

Claim No. SCT 273771

Date: 20080307

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Rushton v. Misener, 2008 NSSM 53

BETWEEN:

**WALTER RUSHTON, "DBA" Wiretech Security and Automation**  
Claimant

- and -

**JOHN MISENER, "DBA" JRM Technical Services**  
Defendant

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**ORDER**

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**Adjudicator: David T.R. Parker**

**Heard: January 29, 2008**

**Decision: March 7, 2008**

**Counsel:**

**The Claimant was represented by Vincent Neary of Keltic Collections.**

**The Defendant was represented by Counsel Lisanne Jacklin.**

**Pleadings**

The claim was for \$11,380.00 and the reason for the claim was that the Claimant purchased security alarm monitoring accounts from the Defendant who continued to collect fees on the accounts. This claim was amended to \$24,999.00 and the delivery of 62 customers and all related files as defined in the Agreement of Purchase and Sale of Assets dated December 18, 2005.

## **The Defence**

The Defendant stated the Claimant repudiated the contract and any collection of the accounts by the Defendant was performed with the knowledge and consent of the Claimant and/or was done after the Claimant's repudiation and following notice of rescission by the Defendant. The defence was amended and remains virtually the same. It does however allege the Claimant abandoned the contract.

## **The Counterclaim**

The Defendant by way of counterclaim claims for damages for alarm contract fees retained by the Claimant, loss of alarm contracts as a result of the Claimant's repudiation and rebates of alarm contract fees to clients who returned to the Defendant after rescission.

In the amended counterclaim the Defendant states the Claimant continued to collect fees and the Claimant has caused the Defendant to lose past and future revenue. The Defendant is also seeking legal fees and costs incurred to set aside a quick judgment and appearing before the Supreme Court to stay an Execution Order. The Defendant is also seeking return of 21 files which the Claimant retains in his possession.

The Defendant also states that in the alternative if this Court grants specific performance the Claimant seeks damages for the full purchase price.

## **Analysis**

I found the Claimant's testimony disjointed, incomplete in the he could not answer questions as to the accounting. However saying that it appears he paid \$2,362.93 of the Defendant's account and he paid in December and January \$575.00 to the Defendant or \$1,150.00 on the agreement he had with the Defendant for the purchase

of the Defendant's accounts. The Claimant also received \$1,903.80 from those accounts. There were no payments made by the Claimant after January. The Defendant also received \$296.40 from customers.

There was an agreement entered into between the parties for the sale of the Defendant's accounts. The Claimant was claiming that the Defendant was still collecting on these accounts. There is no evidence that the Defendant was collecting on accounts owing after the date of transfer except possibly two accounts which were to be credited towards monies owed to the Defendant. There was evidence that the Claimant was receiving monies on these accounts. There is no credible evidence that customers were telling the Claimant they were still paying the Defendant.

The Claimant simply stopped making payments pursuant to the terms of the agreement. Payment for the accounts is a fundamental term of the contract. The contract between these parties ended either when the Claimant stopped making payments, or at the very latest, when the Claimant responded to the Defendant's letter of April 7, 2006, on May 10, 2006.

The Claimant paid \$2,362.93 which is to be credited back to the Claimant as it was a payment made by the Claimant on the Defendant's behalf. The Claimant would be credited back the \$1,150.00 paid to the Defendant and the Defendant will be credited the \$1,903.80 the Claimant received from customers.

The Defendant will not succeed in its claim for costs associated with the stay as the execution order resulted from the Defendant's neglect is not filing a defence in a timely manner. The Defendant will also be allowed his \$100.00 costs allowed by Adjudicator Richards in the previous order. Both sides will be allowed their costs.

**IT IS THEREFORE ORDERED** that the Defendant shall pay the Claimant the following sums:

        \$2,362.93 Paid by Claimant on behalf of the Defendant  
plus        1,150.00 Paid by the Claimant to the Defendant

less 1,903.80 Monies received on Accounts by Claimant  
less 100.00 Previously awarded by Court to Defendant  
plus 170.44 Court costs of Claimant  
less 53.00 Court costs of Defendant on Counterclaim  
**\$1,626.57 Total**

**IT IS FURTHER ORDERED** that the Counterclaim is dismissed.

Dated at Truro, this 7 day of March, 2008.

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David T.R. Parker  
Small Claims Court Adjudicator