Claim No: SCCH No. 460069

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *TNT Teens Now Talk Magazine Publishing Inc. v. HFX Broadcasting Inc*., 2017 NSSM 40

BETWEEN:

TNT TEENS NOW TALK MAGAZINE PUBLISHING INC.

Claimant

- and -

HFX BROADCASTING INC.,
(incorrectly described as Evanov Communications Inc.)

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on July 13, 2017

Decision rendered on July 25, 2017

APPEARANCES

For the Claimant	Sara Nicholson, Counsel Kathleen Mitchell, Student
For the Defendant	Thang Nguyen Counsel

BY THE COURT:

[1] The Claimant publishes a magazine and operates a website, written by and for teens. It was founded in 2004 by Jessica Bowden, who testified on behalf of the Claimant.

[2] Evanov Communications Inc. is a large media company that owns a number of radio stations including CKHZ which broadcasts on the frequency 103.5, which station is directly operated by HFX Broadcasting Inc., an Ontario company registered to operate in Nova Scotia. The parties agree that this case ought to have been brought against HFX Broadcasting Inc., rather than against Evanov, and at trial an order was granted amending the style of cause to reflect the proper Defendant. This decision and the resulting order will reflect the new style of cause.

[3] For sake of the narrative I will simply refer to "the Defendant" or the "radio station."

[4] Off and on for about ten years, the Claimant and the Defendant have had a business arrangement that included several elements:

a. The Claimant would obtain a number (most recently 225) 30-second radio spots on the Defendant's radio station, promoting it generally, but with a concentration on the fall "XPO," a 2-day Trade Show-type event held at the Halifax Forum which brings teens, their parents and teachers together for a major celebration of youth culture, music etc.

b. The radio station would receive a large print ad in the quarterly TTN magazine and feature prominently on the TTN website.

c. The radio station would have a remote unit broadcasting live from the XPO.

[5] The claim seeks damages, or a refund in the approximate amount of $2,800.00, for money paid in 2015 after the radio station changed its music format from “Energy” pop to “Hot Country,” after which the Claimant no longer believed that this format was a fit with the teen audience served by the Claimant, and says that it was forced to switch its advertising relationship to a different radio station.

[6] The transaction in each of the relevant years has been substantially a barter arrangement, where no monetary value was ascribed to most of the mutually exchanged advertising, although in every year there has been a certain amount of money paid by the Claimant to the radio station. The documents introduced at the trial only go back as far as 2012, which appears to have been the year that the relationship resumed after a hiatus of several years.

[7] Ms. Bowden testified that it has always been her understanding that the money that the Claimant paid to the Defendant was to offset the cost of the remote booth set up at the XPO. In 2012, the amount of money that exchanged hands was $1,500.00 plus HST.

[8] The documentation introduced at the hearing for each of the years 2012, 2014 and 2015 consists of a so-called “Contra Letter of Agreement,” an

Attachment A which lists in point form some of the items being exchanged, a set of Terms and Conditions, and two so-called “Contracts” - one of which is more like an invoice for the money part of the deal.

[9] There is also some email communication which is relevant to the issues.

[10] The documents for 2012 support Ms. Bowden’s view that the money paid was for the remote at the XPO. The so-called Contract (which resembles an invoice) refers to a “2 X 4 HOUR PROMOTIONAL PRESENCE ENERGY VEHICLE LOCATION NOV 21 22, 2012" and attaches a $1,500.00 value to it. This is the invoice that the Claimant paid.

[11] No documents from 2013 appear to have survived. In the similar documents for 2014 and 2015, the invoice document ascribes monetary value - not to the remote - but to some of the radio spots. In 2014, the sum of $2,200.00 plus HST is attached to 10 spots between September 29 and October 26 of that year. In 2015, the sum of $2,394.80 is linked to 40 spots during August of that year.

[12] It is an important issue for this case to determine what the cash payment represented. The Defendant argues that it is clear - that the payment was for radio ads, rather than for the remote. Ms. Bowden says that her understanding was that it was for the remote.

[13] The documentation is only part of the total contract between the parties. No one document purports to capture all of what is involved in the relationship. It is clear from the evidence that there were verbal understandings that

supplemented or even overrode the documents that were created. This creates ambiguity which oral evidence and past practice can help to resolve.

[14] In 2015, which was the year that the relationship ended, the station (once again) insisted on its money up front as part of the bargain. On July 23, 2015, Account Executive Mark Larsen (who did not testify) wrote an email to Ms. Bowden saying “I was double checking to see if we can run the Credit Card today for the Remote Broadcast, you mentioned your accountant would give you approval after July 22.” Approval was granted and the Claimant’s credit card was charged $2,754.02.

[15] The invoice later issued by the Defendant attributed the money to 40 radio spots. Ms. Bowden testified that she signed the document, but did not look too closely at it. She stood by her understanding that the money related to the remote broadcast.

[16] I am persuaded that the contract between the parties, taken as a whole, was to have the monetary payment offset the remote broadcast. The only evidence to the contrary would be the two invoices in 2014 and 2015 which attributed money to spots.

[17] But even this evidence is equivocal. The 2014 invoice attributed the payment to 10 spots. There is simply no way that 10 spots would have been worth $2,200.00. In fact, the evidence was that radio spots typically cost $50.00 for 30 seconds. The best explanation for why $2,200.00 would appear to be charged for only 10 spots is that the station chose how to attribute the payment for its internal, accounting purposes, and did not do so consistently from year to

year. The amount attributed to 40 spots in 2015 is closer to their real value, but is not an exact match, either. This reinforces my view that the attribution of payment for spots was an internal, accounting preference only, and not a reflection of the actual agreement.

[18] As such, the credit card payment made in July 2015 was in essence a payment in advance for the remote which was to happen in November of that year. That is how the Defendant's own employee (Larsen) characterized it at the time, and it was how the Claimant understood it.

[19] In September of 2015, the station made a decision to change formats. What had been a station playing top 40 pop and dance hits, under the catch phrase "Energy 103.5" became "Hot Country 103.5" playing contemporary country songs. This was a corporate decision to try to attract a greater listenership.

[20] The station only informed its advertisers and partners (such as the Claimant) after the format came into effect. Indeed, Ms. Bowden was called into a meeting a few days after the format change, the sole apparent purpose of which was to try and convince her that nothing had changed that would affect the relationship.

[21] Ms. Bowden believed otherwise, and was alarmed. She had deliberately partnered with a station that played the type of music that she understood teens listen to. Despite the station's insistence that hot country music would appeal to the younger demographic - and they had statistics to back up the assertion - Ms.

Bowden was convinced that she needed to replace the Defendant with a more suitable station to run ads and have the remote broadcast at the upcoming XPO.

[22] Coincidentally, the cost for a new radio station to do a remote broadcast and run spots was approximately $2,800.00.

Legal theory of liability

[23] The Claimant says that the Defendant breached the contract by changing its format. The Defendant denies that there was any breach, and in fact says that nothing of substance changed since the new format would have equal appeal to the teen demographic.

[24] On the latter point, I disagree with the Defendant. It is not for the Defendant to second-guess Ms. Bowden's assessment of what is appealing to the teens that her organization serves. Hot country may, in fact, attract a certain number of teens as listeners, but is it the same teens that are interested in TTN? There is no evidence that teens' music tastes are monolithic. I trust the Claimant, and Ms. Bowden in particular, to understand what type of music appeals to her constituency.

[25] In the result, in September 2015 the Defendant ceased to be the station that fit the needs of the Claimant.

[26] From a legal standpoint, I believe that the theory that best describes what occurred is frustration of contract. The Defendant could no longer deliver what

had been promised to the Claimant, through no fault of its own making, but simply because it ceased to be the radio station that it had previously been.

[27] I do not find any of the authorities cited by the parties to be of any help. This case is easily disposed of with reference to basic legal principles.

[28] In the case of contract frustration, the party who has paid money for something that the other party can no longer deliver is entitled to a refund of what it has paid. In this case, the Claimant paid $2,754.02 for the remote at its upcoming XPO. It is entitled to a refund.

[29] It is true that as part of the larger contract the Defendant had run some radio spots. By the same token, it had received ads in the Claimant's magazine and on the Claimant's website. These were barter items, and no money was involved, and none should figure into the accounting between the parties. There is no way to place a value on what each party had provided to the other, as the parties themselves never sought to value these items.

[30] The Claimant will have a judgment for $2,754.02 and is also entitled to its costs of $99.70 to issue the claim plus $99.00 to serve it.

Eric K. Slone, Adjudicator