Claim No: SCCH - 470000

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Baydar & Associates Inc. v North Atlantic Marine Supply & Services Inc.,* 2018 NSSM 3

BETWEEN:

BAYDAR & ASSOCIATES INC.

Claimant

- and -

NORTH ATLANTIC MARINE SUPPLY & SERVICES INC.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on January 9, 2018

Decision rendered on January 17, 2018

APPEARANCES

For the Claimant	Said Baydar Owner
For the Defendant	Sara Nicholson Counsel

BY THE COURT:

[1] The Claimant seeks to recover $25,000.00, as the remaining value (reduced from $27,879.97 to remain within the court's monetary jurisdiction) of certain materials supplied to the Defendant in a consignment transaction.

[2] The parties are in agreement that there was a consignment, but the real difference of opinion is whether or not, at some time after the goods were consigned, the Defendant was deemed to have purchased the product and, as such, title to the property would have passed to the Defendant and payment of the price would have become due.

[3] The Defendant (sometimes referred to as "NAMSS") is a Newfoundland based company that has a branch in Dartmouth, Nova Scotia. Its business is primarily in the fishing and marine industry, but at some point in or about 2013, it sought to expand into other areas.

[4] The Claimant is a sales agency, representing manufacturers of various types of industrial chain and rope used in the fishing and other industries. Prior to the transaction that gives rise to this claim, the Claimant had done a modest amount of business with the Defendant supplying wire and rope for the Defendant's core business.

[5] Mr. Said Baydar, one of the principals of the Claimant company, testified at some length about the events. As he stated, sometime prior to May 2013 he was approached by the Dartmouth sales manager for the Defendant, Robert Culling, who asked him to provide a quote on certain specialized metal ropes used by cranes in warehouses. Mr. Culling explained to Mr. Baydar that the

Defendant was looking to expand into this business and would be willing to place an order for a certain amount of rope with an equivalent amount of rope supplied on a consignment basis. Mr. Baydar testified, which testimony was confirmed by Mr. Culling, that there was an additional understanding with three important components:

a. The Claimant would not sell any of this type of product to anyone else, namely anyone who might compete with the Defendant's business.

b. The consigned goods would be delivered to the Defendant, and if any of it was sold during the first year, that would trigger a purchase order, and in turn an invoice, for the sale of the product.

c. At the end of the one-year period, the Defendant would pay for the balance of the consigned material in its warehouse.

[6] In pursuance of this transaction, a purchase order was issued by the Defendant in July 2013 for a quantity of product totalling $61,318.32. The order took some time to fill, and the goods were not delivered until February 2014.

[7] There were certain typed entries on the purchase order that are significant. One of the entries is “**QTY ON P.O. IS FOR NAMSS PURCHASE**." Another entry on the document states "**EQUIVALENT QUANTITY TO BE STOCKED AT NAMSS ON CONSIGNMENT BASIS**." In plain language, this says that the quantity on the purchase order is for the rope being purchased outright, and that an equivalent amount would be supplied on a consignment basis.

[8] These entries are not inconsistent with either party's views of the transaction. No one questions that the Claimant supplied $61,318.32 worth of rope, plus an additional amount – at the same dollar figure - as the consignment inventory. What the purchase order does not state is the critical point that the consigned goods would belong to, and be paid for by the Defendant after one year. The Defendant stakes its position on the fact that there is nothing in this purchase order to that effect.

[9] The case really turns on this single point.

[10] The Claimant called as witnesses two former employees of the Defendant. The first to testify was Robert Culling, a former sales manager in Dartmouth, with whom Mr. Baydar had the conversations that led up to the transaction. Mr. Culling was very clear in his evidence that the Defendant was only asking for essentially a year of grace, i.e. not having to pay for all of the product, to help it as it sought to develop a new market for this type of material. It was Mr. Culling's evidence that he did not make this arrangement without getting the approval of his superiors, and he testified that all of Morgan Snook, Mike Horne and Mike Abbott (who all testified) knew about this arrangement. He confirmed that he stipulated, and the Claimant agreed, that it would not sell similar product to any of the Defendant's competitors.

[11] Mike Horne, the second of the former employees of the Defendant to testify for the Claimant, was in charge of inside sales and procurement in the Dartmouth office at the time, and his name appears on the relevant purchase order. He stated that he knew about the terms that Mr. Culling had negotiated with the Claimant, and he believed that his superior, namely Mike Abbott in

Newfoundland, was consulted and approved the transaction. He also stated that Morgan Snook, the Dartmouth branch manager, was aware of the terms of the transaction.

[12] The Defendant called both Morgan Snook and Michael Abbott as witnesses, the latter of whom gave evidence via video link from Newfoundland.

[13] Mr. Snook was at all material times the branch manager of the Dartmouth facility. His testimony was that he did not recall the specifics of the discussion that he had with Mr. Culling or Mr. Horne about the transaction, but he agreed that the consignment inventory was received and stored in the Dartmouth warehouse.

[14] I got the general impression that Mr. Snook was uncomfortable when testifying about the terms of the agreement, and he sought refuge in a lack of memory about the details. I did not find him to be credible on the main point, namely what he knew to be the terms of the deal.

[15] Michael Abbott is the purchasing and inventory manager for the Defendant working out of its head office in Newfoundland. He denied any knowledge of the alleged agreement with the Claimant. In his view, any such arrangement would have had to have been cleared with the Chief Financial Officer and ownership of the company, before the Dartmouth facility could have approved such a transaction. His view was that the consigned inventory would only be paid for to the extent that it was sold, and that there was nothing obliging the Defendant to purchase any of the inventory if it did not want to.

[16] Apparently the venture into ropes for industrial warehouse cranes was not as successful as had been hoped, and the Defendant has no longer any market for the unsold inventory. As stated by Mr. Abbot, "we have no use for these ropes."

[17] Cutting to the chase, the issue is whether or not there was a binding agreement as to the obligation of the Defendant to purchase all of the consigned rope, or to put it in the alternative, if I were to accept the view of the Defendant, are the excess ropes merely being stored at the Defendant's warehouse and remain the property of the Claimant?

[18] While it may be true (and I am not convinced of this) that not everyone in Newfoundland who ought to have been consulted was consulted about this transaction, the Defendant cannot hide behind its own lines of authority to disavow a transaction entered into by responsible employees such as Mr. Culling and Mr. Horne. I am far from satisfied that the higher-ups in Newfoundland were not consulted, and am more inclined to believe that there is simply no good record of it, and possibly a poor memory in those people who remain with the company.

[19] However, the issue is what occurred in 2013 and 2014, and what agreement was entered into by those in actual or ostensible authority.

[20] There is no question that a binding agreement can be reached verbally, supplemented perhaps by written documents. As I have already stated, the purchase order was consistent with both views of the transaction. There is nothing on its face that precludes other terms or conditions; that is to say, it

does not purport to be the entire agreement between the parties. It was unfortunate for the Claimant that both of Mr. Culling and Horne did not remain with the Defendant much longer after this transaction was entered into, and I believe it is possible that those two individuals did not pass on everything that they knew about the terms of the transaction. As such, over the next several years as Mr. Baydar sought to pursue payment and track down the status of the inventory, he was stonewalled by individuals that he did not have the same personal relationship with, who may have lacked direct knowledge of the terms of the transaction.

[21] I find that there was a binding agreement made between the Claimant and representatives of the Defendant with ostensible authority to make such an agreement, and that the terms of the agreement are as stated by the Claimant and the two former Defendant employees who he called as witnesses.

[22] I accept the evidence that the Claimant was asked not to sell to any of the Defendant’s competitors. This is significant. As Mr. Baydar observed, not being able to sell to any of the Defendant’s competitors meant that the Claimant could not itself develop any market for this material. I accept his evidence that he would not have agreed to order, pay for and supply the product if he did not know he had a firm buyer for it. As such, the remaining rope in the Defendant's warehouse is potentially also of no value to the Claimant, because some five years later the Claimant has no market for this type of material.

[23] It is difficult to believe that the Claimant would have purchased and paid for all of this rope from the manufacturer, running the risk that the Defendant would return half of it after a year or longer. This seems highly improbable.

What makes more sense is that the Claimant would have spent the money, essentially extending generous credit terms (namely a year to pay) to the Defendant to help it develop this new area of business.

[24] There are other facts that ought to be mentioned, although in the end the result is the same. To its detriment, the Claimant did not follow up in a timely fashion to ascertain the status of the inventory, and to ask the question as to when the Defendant planned to pay for the other half of the money. A great deal of time was spent in communications that did not ultimately result in a clear identification of the issue, let alone a resolution.

[25] It also appears that the Defendant did not always have a good handle on how much of the rope was in its possession. In fact, a recent inventory undertaken in January 2018 found a certain amount of rope in the Dartmouth warehouse that had previously been reported as missing. Other amounts were, indeed, missing because it had been sold - partly in 2014 and partly in 2015 - and although the Defendant claims to have issued purchase orders for this inventory, the Claimant is adamant that no such purchase orders were received, and therefore no invoices were generated.

[26] The Defendant concedes that it owes in excess of $8,000.00 for sales of “missing” inventory. In its argument, it suggested that there is no need to issue an order with respect to this amount as it has unconditionally agreed to pay it.

[27] In my opinion, to avoid any confusion, the appropriate order should include what the Defendant concedes is owing. By my calculation, the total (including HST) exceeds $25,00.00, and there should be judgment for that amount. There was no argument made concerning prejudgment interest, but I

am declining to award any because the delay was caused in large part because of the Claimant's failure to pursue its interests in a timely fashion.

[28] I will allow costs of $199.35 for a total order in favour of the Claimant of $25,199.35.

Eric K. Slone, Adjudicator