

County Festival Feud: Plaintiff fails to prove verbal agreement or bad faith against festival organizers and municipality

Contract Law | Litigation | Litigation & Dispute Resolution | Municipal Act | Ontario Limitations Act

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The annual “Smoke ‘N’ Spurs Festival” on the Labour Day Weekend in Powassan, Ontario, commenced in 2013. A caterer for the Festival from 2013-2015, claimed that he was lured away from another Labour Day Weekend festival (the “Powassan Fall Festival”) with the promise of a five-year catering contract. For the first three years, he provided food and beverage catering to the Smoke ‘N’ Spurs Festival (the “Festival”). In 2016, however, the Festival’s owners notified the plaintiff that he would not be catering the event any longer.

With the Festival only weeks away, the organizers sought the assistance of the Municipality of Powassan as they were worried they would not be able to obtain a liquor permit on time. The municipality was asked to cater alcohol for the Festival under its permit. After a special meeting of council, a resolution was passed supporting the Festival’s request.

Dissatisfied with this turn of events, the spurned caterer sued the Festival and its owners, as well as the municipality and its mayor. The plaintiff claimed breach of contract, negligence and/or negligent representation, and bad faith. He alleged that he had a verbal agreement with the Festival which had been improperly terminated. The crux of his complaint against the municipality and the mayor was that they interfered in his dealings with the Festival and its owners.

All of the defendants denied that there was any verbal contract to be breached. The municipality and its mayor further argued that there was no evidence of bad faith and that the action against them was statute-barred under the Ontario *Limitations Act, 2002*.

Summary judgment motions to dismiss the plaintiff’s claims were heard by The Honourable Justice Patrick Boucher in February 2021.

The first issue the court had to address was whether there actually was a contract between the plaintiff and the Festival. As noted by Justice Boucher, one of the few things the parties agreed upon was that they were not bound by a *written* contract. There wasn’t even a memorandum of understanding or other written document which set out any alleged obligations in writing. The issue was therefore whether the conduct of the parties had created any binding legal obligations.

There was some law in the plaintiff’s favour. In that regard, a party’s course of conduct may indicate an agreement to certain terms and create binding obligations. Justice Boucher referred to a prior decision of the court in *Ottawa Convention Centre Corp. v. Treefort Hip Productions Inc.* [2018] O.J. No. 4577 (SCJ) for a summary of the applicable law:

A party’s course of conduct may constitute acceptance of certain terms of business and give rise to binding obligations. The answer to the question of whether a binding course of dealings arises depends upon a reasonable and objective construction of the conduct of the parties (*Saint John Tug Boat Co. v. Irving Refinery Ltd.*, 1964 CanLII 88 (SCC), [1964] S.C.R. 614 at paras 18-19). Put another way, the test is whether the evidence of the relationship between the parties and all that passed between them, viewed objectively in the relevant commercial context, indicates an intention to be bound by particular terms (*Benny Haulage Ltd. v. Carosi Construction Ltd.* (1996), 33 C.L.R.).

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(2s) 47 (Ont. Ct. J. (Gen. Div.)), appeal heard and quantum of award varied, 39 C.L.R. (2d) 175 (Ont. Div. Ct.), leave to appeal to ONCA refused, July 21, 1998, 40 C.L.R. (2d) 247 (C.A.), at para. 17

The plaintiff swore an affidavit which set out his version of the events and alleged that he and the owners of the Festival had agreed upon a five-year contract for exclusive food and beverage catering in 2013, with an option to renew for another five years. Revenues were to be split 60/40 in the first two years and 70/30 thereafter. The plaintiff claimed he would not have agreed to change festivals without the contract, since having two festivals in a small community on the same weekend would upset a lot of people.

The owners of the Festival denied that there was a five-year agreement with the plaintiff and they claimed that the Festival was organized on a year-to-year basis. In 2016, they grew concerned that the plaintiff would not be catering the Festival that year because he was complaining about losing money. They were concerned that he had not taken steps to hire paid duty police or confirm the alcohol licence in time. As a result, they reached out to several caterers and sought the assistance of the municipality to cater the alcohol for the event if necessary.

There was no written contract and the plaintiff could not locate any text messages which he believed had been exchanged with the owners of the Festival at the time. As a result, the plaintiff's case turned largely on the court's assessment of his credibility. Justice Boucher did not find the plaintiff to be a credible witness. Cross-examination on his affidavit demonstrated that his evidence was riddled with inconsistencies which undermined the nature of his claim, which depended on reliable proof of the formation and terms of an unwritten agreement.

Justice Boucher was unable to find that the parties agreed to define their relationship by a long-term verbal agreement. Rather, the parties knew each other and lived in a small community. From year-to-year, they would meet at some point to discuss the open-ended possibility of the plaintiff catering food and alcohol at the Festival. This provided enough time for alternative arrangements to be made. For three years this worked well for all of them and then things changed. There was no merit to the claims of negligence and/or negligent misrepresentation against the Festival and its owners.

Further, even if the corporate owner of the Festival was liable, Justice Boucher found that there was no evidence that its individual owners had acted outside the scope of their roles as directors and officers thereof. They did not personally engage in tortious conduct or "exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own" (*ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.*, 1995 CanLII 1301 (ON CA), [1995] O.J. No. 3556 (ONCA)). Accordingly, there was no basis for a separate claim against the individuals.

As for the municipality, Justice Boucher found no merit to the plaintiff's allegations of bad faith and negligence. The mayor brought the catering issue to a special meeting of council. It was not a secret meeting and they were not required to invite the plaintiff. At that meeting the mayor acknowledged several times that he could not bind Council and a vote was required. Councilors had the chance to ask questions. Council agreed by resolution to help if no other caterer could be located. They made this decision in the public interest, noting that the Festival was beneficial to the community. They did not in their resolution exclude the plaintiff as potential caterers.

Further, six days after agreeing to assist, the municipality was advised that the Festival would be able to cater the alcohol without municipal assistance. Nothing that happened in that brief period could be construed as bad faith or negligence.

Finally, although not necessary given the other findings, Justice Boucher found that the claims against the municipality and mayor were statute-barred by the two-year limitation period in the *Limitations Act, 2002*, as the plaintiff had reasonable grounds to discover his claims by at least August 20, 2016, and failed to commence the action within two years thereafter.

The decision reflects the difficulties that a party will face when attempting to prove the existence of a binding verbal agreement. There is no question that oral agreements may be binding, provided that the proof of the requisite elements of a contract are established, namely offer, acceptance, and consideration: *S & J Gareri Trucking Ltd. v. Onyx Corporation*, 2016 ONCA 505 (CanLII), para. 7. In the case at hand the plaintiff was unable to provide credible evidence of the formation of the contract or the certainty of its alleged terms. The plaintiff did not appear to have any contemporaneous documentation to reflect his alleged agreement with the Festival, and the court found him to be "careless with the truth." As a result, his evidence of the verbal agreement was insufficient. A PDF version is available to download [here](#).

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