

SCCH 351939
IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Wyn Re Network LP v. Dudka, 2011 NSSM 68

BETWEEN

WYN RE NETWORK LP

CLAIMANT

-and-

Michael Alan Dudka

DEFENDANT

Adjudicator: David TR Parker
Heard: September 15, 2011
Decision: November 23, 2011

ORDER

Counsel: The Claimant was Represented by Edwin Patrick Little
The Defendant was self –represented

The claim was for \$25,000.00

PLEADINGS:

The Claim:

The claimant pleads that the defendant entered into a 10 year franchise agreement with GMAC Real Estate Canada (then operated by Laurum Marketing Inc., a company which was sold to the claimant in 2010)

Claimant stated that the defendant personally guaranteed the terms and conditions of the Franchise Agreement.

The Franchise Agreement has a minimum annual amount which is payable at the end of its anniversary year.

In August 2008 the defendant was informed that he was behind in his remittance total of \$4983.81 and was asked to address the \$3455.44 in outstanding transactions that had been reported and not paid.

In August 2009 defendant was informed that he now owed a total of \$11,481.31 royalties along with \$3455.44 and past-due fees from 2007 as well as \$1692.50 in national advertising fees.

From 2009 to 2010 the defendant would have owed another \$6697.50 (comprised of the minimum annual amount of \$5750.00 plus taxes) this totals \$23,126.75 along with interest are claim is for \$25,000.00.

The amended notice of claim dated August 12, 2011 was filed subsequent to the defence being filed on August 3, 2011.

The defence:

The defendant stated in his defence that he has never operated as GMAC Real Estate.

The defendant stated that he had no dealings whatsoever with the claimant. The defendant and his reasons for disputing the claim stated:

1. he was the second individual to purchase and GMAC franchise in Nova Scotia
2. the first person to purchase and GMAC franchise in Nova Scotia was Kevin Ellis from Digby Nova Scotia
3. Mr. Ellis did not have a real estate broker license of Nova Scotia.
4. Mr. Ellis could not open his franchise until he had a real estate broker license by the province of Nova Scotia
5. It was agreed at the time by Joseph Picannci, president of GMAC Canada, and Sam Kay, operating rep for GMAC Canada that I would not open my franchise and I would be the broker for Kevin Ellis in Digby.
6. When Mr. Ellis could acquire a broker then I would be able at that time open my franchise
7. in moving my brokers license to Mr. Ellis I was released from the contractual obligations under the agreement
8. I was never responsible to the terms of the contract or minimum fees due.
9. since December 2010, I have been in negotiations with Patrick Little on a minimum amount to be paid and had made my thoughts known that his company may have purchased the franchise, which I would like proof of, and we should shake hands and wish each other well.
10. Instead he was asking for \$5700.00 to leave the franchise for minimum amount due each year
11. the negotiations have been going on for 6 to 8 months

12. now the claimant says another year has passed and the bill is now \$11,500
13. GMAC real estate has not honored their part of the agreement including numerous articles in the agreement, pain seven part 5 and 5.1
14. the name the defendant operate under was Delta GMAC real estate. For the last number of years and name was not on the GMAC Canada website
15. . Our territory has changed from the agreement to 500 yards from our office at 5730 McCully Street, another sign we were not under any obligation

The defendant WYN RE NETWORK LP, (Briergate Asset Management) has done nothing with the franchise since purchasing it.

On December 31, 2010 the website was collapsed entirely.

They have made promises [but also admitted that they do not know what to do with the franchise, as they got suckered to purchase it] but to date they have accomplished nothing.

On the counterclaim for \$25,000.00 (the cost of purchasing the franchise) the defendant would like his money back for the following reasons:

GMAC (Laurum Marketing Inc.) did not honor the agreement with any of the franchises in regards to marketing, advertising or web exposure (Delta GMAC was not listed on the website as a franchise in Halifax)

the defendant may have purchased the doom franchise (at one point there were 33 franchises, now there are about five left as all others have left the franchise) with the purchase it has inherited the deal between Lauum Marketing and the defendant. They have not billed Delta Real Estate for a "Guaranteed Royalty" until the claimant purchased franchise.

As stated in the claimant's statement from the fall of 2010 they were in negotiations with Delta and Michael Dudka for \$5750 now they have doubled that amount.

NOTE

New evidence will follow as obtained in response to claimant and in response to counterclaim

Analysis

There are number of reasons why the claimant will not succeed in this claim and they are as follows:

The claimant alleges that it acquired contractual rights from another party pursuant to a purchase agreement [Exhibit 1] which allows the claimant to step in the shoes of another with respect to an agreement between the defendant and Laurum Marketing Inc. However Exhibit 1 is an incomplete agreement not signed by anyone and it is impossible to conclude what the claimant is asking this court to do.

Even if there was a valid contract which would allow the claimant to step into the shoes of a Franchisor there is no evidence to show that the franchisor enforced any of its rights against the defendant and according to the defendant franchisor never provided the obligations it had to under any agreement with the defendant. The defendant raises the defence of estoppel and based on the evidence of the defendant

this defense would succeed. The defendant acted on promises of the franchisor, these promises were never delivered and the defendant acted to his own detriment.

The claimant has not shown that it is registered Corporation nor that is registered in this province and without such proof it lacks standing in order to proceed with the claim.

The claimant and the defendant indicated there were several other agreements with other parties that were exactly the same as the one the defendant had entered into with Laurum Marketing Inc. The claimant admitted there were ongoing actions and these actions as a group would take these matters outside the monetary jurisdiction of this court. In other words there are multiple of action ongoing which involve a greater amount than the \$25,000.00 the jurisdiction of this court. There are a number of documents which have to be proven related to this claim which have not been proven and there are a number of parties involved with respect to these agreements. They have not appeared before this court to provide any clarification or evidence as to what this matter concerns.

Finally, the defendant provided to the court a Statement of Claim apparently involving an action started before the Ontario Supreme Court involving the franchise agreements which it is suggested would incorporate the agreement involved in this matter. While either party could not provide sufficient information with respect to this alleged claim and there is no certainty that the statement of claim has actually been filed with the court it does raise concerns that if there is an action already before another court involving this matter and if that is the case then this action should be stayed for that reason.

For all these reasons the claimant will not succeed in this claim. Further the defendant/claimant by way of counterclaim has provided insufficient evidence or foundational evidence to support his counterclaim. As well it is reasonable to conclude that if there are a number of counterclaims the same as the defendants then these matters as a whole are outside the jurisdiction of this court.

It Is Therefore Ordered That the claim against the defendant be dismissed and the counterclaim against the claimant/defendant by way of counterclaim be dismissed with no order as the costs for both.

Dated at Halifax this 23th day of November 2011