Citation: 2024 NBKB 097
Date: May 9, 2024

COURT FILE NO: FC-110-2022

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

TINGKUN (ROGER) LIN,

Plaintiff,

-and-

HOMESTEAD BAY CONTRACTING INC.,

Defendant.

Date of Hearing:	October 31, 2023
Date of Decision:	May 9, 2024
Subject Matter:	Summary judgment
Before:	Justice Terrence J. Morrison
At:	Burton, New Brunswick
Appearances:	Ashley Arbour for the Plaintiff
	Hugh Murphy for the Defendant

DECISION

Morrison, J.

I. INTRODUCTION

[1] This is a motion by the plaintiff seeking summary judgment in the amount of $43,083.70, plus interest, from the defendant. The plaintiff submits that the parties entered into a verbal consulting contract where it was agreed that the plaintiff would provide the defendant with a variety of tasks, including financial management, sourcing of products, human resource work, consulting, and administrative work. The plaintiff says he performed the work, billed the defendant for his time, and the defendant has refused to pay. The plaintiff says he is owed $43,083.70.

[2] The defendant says that there was never any consulting agreement between the parties. The defendant says that it was hired by the plaintiff (as agent for the plaintiff's son) to do renovation work on a duplex. In the course of the renovation work, the defendant had ongoing contact with the plaintiff regarding the renovation. The defendant says that during this routine contact the plaintiff made various proposals to enter into joint ventures in the real estate, storage unit and rental businesses, all of which the defendant declined. The defendant says that the plaintiff wanted to learn about the construction business and the defendant reluctantly agreed to allow the plaintiff to perform administrative and clerical tasks. Although there was no written agreement, the defendant says that he expected to be charged about $20.00 an hour. The defendant says that the value of the clerical/administrative work performed by the plaintiff is approximately $2,800.00.

II. FACTUAL BACKGROUND

[3] This dispute arises from a business relationship between the plaintiff and the defendant. The arrangement was not reduced to writing. The parties have completely different understandings of the agreement between them.

[4] The plaintiff maintains that he has extensive experience in businesses, working in senior management positions in companies in China and in Canada. The defendant, Homestead Bay Contracting Inc. ("HBCI") is owned and operated by Andrew Nelson and carries on the business of construction and renovation. The plaintiff claims that he was retained by HBCI to provide consulting services, including the preparation of a multi-year business plan, implementation of a business improvement "roadmap", coaching Mr. Nelson, evaluating the defendant's technology/software capabilities, instituting payment systems for suppliers and recruiting/screening potential employees for the defendant. The plaintiff maintains that he and Mr. Nelson, on behalf of HBCI, entered into a verbal consulting agreement for the services outlined above with a view to entering into a profit-sharing business relationship.

[5] The plaintiff's affidavit evidence is that, with the knowledge and consent of Mr. Nelson, he completed the various tasks. The tasks completed, according to the plaintiff, are set out in a work summary dated February 18, 2022 (Record, p. 235) (the "HBCI Work Summary") which formed the basis of an invoice sent to the defendant, dated April 11, 2022 (Record, p. 268) (the "Invoice").

[6] In his affidavit, Mr. Nelson's characterization of HBCI's relationship with the plaintiff is starkly different from that described by the plaintiff. In his affidavit, Mr. Nelson deposes that he was hired by the plaintiff to do a $30,000.00 renovation job at the home of the plaintiff's son. Mr. Nelson says that during the course of the renovation he met with the plaintiff regularly. During those encounters, Mr. Nelson says that the plaintiff persisted in "pitching" various business partnership proposals whereby the plaintiff sought a profit-sharing arrangement. Mr. Nelson says that he ignored the plaintiff's proposals and never agreed to anything he proposed.

[7] Wishing to ensure that he was paid for the renovation project, Mr. Nelson says that he reluctantly relented and allowed the plaintiff to perform minor administrative and clerical tasks. Although there was no discussion about hourly rates, Mr. Nelson deposes that he expected to pay the plaintiff approximately $20.00 an hour for administrative office work.

[8] In his affidavit, Mr. Nelson deposes that the renovation project started in mid-October 2021. In January 2022, Mr. Nelson says that the plaintiff asked him to transfer 50% of the shares of HBCI to him without consideration. Mr. Nelson refused and asked the plaintiff why he believed he was entitled to 50% of the company without paying for it. In response, Mr. Nelson says he received an email containing a detailed 3-year plan from the plaintiff, which Mr. Nelson believes was the plaintiff's justification for demanding a 50% stake in HBCI. Mr. Nelson deposes that after he refused the share-transfer proposal, the plaintiff "was unhappy and the relationship deteriorated". Mr. Nelson deposes that "out of the blue" the plaintiff then sent him a draft consulting agreement, the terms of which were never discussed or agreed. Mr. Nelson deposes

that the consulting agreement prepared by the plaintiff came as a surprise to him. Mr. Nelson's evidence is that it was only after he rejected the draft consulting agreement that the plaintiff sent him the HBCI Work Summary and later the Invoice.

III. ANALYSIS AND DECISION

[9] The legal landscape for summary judgment changed markedly with the Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7, wherein the Court directed a "cultural shift" in the use of summary judgment. Courts are encouraged to be bold in their application of summary judgment to expedite access to justice where matters can be fairly adjudicated without the need for a full-blown trial. The test for issuing summary judgment is simply whether there is a genuine issue requiring a trial (*O'Toole v. Peterson*, 2018 NBCA 8, at para. 68). There will be no genuine issue requiring a trial when the process allows the judge to make the necessary findings of fact and reach a fair and just determination on the merits (*Hryniak*, at para. 49). Nevertheless, there are cases where the summary judgment process does not give a judge confidence that they can find the necessary facts and apply the law based on the motion record. In such cases, summary judgment can never be a proportionate way to resolve the dispute and must be rejected (*Hryniak*, at para. 50).

[10] In *Estephan v. Dykeman et al.*, 2020 NBQB 65, I summarized the principles established by *Hryniak* and clarified by our Court of Appeal in *O'Toole v. Peterson*, *supra* and *Russell et al v. Northumberland Co-Operative Ltd.*, NBCA 70 as follows, at para. 14:

In *Russell et al v* Northumberland *Co-Operative Ltd.*, 2019 NBCA 70, the Court of Appeal expanded on the import of the 2017 amendments. The key points from *O'Toole* and *Russell* can be summarized as follows:

1. The only test for *summary* judgment is whether there is a genuine issue requiring a trial;
2. The burden of proof is on the moving party to establish there is no genuine issue requiring a trial and it is on the balance of probabilities;
3. The importance of the parties putting their best foot forward and leading trump or risk losing is more significant under the new Rule 22;
4. The rule provides for a two-step process to determine whether there is a genuine issue requiring a trial;
5. In step one the judge must determine if the evidence presented reveals a genuine issue requiring a trial. If, on the filed evidence alone, the judge can fairly and justly adjudicate the dispute there will be no genuine issue requiring a trial and the judge **must** grant summary judgment;
6. If the judge cannot adjudicate the dispute on the filed evidence he will proceed to step two. A judge only proceeds to step two if the assessment of the filed evidence leads to the conclusion that there **may** be a genuine issue requiring a trial. The judge will then determine if a trial can be avoided by resorting to the fact-finding powers of Rules 22.04(2) and (3) (the "mini-trial");
7. The guiding principle is that it will always be in the interest of justice for a judge to make use of the mini-trial where possible.

[11] The fact-finding powers of the Court are enhanced by Rule 22.04(2), which provides:

> 24.02(2) In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and may exercise any of the following powers for the purpose, unless it is in the interests of justice for those powers to be exercised only at a trial:
>
> (a) weighing the evidence;
> (b) evaluating the credibility of a deponent; and
> (c) drawing a reasonable inference from the evidence.

[12] The Court is empowered to make findings of credibility based on the evidentiary record alone. There are credibility issues with respect to the plaintiff's evidence. For example, the defendant's counsel pointed out several questionable entries in the Invoice issued by the

plaintiff to HBCI, including a "deep dive into a Visa statement" and a claim for mileage and time lost in the amount of $4,522.00. The defendant claims that this latter charge relates to a dishwasher leak, not the responsibility of the defendant (Record, p. 268). The plaintiff is now prepared to abandon that claim. In my view, this unfounded claim taints the plaintiff's evidence. There are also charges for negotiating the renovation project. Mr. Nelson properly questions why HBCI should be billed for time spent by a customer in settling the details of a renovation project.

[13] I also have concerns that some of the evidence prepared by the plaintiff, including the HBCI Work Summary and the Invoice referred to above, may be self-serving. Certainly, Mr. Nelson's evidence is that the documents were created by the plaintiff only after HBCI refused the plaintiff's profit-sharing proposal and rejected the draft consulting agreement presented to HBCI.

[14] In my view, there are also credibility concerns with respect to the evidence of Mr. Nelson. There is evidence on the record that suggests the relationship between the plaintiff and HBCI was more robust than that claimed by the defendant. Rather than mere administrative and clerical duties, there is evidence that Mr. Nelson agreed in principle, at least, to the plaintiff performing recruitment and human resources work (Record, p. 342; 390-392). Mr. Nelson's response to the draft consulting agreement is contained in an email dated January 24, 2022 (Record, p. 342). It is not as definitive as Mr. Nelson suggests. It contains language that could be considered as negotiating terms with the plaintiff of a form of consulting agreement.

[15] This is not a case where the contradictions in the evidence of the parties relate to details of a discreet aspect of the alleged contract or the quantum of the various items claimed.

Here, there is a fundamental disagreement between the parties with respect to the nature of the alleged agreement. As mentioned, the Court has the power to make findings of credibility based on the written record alone. However, given the credibility issues referenced above, it would be unsound to make such determinations without the benefit of hearing from the witnesses and cross-examination. Also, the Court cannot place any reliance on the draft, unsigned agreements, as there is a dispute as to whether the written drafts reflect the intentions of the parties.

[16] The determination of this motion for summary judgment comes down to one overriding question: What was the agreement between the parties? It is impossible to determine that question based on the Record. I cannot with any confidence find the necessary facts and apply the law to determine the matter in issue in this motion. Therefore, there may be a genuine issue for trial.

[17] I am mindful of the guidance in *Russell* that the motion judge should strive to utilize the mini-trial whenever possible. The question becomes whether a mini-trial under Rule 22.04(3) would provide any litigation efficiency and save the cost and expense of a full trial. In my view, it would not. The only issue is what is the agreement reached between the parties. I believe that a mini-trial on this issue would take approximately the same amount of time as a full trial. In this case, there is little or no litigation efficiency in resorting to a mini-trial.

[18] Furthermore, neither of the parties sought a mini-trial under Rule 22.03(4), nor did either party demonstrate by affidavit or argument that oral evidence would assist the Court. I am cognizant of the admonition of the Court of Appeal that the motion judge should not order a mini-

trial on his or her own motion. In *O'Toole v. Peterson*, *supra*, then-Chief Justice Drapeau explained at paragraph 72:

> 72 Furthermore, under Rule 22.04(2), the summary judgment motion judge may allow oral evidence at a "mini-trial" for the purposes of weighing the evidence, evaluating the credibility of a deponent and drawing a reasonable inference from the evidence. Whether the power to weigh the evidence and draw a reasonable inference formed part of the adjudicating tools of a summary judgment motion judge under the pre-2017 Rule 22 may be debatable. What is beyond debate is that the judge could not evaluate the credibility of a deponent (see *Robichaud Apartments Inc. v. TG 112 & 114 Murphy Ltd. et al.*, 2015 NBCA 19, 433 N.B.R. (2d) 367, at para. 4). **Because our new Rule 22 is designed to operate within the adversarial system, an order pursuant to Rule 22.04(3) "that oral evidence be presented by one or more parties" should not be made *motu proprio* by the motion judge, but on application by one of the parties. The party seeking leave to lead oral evidence "should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence"**: *Hryniak v. Mauldin*, at para. 64. [Emphasis added]

IV. CONCLUSION

[19] The plaintiff's motion for summary judgment is dismissed. The defendant is entitled to costs, which I fix at $1,500.00.

_____

Terrence J. Morrison,
J.C.K.B.