CITATION: Collins Barrow Toronto LLP v. Selectcore USA, LLC, 2016 ONSC 3826
COURT FILE NO.: CV-15-530687
DATE: 20160907

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Collins Barrow Toronto LLP, Applicant

AND:

Selectcore USA, LLC, Selectcore Fone Service, Local Fone Service, Selectcore Communications, Selectcore Distribution, Selectcore Ltd, Loblaws Inc. Total, 360 Insentives Total, Directcase ATM Management Partnership Total, Zingocomm Enterprises Ltd Total, Respondents

BEFORE: Pollak J.

COUNSEL: Elliot Birnboim and Alastair McNish for the Applicant

Shahzad Siddiqui for the Respondents

HEARD: January 21, 27, 2016, February 26, 2015, March 15, 2016, June 8, 2016

ENDORSEMENT

[1] Collins Barrow LLP (the "Applicant") brings this Application for a judgment against SelectCore Ltd. and its wholly owned subsidiaries, SelectCore USA, LLC, SelectCore Fone Service, Local Fone Service, SelectCore Communications, and SelectCore Distribution (the "Respondents"), for non-payment of invoices for services performed in accordance with and pursuant to a written contract.

[2] The issue to be decided is whether this matter can proceed by way of an Application and be resolved by way of an application, or whether the application should be converted into an action or a trial of certain issues.

[3] For the reasons that follow, I conclude that the application should be converted into an action.

Factual Background

[4] SelectCore Ltd. retained the Applicant to provide auditing services pursuant to an engagement letter dated January 17, 2013 (the "2013 Agreement"). The Applicant submitted four invoices totaling $160,177.50 for services rendered. Each invoice stated the following term:

> Payment upon receipt. Interest will be charged at the rate of 12% per annum (1% per month) on overdue accounts.

[5] SelectCore Ltd. paid $31,689.83 of the first invoice but refuses to make any additional payments toward the principal balance or the financing charges owing to the Applicant. The Respondents submit that before the Applicant executed the 2013 Agreement it promised a discount if SelectCore Ltd. adopted an electronic record keeping system to facilitate the audit, which it did. The Respondents also submit that there is a material issue regarding whether the Applicant is entitled to a payment of 12% interest on the amount outstanding.

[6] The Respondents object to the payment of the invoices because:

(a) The Applicant's fees pursuant to the 2013 Agreement were too high;

(b) There was a "promise" that the fees would be discounted;

(c) The 2013 Agreement did not contain a provision that the rate of interest to be paid on the outstanding invoices would be 12% per annum.

[7] The evidence before this court is that there was an engagement letter dated February 17, 2012, signed by the Respondent, for auditing services during the 2011 fiscal period. The 2012 letter contained a fee estimate for services. The fee estimate was subject to handwritten changes, initialed by representatives of the parties, to decrease the fees.

[8] The 2013 Agreement is the second engagement letter, signed on January 17, 2013, for services during the 2012 fiscal period. This letter also contained a fee estimate, but there are no handwritten changes to the fees.

[9] The Respondents, however, submit that the evidence is clear that, after the second engagement letter was signed, the parties were still discussing discounts as an inducement to executing the agreement. The Respondents rely on an e-mail to the former President of SelectCore Ltd., Keith McKenzie, dated March 14, 2013, from a representative of Collins Barrow, Octavio Cabral:

> Spoke to Marty today and he says he signed the letter and it's with you. Can I get you to sign it and send it to me? I will be out at the Toronto office (Steeles) tomorrow afternoon. I mentioned to Marty that I think the IT stuff went well so that should impact favourably on the fee (from your end), but we agreed to hammer it out when we meet at close.

[10] The Respondents submit that this evidence supports the evidence of the President of SelectCore Ltd. that:

> I am advised by the former President of SelectCore Ltd., Keith McKenzie, and do verily believe that he discussed with CBT their unreasonable and high fees. Following these discussions, CBT had agreed to apply discounts to our account. These discounts never materialized.

[11] The Respondents also submit that there was no provision in the engagement letter related to interest charges. The Respondents argue that, absent an agreement, the Applicant is entitled only to the interest rate set out by s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which is less than 5 percent for the relevant time period. The Applicant concedes this point.

Positions of the Parties

[12] The Applicant argues that it can proceed by way of application pursuant to Rule 14.05(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, because the relief claimed is the determination of rights that depend on a contract. In this case, it seeks a determination of its right under the 2013 Agreement to be paid for the services it provided to the Respondents.

[13] The Applicant further submits that, on an application commenced under Rule 14.05(3)(d), this court can resolve the claim even if there are material facts in dispute: *McKay Estate v. Love* (1991), 6 O.R. (3d) 511 (Gen. Div.), aff'd (1991) 6 O.R. (3d) 511 (C.A.). Therefore, it argues that if the court is satisfied that this application is covered by Rule 14.05(3)(d), there is no need to consider submissions on whether material facts are in dispute, and it can adjudicate directly on the merits of the Applicant's claim.

[14] Alternatively, the Applicant submits that it can proceed by way of application where it is unlikely that there will be any material facts in dispute pursuant to Rule 14.05(3)(h). The Applicant submits that there are no material facts in dispute in this case, stating the following:

> (a) There is no dispute between the parties regarding the existence, validity or interpretation of the 2013 Agreement;
>
> (b) There is no dispute between the parties that the Applicant provided audit services to the SelectCore Respondents in accordance [with] the 2013 Agreement;
>
> (c) There is no dispute between the parties that the Applicant issued invoices in accordance with the 2013 Agreement; and
>
> (d) There is no dispute between the parties that the SelectCore Respondents benefitted from the services provided by the Applicant.

[15] The Applicant argues that it has a *prima facie* right to proceed by way of application and that a proceeding should not be converted into an action without good reason: *Przysuski v. City Optical Holdings Inc.*, 2013 ONSC 5709, at para. 6. Applications are generally less expensive and more expeditious than actions, and they allow scarce judicial resources to be allocated to where they are needed most. For this reason, it is submitted that applications are integral to the "culture shift" urged by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. The Applicant relies on the comment of Myers J. in *Hayat v. Raja*, 2014 ONSC 2947, at para. 2, that "[t]he Supreme Court's culture shift does not apply only when summary judgment is sought." Rather, all aspects of the civil justice system must be approached

through the lens of *Hryniak* and all civil proceedings should be resolved in the most proportionate, timely and affordable manner possible, in accordance with Rule 1.04(1).

[16] The Respondents submit that, on an application where there is only a paper record, a judge cannot opine on material facts or credibility of witnesses in anything other than the clearest of cases: *Yoo v. Kang*, [2002] O.J. No. 4041 (S.C.); *Newcastle Recycling Ltd. v. Clarington (Municipality)*, [2005] O.J. No. 5344 (C.A.). The Respondents submit that the evidence of the parties is clearly contradictory and that the Court should direct a trial of the competing evidence provided by the parties related to the issues of the promised discount and the interest charges.

The Law

[17] To determine whether I should exercise my discretion to convert the application to an action and direct a trial, I must consider: (a) whether there are material facts in dispute; (b) the presence of complex issues; (c) whether there is a need for the exchange of pleadings and discovery, and (d) the importance and the nature of the relief sought by application: *Sekhon v. Aerocar Limousine Services Co-Operative Ltd.*, 2013 ONSC 542, at para. 51, citing *McKay Estate*, at para. 6.

[18] I should also consider whether the affidavits and transcripts of cross-examination are enough to decide any credibility issues or a trial is required: *Sekhon*, at para. 51, citing *Metropolitan Toronto Condominium Corp. No. 747 v. Korolekh*, 2010 ONSC 4448, at paras. 57-61.

[19] Finally, I should consider whether, if the application had been brought as an action and a party moved for summary judgment, the Court would be satisfied that there is no genuine issue requiring trial: *Sekhon*, at para. 52, citing *A.M. Machining Inc. v. Silverstone Marble & Granite Inc.*, 2010 ONSC 71, at paras. 4-14.

[20] The Applicant submits that there are no material facts in dispute, the issues are not complex, and there is no need for pleadings and discovery. The Applicant seeks relief in the form of liquidated damages.

[21] The Applicant argues that the affidavits and the transcripts of the cross-examinations filed with the court are sufficient to resolve any credibility issues, if any actually do exist. The Applicant relies on *Yoo*, wherein the court stated, at para. 24:

> It is not open to a judge on an application, where affidavits and examinations in transcript form are the only evidence before the court, to decide the credibility of the witnesses in anything other than the clearest of cases, where the facts are in essence unopposed, or the facts are so clear that there is no genuine issue to be tried.

[22] The Applicant submits that this case is the "clearest of cases." The facts are unopposed, and the materials filed are sufficient for the court to make findings of credibility.

[23] I disagree. When I consider all of the factors I have referred to above, I do not accept the Applicant's submissions that this is the "clearest of cases." There are material facts in dispute with respect to whether there were promises made by the Applicant to apply a discount to its fees. Further, pleadings are required to determine the legal positions of both parties with respect to the amount of the debt owed by the Respondents to the Applicant. I am of the view that I cannot fairly determine the issues with respect to the material facts in dispute. This is not a motion for summary judgment wherein the parties set out their legal positions clearly in pleadings. It is difficult on this Application to determine the legal positions of the parties as they relate to the issues to be decided. In this regard, pleadings are required.

[24] I conclude that this application should be converted to an action and a trial be directed pursuant to Rule 38.10(b). The parties did not make any submissions on the procedure or timetable to be followed. I therefore order that:

(i) This application is converted into an action. The Applicant will be the Plaintiff and the Respondents shall be the defendants;

(ii) The Plaintiff has 15 days from today's date to deliver a Statement of Claim;

(iii) The Defendants have 10 days after delivery of the Plaintiff's Statement of Claim to deliver their Statement of Defence, with the Plaintiff having the right to Reply, in the usual manner.

(iv) If the parties cannot agree on a required timetable, this action is referred to a case managing Master to set a timetable.

Costs

[25] If the parties are unable to agree on costs, they may make brief written submissions (no longer than three pages). The defendants' submissions are to be delivered by 12:00 noon on September 16, 2016, and the plaintiff's submissions are to be delivered by 12:00 noon on September 30, 2016. Any reply submissions are to be delivered by 12:00 noon on September 23, 2016.

Pollak J.

Date: September 7, 2016