

DECISION

- (1) This matter concerns a claim by Burnside Physiotherapy Ltd. (“Burnside Physiotherapy”) against the Defendant, Prescott & Associates Certified General Accountant Inc., (“Prescott & Associates) alleging negligence late filing penalties and interest incurred following the filing of the corporate tax return for the fiscal year ending in 2007. The Claimant was represented by Heather MacAuley, the sole shareholder and director. The Defendant was represented by Terri Lipton who appeared with two of the partners, Kristy Prescott and David Prescott. Kristy Prescott was present for the hearing both evenings, while David Prescott appeared on June 14th only. The Claimant attributes the lateness to the Defendant. The Defendant submits that the material necessary to prepare the return was delivered late, indeed beyond the filing deadline. They have filed a counterclaim for the fees charged for the preparation of the tax return plus interest.

The Issue

- (2) As I have outlined in this decision, the facts of this case are in dispute. The issue in this case concerns the timely filing of the Income Tax Return. There has been no issue raised as to the quality or accuracy of the return. While I have been unable to find a case directly on point, it is sufficient to state that it is an implied term of a contract of Income Tax preparation that the return will be filed on or before the filing deadline. Likewise, it is an implied condition that the material will be delivered on time to the accountant to ensure adequate time for preparation. The circumstances of each case may yield exceptions. The cause of the lateness is what is at issue.

The Evidence

- (3) Heather MacAuley testified that she engaged the Defendant for the preparation and filing of her corporate tax return for the fiscal year ending July 31, 2007. She had done so in previous years. She instructed her bookkeeper, Shelley Dunphy to prepare the supporting material necessary for the return and Ms. MacAuley was given a CD with the material copied to it on August 13, 2007. The material was printed and organized and placed in a brown envelope by October 3 and on that date, Ms. MacAuley attended to the Defendants’ business address then at 657 Portland Street at around 9:00 am to deliver the documents. When she arrived, there was nobody at the desk but eventually, she was greeted by an elderly woman, who Ms. MacAuley described as appearing confused. Ms. MacAuley asked if David Prescott was available. The woman replied “no” and told Ms. MacAuley he would be about an hour or so. In Ms. MacAuley’s opinion, she appeared senile, almost as if she had Alzheimer’s disease. She gave the woman the envelope and according to Ms. MacAuley, the woman began to wander around the office in a confused manner looking for a place to put it, eventually sitting it on a pile on the desk. Ms. MacAuley left the office. She testified initially that she recalled the date specifically, as it

was the date she was flying to London, England that evening to proceed to Austria.

- (4) Ms. MacAuley testified that the next contact by her company to Prescotts was in November to make sure the return had been delivered. She testified that Shelley Dunphy made the call and was told by the person on the other end of the phone that the return “will get done when it gets done.” Typically, David Prescott prepares both her corporate and personal returns, or at least is the contact on the files. She testified that she dropped off her personal taxes in mid-March, at the time they discussed income splitting with her son and his inheritance. (The company’s shares are owned by a family trust.)
- (5) Ms. MacAuley received a Notice from Canada Revenue Agency in April 2008 which showed penalties for failure to file. She contacted the Defendants’ office and was advised that Kristy Prescott was on maternity leave. David Prescott spoke to her and denied ever receiving the corporate return in August 2007 or any knowledge of a grey haired woman.
- (6) On cross-examination, she testified that when she dropped off the return, she sat around for approximately an hour. She described the layout of the basement as eight steps down, the receptionist was on the left. The photocopier and book cases were on the left. She indicated the woman entered by way of the conference room. She was not concerned about the presence of this woman only that it caused her to be puzzled. She is not sure of the number of years she had been dealing with the Defendants, although her last accounting relationship ended when her prior accountant made a mistake which Mr. Prescott apparently caught and rectified resulting in additional tax savings.
- (7) Ms. MacAuley testified that she only made one call to David Prescott in November and was given the reply that it would get done when it gets done. The preparation for her year end financial statements and tax returns fell to Shelley Dunphy who was on maternity leave herself from August 2006 – August 2007. In the interim, the office work was in an unacceptable state. The tax would have been due January 31, 2008. She submitted the new material to the Prescotts in August 2008, and the return was finally filed.
- (8) Vivian Fox gave evidence for the Claimants. She worked with the company since 2003 as a physiotherapy assistant and office manager. She testified that Ms. MacAuley had related the story of the elderly woman at the Prescott’s office. Ms. Fox did not attend there herself.
- (9) Kristy Muriel Prescott joined Prescott & Associates in July 1999 and has been a Senior Partner for two years. She described the company as having three partners, herself, her father, David Prescott and Michelle Smith. There are three other employees including a full-time receptionist. She described the office as having a separate entrance for the home and the office.

- (10) She denied emphatically that there was an elderly woman employed with Prescott & Associates nor was there anyone fitting that description who could have access to the premises at the time. She testified that her father was typically at the office by 7:30 and would unlock it.
- (11) Ms. Prescott testified that the company services 120 corporate tax clients and 1000 personal tax returns. She describes September and October as steady months while March and April are their busiest. In October 2007, the company had approximately six employees including herself. When asked of the possibility of nobody being in the office between 9 and 10 a.m., she said it would “never happen”.
- (12) She recalled doing tax returns for Heather MacAuley in 2005 and 2006. It was their practice to send out a reminder for year-end financial statements. She does not follow up the letters once they are sent as she has found many clients have moved, closed business, or retained other accountants. When deliveries are received, the documents are opened, marked and dated and put on an “in” shelf. Her records show a conversation between Ms. MacAuley and Michelle Smith on September 18, 2007, respecting her Family Trust and how the income is to be treated. Normally such a conversation does not take place unless the corporate return has been completed.
- (13) In March 2008, Shelley Dunphy was called respecting Burnside Physiotherapy’s taxes which were due on January 31, 2008. They checked their files and the return was not done by them. They searched for the material and could not find it.
- (14) She testified that she checked the company’s many controls including their time sheets, “in-list” and tracking of who is working on the file.
- (15) There is an e-mail in evidence prepared by Ms. Dunphy showing significant problems with Burnside Physiotherapy’s accounting while she was away on maternity leave. She brought to their attention the various issues which unfortunately show many tax matters including source deductions for EI and income tax not prepared correctly until later. She testified the first contact concerning the corporate taxes took place in March. The tax file was opened on June 19, 2008 and completed on August 20, 2008. An invoice was prepared for the service totaling \$988.75. Their records show a call made by David Prescott to Ms. MacAuley, although no date was given. The payment for services rendered had not been received prompting Mr. Prescott to advise Ms. MacAuley of their resignation as Burnside Physiotherapy’s corporate accountants, by letter dated November 10, 2008.
- (16) When cross-examining Ms. Prescott, Ms. MacAuley stated that the work was done well and acknowledged receiving courtesy letters. Ms. Prescott acknowledged that they would notice the work was not done in February 2008, but not in September 2007 as the returns were not have been late then. They tend to examine both the personal and corporate

returns together. When asked about the allegations of rude remarks by her company's secretary, Ms. Prescott did not speak to her staff about it because she did not believe it actually happened.

- (17) David Frederick Prescott is a partner at Prescott & Associates. He does all of the T-3 Trust returns for the firm. He usually prepares Ms. MacAuley's personal taxes and advises her with respect to her Family Trust planning. He recalled preparing her personal taxes, receiving her "pre-work" on March 28, 2008 and the return was prepared on April 5, 2008. The next contact involved the corporate return in June. He testified that it would be unlikely for the reception area for that length of time as the firm opens for business by at least 8:30, usually earlier. He had not heard any complaints about the quality of work or lack of professionalism.
- (18) On cross-examination, Mr. Prescott testified to tax work respecting one of her predecessor companies, a "Euro spa". Ms. MacAuley seemed pleased with his work. When asked about a reprimand concerning his communication and timeliness, he recalled doing the work but not the reprimanding she purportedly gave him.
- (19) In giving redirect evidence, he testified meeting with Ms. MacAuley in March 2008 and requesting data respecting the Euro spa. He made a note concerning that information on his file. There is no reference to a corporate tax return for Burnside Physiotherapy in any of his notes for that year.
- (20) Shelly Dunphy testified that she has been the accountant or bookkeeper for Burnside Physiotherapy since 2004. She was responsible for preparing the year end documents to give to Heather MacAuley for delivery to their accountants. It was her practice to verify their delivery with Ms. MacAuley, not directly with Prescotts. She recalled discussing the incident with the elderly woman with Ms. MacAuley and Vivian Fox. She did not witness it herself.
- (21) Some evidence was given respecting the rollover affecting the wind up of a Euro spa, although it has become clear that it has no bearing on the facts of this case.
- (22) On cross-examination, Ms. Dunphy testified that she worked for Heather MacAuley since April 2004 and worked full-time, except for when she was on maternity leave from November 2006 to December 2007. Toward the end of her maternity leave, she worked one day per week from April to December 2007. She described the office as having run quite well in her absence. When presented with the e-mail between herself and the accountants, she did acknowledge there were quite a few errors.
- (23) In the e-mail, she made a comment concerning Ms. MacAuley's delivery of the documents as follows:

"I send (*sic*) these documents to your offive (*sic*) via Heather in Sept and she apparently dropped them off

but no one at the office has them which is why we are ready to do another year end. I am thinking that they made it to her kitchen table and that was it. What kind of penalties are we looking at for this?"

- (24) Ms. Dunphy's explanation was this was a joke and not intended to be serious. I find that is probably the case. In fact, she continually described Ms. MacAuley as well organized as it relates to her office procedure. She described Ms. MacAuley as very upset when she received word of the late tax filing. She also testified that she assumed there would be a filing penalty.
- (25) In further questioning from Ms. Lipton, she acknowledged never having issues with rudeness or impolite comments on the part of the Defendants, or any difficulty getting through to them.
- (26) At the conclusion of evidence, Ms. MacAuley amended her claim to \$1610.93 representing the fine, interest and time for preparing for the hearing.
- (27) **Review of Facts**
- (28) In reviewing the evidence presented at the hearing, it is remarkable how the evidence differs significantly. The most significant discrepancy arises in considering the delivery of the tax return.
- (29) Throughout her testimony, Ms. MacAuley has impressed me as an intelligent woman. Like many litigants in Small Claims Court, she was unaccustomed to the nuances in presenting her case. I did not find this to be an impediment to her. That said, with respect, I have a difficult time accepting Ms. MacAuley's version of events as it relates to the elderly woman and the delivery of the documents. By her own admission, it is a "strange story". Yet there has been nothing called to corroborate it. The evidence of Ms. Fox and Ms. Dunphy is merely a restatement of a story related to them by Ms. MacAuley. It is second and third hand information. While hearsay evidence is permitted to be entered in Small Claims Court when it is relevant, it often carries far less weight.
- (30) In addition, I consider Ms. MacAuley's actions to be inconsistent with what a reasonable person would do in those circumstances. For example, it seems strange that one would even leave one's taxes in the care and custody of anyone not familiar to her, particularly one who exhibits this behaviour. It is common knowledge that there are penalties for failure to file Income Taxes. Such action would have been illogical. Similarly, Ms. MacAuley did not attempt to e-mail either Kristy or David Prescott after the files were dropped off, or have any of her employees do it until after November. I also found her answers to direct questions from counsel to be very hesitant and uncertain even when she gave the same evidence minutes before in direct testimony. For example, she stated specifically that the return was delivered on October 3, 2007, the day of her trip to Austria. However, later that same evening, she could not recall the date and only

answered the question when pressed by counsel.

- (31) The procedures described by the Defendants are reasonable. However, I find the prospect of a confused, elderly woman receiving the package in the manner described by Ms. MacAuley as highly improbable.
- (32) The Claimant has the onus to prove on a balance of probabilities that the Defendant was negligent in the preparation and filing of the return. Even though I have some difficulty with the Defendant's evidence, I find on a balance of probabilities the tax return was not actually delivered to the office until June 2008, well beyond the filing deadline. Thus, the Claim must be dismissed.
- (33) In assessing the counter-claim, I find the Defendants prepared the 2007 corporate income tax return as instructed. They are entitled to be paid their usual professional fees. There is a claim of \$316.40 in interest charges of 2% per month since June 2008. However, there is nothing in the invoice nor Mr. Prescott's resignation letter that interest will be charged.
- (34) The law on this point is stated by Justice Hallett in *K.W. Robb & Associates Limited v. Wilson* (1998), 169 N.S.R. (2d) 201 (NSCA) at pp. 217-218 as follows:

"In short, the mere presence of a statement on an invoice that interest is claimed at a particular rate, standing alone, is an insufficient basis to warrant a finding that the debtor is obliged to pay interest; there must be something more in the course of dealings between the parties. If a debtor, for instance, has paid interest on prior accounts this could indicate an agreement to the payment of interest on overdue accounts. As a general rule, a court should be slow to imply a term in a contract and this is recognized by the general principle of law that I have set out. As a result of the provisions of s. 41(i) of the *Judicature Act* there is even more reason for the court to be slow to imply a term to pay interest as the courts are now mandated by the Legislature to award interest on all claims for debt. Absent this legislative directive, the reality of how business is conducted in the 1990s might very well warrant the courts implying such a term simply on the basis of accounts being rendered to the debtor containing a claim for interest on overdue accounts as cash flow into a business on a consistent basis is critical in today's business world.... It will be a question of fact in any particular case whether or not, considering the dealings between the parties, a court will imply an agreement to pay interest at a particular rate based on the presence of such a statement in invoices rendered.

I tend to the view that without more than the statement on an invoice a court should not imply such a term, in circumstances where there is only one contract between the parties as opposed to a lengthy course of dealings as in **Irving Oil v. Whynot.**"

- (35) In the present case, there is no evidence of any express or implied agreement to pay interest on overdue accounts. The claim for monthly interest is disallowed. I fix the principal sum at \$988.75.
- (36) The Small Claims Court has jurisdiction to order pre-judgment interest which I think is appropriate in this case. I fix that item at \$79.10 (2 years @ 4% per year). The Defendants are also entitled to their costs of \$59.41 filing fee. Judgment will be entered for \$1127.26.

Conclusion

(37) In summary, the original Claim is dismissed. The Counterclaim is allowed in part. The Defendant, Prescott & Associates Certified General Accountant Inc. shall have judgment for \$1127.26 consisting of \$988.75, plus prejudgment interest of \$79.10 and costs of \$59.41.

Dated at Halifax, NS,
on September 1, 2010;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
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