No. SC-14-9030-00

ONTARIO
SUPERIOR COURT OF JUSTICE

BRAMPTON SMALL CLAIMS COURT

B E T W E E N:

TECHNIQUE MICROSYSTEMS LTD.

Plaintiff

- and -

STOBAG NORTH AMERICA CORPORATION

Defendant

REASONS FOR JUDGMENT

APPEARANCES:

Shawn M. Philbert	For the plaintiff
Vladyslav Strashko	For the defendant

Introduction

1. The plaintiff, Technique Microsystems Ltd. ("Technique"), is an information technology firm. Technique provided services to the defendant, Stobag North America Corporation ("Stobag"), and rendered invoices to Stobag for the services that were provided.

2. Stobag did not pay all of the invoices. As a result, an outstanding balance of $16,611.01 had accumulated. On June 24, 2014, Technique and Stobag met to discuss the unpaid invoices. Two days after the meeting, Stobag emailed Technique to confirm that at the meeting, Technique had made an offer to settle for $8,000.00 and that Stobag accepts the

offer and will be forwarding a cheque for $8,000.00 to Technique for full payment of the outstanding amount.

3. Before cashing the cheque, Technique advised Stobag that it would be accepting the cheque as a partial payment against the outstanding amount and would commence legal proceedings if Stobag did not pay the remaining balance.

4. On December 22, 2014, Technique commenced an action against Stobag to recover the sum of $8,611.01. On January 19, 2015, Stobag delivered a defence in which it alleged that Technique's invoices contained inflated hours, inflated hourly rates, and were sent for work that was never requested, already paid, or never done. Stobag further alleged that the claim should be dismissed because Technique's claim for $16,611.01 had been settled for $8,000.00 and Technique had received payment of the settlement amount. In the alternative, Stobag alleged that the $8,000.00 payment that Stobag had made was more money than what Technique was entitled to receive on account of the unpaid invoices.

5. Given the above, the issues to be decided are:

   I. Was there a settlement of $8,000.00?

   II. Does Technique's acceptance of the $8,000.00 cheque preclude them from suing for the remaining balance?

   III. Does Stobag have a defence to the claim for the remaining balance?

The Witnesses at Trial

6. Shawn Connelly ("Connelly") and Nick Angel ("Angel") testified for Technique at the trial. Connelly and Angel are partners. Connelly's primary role was as IT manager. In that capacity, he supervised the technicians who provided the services. Angel's primary role was sales and purchasing. He also did the invoicing.

7. Rolf Jahn ("Jahn") and Amy Kwak ("Kwak") testified for Stobag at the trial. Jahn was Stobag's CEO until June 2015 and Kwak was the administrative manager.

Connelly's Evidence at Trial

8. Before doing business with Stobag, Technique had provided IT services to a corporation in which Jahn was associated. Jahn was satisfied with the services, so he hired Technique when he became the CEO of Stobag in 2010.

9. Technique and Stobag did not have a written contract. After setting up Stobag's computer system with an accounting software program known as Business Vision, Technique provided monthly on site and remote services to Stobag. Stobag's head office in Switzerland controlled Stobag's routers and servers.

10. Connelly identified the 12 invoices that Technique had rendered and which Stobag had not paid. The invoices were listed in paragraph 13 of the claim. Copies of the invoices were included in Tab A to the claim. The invoices totalled $16,611.01. The invoices were rendered from April 4, 2013 to April 1, 2014.

11. Each invoice contains a brief description of the services provided, and where applicable, the number of hours worked, and the rate charged for the services. Some of the invoices refer to a working through a "list of issues".

12. Connelly produced and identified Technique's maintenance notes (the "Notes") for the invoices. The Notes were marked, as Exhibit 1 at the trial. The Notes were made by Michael Hanley ("Hanley") and Jens Ehrich ("Ehrich"), the technicians who provided the services to Stobag. The Notes contain a more detailed description of the services that were provided and they confirm the time spent providing the services. Connelly had no concerns with Hanley's skills or training.

13. Based on Connelly's review of the Notes and the Invoices, he was satisfied that the invoices were proper and correct. He testified that the services had been provided, that the hours billed had been incurred, and the rates charged were correct. He was not aware of any complaints made by Stobag.

14. On several occasions, Connelly attempted to speak with Jahn about the unpaid invoices, but he was always told that Jahn was away or not available. He finally met with Jahn in October 2013 at which time Jahn made a payment on account of invoices rendered before April 4, 2013 and promised to pay the rest of the invoices when the Orange Trombone project was completed. This project was completed in April 2014.

15. Connelly's evidence was not challenged on cross-examination. Connelly was not questioned about the quality of the services provided, the time spent or the rates that had been charged.

16. Connelly did not have any personal knowledge about what happened at the meeting. However, based on what Angel had told him, Connelly believed that a settlement had not been made at the meeting. Although he was not at the meeting, Connelly testified that Angel had called him from the meeting with Stobag.

17. Connelly gave his position on some of the emails (Page 17, 19 and 21) that were contained in the Defence Documents, which was marked as Exhibit 2 at the trial. On cross-examination, Connelly was not asked any questions about the emails in Exhibit 2 other than the June 18, 2014 email from Kwak to Angel. Item 4 of that email refers to the list. Connelly stated that Kwak had prepared the list. Neither party produced the list.

Angel's Evidence at Trial

18. Angel prepared the invoices. Before sending out the invoices, Angel reviewed the Notes and spoke to Hanley and Ehrich. Angel also confirmed that the work had been done, the time had been spent, and the rates charged were proper.

19. From time to time, Angel called Stobag for payment. He does not recall Jahn having specific issues about the invoices, but he acknowledged that several months after the invoices were rendered, Jahn had some vague and general complaints about the services.

20. On June 24, 2014, Angel met with Jahn and Kwak to discuss the unpaid invoices. Going into the meeting, Angel was prepared to discount the outstanding amount to preserve the existing relationship. At the meeting, Angel offered Jahn a copy of the Notes, but Jahn declined a copy because he was not interested in getting details on the services that had been provided.

21. During the meeting, Jahn referred to notes that had been made on Jahn's copies of the unpaid invoices. The notes were based on an internal review of the services that Technique had provided. Angel said that the person who made the notes did not know what they were talking about. As an example, Angel states that someone had asked why Technique had used a 2½ inch hard drive. The question showed that this person did not know that a 2½ inch hard drive was the only available option given Stobag's computer system. Angel asked for an opportunity to speak with the person who made the notes, but Jahn refused.

22. At the meeting, Invoice No. 30017 dated April 1, 2014 for $1,067.85 was discussed. Jahn told Angel that Kwak had done the work and Angel believed what Jahn had told him.

23. Angel confirmed that he had offered to accept $8,000.00 to settle the outstanding amount. However, Jahn rejected this offer. When negotiations stalled, Angel called Connelly. During the discussion, Connelly told Angel that Connelly had done the work for Invoice

No. 30017 on an emergency basis. Upon learning that, Angel abruptly terminated the negotiations and left the meeting. In his words, all offers were pulled from the table.

24. On June 26, 2014, Angel received an email from Jahn. This email is located at page 2 of Exhibit 2. This email is reproduced below:

"Good afternoon Nick,

During our meeting on June 24./2014 you offered Stobag to **pay an amount of $ 8,000** in present of Amy Kwak and myself {Rolf Jahn).
Stobag North America Corp. herewith accept the offer from you and will send you a cheque with this amount.
Therefore it is agreed on, that all invoices on your last Statement from June 18./2014 which showed an amount of $ 16,611.01,
is in full paid with this $ 8,000 amount.
See also 2 attachments, Your Statement and Stobag cheque # 2697.

You admitted in our meeting on June 24./2014 that many hours (here mostly from your employee "Mike") which were not correctly charged
over a period of the last 3 years.

Stobag North America Corp. will send you today a cheque # 2697 with the amount of $ 8,000.

With this amount paid, we like to inform you that any service from your company is no longer required and asking back all information
which you received from any "Stobag" location, like "Pass words" or any other "information"... to send us in the next 5 days to our address.

Thank you for your co-operation in this matter.

Regards... Rolf Jahn"

25. Angel did not respond to the email. Instead, on July 23, 2014, Shawn Philbert ("Philbert"), Technique's lawyer, wrote a letter to Stobag. The purpose of the letter was to acknowledge that Technique had received an $8,000.00 cheque from Stobag and to advise Stobag that Technique intended to cash the cheque, apply the payment as a partial payment against the outstanding amount, and sue Stobag for the remaining balance if it was not paid. Philbert's letter dated July 23, 2014 is attached as Tab A to the claim.

26. On cross-examination, Angel stated that he did not recall saying that many hours were not correctly charged and he again stated that the charges on the invoices were proper.

The Evidence of Jahn

27. Jahn acknowledged the pre-existing relationship that he had with Connelly, Angel, and Technique. When he became Stobag's CEO in 2010, he purchased computer hardware and Business Vision from Technique and then retained Technique to provide IT services and maintenance.

28. Jahn was initially satisfied with the services provided by Technique, but the quality of services deteriorated when Hanley started working for Technique. Jahn made general complaints about the invoices. These complaints included services not being provided on a timely basis, invoices not being rendered on a timely basis, spending too much time trying to solve issues, which kept coming back, and the incompetence of Hanley.

29. Jahn had Stobag's IT department in Switzerland review the unpaid invoices and comment on the quality of the services provided and the time that had been spent providing the services. Based on this internal review, Jahn believed that the hours claimed by Technique were excessive and that Technique was entitled to maybe $5,000.00 of the $16,611.01 that it sought to recover from Stobag.

30. On cross-examination, Jahn admitted that some invoices were acceptable while others were not. Jahn could not identify the invoices that were in dispute and should not be paid in whole or in part. Jahn admitted that he was not an expert in computers or IT services and that he did not have the expertise to assess the quality of the services provided by Technique.

31. Jahn testified that during the meeting, Angel admitted that the unpaid invoices contained incorrect charges and he told Jahn that Hanley was no longer employed by Technique. Jahn said that he saw Exhibit 1 for the first time after the action was commenced.

32. Jahn testified that Angel made a settlement offer of $8,000.00, which he accepted. On cross-examination, Jahn was asked why he had not given Angel a cheque for $8,000.00 at the meeting. Jahn's reply was that he had offered a cheque to Angel. When asked how the meeting ended, Jahn stated that Angel walked out of the meeting after saying "This meeting is finished".

33. Jahn identified the June 26, 2014 email he sent to Angel and a copy of the cheque he had mailed. The cheque was written by hand. Jahn admitted that he had received Philbert's July 23, 2014 letter.

The Evidence of Kwak

34. Kwak was the person at Stobag who interacted with Connelly, Hanley, and Ehrich. Kwak made some general complaints about the unpaid invoices and the services that Technique had provided. She commented that the invoices did not contain much detail, some invoices were rendered three months after the services had been provided, and she felt that the charges were too high.

35. Kwak took issue with Invoice No. 30017 dated April 1, 2014 for $1,067.85. That invoice was for 6 hours of emergency service at the rate of $157.50 per hour. Kwak believed that Technique should only have charged the usual rate of $105.00 per hour because she called in the problem during regular business hours. On cross-examination, Kwak agreed that she did not know whether the work had been done after regular business hours.

36. Kwak confirmed that Stobag's IT department in Switzerland had reviewed the unpaid invoices before the meeting and she mentioned a second review by someone else after the meeting. On cross-examination, Kwak agreed that Stobag had not produced the review or the invoices with the review notes on them. She was unable to identify the invoices that should not be paid. She also acknowledged that while it was her opinion that when

Technique charged Stobag to fix a virus, the virus should not have come back 2 - 3 days later, she was not an expert in computers or IT services.

37. Kwak was at the meeting. She stated that Angel had made an offer to settle for $8,000.00 and that Jahn had accepted the offer. On cross-examination she agreed that Angel had called Connelly. She also agreed that Angel said something when he left the meeting, but she was not really sure what Angel had said. She thought Angel might have said something like he would have to discuss it with his partner.

Analysis

I. Was there a settlement?

38. The onus of proving that there was an $8,000.00 settlement rests upon Stobag. Looking at all of the evidence, I conclude that Stobag has not discharged that onus. Based on my review of the evidentiary record, I conclude that while Angel did make an $8,000.00 settlement offer at the meeting, Jahn rejected that offer. Further, when Angel left the meeting, he terminated the negotiations and pulled all offers off of the table. As a result, Jahn's June 26, 2014 email purportedly accepting the $8,000.00 offer had no legal effect because there was no offer to accept.

39. Angel's evidence that Jahn rejected the $8,000.00 offer at the meeting has a ring of truth. It is reasonable to assume that had Jahn accepted the offer at the meeting, as Jahn says he did, then the meeting would have ended amicably because the dispute would have been settled and Angel would have walked away from the meeting with a cheque for $8,000.00. He did not leave the meeting with a cheque because a settlement had not been made. Further, Jahn's statement that he accepted the offer at the meeting flies in the face of what Jahn said in his June 26, 2014 email.

40. My finding that the $8,000.00 offer made at the meeting was withdrawn is based on Angel's evidence, which is corroborated by the evidence of Jahn and Kwak. Angel stated that he abruptly ended the meeting because he thought that Jahn had lied to him about Invoice No. 30017. Before leaving, Angel announced that the negotiations were over. This is consistent with the evidence of Jahn and Kwak.

41. Jahn agreed that Angel walked out of the meeting stating "The meeting is finished." From that statement, it is reasonable to assume that the negotiations had broken down without a settlement having been made. While Kwak could not recall what Angel had said when he left the meeting, she thought that he had said something like Angel having to discuss it with his partner. This suggests that there was no outstanding offer to accept.

II. Acceptance of the $8,000.00 Cheque

42. Based on my review of the case law provided by Technique, I am satisfied that the cashing of the $8,000.00 cheque does not preclude Technique from suing for the remaining balance. In that regard, I adopt and rely upon paragraphs 31-36 from Quinn J.'s judgement in *Collins v. Saga Yachts Inc.*, 1998 CaswellOnt 1138 (O.C.G.D.):

> "31 The July, 1996 cheque from Saga which was cashed by the plaintiff in the face of the accompanying letter stating that, upon negotiation of the cheque, Saga "will conclude that [the plaintiff] has accepted this as final payment", raises the issue of accord and satisfaction. Did the plaintiff agree (the "accord") to accept the cheque (the "satisfaction") as full payment of the commission owed by Saga with respect to the sale to Brunner?
>
> 32 The doctrine of accord and satisfaction is statutorily reflected in s. 16 of the *Mercantile Law Amendment Act*:
>
> > 16. Part performance of an obligation either before or after a breach thereof when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.
>
> 33 It is a question of fact whether there has been an accord and satisfaction. In *Day v. McLea* it was held:
>
> > ...If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of

> the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view.

34 That the plaintiff at bar kept and cashed the cheque is not, by itself, conclusive of his intention to accept part payment as payment in full of the larger debt.

35 There must be an intention on the part of the creditor to take the money or cheque, as the case may be, in full settlement of the claim that he or she would otherwise have against the debtor. Furthermore, silence by the creditor, as to his or her intentions, is not determinative of the issue:

> ... while the silence of a creditor may be some evidence which is to be considered with all the other evidence in deciding whether or not there has been express acceptance... it is not a factor which is singly governing the rights of the parties.

> ... A defendant, pleading s. 16 of the *Mercantile Law Amendment Act*, has in my opinion a heavy onus. He must prove an express acceptance of part performance.

36 It is not a correct statement of law to say that if a creditor receives a cheque, stipulated to be payment in full of a larger amount, he or she is required to immediately advise the debtor that the cheque is being accepted only as part payment.

43. In the present case, before cashing the cheque, Technique advised Stobag that it was accepting the cheque as a *partial* payment and it would sue for the remaining balance if not paid. There was no accord and satisfaction. Technique is not estopped or precluded from bringing the claim.

III. The Remaining Balance

44. The onus is on Stobag to prove that Technique should not be entitled to the remaining balance because the invoices contained inflated hours, inflated fees, and were sent for work that was never requested, already paid, or never done. Stobag fell well short of discharging that onus.

45. Stobag failed to put its best foot forward. Stobag did not identify the specific invoices that should not be paid or provide cogent evidence to support its position. Further, the evidence of Connelly or Angel with respect to the propriety of the invoices was not challenged on cross-examination.

46. The Deputy Judge at the settlement conference had ordered Stobag to produce any expert report they were relying on. None was produced. Further, although Stobag relied on its own internal review of the unpaid invoices, Stobag did not produce the internal review. I therefore give no weight to the hearsay evidence of Jahn based on the internal review.

47. While Jahn and Kwak may feel or believe that the tasks completed by Technique should have been done in less time or that some issues should not have appeared two days after having been fixed, Jahn and Kwak are not experts. The remaining balance cannot be reduced based on what Jahn and Kwak believe they should have been charged.

Conclusion

48. For reasons set out above, Technique is entitled to a judgment against Stobag for $8,611.01 plus prejudgment interest calculated pursuant to the *Courts of Justice Act*, R.S.O. 1990, c.C.43 (the "CJA"). This judgment bears postjudgment interest pursuant to the CJA.

Costs

49. Costs normally follow the result. However, offers to settle and other circumstances can affect the general rule. If the parties cannot agree on the costs, then they can make written costs submission to me. Technique shall deliver its costs submissions limited to three pages not including attachments, within 30 days and Stobag shall deliver its costs submissions within 40 days of the date of my decision. Stobag's costs submissions are also limited to three pages without attachments. The costs submissions shall be filed with the court.

March 18, 2016

Ian Latimer

Deputy Judge Latimer