

CANADA / JUDGMENT

Outwest Enterprises Limited v. Timms

2007 BCSC 560

COURT

Supreme Court of British Columbia

DECIDED

25 April 2007

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2007 BCSC 560 Outwest Enterprises Limited v. Timms

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Outwest Enterprises Limited v. Timms,

2007 BCSC 560

Date: 20070425

Docket: 10948

Registry: Duncan

Between:

Outwest Enterprises Limited

dba Ad/Wise Consultants

Plaintiff

And:

Lorraine G. Timms & Lorraine G. Timms

dba Wives Unlimited Cleaning Service

Respondents

Before: The Honourable Mr. Justice Metzger

Reasons for Judgment

Appearing as principal on behalf of Ad/Wise Consultants

M. Wardrope

Appearing on her own behalf and on behalf of Wives Unlimited Cleaning Service

L. G. Timms

Date and Place of Trial/Hearing:

April 2, 2007

Duncan, B.C.

INTRODUCTION

[1] The plaintiff, Outwest Enterprises Limited dba Ad/Wise Consultants ("Ad/Wise") appeals a decision from the Provincial Court. Ad/Wise submits that the learned trial judge erred in finding that the contract at issue was a nullity by reason of unilateral mistake. Ad/Wise claims that the contract was entered into without coercion by two business principals and that Ad/Wise has fulfilled its obligations under the contract. Both parties are unrepresented by counsel.

BACKGROUND

- [2] Ad/Wise is a consulting company that advises clients on how to reduce their advertising costs in the Yellow Pages. The defendant, Lorraine Timms dba Wives Unlimited Cleaning Service ("Ms. Timms") runs a housecleaning and janitorial business, which she has been doing for approximately 20 years. Ms. Timms advertises her business in the Yellow Pages.
- [3] Ad/Wise contacted Ms. Timms, through a telemarketer, and offered a "free no obligation consultation" with respect to her Yellow Page advertisements. Ms. Timms accepted and agreed to an appointment with Mr. Wardrope, the principal of the plaintiff, on August 11, 2005. At that appointment, Ms. Timms signed a Conditional Agreement which reads as follows:

CONDITIONAL AGREEMENT

I (Advertiser) am becoming a party to this agreement so that I may learn of the recommendations of Ad/Wise Consultants regarding my telephone directory advertising. The agreement is as follows:

IF ADVERTISER CHOOSES TO USE THE RECOMMENDATIONS OF AD/WISE CONSULTANTS:

Advertiser agrees to pay Ad/Wise Consultants a one time fee which is 60% of the annual amount saved on Advertiser's current telephone directory advertising.

IF ADVERTISER CHOOSES NOT TO USE THE RECOMMENDATIONS OF AD/WISE CONSULTANTS:

Ad/Wise Consultants agree that Advertiser is under no obligation to pay them a fee of any kind.

OTHER CONDITIONS:

- 1) This agreement covers all telephone directories to which Advertiser is currently listed.
 - 2) All rates quoted are for the upcoming directories.
 - 3) The fee is payable if the ideas are used within two years of the date shown below.
 - 4) The place of Agreement is the jurisdiction of the head office of Ad/Wise Consultants.
 - 5) Any fees incurred as a result of recommendations used are due & payable not later than the closing date for each directory unless other arrangements are specified on a properly executed Consulting Agreement. Interest/late charges of 26.82% per annum (2% per month) will be added to all overdue accounts.
- [4] Also at the August 11, 2005 meeting, Mr. Wardrope showed Ms. Timms two sample ads. Ms. Timms wanted to see more sample ads so they scheduled a second meeting.
- [5] The second meeting occurred on August 23, 2005. Mr. Wardrope presented Ms. Timms with two sample ads, one of which she approved. She requested further changes to the remaining one. At this second meeting, Ms. Timms signed a Consulting Agreement, two directory advertising orders, and a letter addressed to the Yellow Pages Group. The Consulting Agreement states:

CONSULTING AGREEMENT

ACCEPTANCE: The Advertiser listed below accepts and agrees to use directory advertising changes as authorized by the Advertiser on Ad/Wise Consultants' Form 013.

PLACEMENT OF ADVERTISING: Ad/Wise Consultants' responsibility is limited to consulting with the Advertiser; and preparing the Advertiser to place the advertising with the telephone companies or the directory publishers.

CONSULTING FEE: The Advertiser chooses to use the consulting services of Ad/Wise Consultants for one year or one complete cycle of all directories listed below, whichever is longer. The Advertiser instructs Ad/Wise Consultants to complete the advertising orders and copy sheets; and prepare the Advertiser to make these changes with the telephone companies or the directory publishers. In consideration of Ad/Wise Consultants providing such services, the Advertiser agrees to pay the consulting fee shown below. The fee is due and payable when the advertising changes are submitted to the Advertiser. This agreement supersedes the Conditional Agreement (Form 012) and the Advertiser acknowledges by acceptance that Ad/Wise Consultants' right to the fee becomes absolute.

The Advertiser understands that the fee is for consulting services provided, and that subsequent advertising changes will not affect Ad/Wise Consultants' fee. Oral agreements and conditions not specified hereon will not be recognized. The place of contract, for all purposes, shall be Duncan, BC.

CONSULTING FEE: \$1636.86

(@60% of savings of \$2728.08)

ARTWORK: \$ INCLUDED

GST: \$ 114.58

TOTAL: \$1751.43

FULL PAY DISCOUNT (5% if appl.) \$

NET TOTAL: \$1751.43

AMOUNT PAID: \$ 437.88

BALANCE OWING: \$ 1313.55

Interest / late charges of 26.82% per annum (2% per month) will be added to all overdue accounts.

Ad/Wise Consultants' liability to Advertiser is limited to the fee paid.

TERMS:

Balance due covered by cheques of \$437.85 post-dated as follows:

2005-10-10, 2005-11-10, and 2005-12-10.

DIRECTORIES COVERED BY THIS AGREEMENT:

Victoria

Colwood-Langford-Sooke

ADVERTISER: Wives Unlimited Cleaning Service

ADDRESS: 967 Windship Place

CITY/PROV/CODE: Victoria, BC V9B 5X7

TELEPHONE: 250 383-3220

[6] Ms. Timms signed two directory orders. One order was for the Victoria directory, which showed changes to her advertising costs and total annual savings of \$2,728.08. The other was for the Colwood/Langford/Sooke directory which showed that Ms. Timms did not want to place any ads in this directory. "Form 013" is written below the signature line on both directory orders.

[7] The letter addressed to Yellow Pages Group dated August 23, 2005 and signed by Ms. Timms, reads as follows:

Attention: Custom Service Manager

Re: Directory Advertising Changes

Dear Manager:

Enclosed are changes required to our Yellow Pages white and yellow section directory advertising. We agree to be responsible for billings on the enclosed advertising orders only.

Please ensure where applicable that all instructions on advertising orders and/or copy sheets are followed exactly.

We look forward to receiving our revised customer copies confirming these changes as soon as possible. We will not require a visit from your sales representative this year.

Camera-ready artwork for display and/or logo ads will be forwarded electronically and/or under separate cover.

Thank you for your cooperation.

- [8] At the August 23, 2005 meeting, Ms. Timms gave Mr. Wardrope a cheque for \$437.58 and three post-dated cheques for the same amounts for the months of October, November, and December 2005.
- [9] On August 24, 2005, Ms. Timms phoned Mr. Wardrope stating that she wished to cancel the Consulting Agreement. On August 25, 2005, she sent a fax cancelling the Consulting Agreement. Mr. Wardrope cashed the first cheque but Ms. Timms cancelled the three post-dated cheques. Ad/Wise sued Ms. Timms for the unpaid balance of the contract and contractual interest for a total of \$1,629.27. Ms. Timms, by way of counterclaim, claimed for the amount of her cashed cheque and for fees for a total of \$563.88.
- [10] The learned trial judge dismissed Ad/Wise's claim and granted the counterclaim ordering Ad/Wise to pay Ms. Timms \$437.88, plus fees of \$126 for a total of \$563.88. The court found that Mr. Wardrope read the Consulting Agreement to Ms. Timms and that she signed it. However, the court found that Ms. Timms did not understand that the Consulting Agreement was different than the Conditional Agreement and that Mr. Wardrope did not bring these changes to her attention. The Judge accepted Ms. Timms's evidence that because she had only approved one ad, she thought she had time to consider whether to accept the changes recommended by Ad/Wise. Based on these findings, the court concluded that Ms. Timms made a unilateral fundamental mistake as to the contents of the Consulting Agreement. Paragraph 12 of the Judgment reads as follows:
- I find as a fact that Mr. Wardrope knew or should have known that if Ms. Timms had been aware of the actual nature of the contract she was signing, she would not have signed it. As a result, the contract is a nullity and as such is unenforceable.
- [11] The issues are whether the learned trial judge erred in understanding and applying the law of unilateral mistake and whether she made factual errors in her decision.

ANALYSIS

[12] If an appeal is based on a question of law, this court can consider whether the Provincial Court judge was correct in her understanding and application of the law. Where an appeal is based on questions of fact, this court cannot reverse the trial judge's decision unless there is a "palpable and overriding error" (see *Perfect Auto Repairs Ltd. v. Westway Roofing Ltd.*, 2005 BCSC 1627 at para. 5).

[13] In *Perfect Auto*, supra at para. 6, Smith J. describes the standard of review where the appellant alleges factual errors as follows:

The standard of review that I have referred to means that the appeal can only succeed if the trial judge ignored or misunderstood critical evidence or if he made findings that are not supported by any evidence at all. If there is evidence to support the findings made, I am not permitted to interfere simply because I might have come to a different conclusion on the basis of that evidence.

[14] The principle function of contract law is to protect parties' reasonable expectations engendered by promises. The parties' intentions must be inferred from their words and conduct as interpreted by a reasonable person. A written contract is "persuasive evidence of parties' actual agreement" (see *Frolick v. Frolick*, 2007 BCSC 84 at para. 37). A party who seeks to rescind a written agreement has the burden to provide "convincing proof" that the parties' written agreement does not reflect their actual agreement (see *Frolick*, supra at para. 35).

[15] Unilateral mistake can be grounds for setting aside a contractual agreement. If there is no genuine agreement between the parties because one of the parties has made a mistake as to the fundamental terms of the contract, the law does not regard a contract as having come into existence. The concept of fundamental mistake was expressed as follows in *Magee v. Pennine Ins. Co. Ltd.*, [1969] 2 All E.R. 891 at 896, and cited in *Toronto-Dominion Bank v. Fortin et al.* (No. 2) (1978), 88 D.L.R. (3d) 232 (B.C.S.C.):

Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided. [And to that has to be added the additional rider] ... the assumption must have been fundamental to the continued validity of the contract, or a foundation essential to its existence.

[16] However, a person is generally bound by a contract to which she has expressed clear assent. In the *Law of Contracts*, 5th ed. (Aurora: Canada Law Books Inc, 2005) S. M. Waddams writes at para. 317:

One who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents, or ascribes to words used their reasonable meaning. But the other side of the same coin is that only a reasonable expectation will be protected. If the party seeking to enforce the document knew or had reason to know of the other's mistake the document should not be enforced.

[17] In the Law of Contracts, 5th ed. (Toronto: Thomson Canada Limited, 2006) at 263-264, G.H.L. Fridman expresses this same principle as follows:

Once again the search is for consensus ad idem. Have the parties agreed upon what is fundamental to their contract? If so, then irrespective of the reasons or motives for such agreement, which may differ from party to party and may, indeed, be founded upon error, and as long as this is not the product or consequence of fraud, the contract will be good and will bind.

[18] There is a difference between mistake and misunderstanding. The court must determine whether the agreement reflects a meeting of the minds. In Frolick, supra at para. 45, Smith J. writes:

The mere fact that one party may suffer from a misunderstanding as to a term of the agreement does not necessarily lead to the conclusion that a consensus was not achieved. The principle was stated in *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 (Q.B.) as follows:

If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound.

Thus, an objective construction is to be applied in determining whether a mutual or unilateral mistake exists.

[19] In *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257 at 262, the Saskatchewan Court of Appeal cites Fridman in describing the differences between the approaches of the common law and equity to unilateral mistake:

To the common law a contract either existed or it did not; if there was fundamental mistake there was no contract and any purported agreement was void, a nullity. In equity, however, it would seem that, even where a mistake would not invalidate a contract *ab initio*, under common-law rules, if it would be inequitable or unconscionable for a party to be permitted to take advantage of another's mistake, even if not induced by him, then equity would come to the rescue of the mistaken party, at least to the extent of providing an equitable remedy, for example, rescission or rectification, or allowing an equitable defence to an equitable remedy, such as specific performance, which the non-erring party was attempting to invoke.

[20] The common law defence of non est factum is a form of unilateral mistake in relation to written documents. Originally where a contract was by deed, a party could plead non est factum meaning that the deed, although appearing to be his, was not so because he had assented to something other than what he had intended. This defence can now be raised in relation to any written document (see Fridman, *supra* at 272). In Frolick, *supra* at para. 46, Smith J. describes the defence of non est factum as follows:

The doctrine of non est factum also negates a party's obligations under an agreement if that party can establish that the agreement was fundamentally or radically different from what he or she believed, or intended it to be, and where the execution of the agreement was not the result of that party's negligence in failing to take reasonable precautions: *Van der Ross v. Van der Ross*, 2003 BCCA 270, 12 B.C.L.R. (4th) 307.

[21] However, a party cannot rely on the non est factum defence if she has been careless in signing the document by not informing herself of its meaning (see *Van der Ross*, *supra* at paras. 13-15).

[22] I am satisfied a reasonable person would infer from the words expressed in the Consulting Agreement and the parties' conduct, that there was a meeting of the minds and an actual contractual agreement between the parties.

[23] The Consulting Agreement was a written contract signed by both the parties. The contract clearly states that Ms. Timms "accepts and agrees to use directory advertising changes as authorized by the Advertiser on the Ad/Wise Consultants' Form 013". Ms. Timms signed both directory order forms which clearly state "Form 013" on the bottom.

[24] The contract clearly states that Ms. Timms instructs Ad/Wise to complete the advertising orders and copy sheets and prepare the Advertiser to make these changes with the directory publishers in exchange for the fee of \$1,751.43 which is 60% of the advertising savings and GST. Ms. Timms paid Mr. Wardrope \$437.88 by cheque and then gave him three post-dated cheques as the contract described.

[25] I find that the learned trial judge made three factual errors when she found that:

- a. Mr. Wardrope faxed "display ad's" with respect to Ms. Timms's business to the directory on August 25, 2005;
- b. Ms. Timms had not agreed to "advertising changes as authorized" because she had not agreed to the composition of the second ad; and
- c. Mr. Wardrope knew or should have known that if Ms. Timms had been aware of the actual nature of the contract she was signing, she would not have signed it.

- [26] Mr. Wardrope's evidence was that he faxed all of Ms. Timms's advertising requirements to the publisher including the letter signed and dated on August 23, and the two directory advertising orders (Forms 013) signed on August 23, 2005. Mr. Wardrope was clear in his evidence that he never faxed or sent any artwork or display ads because Ms. Timms had not yet approved the second ad.
- [27] Ms. Timms's testimony corroborates this as she stated that she had not approved the second ad because she wanted the cartoon character Wilma inserted back into it. There was no evidence that Mr. Wardrope faxed "display ad's". To the contrary, Mr. Wardrope's testimony, as well as the letter, state otherwise. The letter clearly explains that "Camera-ready artwork for display and/or logo ads will be forwarded electronically and/or under separate cover".
- [28] I am satisfied that the trial judge confused the actual ads with the paperwork which explained the ad requirements and requested changes to Ms. Timms's prior advertising in the Yellow Pages. The "directory advertising changes as authorized" had nothing to do with the artwork Ms. Timms would ultimately approve but were those changes outlined on Form 013, which Ms. Timms had authorized as evidenced by her signature.
- [29] Mr. Wardrope did not fax display ads but did fax the advertising orders and letter necessary to alert the publisher directory that Ms. Timms had decided to change her advertising order with Yellow Pages.
- [30] I am satisfied that the trial judge erred in finding that "Mr. Wardrope knew or should have known that if Ms. Timms had been aware of the actual nature of the contract she was signing, she would not have signed it" is not supported by the evidence. How could Mr. Wardrope have known that Ms. Timms had misunderstood or did not assent to any of the fundamental contractual terms?
- [31] Mr. Wardrope could only rely on Ms. Timms's conduct to ascertain her intentions. The learned trial judge accepted Ms. Timms's testimony that she did not understand that the Consulting Agreement was different from the Conditional Agreement. Ms. Timms's conduct, however, contradicts this testimony.
- [32] First, Ms. Timms phoned to cancel the Consulting Agreement the day after she signed it. If she did not understand that the Consulting Agreement was different, why did she phone to cancel it the very next day?
- [33] Second, Ms. Timms signed the Consulting Agreement. Why would she need to sign another agreement if she had already signed one that was identical?
- [34] Third, the Conditional Agreement did not oblige Ms. Timms to pay any money. If the Consulting Agreement was the same, why did Ms. Timms pay Mr. Wardrope \$437.88 and give him three post-dated cheques?

- [35] Fourth, on the same day that she signed the Consulting Agreement, Ms. Timms signed Form 013 and the letter which explained the advertising changes that she had accepted. These documents show that Ms. Timms had used Ad/Wise's consulting services.
- [36] Even if Ms. Timms misunderstood the nature of the Consulting Agreement, misunderstanding of the contractual terms does not constitute unilateral mistake. If Ms. Timms did not inform herself of the meaning of the contractual terms by carefully reading and considering the written document, she cannot rely on this carelessness to relieve herself of her contractual obligations.
- [37] The written Consulting Agreement is clear and concise. I am unable to find any convincing proof that the written agreement does not reflect the parties' actual agreement. Ms. Timms signed it, and acted upon its terms by signing Form 013 and making payments.
- [38] Further, I am unable to identify any contractual assumptions which are not true. The fundamental assumption is that Form 013 contains the directory advertising changes as authorized by Ms. Timms. Form 013 contains such changes. There is nothing in the contract or the surrounding circumstances to support a finding that the parties' consensus was reached on the basis that Ms. Timms approve the second ad.
- [39] I am satisfied that the trial judge erred in law by finding that Ms. Timms's misunderstanding of the contract constituted a unilateral mistake. If the trial judge had applied the correct objective test of whether a reasonable person would understand, by examining the parties' words and conduct, that Ms. Timms had assented to the contractual terms, she would have found that the Consulting Agreement was binding.
- [40] Further, I am satisfied that the trial judge made three factual errors as outlined in paragraph 25 of this judgment.
- [41] I find that the Consulting Agreement is a binding contract that the court should enforce by ordering Ms. Timms to pay the balance owing plus contractual interest.

ORDER

- [42] Pursuant to s. 13 of the Small Claims Act, RSBC 1966, Chapter 430, I make the following orders:
1. The monies paid into court pursuant to s. 8(2) by the plaintiff /appellant shall be returned to him forthwith.
 2. I order there to be no interest payable from the time of the Provincial Court judgment to the date of this order or following. The outstanding sum owed to the plaintiff /appellant including interest is set at \$1,650.
 3. The plaintiff /appellant will have costs set at \$200.

4. The defendant/respondent will pay the total amount owing of \$1,850 at the rate of \$308.33 per month commencing May 31, 2007 and each and every month thereafter until the judgment is paid in full. The sum of \$1,850 will not be subject to any additional interest.
5. Should the defendant/respondent fail to make the ordered payments, the plaintiff /appellant is at liberty to appear before me with notice to the defendant/respondent to seek additional interest or changes to the payment amounts and schedule.

"R.W. Metzger, J."

The Honourable Mr. Justice R.W. Metzger

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