Claim No: 392363

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Kent v. Johnson, 2012 NSSM 47

BETWEEN:

RUTH ELIZABETH KENT

Claimant

- and -

MICHAEL JOHNSTON and SCOTIA ATLANTIC HOSPITAL SUPPLY

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on July 31, 2012

Decision rendered on August 3, 2012

APPEARANCES

For the Claimant	Brian Kent (son), agent
For the Defendants	self-represented

BY THE COURT:

[1] The Claimant is a woman who is visually impaired to a very significant degree. She also has multiple other health problems that require her to take several medications at different times of the day. Included among her health problems are anxiety and depression.

[2] The Claimant lives semi-independently and is very conscientious about taking her medications on schedule. She is very concerned that if she forgets to take her medications, as prescribed, she is at risk of losing her cherished independence.

[3] In March of 2012 she learned about a new device that assists people in keeping to a medication schedule. Essentially it is a pillbox that is loaded up with a supply of the medications, and using wireless technology it allows a remotely located company to monitor compliance by measuring whether or not compartments containing the pills have been opened at the appointed time. After a certain time, an alarm would sound as a reminder. Other people might be alerted. The trade name for the device is the “Do-Pill” Intelligent Pillbox, from a Quebec-based company called DOmedic.

[4] The Claimant heard about this through her sister in New Glasgow, who in turn had gotten a toll-free number to call from a pharmacy there. The Claimant called the number and spoke to the Defendant, Michael Johnston, who operates a business based in Hantsport. This business appears to have distribution rights in Nova Scotia and perhaps elsewhere. Mr. Johnston offered to come and visit her at her home in Eastern Passage.

[5] The Claimant's adult son, Brian Kent, lives in a separate area of the same house and helps her with some of her needs (including assisting with this hearing). He was present for some, but not all of the encounters that the Claimant had with Mr. Johnston.

[6] Mr. Johnston attended at the Claimant's home and discussed the Do-Pill and explained the cost and ways that it could be paid for. Although the Claimant does not recall all of what was said to her, I am satisfied that Mr. Johnston likely gave her the option of renting or purchasing. The purchase cost was $1,800.00. On top of that would be monthly fees to the company that monitors the system.

[7] Mr. Johnston also testified that he explained to the Claimant that it was possible that her insurer, Sun Life, might cover the cost and he offered to apply on her behalf for a preapproval. In the meantime, the Claimant was persuaded to sign an order form and supply a cheque for $1,800.00. The payee was left blank as Mr. Johnston said that he would fill it in.

[8] The Claimant made it very clear to Mr. Johnston that her current supply of medications was due to run out on April 12, 2012, and that she took her medications early in the morning. She was very concerned that she not find herself without medications on April 13.

[9] She also testified, and I accept, that she told Mr. Johnston that she did not have the money to pay for the machine right away, and that she would have to withdraw funds from a RRIF, which might take a little time. She accordingly insisted that the cheque be postdated for April 6.

[10] Mr. Johnston left with the cheque on March 30, and wrote his own name - not that of his business - as the payee. This was not satisfactorily explained. He also failed to respect the fact that the cheque was postdated and presented it to his bank (or someone did on his behalf) for deposit on April 3. The cheque did not bounce, but it apparently created something of a mixup as Mr. Johnston was apparently told by his bank that there were insufficient funds. In fact, it caused the Claimant's bank account to be overdrawn although the overdraft fee was waived by the bank.

[11] To further complicate matters, in order to use the device the Claimant was told that she would have to change pharmacies, as not all pharmacies are equipped or willing to be part of this system. The Claimant was directed to the Medicine Shoppe on Baker Drive in Dartmouth. The owner and pharmacist there, Brian Dillman, testified that he was contacted by Mr. Johnston who explained that he had a customer who would be switching over. He told Mr. Johnston that he was not trained in how to use the Do-Pill and that he wanted to have Mr. Johnston demonstrate it both to him and to his pharmacy technician. He told Mr. Johnston to attend the next day between 10:00 a.m. and 2:00 p.m., which were the hours that both he and the technician would be present.

[12] Mr. Johnston showed up late for that meeting, which meant that the technician was already gone for the day. According to Mr. Dillman, who was a fair and unbiased witness, Mr. Johnston either missed meetings altogether or showed up very late. Mr. Dillman appeared to have been quite frustrated.

[13] Mr. Johnston testified that he prefers to train the pharmacist first, and the technician later. Whether true or not, this does not satisfactorily explain why he was so late for a meeting where Mr. Dillman expected to have his technician in attendance.

[14] Mr. Dillman was quite aware of the April 12 deadline. In fact, he had looked after getting the Claimant's prescriptions refilled by her physician over the phone. Time was getting tight. He needed to have the machine in his hands, so he could load it up with the medications, well in advance of his 5:30 p.m. closing time on the 12th of April.

[15] The Claimant and her son were in touch with Mr. Dillman as they were also concerned.

[16] By sometime after 3:00 p.m. on the 12th, Mr. Johnston had yet to show up or call. Mr. Dillman made the decision to prepare the Claimant's monthly medication supply in the conventional blister packs that she had been using. They were picked up by Brian Kent at around 4:30 p.m.

[17] At approximately 5:10 p.m., Mr. Johnston showed up with the machine in his hand. Mr. Dillman explained to him that it was too late; that he should have come much earlier.

[18] Mr. Johnston proceeded to attend at the Claimant's residence, with the apparent intention of delivering the (empty) machine. By then the Claimant and her son were disenchanted with what had occurred and no longer wanted to buy

the machine. They asked him to provide a refund. Mr. Johnston apparently said he would do so and left with the machine in hand.

[19] To make a long story short, Mr. Johnston later issued a refund of $1,440.00, keeping $360.00 as a “restocking fee” and toward his expenses. This claim seeks to have the refund made in full.

Discussion

[20] The initial question for the court is whether or not the Claimant was entitled to cancel the contract. If she was, then the Defendants would have no right to claim an offset for expenses.

[21] Assuming that the Claimant breached the contract by refusing delivery of something she had bought, the seller (the Defendants) would have a right to deduct something toward their losses, such as the restocking charge.

[22] In my view, the contract was not just for the sale of a machine. What Mr. Johnston was really selling was a system designed to give protection and comfort to the Claimant. He knew, or ought to have known, that the Claimant was a person with significant challenges and someone labouring under considerable anxiety. Given all of that, his job was to inspire confidence and reassurance.

[23] His behaviour did none of the above. He was chronically late for meetings and alienated the pharmacist, who was an essential component of the system. He left the Claimant hanging by a thread on April 12, worrying about whether

she would have medications to take on the 13th. When the Claimant was eventually given blister packs and told that Mr. Johnston had failed to show up at the pharmacy, she justifiably lost confidence entirely. I find that she was within her legal rights to call the contract at an end and claim a full refund.

[24] Mr. Johnston's explanation for his lateness and for the entire situation were in part because of his need to travel all the way from Hantsport, and that it is impossible to predict traffic. This is a weak excuse. It was clearly his desire to promote this product throughout Nova Scotia and getting places was his problem, no one else's. I find that he did a particularly poor job of keeping the Claimant and the pharmacist "in the loop." Had he done a better job of this, he might have persuaded them to be more patient.

[25] Mr. Johnston initially filed a counterclaim, in which he claimed damages for, among other things, having to listen to the Claimant "rant and rave." He eventually decided not to proceed with the counterclaim. Nevertheless, it provides a little insight into his attitude. Surely he must understand that if he is in the business of selling these devices to a population who are vulnerable due to their age and infirmity, part of his job is to provide a listening ear and to provide reassurance, rather than regarding them as a nuisance.

[26] Even if I am wrong about the Claimant's right to cancel, I find that the Defendant has not established any damages. He claims the restocking fee is justified because the box was opened and the machine programmed for the Claimant. It seems to me that since the Claimant never even touched the machine, that another customer would have no difficulty accepting a machine

that had been “opened.” No one would expect a sealed box, as if they were buying a new TV.

[27] While there might be an expense associated with the reprogramming, there was no evidence to enable me to quantify it. In any event, it is not necessary that I make such a finding as the Claimant has succeeded in her claim.

[28] Normally I would only hold the corporate Defendant responsible, but here both Defendants bear responsibility as Mr. Johnston put his own name on the cheque and - notionally, at least - received the money and became a party to the contract.

[29] The Claimant is also entitled to her costs of filing and serving the claim. The following is allowed:

Balance of refund	$360.00
Filing claim	$91.47
Serving claim	$144.23
Total	$595.70

[30] The Claimant shall have judgment for $595.70.

Eric K. Slone, Adjudicator