

Citation: *Williams v. WildMan*, 2008 YKSM 1

Date: 20080714
Docket: 07-S0128
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON

Before: His Honour Judge Cozens

Dean Williams

Plaintiff

v.

WildMan Productions Incorporated

Defendant

Appearances:

Dean Williams

Appearing on own behalf

Ron Daub & Phil Timpany

Appearing for defendants

REASONS FOR DECISION

Overview

[1] This is a claim by the Plaintiff, Dean Williams, for damages in the amount of \$18,900.00 against the Defendant, WildMan Productions Incorporated (WildMan), based upon an allegation of breach by WildMan of an oral contract between the parties.

[2] The Plaintiff was an independent contractor, who provided his services as an editor, videographer, graphic designer and general video technician to the Defendant for seven months from May through mid-December, 2007. On December 10, 2007, there was a meeting between Mr. Williams and the owners of WildMan, these being Ron Daub and Phil Timpany. This meeting took place in Mr. Daub's office.

[3] Mr. Williams takes the position that the result of this meeting was an oral six-month contract for services between Mr. Williams and WildMan commencing January 3, 2008.

[4] Mr. Daub and Mr. Timpany, on behalf of WildMan, take the position that in the December 10th meeting the parties simply agreed upon a new pay structure for the further provision of services by Mr. Williams to WildMan, as long as there was sufficient work to require these services. There was no agreement between the parties for a six-month contract for services.

[5] On January 25, 2008 there was an argument between Mr. Williams and Mr. Timpany. The next day Mr. Williams was advised by Mr. Timpany that his services were no longer required by WildMan. The reason subsequently given to Mr. Williams for the termination of his services was that WildMan had insufficient work to continue to require his services.

[6] There was no allegation of just cause raised by WildMan for the termination of Mr. Williams' services.

Analysis

[7] The issue to be decided is whether Mr. Williams and WildMan entered into a six-month verbal contract on December 10, 2007 for the provision of services by Mr. Williams to WildMan. If, on a balance of probabilities, the evidence shows that there was a six-month contract for services entered into, Mr. Williams is entitled to damages for breach of contract, as WildMan did not raise a defense of frustration of contract or just cause for termination of the contractual relationship.

Law

[8] It is a well established principle of contract law that "...if one party is aware of the other's belief in the existence of a contract, and does nothing to deny it, but acts himself as though there were a contract, he may be estopped from later denying that a contract exists" (Professor Waddams, *The Law of Contracts*, 2nd Edition (Toronto: Canada Law Book, 1984), at pages 70-71. This principle was applied in the case of **Adam v. General Paper Co. Ltd. et al** (1978), 19 O.R. (2nd) 574 (Ont. H.C.) as well as in **Bowen v. Canadian Tire Corp.**, [1991] O.J. No. 48 (Ont. C.J.).

[9] In **Adam**, the defendant was held to have entered into an enforceable verbal contract, despite the fact that the contemplated written contract was never executed. The court held that the essential terms of the contract were already settled and "...the execution of the written agreement was nothing more than a formality and amounted to no more than expressing in writing the terms that had already been agreed upon between the parties".

[10] In **Bowen**, however, it was held that there was not a contract because the essential terms had not been settled and the written agreement was necessary in order to finalize these terms. The written agreement was thus not a mere formality.

[11] In the absence of a written agreement, the court "...must consider everything that occurred between the parties relevant to the alleged contract in order to decide the issue." **Baynes v. Vancouver Bd. Of School Trustees**, [1927] 2 D.L.R. 698 (B.C.S.C.) at p. 700; **Carruthers Enterprises Ltd. (c.o.b. Action Press) v. Prince Edward Island Teachers' Federation**, [2002] P.E.I.J. No. 2 (S.C.) at para. 14. This approach is an objective one:

Hence the requisite agreement may be established by the conduct of the parties subsequent to the alleged contract. Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is

whether the parties have indicated to the outside world, in the form of the objective, reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions, but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether the reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. (*The Law of Contract in Canada* by G.H.L. Fridman, 4th ed. (Toronto: Carswell, 1999) at pp. 16, 17)

[12] The position of the objective, reasonable bystander will take into consideration factors such as the conduct of the parties, their history, and each party's level of sophistication in business matters.

[13] What one particular party believes with respect to the existence of a contract is insufficient, in and of itself, to allow the court to find in favour of that party without objective supporting evidence.

[14] Although written contracts can provide documentary evidence of the terms that parties have agreed to, oral contracts are equally binding if the court is satisfied that there exists *consensus ad idem* between the parties and the fundamental terms are resolved. The denial by one of the parties of the existence of a contract is, of course, easier to refute when a written contract can be produced. It is more difficult to do so in the case of an oral contract, yet still possible when there is extrinsic evidence in support of the existence of such a contract.

Evidence of the Witnesses

Dean Williams

[15] Mr. Williams testified that the terms of the contract were as follows:

- He was to be paid \$3,000.00 per month in bi-weekly \$1,500.00 installments. He was also to receive 3% of WildMan's gross income per month, payable every three months.

oral contracts. Trial Exhibits 4 and 5 show payments made and received. No issue was raised by WildMan with respect to this evidence.

[18] Mr. Williams had provided services to WildMan on three separate, albeit consecutive, occasions in 2007, these being for one month, three months and three and ½ months. These were not written agreements, but were oral.

[19] The first occasion was for one month in May, 2007. The purpose of this period was to see if the parties liked each other. This agreement was made at the Vancouver airport.

[20] The second occasion was June through to the end of August. Mr. Williams was to be paid \$1,500.00 per month plus 15% of any project he worked on. In late August payment structure alterations were made and the arrangement for the provision of services was ultimately extended from September until mid-December. On November 30, 2007 Mr. Williams presented a document to WildMan outlining all the projects he had worked on and breaking down the work he had done on each project (Trial Exhibit 6). Mr. Williams indicated that he had done this in order to obtain a more lucrative and balanced contract as he felt that the contract that was ending was inadequate for the time and effort he applied.

[21] Mr. Williams testified that there was no discussion in the December 10th meeting about the requirement for services being dependant upon WildMan being awarded a government tender. He states that before the December 10th meeting, WildMan had already received news that they were not being awarded a particular government tender for a video production on nursing opportunities in the Yukon.

[22] On January 3, 2008 Mr. Williams began working with Mr. Timpany on a contract for the Government of Yukon Department of Economic Development.

This contract had been secured before December 17 and Mr. Williams was part of the initial planning discussions in regard to this project. Mr. Williams provided the following services on this project. He:

- searched for and secured additional stock footage from outside sources;
- recorded and edited narration tracks;
- designed all aspects of the DVD including menu and disc face label designs;
- handled the duplication of 115 DVDs.

[23] On January 25, 2008, production was being finished on the 110 Handout DVDs and the five Presentation DVDs. Mr. Williams showed Mr. Timpany the Presentation DVD's final specifications. Mr. Timpany was unhappy with an aspect of the DVD's production and Mr. Williams' work related to this aspect. A heated argument developed between the two and Mr. Timpany left the room. Mr. Williams immediately wrote down the words exchanged between the two in his notebook. Mr. Williams finished up what he was doing and left for the day shortly afterwards.

[24] Mr. Williams testified that the following morning he was told by Mr. Timpany that his contract was being terminated. He was told he would be paid up to the previous day and be provided a plane ticket back to Vancouver. The next day Mr. Williams went to WildMan's offices to gather his personal effects. He was given a final cheque for \$1,200. Mr. Williams was not told at that time why he was being terminated.

[25] Mr. Williams contacted Mr. Daub by telephone on January 31, 2008 and spoke to him regarding his termination. Mr. Daub had been away on vacation until then. Mr. Daub appeared to be unaware of his termination and said he wanted to speak to Mr. Timpany in order to get his side of the story. Mr. Williams spoke to Mr. Daub again on February 1, 2008. Mr. Daub said he had talked to Mr. Timpany and he "guessed that was it" in regards to Mr. Williams' services

being terminated. Mr. Daub explained that WildMan did not have the work and Mr. Williams' services were therefore not required any longer.

[26] In cross-examination, Mr. Williams agreed that he had been well treated by WildMan before this dispute. He agreed that all contractual terms had been met, that WildMan had been generous with flights and change fees, that the pay scale for the seven ½ months that he had worked was good and consistent, that he had lived rent-free, paying bills and utilities only, at Mr. Daub's house for one month and then until January at Mr. Timpany's house, and that Mr. Timpany had assisted him in producing a personal audition reel.

[27] Mr. Williams was also questioned as to why he had not pursued a written contract with WildMan. He responded by pointing to the previous oral agreements for services and how these had all come to term without problem. He stated that he trusted WildMan. He also stated that he believed that there had been discussions with Anne Daub, Mr. Daub's wife, with responsibility for certain operational duties of WildMan, and WildMan regarding preparing and signing a contract, but that this had not occurred in the end.

[28] Mr. Williams called two additional witnesses in support of his claim, neither of whom he was acquainted with while he was providing services to WildMan.

David Hamelin

[29] Mr. Hamelin testified that he met with both Mr. Timpany and Mr. Daub (briefly) on March 5, 2008. He was told that WildMan was looking at possibly bringing on an editor. Over the course of this approximately 2 ½ hour informal "meet and greet" there was general discussion regarding the nature of the position and Mr. Hamelin's goals as a filmmaker. He was able to acquire a sense of the business overall. Mr. Hamelin inquired as to income and Mr. Timpany advised that the last editor was receiving \$3,000.00 per month plus a small

bonus. He was also told that WildMan would be looking for a one-year commitment from a new editor. He was told that WildMan was cautious about bringing on a young editor as they had some problems with the previous editor. Mr. Hamelin was not offered a position with WildMan and was unable to say whether WildMan hired anyone.

[30] He testified that verbal contracts were pretty normal in the business and that a lot of the time, work arises from personal relationships and establishing that the other party is the right person to work with.

Michael Vernon

[31] Mr. Vernon became acquainted with Mr. Williams when Mr. Williams worked as a Final Cut Pro editor for Northern Native Broadcasting Yukon (NNBY) from March 3 to April 5th, 2008. Mr. Vernon was senior editor for NNBY. Besides providing favourable information as to Mr. Williams' performance while at NNBY, Mr. Vernon testified that in his 13-14 year career a large number of the contracts for services were oral, and in particular this was the case with short-term contracts.

Ron Daub

[32] Mr. Daub testified that Mr. Williams was hired as an independent contractor. His services were always dependent on the work WildMan had. The meeting of December 10, 2007 was to alter the pay structure between WildMan and Mr. Williams. Mr. Williams was told that any future work would depend on WildMan's success in obtaining a pending Government tender. Mr. Daub said that he and Mr. Timpany had discussed several times since November, 2007 whether Mr. Williams' services would be required any further.

[33] In cross-examination, Mr. Daub agreed that the three separate periods during which Mr. Williams provided services in 2007 were pursuant to contracts

for services, as set out in the Reply filed in this proceeding. These contracts, however, were dependant on work being available for WildMan and were not for fixed terms, other than the first one-month period. He stated that the terms regarding Mr. Williams' provision of further services to WildMan that were agreed on in the December 10th meeting were supposed to be "cemented" in writing but that this never happened due to holidays and being busy. The termination of Mr. Williams' services was "strictly a business decision".

Phil Timpany

[34] Mr. Timpany stated that during the December 10th meeting, Mr. Daub told Mr. Williams on three occasions that any further services he would be required to provide WildMan were work dependant. He and Mr. Daub had spoken four to five times from November to January regarding the possibility of WildMan no longer requiring Mr. Williams' services. Prior to leaving for his holidays in January, Mr. Daub had told him to terminate Mr. Williams' services if there was no work and he was no longer needed.

[35] He agreed that he and Mr. Williams had an argument along the lines Mr. Williams testified to. This argument occurred the day before Mr. Williams' services for WildMan were terminated by Mr. Timpany. He was very frustrated and wanted Mr. Williams out of the expensive equipment room because he didn't want anything to get broken if something happened. With respect to the allegation of a threat of potential physical violence, he testified that he would never have hit Mr. Williams.

Findings

[36] This case turns on a fairly simple point: Was there a six-month term contract for services agreed to between the parties in the December 10, 2007 meeting? Mr. Williams says that there was and Mr. Daub and Mr. Timpany say that there was not.

[37] Mr. Williams presented his case and testified in a clear and direct manner. There were no apparent contradictions in his evidence. His demeanour was calm and appropriate for the situation. He had evidently put considerable thought into the preparation of his case and compiled documentation and subpoenaed witnesses to support his position.

[38] Mr. Daub and Mr. Timpany also were direct and consistent in their evidence on the salient points. There was nothing in their demeanour or manner of testifying that would cause me to disbelieve their evidence refuting Mr. Williams' claim that there was a six-month contract entered into on December 10, 2007.

[39] If the extent of the evidence before me was simply the testimony of the parties on what happened in the December 10th meeting, I would be unable to make a finding one way or the other as to whether a six-month contract existed, and I would dismiss Mr. Williams's claim. I must, however, also consider the evidence relating to the context in which this meeting took place, including the events that occurred before and after December 10, 2007, in order to see whether it is more likely than not that Mr. Williams' claim is true.

Oral contract

[40] The evidence is clear and undisputed that the previous working arrangements between Mr. Williams and WildMan were oral and not reduced to writing. There was performance by both parties of their obligations under these separate contracts. The evidence of Mr. Hamelin and Mr. Vernon was that oral contracts were normal in the film business in the Yukon. I have no difficulty on these facts in finding that the parties could well have entered into an oral contract for a six-month term without necessarily reducing this contract to writing.

[41] I also find on the evidence that the fundamental terms and obligations of each party were sufficiently expressed, therefore not allowing Mr. Williams' claim to be defeated on grounds of uncertainty of terms. The duties to be performed by Mr. Williams, the compensation for these duties, and the duration of the contract for services were all set out.

[42] In this regard, one factor I considered is the conflict in the evidence between Mr. Williams and Mr. Daub on whether the three contracts from May through to mid-December 2007 were fixed-term contracts. It seems more consistent with the evidence that these were time-limited contracts rather than floating, in the sense of being work dependent. One aspect of the evidence in support of this is that Mr. Williams submitted proposals for further work and/or compensation for future work at times in August and November consistent with the end of one contract and in anticipation of another.

Reliance

[43] Although there is not a lot of evidence pointing to Mr. Williams having acted in reliance on the existence of a six-month contract, what evidence that was presented is supportive of his position and nothing in the actions of either party, outside of the termination itself, contradicts it. That said, there is not, however, any evidence such as existed in **Adam** or **Bowen**, that points to any actions of WildMan that indicate they were aware Mr. Williams was acting in reliance on this contract. The most that can be said in this regard is that Mr. Williams commenced work with WildMan as per his understanding of the contract and performed this work for the better part of a month. WildMan's actions are equally consistent with Mr. Williams' position as with their own position that Mr. Williams' services could be terminated without notice when there was no work.

[44] To the extent, however, that WildMan's actions are not inconsistent with Mr. Williams' belief in the existence of a contract, and in consideration of Mr. Williams' evidence of reliance, I find some support for Mr. Williams' claim.

Character Evidence

[45] Mr. Williams provided evidence in the way of letters of support from individuals he knew or had worked with. Mr. Daub in his closing submissions said that neither he nor Mr. Timpany had ever been in court before, which is, without being evidence per se, an equivalent statement of good character, regarding how he and Mr. Timpany conduct business. I do not find this evidence to be of any assistance in deciding this matter. This is not a case where there is evidence of bad character and, in my mind, all parties stand on an equal footing with respect to character.

Future work

[46] There was some evidence provided by Mr. Hamelin, with regard to his meeting with WildMan about a potential employment opportunity, that could result in a negative inference being drawn against WildMan and their claim that Mr. Williams' services were terminated because of a lack of work. I will not draw such an inference as there is little cogent or persuasive evidence in that regard and other possible explanations exist, such as WildMan keeping a pool of possible service providers available in the event that employment opportunities arose.

Good Business Sense

[47] Some of the evidence of WildMan, the cross-examination of Mr. Williams and submissions made on WildMan's behalf relate to the fact that it did not make good business sense for them to enter into a six-month contract with Mr. Williams. I find this aspect of the case to be of little value in determining the ultimate question of whether a contract existed. There was not sufficient

evidence presented to provide an objectively reasonable basis for me to conclude that a six-month contract was not good business sense, to the extent that it would therefore cause me to accept the evidence of Mr. Timpany and Mr. Daub over that of Mr. Williams, or to otherwise find myself unable to decide this case when considering all the evidence.

Conclusion

[48] Much of the evidence in this case was undisputed. The only conflicts in the evidence were with respect to whether the second and third contracts in 2007 were for fixed terms or not and whether the December 10, 2007 meeting resulted in a six-month contract for services or simply a restructured compensation arrangement. While both parties presented their evidence consistently, Mr. Williams supported his claim with unchallenged documentary evidence of belief in and reliance upon the existence of the six-month contract for services.

[49] I also find the circumstances of the termination of Mr. Williams' services somewhat unusual in that the termination was immediately after a heated argument with Mr. Timpany at the conclusion of a project they were working on together. There was no warning given to Mr. Williams and Mr. Daub was not aware of the termination until he was told of it by Mr. Williams. Given the history between the parties and the nature of their relationship, the termination appears to be more consistent with a spur of the moment decision by Mr. Timpany than with a carefully considered decision that arose from a lack of work for WildMan.

[50] When I say "spur of the moment" this is not to say that Mr. Timpany first concluded that WildMan no longer required Mr. Williams' services at the time of the argument. He and Mr. Daub may well have previously considered the work WildMan had at the time and in the foreseeable future and together discussed the fact that Mr. Williams' services were not necessarily required. It is, however, consistent with WildMan finding itself in a contractual arrangement that it may

have no longer been comfortable with but also found it difficult to extricate itself from. That does not in and of itself provide proof of the existence of a six-month contract, but is certainly a factor to be considered.

[51] In all of the circumstances, I am persuaded on a balance of probabilities that there was a six-month contract for services entered into between the parties on December 10, 2007. This contract commenced January 3, 2008 and was breached by WildMan on January 26, 2008. Mr. Williams is entitled to damages for breach of contract.

[52] There was some evidence led with respect to Mr. Williams' mitigation of damages through employment subsequent to his termination by WildMan but this evidence is insufficient to allow for a proper assessment of damages. There was also a claim in the Reply for a set-off in the amount of \$3,300.56 for overpayments made by WildMan to Mr. Williams. No evidence related to this alleged overpayment was tendered at trial. Therefore, this matter should be brought back before me for further evidence as to damages suffered as a result of the breach of contract.

Cozens T.C.J.