

SUPREME COURT OF NOVA SCOTIA

Citation: Fancy Lebanese Bakery v. Uncle Bucks Food Services Inc.,
2011 NSSC 45

Date: 20110208
Docket: Hfx No. 312193
Registry: Halifax

Between:

3026236 Nova Scotia Limited,
c.o.b. as Fancy Lebanese Bakery

Plaintiff

v.

Uncle Bucks Food Services Inc.

Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: December 6 and 7, 2011, in Halifax, Nova Scotia

Counsel: J. Walter Thompson, Q.C, for the Plaintiff
John Di Costanzo, Esq., for the Defendant

By the Court:

[1] The Plaintiff, 3026236 Nova Scotia Limited, is a body corporate carrying on business under the name ‘Fancy Lebanese Bakery’ (henceforth “FLB” or the “Bakery” or the “Plaintiff”).

[2] FLB is suing the Defendant, Uncle Bucks Food Services Inc. (henceforth “Uncle Bucks” or the “Defendant”) for unpaid bakery products it supplied to Uncle Bucks dating back as far as December of 2005. FLB values the bakery products at \$42,159.51. It also claims interest on the overdue account at the rate of 5% per annum calculated from August 1, 2008 up to the date of judgment in accordance with *Civil*

Procedure Rule 4.03. The authority to allow interest is derived from Section 41, subsections (i) and (k) of the *Judicature Act*, R.S.N.S., 1989, c. 240 (as amended).

BACKGROUND AND DISCUSSION

[3] FLB was started by Halim “Harry” Laba, and his wife, Mary Laba. After Mr. Laba passed away in 1996, Mrs. Laba continued to operate the business. She was eventually joined by her three daughters – Nina, Zeina and Tanya.

[4] The company produces various baked goods such as pita bread, Kaiser rolls for submarine sandwiches, buns and bread sticks. They supply grocery stores and fast food outlets in Nova Scotia and New Brunswick.

[5] Uncle Bucks is one of FLB’s oldest customers. By all accounts theirs was a good business relationship.

[6] Uncle Bucks is owned by Ann Tanner but operated primarily by her husband, Rick Tanner. Mr. Tanner’s father, George, also worked in the business until his retirement about a year or so ago. The senior Mr. Tanner’s job was to arrive early in the morning to open up the shop. He was normally there when the daily delivery of baked goods arrived from FLB. Other staff members would verify the order and then George Tanner would sign a copy of the invoice to acknowledge delivery.

[7] A white copy of the invoice was left with the customer. A yellow copy, signed by the customer acknowledging delivery, was returned to the Bakery by the driver. There it would be joined up with a pink copy of the invoice which was retained at the Bakery.

[8] The accounting system used by FLB was not complicated. The pink copy of the invoice was filed in a hanging file marked “unpaid” until such time as cash or a cheque was received in payment. When payment was received the pink invoice was taken from the (unpaid) hanging file and attached to the Cash Report for deposit at the Bank. Most of FLB’s customers paid in cash on a daily basis.

[9] Given Uncle Bucks status as one of FLB’s oldest customers they were not treated the same as most of the other cash customers. They were not required to pay cash upon delivery and sometimes they went days and even weeks and months without making payments. Rick Tanner admitted that there could have been times

while he was away on vacation that a month might go by without a payment being made.

[10] When the account fell behind either Mrs. Laba or one of her daughters would contact Rick Tanner to request payment on the account. FLB did not prepare and send out monthly statements. Mrs. Laba acknowledged that she was not as diligent or demanding as she should have been with Uncle Bucks.

[11] It was not until the Spring of 2008 that things finally came to a head. Mrs. Laba heard a rumour that Uncle Bucks was going to be sold. She instructed her lawyer to send a letter of demand for \$44,206.31. The letter was dated June 3, 2008.

[12] Subsequent to that, on July 7, 2008, a statement was sent by fax machine to Uncle Bucks (Attention Rick) which provided details of invoices including dates and amounts for the period beginning December 14, 2005 up to and including July 25, 2007. The invoices totalled \$44,206.31.

[13] A meeting was then arranged with Rick Tanner attended by two of Mrs. Laba's daughters, Nina and Zeina. Mr. Tanner made what he characterized to be a goodwill payment of \$4,000.00. This was not the first time he had provided cheques to pay down Uncle Bucks outstanding account. In August of 2006 he gave a series of four post-dated cheques (all sequential in number) totalling \$10,224.80 to cover invoices for the months of April, May, June and July. Most often payments were made in cash.

[14] Mr. Tanner did not make any further payments after the goodwill payment in July of 2008. According to his testimony he thinks the account was actually overpaid. Uncle Bucks has not counterclaimed for the return of any alleged over-payment.

[15] Shortly before the trial was scheduled to begin Mr. Tanner provided copies of invoices from his records marked "Pd." He testified that this was how he customarily marked invoices after they were paid. The invoices were then forwarded to his accountant to do quarterly HST reports and eventually annual financial statements. Despite several requests to provide all documents pertaining to the account and despite the legal obligation to provide full disclosure under the *Civil Procedure Rules*, Mr. Tanner not only failed to provide a copy of these invoices to counsel for FLB he also failed to provide them to his own counsel until just a few days before the commencement of trial. His explanation for this decision did nothing to bolster his credibility. Indeed, it only weakened it. If, as he alleged, these documents proved that

he made payments that Uncle Bucks had not received credit for why would he withhold them? It defies logic.

[16] Unfortunately Mrs. Laba and her daughter, Nina, were not in a position to go through all their records again to challenge or confirm what Mr. Tanner alleged. They simply did not have enough time to do it. Mr. Tanner suggested that he withheld this information from FLB's counsel because it was the only record he had and was therefore reluctant to part with it. He also suggested he did so because FLB's counsel had not complied with requests that he had made for disclosure so why should he. These are weak excuses. It does nothing to explain why he chose not to disclose the information to his own lawyer until just a few days before the commencement of trial.

[17] The burden of proof is on a plaintiff but a defendant cannot hope to succeed in its defence by withholding allegedly relevant information until the very last moment in contravention of the rules that require both timely and full disclosure. This is not a case of inadvertence – it was intentional. This conduct on the part of Mr. Tanner undermines his credibility.

CONCLUSION

[18] In conclusion, where the evidence of one side conflicts with the other, I accept what the witnesses for the Plaintiff had to say.

[19] The system of accounting used by FLB was simple but effective. If there were any mistakes on the part of the Plaintiff, it was in not sending out regular monthly statements and in allowing the Defendant to run up a considerable account. This should not, however, deny the Plaintiff payment for the product it delivered to the Defendant. There were never any complaints about the quality of the product received. The Defendant used that product to produce revenue which in turn generated income. The Plaintiff should not be expected to subsidize the Defendant's operations.

[20] Despite the late disclosure by Mr. Tanner, I will request FLB to once again go through their records to see if indeed the slips/invoices provided by Mr. Tanner have been paid as he alleges. I realize this might take some time to do but hopefully it will not prove too onerous.

[21] I will allow 45 days from the date of release of this decision for FLB to complete this task and to report the results to the Court. If Uncle Bucks is owed any

credits then the necessary reduction can be made to the amount claimed. I am confident that Mrs. Laba and her daughters will do a thorough review and report the results honestly.

[22] If FLB's records do not confirm the payments that Mr. Tanner now says were made, judgment will be granted in the amount claimed – \$42,159.51 – together with interest at the rate of 5% per annum calculated simply for the period commencing August 1, 2008 up to the date of judgment and thereafter at the same rate until full payment has been received.

[23] I will leave it to the parties to try to reach an agreement on costs. If they cannot agree I will accept their written submissions on the subject within 60 days of release of this decision.

McDougall, J.