

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Bessy Inc. v. Money Finder Software Inc.*, 2017 NSSM 80

Claim No: SCCH 464841

BETWEEN:

BESSY INC.

Claimant

-and –

MONEY FINDER SOFTWARE INC.

Defendant

Bessy Nikolau appeared as agent for the Claimant, Bessy Inc.;

Sammy Davis appeared as agent for The Well Creative Consultants Inc.;

Stephanie Holmes-Winton, represented the Defendant, Money Finder Software Inc.

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

(1) The Defendant, Money Finder Software Inc. (“Money Finder”), sought consulting services for website design and digital marketing from The Well Creative Consultants Inc. (“The Well”). The Well serves as an agent and resource to connect businesses to specialized service providers within its network. The Well introduced Bessy Inc. to the Defendant to perform web and digital services. A contract was signed in October 2016 and the Defendant provided services until December 16, 2016, when the Defendant sought to pause the services. The contract provided for 30 days notice to terminate the contract. Bessy Inc. seeks to be paid for the period from December 12, 2016 to January 12, 2017, namely \$5999.55. The Defendant disputes any liability. As a result, the

Claimant, Bessy Inc., has taken this action.

Preliminary Matters

(2) There are several issues to address all relating to the identification of the parties and the style of cause of this matter. The Defendant's name, as it appears on all of the contracts is "Money Finder Software Inc.". Bessy Nikolau originally filed the claim in her personal capacity, although it is now clear that at all times she was doing business as agent for her services company, Bessy Inc. Finally, as noted further in this decision, The Well did not contract directly with the Defendant. They are compensated by Bessy Inc. They received the monthly fees under the Agreement as an intermediary and remitted them to the Claimant. I find The Well was never a party to the contract and, therefore, lacked standing to bring this claim. For the balance of this decision, Bessy Inc. is the Claimant, the Defendant is Money Finder Software Inc. The claims by The Well Creative Consultants Inc. and by Bessy Nikolau in her personal capacity are dismissed without costs. The style of cause for this matter is amended as set out above.

(3) This decision has been filed beyond the timelines provided in the *Small Claims Court Act*. It has been decided by the Supreme Court of Nova Scotia that the timelines are directory rather than an issue of jurisdiction.

(4) The evidence provided in this proceeding was detailed. While I have not referenced all of the evidence in this decision, I have read and considered all of the evidence and given each its appropriate weight.

Background

(5) Bessy Nikolau submitted a proposal on behalf of her business to the Defendant by e-mail dated September 26, 2016. The Defendant accepted the proposal and the parties entered into a contract dated October 11, 2016 ("the Agreement") where the services would be provided for a term of approximately one year, from October 5, 2016 to September 30, 2017. The Agreement was to terminate on September 30, 2017 unless terminated earlier in accordance with the provisions of the Agreement.

(6) The Agreement contained the following terms:

6. Termination

"... The Company (Money Finder) may terminate this Agreement at any time at its sole discretion, upon providing to the Contractor (Bessy Inc.) **30** calendar days advance written notice of its intention to do so or payment of fees in lieu thereof.

The Contractor may terminate this Agreement at any time at its sole discretion upon providing to the Company **30** calendar days notice of Contractor's intention to do so. Upon receipt of such notice the Company may waive notice in which event this Agreement shall terminate immediately. All promised items not limited to training, DAMM and other results laid out in the proposal must be up to the date as of the date of termination. The company reserves the right to withhold final payment until said deliverables a

received from the Contractor.”

(7) The Defendant advised the Claimant and The Well they were experiencing difficult times, such that they had to let their marketing team go on December 12. They indicated they wished to “hit pause on the contract”. The payments were \$5217 plus HST per month, paid in advance. The Claimant seeks \$5999.55, representing its fees plus taxes for the period from December 12, 2016 to January 12, 2017.

Issue

(8) The issue in this claim is straightforward, is the Defendant liable for fees owed under the Agreement for December 2016?

Evidence

(9) Sammy Davis works for The Well. One of his key duties is business development. He testified that he worked with Ms. Nikolau and Stephanie Holmes-Winton on behalf of the Defendant to secure a contract for marketing services provided by Bessy Inc., billable on a monthly basis. The Well and Ms. Nikolau presented a contract to the Defendant. They found it was not acceptable and reworked a number of the terms. A new contract was prepared by Money Finder and signed by Bessy Inc. and the Defendant. This new Agreement was tendered into evidence and serves as the basis for this claim. Mr. Davis referred specifically to paragraph 6 of that Agreement.

(10) Mr. Davis spoke with Kathy Doucette, the CFO of the Claimant who advised they would like to “hit pause on the contract”. The Defendant was having money problems. He was aware the November invoice was paid in February. He found it odd that December's invoice had not been paid.

(11) Under cross-examination he acknowledged that he did not have a conversation with Ms. Doucette but rather all correspondence was by e-mail.

(12) Bessy Nikolau is the sole owner of Bessy Inc. which provides services of a digital marketing consultant. She helps to develop a website based marketing strategy. She confirmed the services provided by Bessy Inc. She rendered invoices for the account on a monthly basis. She described the role of The Well in her business strategy. The Well is a facilitator of various services. Bessy Inc. pays The Well monthly when payment is received from their client. The customer pays The Well directly, who, presumably deducts their payment and remits the balance to Bessy Inc.

(13) Under cross-examination, Ms. Nikolau acknowledged that she built an Adwords strategy. She had worked with the Defendant's marketing team, some of the work was done in advance and others in early December. She indicated that she had attempted to continue the contract by e-mailing Ms. Holmes-Winton to determine how services might be continued. She had planned on team training between November 23 to February 10. She confirmed that between October 12 to December 12, there was no training conducted by Bessy Inc.

(14) Stephanie Holmes-Winton owns 51% of the Defendant company. The business of that company is to create online software and training for financial advisors. In particular, it assists them in determining how to talk about debt and cash flow with their clients. Money Direct had contacted The Well and entered into a contract with Bessy Inc. She felt the employees of her company had many of the necessary marketing skills but needed outside help to fill the gaps. She looked at the list of services that Bessy Inc. provided and found that they were appropriate.

(15) Ultimately, she felt the marketing team was not being productive. In December, the company decided to terminate the marketing department and freeze the digital marketing contract. When Ms. Doucette spoke with Ms. Nikolau, Ms. Holmes-Winton thought the contract was no longer in effect. She gave her 30 days notice. She felt the marketing services were inadequate and that the contract was in breach. She believes the services for invoice number 812 for the period from December 12 to January 12 was the invoice that was frozen. She disputes that any services were provided.

(16) Under cross-examination, Ms. Holmes-Winton confirmed she believed the contract stopped on December 12. She believes that anything for which the Claimant was charged must also be delivered. She did not feel that any of the services provided in December were of any value. She confirmed there was no talk of termination of the contract. She believed the Defendant gave adequate notice.

(17) Essentially, the Defendant submits that the case turns on whether the contract was terminated in time. She believes she had communicated appropriately. She believes she paid for what she had received.

(18) The Claimant submits that the work was completed and there was no complaint about the quality of the work. The work was completed by early December after which there was no further work done.

Findings

(19) In reviewing the evidence I find the first notice came by e-mail on December 16, 2017, from Kathy Doucette on behalf of the Claimant. I find the bill was in advance for services to be provided from December 12 to January 11, 2017. I find no further work was conducted by Bessy Inc. from that point on.

(20) The Agreement was drafted by Money Finder following negotiations. Both Bessy Inc. and Money Finder are businesses entering the contract on equal footing. Paragraph 6 of the Agreement provides that 30 days notice must be provided in order to terminate the contract. In order to terminate the contract effective December 12 or 16th, it was necessary for the Defendant to have provided notice 30 days before or by November 12. Indeed, the notice on December 16 would not have been adequate for a January termination.

(21) The Defendant submitted that they have the discretion to withhold funds for services not provided. I find the services provided by Bessy Inc. were not well defined or described by Ms. Nikolau, I am unable to find the provision of services amounted to a complete failure of consideration. If it had, there would have been evidence of communication between the parties over the quantity and quality of services provided by the Claimant. Instead, the communication related solely to the Defendant's money troubles and their inability to pay the Claimant's fees.

(22) As a result, I find the Claimant liable to the Defendant, Bessy Inc., for the sum of \$5999.55. The Claimant shall also have its costs \$199.35 for a total judgment of \$6198.90.

(23) An order shall be issued accordingly.

Dated at Halifax, NS,
on November 3, 2017;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)