
CANADA / JUDGMENT

Mau v. G.A. Consulting Services Inc.

2020 BCSC 1709

COURT

Supreme Court of British Columbia

DECIDED

27 October 2020

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2020 BCSC 1709 Mau v. G.A. Consulting Services Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mau v. G.A. Consulting Services Inc.,

2020 BCSC 1709

Date: 20201027

Docket: S188110

Registry: Vancouver

Between:

Diana Nam H. Mau, Christina Mau Nowik, Joanna Mau Nowik and

Diana Mau Financial Corporation

Plaintiffs/Defendants by Counterclaim

And

G.A. Consulting Services Inc., Katie Mak Accounting Corp. and

Diana Mau Corporation

Defendants/Plaintiffs by Counterclaim

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

(via teleconference)

Counsel for the Plaintiffs/Defendants by Counterclaim:

S.M. MacKenzie

Counsel for the Defendants/Plaintiffs by Counterclaim:

J.K.R. Bienvenu

A.K. Hall

Place and Dates of Hearing:

Vancouver, B.C.

October 19-23, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 27, 2020

- [1] These reasons address a claim, and a counterclaim, for damages from disputes over the sale, by the first three named Plaintiffs, of their shares in an accounting practice to the first two named Defendants. The Plaintiffs seek rectification, as addressed beginning at para. 20 of these reasons.
- [2] The Plaintiff Diana Mau is a Chartered Professional Accountant ("CPA"). She and two other Plaintiffs, her daughters Christina and Joanne, agreed to sell their shares in the Defendant Diana Mau Corporation ("the Company"). The Company was the vehicle Ms. Mau used to operate her accounting practice (the Plaintiff corporation was incorporated by Diana Mau for her own purposes and is not a central player in the dispute).
- [3] Diana Mau had run her own accounting practice since 1991. She earned her Bachelor of Commerce degree at Simon Fraser University in 1974, and articulated and then practiced accounting at two of the big accounting firms and elsewhere before opening her own practice. She earned a reputation, particularly in Vancouver and Richmond, as a capable accountant, principally serving the Chinese community. Ms. Mau also taught accounting in various settings up to 2016. When I refer to Diana Mau, I will generally be treating her as representative of all the Plaintiffs. Her two daughters were passive investors in the Company who did not work in the accounting practice and who played no real part in the facts of the case.
- [4] Ms. Mau sold all the shares in the Company to two CPAs who had been working for her in the Company, Ms. Fonny Fong and Ms. Katie Mak. Ms. Fong bought her shares through her Company, the Defendant, G.A. Consulting Services Inc. Ms. Mak bought her shares through the Defendant, Katie Mak Accounting Corp.

- [5] Before proceeding to address the claims, I note briefly that this case proceeded as a hybrid trial, pursuant to my reasons reported at 2020 BCSC 125. Three large volumes of affidavit evidence were used, as would be the case in a conventional summary trial application. In addition, Ms. Mau and Ms. Mak testified in chief and in cross-examination in the courtroom in the course of the five-day hearing.
- [6] Returning to the case, the share purchase was evidenced by a written share purchase agreement ("SPA") signed on January 5, 2018. One issue is whether s. 3.2(a) of the SPA, as it was later amended, should be rectified. The defined closing date for the SPA was January 23, 2018. An adjustment date of January 1, 2018 is named in s. 3.2(b) of the SPA. Section 3.2 reads, in full, as follows, subject to the fact that s. 3.2(a) was later amended, as I noted a moment ago:

3.2 Adjustment to Purchase Price

- (a) The Purchase Price shall be reduced by the amount of any liabilities and accounts receivables existing at the Closing Date.
- (b) The Purchaser shall assume and pay all property taxes, municipal rates, local improvement assessments, utilities, insurance and other charges from, and including the date for adjustments, and all adjustments both incoming and outgoing of whatsoever nature will be made as of January 1, 2018 (the "Adjustment Date").
- [7] Ms. Mau's main claim is that she was never paid the \$350,000 agreed upon for the shares. Under the SPA, the Plaintiffs, as vendors, were to receive \$116,667 on May 31, 2018, the same amount again on January 31, 2019, and \$116,666 on January 31, 2020.
- [8] The SPA provided that the second and third of those payments were to be reduced if the Company did not earn stipulated amounts from existing clients in designated time periods. Existing clients were those brought to the SPA by Ms. Mau from her practice. The contemplated reductions were never called for because the Company, under the Defendants' control, always earned more than enough from those existing clients to avoid the reductions.
- [9] Notwithstanding these payment obligations, the closest the Defendants ever came to honouring them, that is, to paying \$350,000, was when they tendered only \$33,497.92 on May 31, 2018, the day the first payment of \$116,667 was due. The Defendants' rationale for tendering that lesser amount was that it was the difference between \$116,667 and the amount Ms. Mau had earned thus far in 2018 for her consulting work for the Company after the Defendants owned it.

[10] There was no basis for the Defendants to take that position. They owed Ms. Mau all of the \$116,667 due on May 31, 2018. Ms. Mau refused to accept the \$33,497.92. She took the position that, by the Defendants tendering only that amount on May 31, they repudiated the agreement. She was right. She accepted the repudiation on June 11, 2018 through a letter from her lawyer at that time. The first page of the lawyer's letter reads as follows:

June 11, 2018

G.A. Consulting Services Inc. Katie Mak Accounting Corp.

c/o Suite 510 - 999 West Broadway c/o Suite 510 - 999 West Broadway

Vancouver, BC V5Z 1K5 Vancouver, BC V5Z 1K5

Attention: Fonny Kam Wah Fong Attention: Hiu Ying Katie Mak

Re: Legal Representation for breach of Share Purchase Agreement (the "Agreement") by G.A. Consulting Services and Katie Mak Accounting Corp.

We represent Diana Nam H. Mau, Christina Mau Nowik and Joanna Mau Nowik in relation to the above-captioned matter.

By failing to tender a payment of \$116,667.00 on May 31, 2018, you are in breach of the Share Purchase Agreement dated January 5, 2018 (the "Agreement"). It was a term of the Agreement that time is of the essence. As your refusal to make a payment removes the primary benefit my clients were to receive under the Agreement, it constitutes a repudiation of the Agreement which my clients can elect to accept.

Further, it was an implied term of the Agreement that Ms. Mau would be retained by Diana Mau Corporation for at least five years as a consultant on terms similar to those set out in the Supplementary Agreement to the Sale of Shares enclosed in Ms. Mau's December 18, 2017 email. Rather than offering a consulting agreement with reasonable and fair terms, you insisted that Ms. Mau accept a consulting agreement that was incapable of being accepted given that the purpose of selling the Diana Mau Corporation was to allow Ms. Mau to gradually reduce her workload as her family needs increase.

Given your overall course of conduct in failing to tender the May 31, 2018 payment, changing the locks, banning Ms. Mau from the premises, and making various accusations about Ms. Mau, it is no longer possible for Ms. Mau to consider any ongoing relationship with Ms. Fong or Ms. Mak.

My clients elect to accept the repudiation of the Agreement by G.A. Consulting Services and Katie Mak Accounting Corp.

[11] The facts stated in the letter are true, and the position set out in the letter is legally sound. The Defendants G.A. Consulting and Katie Mak Accounting owe the Plaintiffs \$350,000. The Defendants offered several excuses for not being required to pay that amount, all based on their assertion that it was Ms. Mau who breached the SPA, not the Defendants.

- [12] The Defendants, on May 31, 2018, told Ms. Mau she could not come into the Company's premises because, "you have been refusing all our attempts to arrive at a reasonable written longer-term consulting agreement". That was not true. Section 8 of the SPA listed the purchasers' conditions of closing, including that the Company entered into a consulting agreement with Ms. Mau by 12 p.m. on January 23, 2018. But the Defendants did not produce a draft consulting agreement until February of 2018. Given its terms, it was, understandably, unacceptable to Ms. Mau. It required her to consult for 10 years, when everyone knew she was selling her business in order to wind down her practice of accounting. Similarly, the description of her work obligations in the Defendants' draft expressed, or at least implied, that Ms. Mau would have to work full time or close to it, when it was known that was not her plan. Finally, the Defendants' draft gave them the right to terminate Ms. Mau on a mere 10 days' notice.
- [13] When Ms. Mau came to the May 31, 2018 meeting with the Defendants, she had their draft of the consulting agreement with her, with proposed changes on it. But the Defendants had obviously resolved, before that meeting began, to accuse Ms. Mau of breaching the SPA, in the hope, I believe, of being able to avoid paying her what they owed her. Incidentally, between February and May of 2018, the Defendants never demanded the conclusion of negotiating the written consultation agreement. I expect that was because that is a busy time of year for accountants, when Ms. Mau was carrying out her consulting work for the Company at the rates she had negotiated with the Defendants.
- [14] The Defendants also argue that Ms. Mau warranted the Company was not indebted to her as of the closing date, whereas Ms. Mau, in her rectification claim, argues that the Company owes her for work she did before that, including work done in 2017. If Ms. Mau's claim for rectification is not allowed, there could be no possible breach of indemnity as to indebtedness because there would be no such indebtedness.
- [15] The Defendants also argue that Ms. Mau directed work away from the Company, controlled the Company's clients, and directly billed clients while working for the Company. The facts are that all work Ms. Mau did for the Company's clients, after the share sale and up to her acceptance of the Defendants' repudiation, was paid for on the percentage sharing arrangements negotiated between Ms. Mau and the Defendants, whereby Ms. Mau received her percentage and the Defendants received theirs through the Company. The fact that Ms. Mau worked directly with the clients in no way caused her to be violating the SPA. Regarding billing, Ms. Mau explained to some clients that they would be receiving two accounts early in 2018, one to cover work Ms. Mau had done in 2017, and the other for work she or the Defendants had done in 2018. As for allegedly directing work away from the Company, Ms. Mau, probably in about May of 2018, assisted a single client to hire an in-house bookkeeper, because that was needed for the efficiency of that client's operation. The Defendants' allegations of Ms. Mau controlling clients, directly billing, and directing work away from the Company, have no substance to them. I believe those allegations were developed as a means of the Defendants avoiding their payment obligations.

- [16] Finally, the Defendants admit they tendered the first instalment due, of \$116,667.00, by tendering only \$33,497.92. I have addressed that position earlier. The Defendants had no right to reduce the first instalment by the amount Ms. Mau earned in consulting for the Company in 2018.
- [17] In summary, there is no defence to Ms. Mau's claim against the Defendant G.A. Consulting Services Inc. and the Defendant Katie Mak Accounting Corp. for the \$350,000 owing under the SPA.
- [18] Ms. Mau had initially advanced a claim for the breach of her consulting agreement. However, she no longer advances that claim. As I understand her submission on that point, she, in effect, is accepting that she successfully mitigated her loss under the consulting agreement after she had accepted the Defendants' repudiation, and did so by consulting on her own thereafter. However, for consulting work Ms. Mau did for the Company prior to accepting the Defendants' repudiation, she is now owed \$14,227.35 by the Company for work done as of June 6, 2018, but still unpaid. Ms. Mau did that work at rates agreed to between her and the Company. The Company directly benefited from that work by getting its percentage of the underlying billings.
- [19] The Defendants correctly concede, regardless of the outcome in the rectification claim, that the Company owes Ms. Mau \$7,108.50 for work performed and invoiced by Ms. Mau or the Company before the change in control and collected by the Company afterward. The Defendants also concede correctly that the Company owes Ms. Mau \$7,998 as a tax credit from CRA for the deemed year-end of January 2, 2018, stemming from a tax overpayment by the Company before the change of control.
- [20] The Plaintiffs seek rectification of s. 3.2(a) of the SPA, quoted earlier, but set out again here:

3.2 Adjustment to Purchase Price

- (a) The Purchase Price shall be reduced by the amount of any liabilities and accounts receivables existing at the Closing Date.
- [21] It is common ground that s. 3.2(a) was amended, by agreement dated January 19, 2018, in the SPA Addendum Number 2, to read as follows:
1. The parties agree to amend paragraph 3.2(a) as follows:

"The Purchase Price shall be reduced by the amount of any liabilities and accounts receivables existing at the Closing Date except for the shareholder's loan which will be assigned to the Purchasers by the Vendors as at the Closing Date."

- [22] The subject of the rectification application is s. 3.2(a) as amended, quoted immediately above. The Plaintiffs submit that it should be rectified to simply read: "(a) The purchase price shall be reduced by the amount of any shareholder's loan existing at January 2, 2018."

- [23] That would require the deletion of any reference to liabilities and accounts receivable, and changing the date from the closing date of January 23, 2018 to January 2, 2018.
- [24] Ms. Mau is faced with the difficulty that s. 3.2(a) in the SPA was the specific focus of amendment in the SPA Addendum Number 2, dated January 19, 2018, at which time the words she seeks to have removed were repeated from the original SPA. She pointed out at trial that, in her email of December 18, 2017, she expressed s. 3.2(a) largely as she now seeks to have it rectified. Her explanation for why she still signed the SPA on January 5 with the old wording for s. 3.2(a) was that one of the Defendants told her she had to sign the SPA urgently so that the Defendants could proceed with their application for bank financing. However, that does not explain why Ms. Mau signed the SPA Addendum Number 2 approximately two weeks later, again containing the old wording for s. 3.2(a). Even in her version of the SPA, sent with her email of December 18, 2017, Ms. Mau did not change the closing date, as she now also seeks to do.
- [25] Another difficulty for the Plaintiffs is that I did not see evidence of a clear agreement having been formed reflecting the wording Ms. Mau seeks, either in a meeting, an email exchange, or otherwise, before the SPA and the SPA Addendum Number 2 were signed. Her counsel obtained evidence from the Defendants, in examinations for discovery, that their intentions were similar to those of Ms. Mau for treating January 2, 2018 as the dividing time for rights and obligations between the parties, but even that evidence did not demonstrate to me the existence of a prior agreement having been formed. Rectification is an equitable remedy. But, like many equitable remedies, it depends, for its success, on meeting several standards which have been set down in the case law. I have sympathy for Ms. Mau on this rectification question, but I must be mindful of what the case authority has established.
- [26] As Binnie J. observed in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, convincing proof is the requirement for establishing that an executed instrument is to be altered. Lowry J.A. spoke of the need for compelling evidence in *Fraser v. Houston*, 2006 BCCA 66. I note, from para. 13 in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, the Court's caution that rectification is a "potent remedy" to be used with "great caution". As Denning L.J. said, in the English Court of Appeal in 1953, as adopted and quoted at para. 29 in *Fairmont Hotels*:

Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties -- into their intentions -- any more than you do in the formation of any other contract.

That passage compels me to give less weight to the statements of intention in the Defendants' examinations for discovery than I otherwise might. Mere statements of intention must play a secondary role.

- [27] When I take these authorities into account, I conclude that Ms. Mau cannot succeed in a claim for rectification, either as mutual mistake or unilateral mistake. I accept from the evidence her counsel's submission that, in the result, payments otherwise owing to Ms. Mau by the Defendants G.A. Consulting Services Inc. and Katie Mak Accounting Corp. will be reduced by \$55,703.50. Subject to that reduction, the Plaintiffs are entitled to the payment of \$350,000 and the three other payments, as set out earlier in these reasons.
- [28] Ms. Mau claimed exemplary or punitive damages for the manner of her termination as a consultant. I am not making such an award. Little evidence or argument was directed to that point and there was no review of the authorities. The Defendants' conduct, in my view, was not admirable in May of 2018, but it was not such as to warrant an award of exemplary or punitive damages, in my view.
- [29] The Defendants' counterclaim is dismissed, as will have been implicit from my allowing most of the Plaintiffs' claims, in the course of which I did not accept the Defendants' counter-positions, except on rectification.
- [30] The primary substantial success in this case was that of the Plaintiffs. I would be awarding costs to the Plaintiffs on the ordinary scale, but I have not considered what, if any, is the impact of s. 11.5 in the SPA, addressing indemnification by the purchaser. If need be, the parties can appear before me on the questions of costs and indemnification.

"Macintosh J."

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