SMALL CLAIMS COURT OF NOVA SCOTIA

cite: *Yu v. Kaur,* 2020 NSSM 8

SCCH No.495959

BETWEEN:

Michael Yu

Claimant

– and –

Lovpreet Kaur

Defendant

Adjudicator: Augustus Richardson, QC

Heard: March 10, 2020

Decision: March 12, 2020

Appearances: Michael Yu, Claimant
Meghan Deveau, for the Defendant

DECISION

[1] Is an immigration consultant entitled to charge an agreed upon fee for an agreed upon service when he refuses to agree to instead perform a different service? Can he or she charge for the original service, even when not completed, when the client terminates the agreement in order to obtain that different service? These are the central questions in this matter.

[2] At the hearing I heard the testimony of Mr Yu and Ms Kaur. A hand full of documents were also entered into evidence. Based on that evidence I make the following findings of fact.

[3] The claimant, Michael Yu, is a registered and certified immigration consultant. He performs his service via a corporate entity known as EMC

Immigration Consultancy & Recruitment Company ("EMC"). The defendant was, at all material times, an immigrant from India who was working in Nova Scotia pursuant to a valid but temporary work permit.

[4] The Defendant first came to Canada on a study permit in Ontario. She became a Licensed Practical Nurse ("LPN"). Upon the completion of her studies she applied for permanent residence in 2017. At the time she had a three-year work permit. Melville Lodge in Nova Scotia offered her full time employment. She accepted the position and came to Nova Scotia to work. Her permit was set to expire in March 2019. Some time in early 2019 her application for permanent residency was rejected, apparently because there was an error of some sort in her employment letter. (Applications for permanent residency apparently have to be supported by work documentation.)

[5] The Defendant wanted to stay in Canada. She did not want to return to India, where prospects of employment were poor. She obtained a one-year extension on her work permit, meaning that it would expire in May 2020. She also went to her employer, who suggested that she retain Mr Yu. He had helped a number of the employer's staff in their successful applications for work permits and permanent residency. She met with Mr Yu and on July 11, 2019 entered into a retainer agreement with EMC (the "Retainer"). I should note here that the Retainer, upon which Mr Yu makes his claim, was between EMC and Ms Kaur. Ordinarily one would have expected the claim then to have been made by EMC, not Mr Yu. However, neither party raised that as an issue and I have proceeded on the basis that Mr Yu is pursuing the claim on behalf of EMC.

[6] Pursuant to the terms of the Retainer, EME agreed "to act for the client in her Nova Scotia Program (NSP) permanent residence application under the Atlantic Immigration Pilot Program (AIPP) of the Nova Scotia Office of Immigration (NSOI) and the second stage permanent residency (PR) application ot Immigration, Refugees and Citizenship Canada (IRCC):" para.2. The total fee for the services under the Retainer was $5,500.00 plus HST "for AIPP Endorsement,

Work Permit assistance and Permanent Residence Applications:" para.4. Ms Kaur was to be billed in three instalments: para.4, as follows:

a. Initial Payment: a non-refundable payment of $1,834.00 plus HST to be paid on signing the Retainer;

b. Second Payment: $1,834.00 plus HST "to be paid prior to the start of Work Permit assistance and PR application work and after approval of the client's name in the Endorsement application of the CE [client employer];" and

c. Third and Final Payment: $1,832.00 plus HST "to be paid after the completion and just prior to the submission of the PR [permanent residency] application to IRCC [Immigration, Refugees and Citizenship Canada]:" para.6.

[7] I pause here to note that there are at least two routes to permanent residency in Canada. One is via what is called the Atlantic Immigration Pilot program ("AIPP"). This project helps employers in Atlantic Canada hire foreign skilled workers who want to immigrate to Atlantic Canada. There is a quota of applications for each Atlantic province for each year. A successful application gives the employee status to then apply for permanent residency in Canada.

[8] The second route is via the Provincial Nominee Program ("PNP"). Under this program immigrants who have skills and experience that have been targeted by a province (here, Nova Scotia) may be nominated by a province to immigrate. A successful application then leads to permanent residency.

[9] Each of these two routes have different processing and application requirements, and may take different amounts of time. An applicant cannot be considered under both programs at the same time.

[10] The route spelled out under the Retainer was the first—the AIPP.

[11] The Defendant paid the first installment of $1,834.00 plus HST specified under the Retainer when she signed it. After the Retainer was signed in July 2019 Mr Yu worked to complete the necessary AIPP application materials and filed the same with the province. On October 30, 2019 the Defendant's employer was notified by the provincial department in charge of the program that it had received more applications than the quote that had been allotted to it for 2019. It added that "[t]herefore, an endorsement for this file cannot be issued until January 2020," adding that "[t]he assessment is complete, and the application has been placed in the queue for approval in January 2020." The department went on to explain that if the employer had "an urgent labour need, please be advised that your employee may be qualified for another stream through the Provincial Nominee Program:" Ex. D2, Tab 3.

[12] Mr Yu received a copy of this notice from the employer on October 30th, 2019. He forwarded it to the Defendant that same day. He explained that her "endorsement review was already completed and will have to wait until January 2020:" Ex. D2, Tab 3.

[13] The Defendant panicked. She worried that the statement that her application was "in the queue for approval in January 2020" did not constitute a guarantee that it would be approved or that it would be approved that month. Her work permit was set to expire in May 2020, and if her application was rejected, or if it was still undergoing an approval process by that date, she would have to leave the country and return to India. The Defendant asked Mr Yu if she could apply for PNP which "might be faster than waiting for AIPP:" Ex. C1, document 2.

[14] Mr Yu tried to assure her that in his experience her application would be approved—that the only reason it had not been approved was that the province had run out of its quote for 2019. He explained that even if they applied for the PNP in November "it's not sure if approval will come quickly by December" adding that if

the approval "comes out January, it's the same as AIPP release." He also explained that permanent residency applications under the "AIPP is much faster:" Ex. C1, Doc. 2.

[15] About this time Mr Yu had made arrangements to be in the Philippines from late November to early January. On November 11th he emailed the Defendant to explain that he would be out of the country between November 24th and January 1st and that during that time he would have limited ability to respond to business matters: Ex. D2, Tab 4. He went on to say that "[s]ince the Endorsement Approval [i.e. the AIPP application] will not come out until first week of January, my absence will not be that critical." However, to save time he suggested that the Defendant commence filling out the permanent residency application forms, asking her to check on the government web site to ensure that the forms he was sending her were "still current." He asked her to assemble all the necessary documents, and to fill out the forms as best she could. He would review them on his return to ensure their accuracy and completeness: Ex. D2, Tab 4.

[16] The Defendant was not comforted by Mr Yu's assurances. Still concerned about the looming expiry in her work permit she decided to apply herself to the PNP program. A few days later, on November 22nd, she was advised by the provincial department that it was prepared to issue her a nomination under one of the application streams under the PNP but that in order to proceed her employer would have to withdraw the AIPP application. On November 22nd the Defendant asked both her employer and Mr Yu to withdraw the AIPP application: Ex. C1. The Defendant testified that her application under the PNP was approved by the end of November 2019. That meant that the status of her work permit was now assured and that she could proceed with her permanent residency application.

[17] On November 25th Mr Yu emailed the Defendant to say that he had received the employer's consent to the withdrawal but that he "will be able to do it when I arrive Phils [the Philippines]. I'm in Toronto and about to board for Korea then Phils:" Ex. C1. On November 26th he emailed the Defendant again. He noted that

on his arrival he saw that the employer had already withdrawn the AIPP application. He added the following: "Meanwhile, please reply about your intention related to your signed Retainer Agreement on the 2nd payment and the last one when the PR application is submitted to CIC:" Ex. C1. The Defendant did not respond. She testified that she saw no need to pay the second installment because she had proceeded under a different program than the one specified in the Retainer; and because Mr Yu had refused to make the switch himself, having told her that "it was not practical."

[18] By December 2019 Mr Yu was upset. He formed the opinion that the Defendant had gone behind his back in applying under the PNP. He thought this conduct constituted an amendment of the Retainer without his consent. He thought that she had "violated our signed Retainer Agreement for processing her AIPP Endorsement Application:" Ex. C1. He then commenced the within claim for $2,209.10, being the amount of the second payment contemplated under the Retainer plus HST and costs.

[19] Having considered the submissions of Mr Yu and of counsel for the Defendant I have decided that the claim must be dismissed. I came to this conclusion for several reasons.

[20] First, the Retainer is for an AIPP application, not a PNP application. Mr Yu prepared and submitted an AIPP application, not a PNP application. Moreover, the PNP application was prepared by the Defendant only after Mr Yu refused to do so himself. He may ultimately have been right in his assessment that the AIPP application would be approved in January 2020, but neither he nor the Defendant could be certain that that result was guaranteed. Once Mr Yu refused to switch course the Defendant was entitled to take matters into her own hands.

[21] Second, and following from the first, the Retainer did contemplate the possibility that a client might discharge the consultant and terminate the Retainer: para.13.1. It also contemplated that on any such termination "any advanced fees or

disbursements, if any, will be refunded:” para.13.1. As I read this provision a client was free to terminate the Retainer prior to the consultant preparing and submitting an application with respect to any of the steps on the road to permanent residency. So long as the terminate occurred before the consultant put pen to paper, so to speak, the client was entitled to terminate and thereby avoid any liability for the fees associated with that step in the application process.

[22] Third, and following from the second, Mr Yu’s belief that the Defendant’s actions constituted an amendment to the Retainer contrary to its provisions (para.15.4) represent a misunderstanding of what had happened. The Defendant’s actions did not constitute an amendment of the Retainer. Rather, they constituted a termination pursuant to para.13.1. It was moreover a termination that was for a “fair and just reason,” to use the words of para.13.1. The Defendant’s temporary work permit was set to expire in May 2020. She needed the assurance of an accepted application, whether AIPP or PNP, to ward off her fear of being forced to return to India. The provincial department had suggested the PNP as a quicker alternative to waiting for the AIPP in January. She discussed this change of course with Mr Yu, but he advised against it. His advice and opinion may have been reasonable, but the Defendant was the client and ultimately he was required to follow her instructions or accept the termination of the Retainer.

[23] Fourth, the second installment was due “at the start of” the work permit and permanent residency application work. In this case, the Defendant already had a temporary work permit. Mr Yu had not started work on the permanent residency application because he was waiting for the AIPP approval. The Defendant withdrew the AIPP application, meaning that there was nothing more for Mr Yu to do under the Retainer. Morever, since Mr Yu had not commenced either the work permit or the permanent residency process, and was not even close to starting (because all awaited the AIPP approval), the Defendant’s potential liability for the second installment had not been triggered.

[24] The claim is accordingly dismissed, and I will issue an order to that effect.

DATED at Halifax, Nova Scotia
this 12th day of March, 2020

Augustus Richardson, QC
Adjudicator