

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Market Expressions Sales and Distribution Ltd. v. Pearl & Daisy Natural Soap Company Inc.*, 2017 NSSM 28

Claim No: SCCH 453776
SCCH 436787

BETWEEN:

Market Expressions Sales and Distribution Ltd.

Claimant

v.

Pearl & Daisy Natural Soap Company Inc.

Defendant

Editorial Notice: Addresses and phone numbers have been removed from the electronic version of this judgment

DECISION

Dennis Pearson and Joan Pearson appeared on behalf of the Claimant;

Rebecca Taylor appeared for the Defendant.

This is a claim for breach of contract arising from a sales agency contract where the Claimant, Market Expressions Sales and Distribution Ltd. (“Market Expressions”) agreed to market natural soap and products produced by the Defendant, Pearl & Daisy Natural Soap Company Inc. (“Pearl & Daisy”). Market Expressions is a distribution company owned and operated by Dennis and Joan Pearson. Pearl & Daisy is owned and operated by Rebecca Taylor. The Claimant is seeking unpaid sales commission pursuant to an agreement between it and the Defendant for the sale of Pearl & Daisy products. Pearl & Daisy counterclaims alleging that the Claimant did not do the

work it contracted to do. It seeks compensation for loss of revenue on its sales along with out of pocket expenses such as sample kits and show fees.

The Claimant also seeks compensation for sample packs of other products produced by the Claimant's clients (Lollia and Love & Toast) to be sold by the Defendant in the Defendant's retail shop in Debert. The Defendant acknowledges this bill is outstanding and essentially admits liability for that portion of the claim, namely, \$2254.08.

The working relationship began on February 1, 2016. As noted during the hearing, the relationship was a disappointment for both parties from the outset. It did not begin or end well. The parties signed an agreement prior to commencing the working relationship. A blank standard document is in evidence. The document is poorly drafted and on the issue of consideration, it was vague. If the written agreement were considered in isolation or in support of an argument for compensation, significant portions of it would be unenforceable, and probably unenforceable in its entirety.

Issues

Did the Claimant, Market Expressions Sales and Distribution Ltd. ("Market Expressions"), establish a breach of contract?

For the reasons provided in this decision, I have found in favour of the Claimant and denied the Counterclaim. However, liability is founded on the oral portion of the arrangement and alternatively, on a reasonable sum based on the work performed, i.e. *quantum meruit*. In addition, in an e-mail, despite her previous protests of the perceived lack of efforts on the part of Market Expressions, Ms. Taylor acknowledged owing \$3703.12.

The Evidence

Dennis Pearson testified that the Claimant acts as a manufacturer's agent which represents companies looking for store placement for their products with various retailers. The company entered into an agreement with the Defendant to represent and sell Pearl & Daisy products across Canada in return for a commission. The evidence regarding the terms of the commission vary depending upon which documentation is referenced, namely, 17.5% in a blank standard "Sales Representation Agreement" and something less when calculated and tendered into evidence.

He described the company's involvement as selling Pearl & Daisy sample products. For example, the Pearsons and Ms. Taylor attended a trade show in Toronto and participated in selling her products. Secondly, the company sells other lines to Pearl & Daisy and others for sale at their location.

Mr. Pearson entered into evidence a copy of an e-mail from Ms. Taylor dated May 9, 2016. In it, she refers to a commission report for the period of February 1 to April 30. She indicated "we

owe you \$3703.12 commission and \$2254.08 for (Lollia/Love & Toast) samples. In support of this calculation, Mr. Pearson refers to a sales report of all Pearl & Daisy products sold during that time with the commission calculated at \$3703.12. Exhibit 3 is an invoice from Market Expressions showing an amount owing of \$2369.27 in Lollia/Love & Toast products. A notation at the bottom shows that the amount owing was reduced to \$2254.06 to account for damaged product. Finally, Exhibit 6 was entered and shows the total sales during that period of time.

Joan Pearson is married to Dennis Pearson and is a co-owner of Market Expressions. It is clear from her evidence and that of Ms. Taylor that Ms. Pearson is more “hands-on”. In addition to her role in running the business, she is an active member of the sales team as well. She testified that the standard commission charge on Canadian sales is 17.5%, except for a few accounts which are lower. She acknowledged the sales figures that were put into evidence. She described her attempts to collect and settle the claim. She believes that Ms. Taylor has acknowledged owing the money in sales commissions.

With respect to the counterclaim they deny any breach of contract. Specifically they indicated that they did what they were contracted to do and simply were not paid for it.

Under cross-examination Ms. Pearson confirmed that she is one of nine full-time sales representatives. Ms. Pearson's territory is Atlantic Canada. She and the representatives sell their various lines either directly to customers, at trade shows, by catalogue or e-mail. She testified that it is her responsibility to make sure that her representatives are making money. She testified that she was shown Pearl & Daisy products in August 2015 and intended to market them in 2016. The parties attended the Toronto show in January 2016, but it was not well attended. They added nine customers after that show. The next show was in August 2016 but as the relationship began to break down, they were not going to sell Pearl & Daisy products. During the time of representation, she found it difficult to sell Pearl & Daisy products but had been able to sell other lines. The decision to let Pearl & Daisy go as clients was based on Market Expressions not getting paid. She found the samples were not well received. There were no limits in the contract on Pearl & Daisy's ability to make calls themselves. She described difficulties with some of the products having their orders filled when follow up calls were made. She felt it advantageous to Pearl & Daisy to be represented across the country rather than simply on a regional basis as Market Expressions has between 2700 to 4700 active customers. She described Ms. Taylor's sales expectations as naïve. During the period from February to April 2016, Ms. Pearson was not as involved in the business as she had to go to California to look after her mother. She believes there were approximately 6 weeks of sales calls in Atlantic Canada for Pearl & Daisy products. Her grandson was born in Nova Scotia at the end of March or April so she did not go to Ontario. There was a process to cover her absence. She estimates the time for the contract to be somewhere between February 1, 2016 and July 26. Ms. Pearson gave Ms. Taylor 60 days notice of the termination on May 26, 2016.

Ms. Pearson indicated in redirect evidence that she was working on sales of Pearl & Daisy products at all times. The representatives worked with her in good faith. There were e-mails

threatening litigation sent to Ms. Taylor. In May, she no longer represented Pearl & Daisy. She did not feel it was appropriate to keep continuing to work when she was not getting paid. She estimates it takes approximately 3 to 4 months of effort for a product line to gain traction. This was not happening.

Rebecca Taylor is the founder and CEO of Pearl & Daisy. The business was founded in 2009 and incorporated in 2011. It sells soap and bath products from its location in Debert, Nova Scotia. It has two employees who work in retail locations.

Ms. Taylor's company had enjoyed early successes and after some discussions was taken on as a client of Market Expressions. It was Ms. Taylor's belief that the agency's connections outside of Atlantic Canada, particularly in Ontario, Alberta and British Columbia, would help to grow the business. She went with an agency for that purpose. She described a very enthusiastic first meeting with Ms. Pearson. After the agreement was signed, Ms. Taylor and Ms. Pearson met to ensure that the customer service standards were on par with what Ms. Taylor was hoping to do herself. She found that reorders were a big part of her business she did not want to lose those. She believed the commission rate of 17.5% on all sales including current customers was a lot of money but hoped the increase in sales would be better in the long run. The contract was signed.

She described the initial start as exciting. She was impressed with Market Expressions' plans and systems for the rate of growth. She testified that Joan Pearson asked her to refrain from making calls as they wanted the representatives to do that. She attended the trade show for which she paid \$1100 in show fees to attend in January 2016. She found the customers liked the packaging and the scents. The buyers were particularly impressed Pearl & Daisy was a Canadian company and the products were all-natural.

Ms. Taylor agrees with Ms. Pearson the show was not well attended. She made \$4978 from the show from nine new customers. She hoped to earn an additional \$10,000 at minimum. Ms. Taylor did not indicate how she arrived at this estimate.

Ms. Taylor described the arrangement for phone sales as Market Expressions would provide the customers' names to Market Expressions and they would service these customers as well as, of course, seek out new customers. Pearl & Daisy would be responsible for phone training and the set up of accounts for Joan and the other representatives. No documentation has been provided to show how this was to develop.

The sales figures during this time were provided in evidence. The monthly sales pattern shows an unstable and unpredictable track except after the notice of termination was sent in May when the figures took a stark downturn. The evidence shows \$35,214.93 in sales between February and July 2016. Specifically, the figures were as follows: February \$9441; March \$5507; April \$8449; May \$8615; June; \$2421 and July \$790. Ms. Taylor believed she was not getting the desired results from the arrangement. She found that after March 10, 2016, the referrals from Market Expressions ceased. The remaining business came from her own efforts, and that of her

employees. She described the business as having 86 active business accounts. She believed during the time of the contract it was not unreasonable to expect two or three customers per sales representative. She testified there were only eight new accounts rather than nine. Pearl & Daisy's revenues were down from \$26,067 to approximately \$22,000. She felt the company needed an increase in sales of \$5000 to recoup the cost of signing on with an agency. In her experience, retailers typically order in February for Mother's Day deliveries in May. There were no pre-orders for Market Expressions, as noted by Ms. Pearson in an e-mail of April 13, 2016. Ms. Taylor does not believe it appropriate to pay for the service because she did not generate the business she expected. She was hoping to see growth on a year-over-year basis, but was seeing the opposite. The personal calls needed further interaction and they were not getting it. On May 3, the relationship severed. She believes the experience was not fair because the agency was not doing the work that was expected; the work that was fundamental to the contract. As a result, she proposed a new arrangement with Ms. Pearson however it did not materialize. She hoped the sales representatives might be able to bring the company around. She did not have the money to pay commission.

Under cross-examination, Ms. Taylor described 75% of her business as retail and 25% as wholesale. Her Whole Foods contract was responsible for approximately \$3000 per year. The company experienced a slight increase over the previous year as there was an increase in business after the agency contract terminated. She believes the poor sales results were partly the result of the downturn the economic situation in Atlantic Canada had a role to play but more firmly believes it the result of a lack of evidence of sales call or activity. After the relationship ended, she had to reorganize the company. She was expecting success in the first three months of the contract but was not optimistic of the months to follow. She sought to renegotiate the contract. She indicated that she was prepared to pay commission for sales outside of Canada but not on existing customers. She was open to the idea of rewriting the contract but the Pearsons did not want to make a new deal. She was aware that there was no guarantee of sales but expected more work to be done.

In redirect evidence, Ms. Taylor testified that there were no complaints about a lack of sophistication or any indication that there was a problem with placing the product. The only problems arose when a customer call would be received for a product order but there was no follow-up from Market Expressions to that customer.

In rebuttal evidence, Ms. Pearson testified that there were has always been feedback about the product lines which they sell. They do not always share that with the representatives. Her customers indicated that they tried to sell Pearl & Daisy products but for some customers, it was not right for them. Some customers bought it and some did not. She describes that as "the nature of the business". She believes had there been more work done by Ms. Taylor and more patience by Pearl & Daisy she could have seen things turn around.

I asked Ms. Pearson during her evidence if she could indicate for me the scope of Market Expressions' work or specific expectations. A fulsome review of the blank document shows a list

of obligations and limitations imposed by Market Expressions. It provides no promise to do anything.

Findings

In reviewing the evidence, I find the contract consisted of the understanding that Pearl & Daisy products would be marketed by Market Expressions and a commission would be paid. Based on the sales figures I find commission of 17% was charged rather than 17.5%. The sales figures were not challenged by either party and are somewhat ambiguous. The calculation of the commissions was accepted by both parties. Furthermore, the figures were acknowledged by Ms. Taylor in her e-mail of May 9, 2016.

There is evidence of e-mails in April between the parties where Ms. Taylor expressed concern about what she perceived as poor efforts by Market Expressions. Ms. Pearson was absent to attend to family obligations, however, I do not find Pearl & Daisy was not being serviced. Perhaps there were service issues of Pearl & Daisy clients in the form of less attention. I have no doubt Ms. Taylor's financial expectations were not met. Common sense would dictate that a certain degree of effort would be expended by Market Expressions in order to generate sales.

However, there were no commission payments made at all during any of the service period. The concerns were raised only in April and not before. On May 9, Ms. Taylor acknowledged Pearl & Daisy owed \$3703.12 in commission and \$2254.08 for Lollia/Love & Toast samples and products. Market Expressions' lack of interest was financially driven once it became clear they were not getting paid. Such a view is entirely reasonable.

During the hearing, I expressed grave concerns about the language in the Sales Representation Agreement. Having found the Defendant liable as a result of the work done and Ms. Taylor's acknowledging of the Defendant's company's debt, there is little value in a full analysis of the document. The document is very one-sided in its obligations. It provides no guidance or scope of work such that the readers or the parties are able to discern what is expected from Market Expressions in a sales agency contract. My first impression is that it was copied from one of a multitude of legal document books, apps or software and then cut down to remove any agent's obligations. Perhaps this is standard for the industry. While not a factor in my decision, it is clear Ms. Taylor ought to have retained legal counsel to assist her in her negotiations.

When I remarked during the hearing that the expectations of Market Expressions in the written agreement were ambiguous, Ms. Pearson's comment was to the effect, that ambiguous language makes it practical from their point of view as they are not bound to any specific promises. Such a statement is very telling indeed. Far from being practical and suitable, a lack of clarity in contractual language is fodder for deception if the parties were so inclined. I do not find there was any deception or efforts to mislead Ms. Taylor. Much of the problem between the parties was a lack of communication to confirm expectations and resolve problems. With the benefit of hindsight, I am certain both parties would have documented the expectations far better if they

had the opportunity to do so, assuming the unlikely contingency that they would ever contract with each other again.

The evidence shows that Ms. Taylor raised with Ms. Pearson a concern over her perceived lack of effort and obvious lack of results selling the products. This occurred in April 2016. The relationship ended in May. Ms. Pearson, on behalf of Market Expressions, made several demands and ultimately ended the relationship as well. However, while Ms. Taylor protested in April 2016, she still acknowledged owing Ms. Pearson commissions which the Claimant seeks in her May 9th e-mail.

If it were not for the e-mail of May 9, 2016, I may have reduced Pearl & Daisy's liability. However, it would not have been by a significant degree. Much of the Claim and Counterclaim are based on Ms. Taylor's sales expectations. For this Court to predict what the Defendant's sales may have been would be a matter of pure conjecture and speculation. The total abatement would have been \$1000.

I do not fault Ms. Taylor in any of this either. She impressed as an intelligent and motivated woman who cares about her small business. Furthermore, from the evidence, except for a few customers which appear to be in the minority, the product has been well received.

In the end, this was a business relationship that just did not work.

Where the debt has been acknowledged and quantified by both parties, I find the Defendant, Pearl & Daisy Natural Soap Company Inc. liable to the Claimant, Market Expressions Sales and Distribution limited as follows:

| | |
|---------------------|------------------|
| Commission Owing: | \$3703.12 |
| Lollia/Love & Toast | <u>\$2254.08</u> |
| Total | \$5957.20 |

I award the Claimant their filing fee of \$199.35.

There is not sufficient evidence to support the counterclaim. The counterclaim is dismissed.

Summary

In summary, I find the Defendant liable to the Claimant as follows:

| | |
|-----------------------|------------------|
| Total Debt: | \$5957.20 |
| Costs | <u>\$ 199.35</u> |
| Total Judgment | \$6156.55 |

An order shall issue accordingly.

Dated at Halifax, NS,
on March 24, 2017;

Gregg W. Knudsen, Adjudicator

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