

**IN THE DISTRICT COURT  
AT HAMILTON**

**CIV-2015-043 - 000197  
[2016] NZDC 11552**

BETWEEN                      KS NEW ZEALAND DISCOUNT  
   HOUSE LIMITED  
   Plaintiff

AND                                SPICEBERG LIMITED  
   Defendant

Hearing:                      21 June 2016

Appearances:                AJ Nolan for the Plaintiff  
   Defendant in Person (Mr K Singh)

Judgment:                    24 June 2016

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**RESERVED JUDGMENT OF JUDGE A S MENZIES**

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[1]     The Plaintiff sold the Defendant the tangible assets of a business located at 562 Devon Street, East Fitzroy, New Plymouth. The terms of the transaction were set out in a written agreement for sale and purchase of a business dated 3 May 2014. That agreement was prepared and signed by the parties without legal input.

[2]     The key terms of the agreement were:

(a)     Purchase price \$33,000.00 plus finance from Canon Finance \$2,000.00.

(b)     Payment by way of deposit of \$5,000.00 with balance payable:

(i)     \$5,000.00 - 11 June 2014

(ii)    \$5,000.00 - September 2014

(iii) \$9,000.00 - December 2014

(iv) \$9,000.00 - March 2015.

[3] It is common ground that the sum of \$9,500.00 has been paid and the Defendant also accepts that a balance of \$6,081.89 is payable. From the purchase price, that leaves an outstanding balance of \$17,418.11 which is in dispute. The Defendant says it is not liable for that sum for four reasons described as follows:

(a) \$2,838.05 – Summit Trades Limited

(b) \$18,080.06 – Lamberts

(c) \$12,000.00 - cost of restoring open deli fridge

(d) \$700.00 paid in cash

[4] Each of those items is now discussed.

### **Summit Trades Limited**

[5] The defendant says that upon taking over the business it paid to Summit Trades Limited the sum of \$2,838.05 in relation to a sum outstanding to that company by the Plaintiff for stock in the business on possession date (11 June 2014). The Defendant says that amount was a debt by the Plaintiff which it was obliged to pay to continue trading and should be offset against the purchase price outstanding.

[6] The Plaintiff on the other hand says that the agreement itself did not provide for the sale of any stock. The Plaintiff says that an oral agreement was reached between the parties, that the Plaintiff would leave all of the stock present in the premises on possession date (which the Plaintiff estimates as being of value of up to \$10,000.00) on the basis that the Defendant would in return meet the Plaintiff's liability to Summit Trades Limited. The Plaintiff says it was prepared to make that arrangement because of the past relationship between the personnel of the two companies combined with the fact that the principal of the Plaintiff's company

Mr Swami was intending to cease business for personal reasons. Therefore the stock would be of limited use to him and he would be faced with selling it separately.

[7] There is no argument that the stock was left in the premises upon possession date. There is also no argument that the agreement does not purport to transfer any stock in trade and the stock did not form part of the written agreement. It does not appear to me logical that the Plaintiff would simply abandon that stock and leave it as a windfall for the Defendant and still have an ongoing liability to Summit Trades Limited for its purchase.

[8] I am satisfied from the evidence that Mr Swami and his wife provided about the arrangement and I did not find the evidence from the Defendant's witnesses compelling on the point. I am therefore satisfied that the arrangement was as claimed by the Plaintiff that the Defendant was entitled to retain the stock in return for agreeing to meet the liability of the Plaintiff to Summit Trades Limited. There is therefore not basis to deduct the sum of \$2,838.05 from the amount claimed.

### **Lamberts**

[9] It is common ground that upon possession date the Plaintiff owed money to Lamberts or more specifically to Canon Finance for a point of sale system necessary for running the business.

[10] The Plaintiff's case is that the original agreement between the parties was for the purchase price to be \$35,000.00. However, as the result of negotiations, agreement was reached that the purchase price would be reduced to \$33,000.00 on the basis that the Plaintiff would take over responsibility for the finance from Canon Finance for the point of sale system. That claim is corroborated by the agreement itself. It is clear that the original purchase price was \$35,000.00 and has been changed to \$33,000.00 with the added words "plus finance from Canon Finance \$2,000.00". Therefore, the agreement confirms that the issue of liability to Canon Finance was addressed at the time the agreement was signed and the agreement confirms the position claimed by the Plaintiff.

[11] The Defendant's evidence about this issue again was not compelling. There was no real explanation offered for the change in the purchase price and specific reference to Canon Finance and it is difficult to see what other explanation there would be beyond the explanation by the Plaintiff.

[12] I accept the Plaintiff's explanation on this issue and do not accept any deduction is warranted from the purchase price in relation to finance outstanding for the point of sale system paid by the Defendant.

### **Open deli fridge**

[13] This item was the major source of argument between the parties and is the largest single item in debate. It was common ground that Mr Singh had assisted Mr Swami in 2011 when Mr Swami was involved in the purchase of certain items which led to a dispute with a third party. As a result of that dispute which was ongoing at the date of agreement, Mr Swami had in his possession a freezer unit which was not operative. The reason that it did not work was primarily explained as being on the basis that the wrong motor had been supplied with the unit and the unit could not therefore function. A different motor would be required and that issue had not altered at the date of possession.

[14] The Plaintiff says the unit was essentially sold "as is where is". That claim is corroborated by the agreement itself which lists in Schedule 1 under List of Tangible Assets:

Display unit 9 x 2 without the motor

[15] Evidence was given by both Mr and Mrs Swami that the agreement was prepared in that manner to make it clear that the unit was being supplied without a motor. It had never operated within the Plaintiff's business and the Defendant was aware that was the case.

[16] The Plaintiff claims simply that the issue of the freezer unit was dealt with by the agreement recording the freezer unit being sold without a motor which is what occurred.

[17] The Defendant's argument is that contrary to the wording of the agreement, the Plaintiff promised to have the freezer in working order at the time of sale or account for the value to restore it to a working state. The Defendant now says that the cost of restoring the fridge to a working state is \$12,000.00 and that sum should be set off against the purchase price.

[18] The Defendant's claim meets the immediate and in my view insuperable obstacle that the argument advanced by the Defendant is directly contrary to the terms of the written agreement acknowledged and signed by the Defendant. Both Mr and Mrs Swami stated that there was no commitment made to do anything in relation to the freezer and specifically noted the agreement to that effect. There is no other documentary evidence to support the Defendant's claim and I find the claim unlikely and inconsistent with the circumstances at the time. Mr Swami was still embroiled in a dispute about the freezer unit.

[19] I accept the Plaintiff's evidence in relation to this issue and find that the position in relation to the freezer was as set out in the agreement. The display unit was supplied without the motor and there was no ongoing associated liability on the part of the Plaintiff. It is not therefore appropriate to set off any amount from the outstanding purchase price in relation to this issue.

**Cash payment \$700.00**

[20] The Defendant argues that Mr Sahib Singh paid the sum of \$700.00 to Mr Swami in cash on account of the purchase price and that amount therefore should be deducted from the Plaintiff's claim. Mr Singh himself gave evidence to that effect and said that he withdrew the money from an ATM machine and handed it to Mr Swami at the business address. Mr Singh did not have any supporting documentation such as a bank statement or ATM statement confirming the withdrawal. Nonetheless he was adamant in his evidence that he withdrew the money and made the payment.

[21] That matter was not put to Mr Swami specifically when he gave his evidence initially. I therefore allowed Mr Swami to be re-called and asked him to comment on

the evidence that Mr Singh had given. Mr Swami's first response was to say that if such a payment had been made, he would instruct his lawyers to adjust the claim accordingly. He then vacillated about the issue stating at different times that he was unsure if it had been made and then disputed that it had been made. I find Mr Swami's evidence on this issue unreliable and my view is that the true position is he cannot accurately recall whether such payment was made or not. Against that Mr Singh was adamant that such a payment was made and I am satisfied such payment was indeed made. The sum of \$700.00 should therefore be deducted from the claim.

### **Outcome**

[22] With the exception of that \$700.00, the setoffs claimed by the Defendant against the amount outstanding fail applying the requisite standard of the balance of probabilities. The Plaintiff is therefore entitled to judgment in the sum of \$22,800.00 together with interest from 1 April 2015 until judgment together with costs on a 2B basis to be fixed by the Registrar.

A S Menzies  
District Court Judge