

**SMALL CLAIMS COURT OF NOVA SCOTIA**

Citation: *Lewis v. Purcell*, 2022 NSSM 33

**Date:** 20220430

**Docket:** SCCH 508590

**Registry:** Halifax

Between:

Judy Lewis

*Claimant*

-and-

Joan Purcell and the Purcell Group Income Tax Service

*Defendants*

**REASONS FOR DECISION**

**Adjudicator:** Eric K. Slone

**Heard:** March 31, 2022, in Halifax, Nova Scotia

**Appearances:** For the Claimant, self-represented

For the Defendants, Wayne Rogers

**BY THE COURT:**

[1] The Claimant, Judy Lewis, is an artist, sometime health care worker and paralegal in training who resides in Halifax.

[2] The Defendant, Joan Purcell, resides in Halifax and works as an income tax preparer. She and her sister Colleen Purcell are in a partnership called the Purcell Group Income Tax Service (the “Purcell Group”).

[3] Joan Purcell is married to Wayne Rogers, who is not named as a party but who testified as a witness and represented the Defendants at the hearing.

[4] The Claimant has sued the Defendants seeking the return of several pieces of artwork, and for damages based on a menu list of causes of action including breach of contract, unjust enrichment, breach of trust, breach of confidentiality and bad faith. There was also a counterclaim filed.

[5] The matter was heard in a zoom hearing on March 31, 2022. Both sides submitted significant amounts of documentation in support of their positions.

[6] For the sake of the narrative, I will refer to the principal players by their first names, Judy, Joan, Wayne and Colleen.

**Background facts**

[7] Judy met Joan in about 2004 when they were both working at an organic food store on Quinpool Rd. in Halifax, then known as Great Ocean (currently Organic Earth). They became friends and eventually confidants.

[8] By 2012 Joan had left her job to pursue her partnership with Colleen in the Purcell Group. Judy’s friendship with Joan appears to have intensified around this time, as both were going through personal difficulties and were able to support each other emotionally.

[9] In 2014 Judy started to take her personal tax returns to be prepared by Joan. This business relationship continued for about five years but stopped when they had a personal falling out.

[10] I believe it is fair to say that during these years Judy was experiencing a number of significant challenges, health-wise, financially and personally. I do not believe it would serve any useful purpose to be specific about these facts, as the details are quite personal and are best kept confidential. However, the reason that they are relevant at all is that they show an arguable imbalance in bargaining power that underlies the claims - particularly the theory of unjust enrichment.

[11] As Joan got to know Judy, she also developed a fondness and respect for Judy's artwork. Over the years since about 2015 Joan has come to possess about seven (I think) pieces of Judy's artwork. The circumstances of their acquisition are key to understanding Judy's claims.

[12] Joan and Judy disagree to an extent about who initiated the transactions, but there are several points that are indisputable:

- a. The predominant (though not only) motivation for these acquisitions was for Joan to assist Judy financially, as she was in financial dire straits.
- b. The prices were set by Judy.
- c. There was an understanding that Judy could buy back any or all of the pieces at any time in the future, for the original price.
- d. Judy could have access to the pieces for promotional purposes, such as an exhibition.
- e. In a couple of cases, the "price" for the art was offset as a barter for tax preparation services.

[13] Judy now takes the position that the terms were unfair to her. She feels taken advantage of. She believes that it is unfair for her to have to buy back her own artwork at the original prices, because this essentially allows Joan to have enjoyed the artwork for years, at no cost. She says that there should be something like an art rental fee applied to reflect the years of enjoyment.

[14] She also says that the prices Joan paid were ridiculously low when compared to the sometimes hundreds of hours Judy spent creating the artwork.

[15] Judy is asking for the unconditional return to her of some of the pieces.

[16] Joan has asked that the terms of the original deal be upheld, and that moreover there be a limit placed on how long Judy has to “redeem” any of her art. I will deal with those claims in due course.

### **Discounted income tax services**

[17] Another aspect of the claim concerns the income tax services rendered, which is what potentially implicates the Purcell Group.

[18] It should be mentioned that Colleen never worked on Judy’s taxes, and has never acquired any of Judy’s art.

[19] When Judy first brought her tax returns (as well as those of her daughter Claire) to be prepared, Joan extended a friends and family discount of 50%. She also sometimes did Claire’s returns free of charge. At some point, in or about 2016, that discount was discontinued, coinciding with the decision (recommended by Joan) to treat Judy as a self-employed artist for tax purposes.

[20] Judy says that she did not notice until years later that she was no longer receiving the discount. She blames her health problems for her not being more alert. It does not appear that Joan explicitly pointed out to Judy that the discount was being discontinued.

[21] Joan says that the discount was at all times gratuitous, and that she was under no obligation to continue extending such a discount, especially as Judy’s tax situation became a bit more complex.

[22] Judy vaguely alluded in her claim to bad tax advice. This was referenced in Judy’s written submission, but not vigorously pursued at the hearing. It appears that there was some kind of mix-up with some RESP money that Claire received, leading to an unexpected tax bill which was straightened out eventually. Also, Judy complained that she should not have been encouraged to treat herself as a self-employed artist, as this made her tax situation more complex.

[23] I am far from persuaded that any of the Defendants acted negligently in

connection with tax advice. Nor am I satisfied that Judy suffered any damages as a result of any allegedly bad advice.

[24] As for billing issues, it was not made exactly clear what relief Judy was seeking for the withdrawal of the discount, other than unspecified damages.

[25] It is worth mentioning that the amount of the non-discounted fees charged was no more than about \$600.00, meaning that the discounts would have been in the very modest \$300.00 range, if applied.

[26] I can dispose of this claim fairly easily.

[27] There is an argument to be made that when one intends to raise one's price, or discontinue a discount, there is an onus on the service provider to give notice so that the client can decide whether to continue receiving the service. The obligation becomes a little fuzzy after the first instance of the price being raised or the discount being withdrawn, because it is presumed that the client would (at least) look at the bill and should take notice that something has changed.

[28] Once the discount has been withdrawn the first time, the customer is on notice that the terms have changed and cannot be heard to complain. So, Judy might have a legitimate complaint about not receiving adequate notice that there would be additional charges for the 2016 return. In other words, the \$153.50 (plus tax) that she was charged might be seen to be unacceptable and might be reduced to \$76.75.

[29] In the case here, though, the claim is otherwise doomed by the failure of Judy to bring the claim within a reasonable time after the events complained of. This claim should have been raised within the two-year limitation period provided in the *Limitation of Actions Act*:

8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of

(a) two years from the day on which the claim is discovered; and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage was caused by or contributed to by an act or omission;

(c) that the act or omission was that of the defendant; and

(d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[30] I am mindful also of s.19 of the Act, which holds limitation periods in legal suspense or limbo during any period of incapacity when a claimant ought not to be expected to bring a claim:

**Incapacity**

19 (1) The limitation periods established by this Act do not run while a claimant is incapable of bringing a claim because of the claimant's physical, mental or psychological condition.

[31] While I have no doubt that Judy has been through some tough times, the evidence falls far short of establishing that she was under a legal disability that would cause the limitation period to be in legal suspense.

[32] I find that any complaints about the bills for tax services are statute barred.

**The contract for artwork**

[33] A contract that provides for a payment but reserves an unlimited right to redeem the object at the original price, is not really a sale. Nor is it a rental. It more resembles a bailment or a pawn.

[34] A true sale of property involves the transfer of title. Upon the sale being completed, subject to perhaps some time-limited conditions (such as a 30-day right to cancel the sale), the property belongs to the buyer. The implications of this transfer of title include the fact that the buyer can part with the property (such as by reselling it) and has no further obligation to surrender it or otherwise account to the original seller.

[35] In the arrangement which both parties concede here, Joan has never been fully at liberty to consider the artwork as her own. She has agreed that Judy may redeem it upon paying the original price.

[36] Moreover, since Judy believes that Joan should pay something as a rental fee for the artwork, the transaction looks even less like a sale.

[37] I might as well say that I do not believe that Joan would ever have agreed to terms that would charge her for “rental” of the artwork that she was ostensibly buying, with her motivation being predominantly to help Judy financially.

[38] As I have said, despite the slightly pejorative implication, the transaction is more like a pawn than a sale. It is not a perfect fit, because pawning is essentially a form of secured moneylending, and I doubt that there was ever any intention here to consider the artwork as security for a loan. But the right of redemption is a common feature, though a commercial pawnbroker would never agree to an unlimited redemption period, and usually requires a premium to be paid in order to redeem the item.

### **Pricing of the artwork**

[39] I will address the question of whether Joan paid full value for the artwork. Judy says that the prices paid do not adequately reflect the time she put in creating the artwork. She says that these prices give her much less than minimum wage for the hours spent. She feels taken advantage of.

[40] First of all, artwork is only worth what someone will pay. Unlike other “services” the value of a piece of art (in any medium) is unrelated to the time spent creating it. Had Judy wanted to earn more for the time spent, she ought to have asked for more, though of course there is no reason to believe she would have gotten it.

[41] Also, there is no evidence that Joan was aware of how long it took Judy to create these pieces.

[42] Lastly, the “low” prices cut both ways. Judy has the right to buy them back for the same low prices.

[43] I find nothing unfair, let alone unconscionable about the prices paid for the artwork.

### **Open-ended?**

[44] The notion that Judy could buy back her artwork at any time in the future is, as already mentioned, inconsistent with a sale because Joan's title to the pieces would remain forever uncertain and never fully vest. Even though no time limit was discussed, I believe it is appropriate to imply a term into the agreement that places a limit on Judy's right to "redeem" her pieces.

[45] Implied terms are appropriate and necessary to do justice in the case of contracts that (for whatever reason) do not try to define every term to the nth degree or cover every eventuality. The usual test for an implied term is sometimes called the "officious bystander test." One imagines a reasonably intelligent bystander observing the formation of the contract, being asked the question whether he or she would interpret the words used to include something else. Here, such a bystander might be asked whether there was an understood time limit on Judy's right to buy back the artwork. I believe the answer would be "of course" and that such limit would be measured in a small, "reasonable" number of years.

[46] This introduces some certainty into the contract.

[47] But what is reasonable, in the circumstances?

[48] One way to give form to that implied term is to look to limitation statutes and declare that as of the date of this order, Joan continues to hold the pieces for Judy, and that Judy has a right to redeem them (or any of them) by paying the original price back to Joan. That right of redemption must be exercised within two years, or any claim would be statute barred.

### **Other claims**

[49] I am not convinced that Judy has proved any actionable conduct on the part of the Defendants.



[50] Specifically, there is no basis for general damages because nothing that either Defendant has done was tortious or in breach of some other obligation such as to attract a damage claim.

[51] Also, there are no damages for breach of contract because no contract has been breached. If there were some minor claims arising out of tax preparation services, those claims are time barred.

[52] There has been no unjust enrichment. Joan has not benefited unjustly by holding onto the artwork under the agreed-upon terms. And there was nothing in those terms that was unconscionable.

[53] I do not consider that Joan was in any conflict of interest by virtue of preparing Judy's income tax returns. This is a farfetched proposition. Whatever knowledge Joan had of Judy's circumstances arose from their personal friendship, not from doing her taxes. Joan did not take advantage of her position as a tax preparer.

[54] I have no doubt that Judy feels hurt by what became of her friendship with Joan, but that is not a matter for the courts.

[55] Because Judy has not been successful, I do not allow her any costs.

### **The counterclaim**

[56] I note that the Defendants raised a counterclaim based on loss of reputation, damages for mental anguish, and time spent preparing to defend Judy's claims. None of these are allowable.

[57] The court has no jurisdiction to grant relief for defamation, and mental anguish damages are a form of general damages and would be limited to \$100.00. I do not find any actionable conduct on Judy's part on which to base general damages.

[58] As for time spent preparing the defence, as a matter of policy the court does not compensate litigants for their time engaging in the process. I appreciate that pursuing or defending a claim can be demanding. However, to allow such a claim would set a dangerous precedent.

**Conclusion**

[59] In conclusion, it is the court's determination that any artwork of Judy's in Joan's possession may be redeemed within two years of the date of this decision, failing which it shall be Joan's to deal with entirely as she pleases.

[60] The price for redemption shall be the price originally paid. Such price shall be offered in cash or equivalent, up front, unless otherwise agreed.

[61] In cases where there was a barter, the price shall be the amount credited toward the barter. In the event of a disagreement the court shall retain jurisdiction to make a determination as to the price.

[62] All other claims and counterclaims are dismissed.

**Eric K. Slone, adjudicator**