

CANADA / JUDGMENT

# Orange A (Peel) Design Communications Inc. v. Murphy

2011 NSSM 24

COURT

Nova Scotia Small Claims Court

DECIDED

21 April 2011

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**Orange A (Peel) Design Communications Inc. v. Murphy**

**Court**

**Small Claims Court**

**Date**

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**2011 NSSM 24**

**Docket**

**344487**

**Judge/Registrar/Adjudicator**

**Slone, Eric K. (Adjudicator)**

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**Decision**

**Decision Content**

**Claim No: 344487**

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

**Cite as: Orange A (Peel) Design Communications Inc. v. Murphy, 2011 NSSM 24**

**BETWEEN:**

ORANGE A (PEEL) DESIGN COMMUNICATIONS INC.

Claimant

- and -

ANNA MURPHY and PINK INK REALTY LTD.

Defendants

## REASONS FOR DECISION

### BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on April 5, 2011; written submissions received on April 4, 2011 and April 12, 2011.

Decision rendered on April 21, 2011

### APPEARANCES

For the Claimant J. Gary G. Jewett, counsel

For the Defendants self-represented

### BY THE COURT:

1 The Claimant is suing to recover \$3,028.39 said to be owing on a contract to provide marketing services to the Defendant, Anna Murphy (“Murphy”), and her company, the Defendant Pink Ink Realty Ltd. (“Pink Ink”)

2 The principal of the Claimant company is Harm Geurs (hereafter “Geurs”), an experienced graphic artist and designer who in 2007 started his own company which he was hoping to grow into a thriving business. The Defendant Murphy was also an experienced agent/broker who had also recently started her own real estate brokerage, namely Pink Ink.

3 The two individuals met at a Chamber of Commerce event in late 2009 and had some discussions about how they might help each other. Geurs informed Murphy that his company had started a magazine called Mingle which was aimed at the small business market. Geurs suggested that Murphy purchase an ad in the magazine, which Geurs would design essentially for free. The cost of the ad insertion was \$375.00 plus HST.

4 The discussions eventually progressed to a proposal by Geurs to look after all of the Defendants’ marketing needs. On January 31, 2010, Geurs sent an email to Murphy recapping what he believed to have been the terms of a verbal agreement. The text of that email was:

Anna, thank you for coming by the office to discuss your needs. Before I usually start any project, I get an agreement in place so are on the same page moving forward.

As a recap, here is what we discussed with you.

We will take care of all of your marketing needs, for the fee of \$400.00 per month, over 12 months. This is a value of 4800.00. Taxes would be over and above those costs.

Over the next 12 months, we will take care of all of your marketing needs including:

Any consultation required to move your marketing forward.

Any print collateral required for any marketing you require including any brochure, presentation folders or postcard designs.

Billboard designs

Signage TV scripts

Website creative direction (not including programming costs as this is a variable we have no control over)

As with anyone on retainer, we require that the payment is made at the beginning of each month. That would mean with your acceptance of this agreement, we would start work right away. We would also require the first installment as well.

Printing is not included in any of these costs, and if there is printing or production of any kind required, payment must be made up front on these costs. We have the relationships with our suppliers, allowing us to provide you with the best costs in the industry. We will also go to bat for you and provide the expertise required to produce the best product for you possible.

Images are not included in this cost.

Please send me back a confirmation email or let me know what you would like to have addressed in this agreement.

## **Regards, Harm Geurs**

5 It is conceded that Murphy never replied specifically to this email. Nevertheless, Geurs immediately went to work and began to produce marketing materials that Murphy accepted and, in several instances, praised profusely. Most of that material included a version of the attractive Pink Ink logo which already existed as a concept developed by Murphy and one of her friends. What Geurs did was to source and purchase stock photographic images of the highest quality to produce a high-definition version of the logo that could be used on all of the Defendants' material.

6 Over the next few weeks Geurs produced an ad for the military magazine, Trident, a lawn sign, bench ad, Open House sign, letterheads, postcard, presentation folder, flag, and other material. Some of it met with immediate, enthusiastic approval. Other items had to go through several iterations before Murphy was satisfied.

7 Geurs testified that he believed Murphy had agreed to the \$400.00 per month contract, and did not take her lack of response as a denial or repudiation of that proposal. He did not send the first \$400.00 invoice immediately, because he knew or believed that Murphy was short of money and did not want to put her under too much pressure. It went out on February 23, 2010, and was paid via an interac email funds transfer several days later.

8 Murphy's testimony was that she never agreed to the \$400.00 per month, or \$4,800.00 per year figure. She admits that she was hiring the Claimant but only for so long as she was happy with what he was producing. She saw this arrangement as an extension of the networking that they were both doing at that time for their young businesses. From her viewpoint, Geurs was on some kind of probation where she would only pay if he proved himself worthy in her eyes.

9 After a flurry of activity in February and March 2010, and into April, Murphy says that she became increasingly unhappy with Geurs and his work. She says that he was requiring too much supervision, and that she became busy and lacked the time to spend helping him to understand what she wanted. She had been expecting someone who would work more independently and intuitively know what she wanted without having to be shown.

10 As mentioned, Murphy paid the first invoice in the amount of \$400.00 plus HST (she actually overpaid by \$1.00, which was never explained), but refused to honour any further charges. Eventually it became clear that the relationship was over, and she took her business elsewhere. She continued to use some, but not all, of the material that the Claimant had produced.

11 The Claimant has sued on the contract, or in the alternative on the basis of quantum meruit. During the time he was working, Geurs kept track of his time (mostly for internal purposes) and calculated his work at the rate of \$80.00 per hour which he says is the industry standard for graphic design work of this type. He had logged some 38 hours and 36 minutes on this account. He admits that he never told Murphy that he was keeping track of his time, nor what hourly rate he might charge (if being paid hourly), but he contends that this is nonetheless the best indicator of the value of his services.

Was there a binding contract?

12 Clearly, had Murphy responded to the January 31, 2010 email and said something to the effect of "I agree, you have correctly recapped our understanding" there would be no doubt that a contract was in place and the Claimant might have a good case for the balance of the \$4,800.00, namely \$4,400.00 plus tax. But her response was not to respond at all.

13 The law does not look favourably on so-called "negative options," where the failure to respond to a proposal amounts to agreement. However, one's agreement can be communicated in other ways. Here, Murphy should not have been in any doubt that Geurs was under the impression that they had a verbal agreement and that this was a paying engagement rather than work "on spec" or with payment contingent upon some unspecified level of approval by Murphy.

14 Once Geurs began working and producing material on Murphy's behalf, had she believed that the agreement was something else - such as "I will pay you as long as I like what you are doing" - she had a duty to communicate that view or risk liability for something different. She did nothing of the sort. I am of the view that Murphy communicated by means other than a direct verbal acceptance, that there was a contract in place on the terms discussed. Even by paying the first invoice she was communicating the fact that they were in a contractual relationship, as the invoice itself identified the \$400.00 charge as a monthly retainer. Why would she pay for the first

month identified on the invoice as “monthly retainer” if she believed that there was no such contract?

15 By refusing to pay anything beyond the first \$400.00 invoice, she breached that contract giving the Claimant the legal right to decline to perform any further work and claim damages.

16 If I am wrong about the terms of the agreement, there was at least an agreement to the effect that the Claimant would be compensated for its efforts. The Claimant was not working for nothing, and in the absence of an agreed-upon measure the court will set a value on the work.

17 What is the value of the work performed? Murphy’s subjective view of what the services were worth carries no real weight. Her negative assessment attested to at trial is quite at odds with the gushing praise that she expressed in her email communications to Geurs during the time he was working. I am fully satisfied that the services were professionally performed, and I regard it as appropriate to use the alternate measure of payment for Geurs’s time at the rate of \$80.00 per hour, plus tax. The amount of time spent does not appear to have been excessive. I accept Geurs’s testimony that much of the work in an engagement such of this is “front loaded” in the sense that a lot of time had to be spent early on getting the basic design themes in place, which would be carried forward into different media.

### **The counterclaim**

18 The Defendants have counterclaimed for approximately \$24,000.00, consisting of two items. One is for \$3,418.25 which the Defendant Pink Ink paid another company to design and produce a billboard, advertising a condominium project. Murphy claims this amount from the Claimant because she contends that it would have fallen under the scope of the Claimant’s work.

19 The other claim is for a loss of about \$20,000.00 which Murphy says is a commission that she might have earned, had she not been obliged to spend extra time supervising the Claimant’s work, and time contesting this dispute.

20 As for the first item, I accept that the Claimant might have been asked under the terms of the agreement to design a billboard ad, but it appears that much of the \$3,418.25 was actually production cost which would have been an extra charge anyway. More importantly, the Defendants have no legitimate claim where they, and not the Claimant, breached the contract.

21 The claim for a lost commission is remote in the extreme. There was not a shred of evidence that the Defendants lost a potential sale. Even if Murphy was forced to turn more of her attention to what Geurs was doing than she had hoped, there is no reason to believe that she let the rest of her business lapse. As for time spent after the relationship broke down, I observe that the law simply does not recognize a claim to be compensated for the time that a party spends engaged in a dispute. Allowing for such a claim might encourage, rather than discourage, litigation, and would open the door to endless speculation and abuse.

22 Even so, as above, it is my finding that the Defendants, and not the Claimant, breached the contract so there is no basis for any counterclaim.

## Conclusion

23 The Claimant has only claimed \$3,028.39, namely the value of his time. I am prepared to grant judgment for this amount as well as claimed costs of \$227.13. I believe it is appropriate that the judgment be against the Defendant Pink Ink only, as the Claimant always understood that he was working for that company and not for Murphy personally. It may make no difference in the final analysis, but personal liability does not attach in a situation where someone, namely Murphy, is clearly acting as the agent for an incorporated business.

Eric K. Slone, Adjudicator

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