

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Eastern Shore Holistic Acupuncture v. Teal, 2015 NSSM 9

BETWEEN:

EASTERN SHORE HOLISTIC ACUPUNCTURE

Claimant

- and -

SHELLEY A. TEAL and ACUPUNCTURE AND TRADITIONAL
CHINESE MEDICINE ASSOCIATION OF NOVA SCOTIA

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on January 22, 2015

Decision rendered on February 4, 2015

APPEARANCES

For the Claimant, Eastern Shore
Holistic Acupuncture

Gwen Williams, Proprietor

For the Defendant, Acupuncture
and Traditional Chinese Medicine
Association of Nova Scotia

Linda Scott, President

for the Defendant Shelley A. Teal

Self-represented

BY THE COURT:

Introduction

[1] The Claimant sues for \$7,350.00 in compensation and related damages for work done designing, setting up and maintaining a website for the Defendant, Acupuncture and Traditional Chinese Medicine Association of Nova Scotia, which I will hereafter refer to by the acronym “ATCMANS” and/or “the Association.”

[2] The Claimant is the business name through which Gwen Williams operates her practice of acupuncture and traditional Chinese medicine. Ms. Williams also has some experience with web design and other information technology (IT).

[3] The Defendant ATCMANS is a non-profit Society, acting as a professional association for some practitioners in Nova Scotia. It is not the only such association. It currently has some 40 members and is run by a volunteer board of directors.

[4] The Defendant Shelley A. Teal was for some of the relevant times the president of ATCMANS.

[5] The Claimant joined ATCMANS in about 2011, and volunteered to join the Executive Board in 2012, at one time serving also as Vice-President. Upon joining the Board she soon thereafter became one of its more enthusiastic volunteers. Without active volunteers, small professional associations or other

non-profits cannot survive. As might be expected, some board members take on more than others. Ms. Williams apparently took on a lot of projects.

[6] In about mid-2013, there was a discussion at a Board meeting about the state of the organization's website. Ms. Williams and Ms. Teal were in attendance. The suggestion was made by someone (I am not sure whom) that Ms. Williams should design a new website for ATCMANS. Ms. Williams stated emphatically that she did not want to do so because it would be too much work. Someone suggested that perhaps ATCMANS could pay Ms. Williams to create the website. Ms. Williams reiterated that she was not interested. The discussion appears to have been left at that.

[7] Ms. Williams was already maintaining the website, because of her IT background. On or about August 14, 2013, it started to become unstable and crashed. Without informing anyone else with the Association, let alone consulting them, Ms. Williams took it upon herself to create a brand new website.

[8] Ms. Williams kept rough track of her time. She produced calendar records showing that she spent a total of 38 hours between August 14 and 20 creating the site, plus a further 8 hours on September 14 programming the old web address to redirect traffic to the new site.

[9] Ms. Williams testified that she believed there was (in effect) a standing offer to compensate her for her efforts. Although she did not know how much money she might be paid, she did not believe that this was pure volunteer activity.

[10] Ms. Williams first reported her activity to the Board in an email dated August 20, 2013, as follows:

“I created a new website because the old one broke and could no longer be updated. This site is free for up to 10 pages and allows members to join and update their own profiles, add news and post in forums. Anyone can maintain this one and I got rid of tables which are difficult.”

[11] On September 14, 2013, after the further work to redirect the site, Ms. Williams wrote in another email:

“I was able to use the technical information and passwords I obtained at the Board meeting from Dr. Li, to make our current website address (atcmans.ca) point to or “redirect” to the new website. ... Now you will only see the new website! I didn’t know how to do it but figured it out... I am very pleased with myself :) ...”

[12] In neither of these emails did Ms. Williams mention that she expected, or even hoped for, compensation for her efforts.

[13] In early November 2013, for reasons that are not entirely clear to me, Ms. Williams resigned as Vice-President and as a member of the Board.

[14] On December 1, 2013 ATCMANS held its Annual General Meeting. The Minutes state, among many other things:

“Gwen Re: New Website. Gwen has been working on getting a new website together for atcmans. It is free in that there are no hosting charges with this provider for this small site. It has a member area where you can manage your own profile and update your clinic info. Any questions email Gwen.”

[15] Again there was no mention of compensation.

[16] A mere few days later, the new website experienced some problems. In email exchanges, each of Ms. Williams and Ms. Teal accused the other of crashing it and of changing the passwords. Allegations of lying and counter-allegations of defamation were levelled by both sides. An obvious rift between Ms. Teal and Ms. Williams developed, or worsened.

[17] Another Board meeting occurred on December 11, 2013. An entry in the Minutes expressed “concerns about Gwen” referring to the incidents with the website. Further entries also concerned Ms. Williams and some Board members’ desires to remove her from committees because of stated concerns about the ethics of her behaviour.

[18] In January 2014, the brewing dispute between Ms. Williams and ATCMANS escalated and lawyers’ letters were exchanged, containing allegations of defamation and other wrongdoing.

[19] It was in February 2014, it appears, that Ms. Williams put together an invoice for her design of the website and sent it to the Board. Although on its face dated December 5, 2013, it notes that it was sent on February 25, 2014. It asks for a total (including HST) of \$6,123.75 for work building the new website (38 hours @ \$75/hr = \$2,850), redirecting the test site to the proper web address (8 hours @ \$75/hr = \$600) plus a further charge of \$1,875 for website changes and updates from November 25 (after she quit the Board) to December 4, 2013.

The invoice referred to some 110 hours of time spent, but not charged, while she was on the Board from November 16, 2012.

[20] Ms. Teal received the bill and responded to Ms. Williams a few days later in an email, asking for the following items of information:

“Was there a contract?
Was there a set amount agreed upon?
What were the terms of the contract?
Who did you negotiate the contract with, and was it cleared by the executive who should/would have cleared a contract of that much with the general membership first?”

[21] There is nothing before me to indicate that these questions were answered. They were reiterated about a month later in a follow up email of April 4, 2014. In that email Ms. Teal stated:

“When you first presented the board with the bill I was shocked. I sat there at that meeting in which you volunteered to help with the website. I have since asked you for proof of a written contract that ATCMANS hired you to work on this website and agreed to pay you a certain amount. Your response to me was “how do you intend to pay.”

I will have to take this matter to the general membership for discussion.”

[22] Ms. Teal testified that the invoice had indeed come as a huge shock, for several reasons. First of all, she was not aware of any agreement to pay Ms. Williams to build a website. Secondly, she regarded the amount as so exorbitant that to pay it would have virtually bankrupted the Association, or (more accurately) forced it to go to its members and levy some special charge in order to be able to raise the funds that it otherwise did not have.

[23] At that next meeting of April 24, 2014 the issue of the website and the invoice was raised and the discussion became somewhat acrimonious. Ms. Teal was chairing the meeting. Ms. Williams was in attendance, and was urging that the issue of compensation be put to a vote. Some other members (in a more conciliatory spirit) suggested that there should be some compensation offered. Ms. Teal was insisting that the Board needed to obtain legal advice to tell them whether or not they had a legal duty to pay the bill. No vote on the matter was taken.

[24] In the months that followed, several things occurred. At one point, the ATCMANS web address lapsed because of a mixup in paying the fee to renew the URL. Ms. Williams put up an almost identical website to direct traffic to her own clinical practice. Ms. Williams joined a new association which splintered off from ATCMANS. Other acrimonious exchanges also occurred. Eventually ATCMANS obtained a similar web address, and is planning to develop a brand new website without using the content that Ms. Williams developed. Some of that content is now on Ms. Williams's own website for her clinic. Ms. Williams continues to own web addresses that utilize the acronym ATCMANS, which she has recast as "Acupuncture and Traditional Chinese Medicine around Nova Scotia." At a Board meeting in November 2014, Ms. Williams served her claim on Ms. Teal and ATCMANS. At that meeting she was accused of violating the Code of Conduct and her membership in the Association was not renewed.

[25] As matters currently stand, ATCMANS is not using any of Ms. Williams's material. Ms. Williams continues to operate a website directed to her clinical practice that, to a casual observer, looks identical to the website she created for

ATCMANS and for which she seeks payment. I note that she does not use the ATCMANS logo, but most of the design elements are identical.

The issue

[26] The threshold question for me to answer is whether or not the Claimant is entitled to any compensation. If she is, then the next question would be: How much? The amount set out in the invoice would not necessarily be the amount awarded.

[27] In order for the Claimant to succeed, there must be a legal basis for recovery. She concedes that she does not have a written, or even verbal contract (in the usual sense). It is this lack of contract that has caused the Defendant ATCMANS to take the legal position that it is not liable to pay.

[28] Although she did not frame the issue in these terms, the Claimant could potentially avail herself of other legal theories that allow for someone to be compensated where there is no contract. The two somewhat related legal theories are *quantum meruit* and unjust enrichment.

quantum meruit

[29] *Quantum meruit* is a Latin term that literally means the amount that is deserved, or merited.

[30] The principle was helpfully explained in our Court of Appeal by Cromwell J.A. (as he then was) in *Polem v. Data General Canada Inc.* 1998 NSCA 207:

91 It is helpful to recall the basic principles. "Quantum meruit" literally translates "as much as he deserves". It is an equitable doctrine based on the principle that one who benefits from the labour and materials supplied by another should not be unjustly enriched thereby. Under circumstances where contracts are not enforceable because of uncertainty or where there has been no contract (e.g., the voluntary provision of goods and services under certain circumstances), the law implies a promise to pay a reasonable amount for the materials and labour which have been furnished..... As I understand the law an award based on quantum meruit is assessed by reference to all the circumstances surrounding the situation under which the obligation arose. ...

93 The amount of money to be awarded on a quantum meruit claim is, generally, the market value of the services rendered. In considering what that market value is, attention must be paid to all the circumstances of the particular work in question. ...

94 In summary, quantum meruit is an equitable doctrine to be applied in light of principles of justice and reasonableness in all of the circumstances of the case.

[31] *Quantum meruit* has been described as a "quasi contract" remedy that fills in the gap where parties have agreed or it is otherwise obvious that work is to be done for compensation, but for some reason the parties have neglected to fix a price. This sometimes happens in emergency situations. For example, one's basement floods and a plumber is called to investigate and fix it. In the panic of the moment no prices are discussed. The plumber presents a bill. If the customer disputes the amount, a court could decide what is reasonable on the theory that the parties implicitly agreed that a reasonable amount should be charged. The court might look at the plumber's usual rates, or prevailing rates in the industry, to get a handle on what is reasonable.

[32] This is but one example, but it gives the flavour of the doctrine. It would be unjust in such a situation for the customer to avoid paying anything on the theory that no price was agreed upon.

[33] Here the Defendants say, and the evidence supports the view, that there never was an agreement to pay the Claimant. Had they been looking to spend money on a new website, they would have insisted upon a quote and perhaps sought outside quotes, for comparison purposes. They would have reviewed their finances to see what they could afford. In short, there would have been a process before money would have been earmarked.

[34] While I have some sympathy for Ms. Williams's dedication and work, I do not believe she has proved that there was any underlying agreement to compensate her. The suggestion in the air at the meeting that Ms. Williams should consider doing the website for compensation, was not enough to create a legal "offer" that she was at liberty to "accept" at any time. It is far from clear that the person suggesting that Ms. Williams be compensated would have had the legal authority to bind the Association. Furthermore, Ms. Williams vocally rejected the suggestion, which ensured that no further discussion took place and the suggestion was never elevated to something resembling a standing offer.

[35] I use the terms "offer" and "acceptance" advisedly because it is elementary contract law that this is how a contract is formed. There must be an offer by one party that, if accepted, renders the first party responsible for payment. *Quantum meruit* only fills in the gap where the parties have not agreed on price. It does not assist where there is no express or implied understanding to begin with that the work will be compensated.

[36] I accordingly find that there is no contractual basis for the Claimant's case against either of the two Defendants, and *quantum meruit* does not apply.

Unjust enrichment

[37] This principle was discussed in the Supreme Court of Canada case of *Garland v. Consumers' Gas Co.*, [2004] 1 SCR 629. The headnote to the case summarizes the point:

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. The proper approach to the juristic reason analysis is in two parts. The plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

[38] To put it into ordinary language, the courts will not allow one party to take advantage of the efforts or property of another, unless there is a valid reason. One could simply say (at the risk of oversimplification) that no one should be enriched at the expense of another, unless it is just that it end up that way.

[39] In my opinion, the Claim fails this test, as well.

[40] First of all, as things have turned out, ATCMANS has not retained any of Ms. Williams's work. Ms. Williams has withdrawn her site and is using the design and content for herself. It may be true that ATCMANS had the benefit of the site

for a time, but that time was brief. I find that there was no enrichment of ATCMANS, at Ms. Williams's expense or otherwise.

[41] Even if there were an enrichment, there is a "juristic" reason to deny recovery, which is that ATCMANS would not have agreed to pay for the site, had it known that the Claimant was proposing to charge for her work. In other words, ATCMANS had good reason to believe that Ms. Williams was volunteering her time, i.e. had the "donative intent" referred to in the above quote. It is not unjust for a party to retain the value of a good or service that it reasonably believed was offered gratuitously.

Other issues

[42] Even if I am wrong on the question of liability, I have grave reservations about the amount of the bill. Both the number of hours (71) and the hourly rate (\$75.00) seem excessive. I believe that the Association could have had something similar done for much less, had it been given the opportunity to shop around. It appears that Ms. Williams used her rate as an acupuncturist, or something close to it. That does not seem like a fair rate. Undoubtedly Ms. Williams has some IT experience, but there is no evidence that she commands that much for paid IT work. As for the time spent, the relatively straightforward site that she created should not have taken that long. If, as I suspect, much of the time was spent writing content for the site, then Ms. Williams is asking to be paid \$75.00 per hour for writing, not IT work. Had the Board been asked to provide content, others might have volunteered to write that content, or perhaps it could have been copied from other sources.

[43] Her 8 hours of time redirecting the site also seems excessive. In her email she concedes that she did not know how to do this, but managed to figure it out. I suspect that a more experienced web designer would have known what to do, and could have accomplished this in a matter of minutes, rather than hours. Ms. Williams cannot charge for teaching herself how to redirect a web address to what was, until then, a test site.

[44] Ms. Williams testified that she did not expect to be paid this bill, in full, but was presenting it as a negotiating tool to try and persuade the Association to pay her a fair amount. With all due respect, this is not how one negotiates toward an amicable solution. The way she chose was a highly confrontational tactic. The timing suggests that she only decided to charge after matters became confrontational for other reasons, including personal animosities.

Personal liability of Ms. Teal

[45] The Claimant sued Ms. Teal personally, despite the fact that the supposed beneficiary of her work was ATCMANS. She offered very little explanation for why Ms. Teal might be personally responsible, other than saying that Ms. Teal was President at the time and (Ms. Williams alleges) she ought to have supported the claim by putting it to a vote at the Board meeting where the subject of possible compensation was raised. Instead, as noted above, Ms. Teal insisted that the Association obtain legal advice. Ms. Williams regarded this as Ms. Teal working (improperly) against the interest of an Association member.

[46] Had I found any legal basis for recovery, I would have done so against only ATCMANS. Ms. Teal was acting in her capacity as an officer of the Association and bears no personal liability. I do not see any legal theory which could have

held her personally responsible. I am more inclined to regard Ms. Williams's naming of Ms. Teal as a Defendant as a misguided expression of her personal animosity toward Ms. Teal.

[47] In the result the Claim is dismissed against both Defendants.

Eric K. Slone, Adjudicator