[15] Given the Statement of Claim which says that he and his numbered company entered into an agency agreement, further evidence is required to clarify this issue.

[16] As well, there is a contract of employment with Presentoirs attached to Mr. Foster's affidavit which Mr. Foster says he entered. It does identify him as an employee, but it is unsigned. As well, although he says that the commission structure was 10 % for new clients and 8 % for repeat, the unsigned employment agreement contains no language along these lines. Paragraph 3.1 simply says that "the SALESMAN" will use the rate card provided...to establish pricing parameters for quotations..." The fact that the payment structure appears different than that quoted in his affidavit, together with the fact that it is unsigned, calls into question whether this was their contract. As well, if this was their employment arrangement, there is no explanation as to how this formula resulted in the payment structure he identifies in his affidavit.

[17] As well, the unsigned employment agreement states that it shall terminate upon the company (Presentoirs) ceasing business operations. In this case, Presentoirs made an assignment of bankruptcy. In the circumstances, if this is the applicable agreement, then it is unclear whether the same contract applied to the plaintiffs' business relationship with Innovation and/or whether the period of employment with Presentoirs should apply to the reasonable notice period. Further case law and argument is required on this issue.

### **Other Deficiencies in the plaintiff's materials**

[18] There are a number of other deficiencies in the materials which must be addressed:

- The claim for commission owed set out in paragraph 14 of Mr. Foster's affidavit applies the same rate of 10 % to clients after the plaintiffs were terminated to the period from August 2014 to January 2016. Presumably this is the amount claimed during the notice period claimed. However, even if I accept that the payment structure was 10 % for new customers, it is unclear why 10 % applies since these customers appear to be repeat customers.
- Although there is some evidence that Innovation continued Presentoirs' business, the plaintiffs have not provided sufficient evidence that this was the identical business and/or any case law on whether any notice period should include the duration of the plaintiffs' business relationship with Presentoirs and the criteria from the case law which may be applicable to this issue. The corporate profile reports do show Mr. Boucher as associated with both corporations, but the corporate addresses are different and there is little other than these facts cited.
- There is a claim for future vested commissions in the amount of \$207,006.88 claimed in the factum for which there is no evidence.

### **What I can decide**

[19] Despite these issues, I can conclude that the plaintiffs are owed the sum of \$79,745.15, which is the amount the plaintiffs calculate for the work they did for Innovation from February 2014 to July 31, 2014 which was never paid. This amount is due and owing regardless of whether

Innovation took over Presentoirs and regardless of whether the plaintiffs were employees, independent contractors or dependent contractors.

[20] Pursuant to r. 19.05(1)(3) all other remaining issues shall proceed to trial.

### **Conclusion**

[21] Therefore, I am awarding damages in the amount of \$79,745.15 and directing that remaining issues proceed to trial for a one day hearing. The plaintiffs may provide oral testimony and/or provide additional evidence to address these issues by way of affidavit.

[22] I am seized, subject to my availability. The plaintiffs may arrange a case conference with me to address the scheduling of this matter through my assistant polly.diamante@ontario.ca.

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Justice Papageorgiou

**Date: July 10, 2023**