

CITATION: Bigwin v. Trade X, 2024 ONSC 3827
COURT FILE NO.: CV-22-00684407-0000
DATE: 20240704

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
)
BIGWIN GROUP INC.)
) *Sara J. Erskine, for the Plaintiff*
)
Plaintiff)
- and -)
)
TRADE X GROUP OF COMPANIES INC.)
) *Peter Smiley, for the Defendant*
)
Defendant)
)
)
)
) **HEARD:** December 13, 2023

JUSTICE J.S. SHIN DOI

- [1] The Plaintiff, Bigwin Group Inc., was retained by the Defendant, Trade X Group of Companies Inc. to conduct an executive search for a global Chief Financial Officer. The Plaintiff claims the amount of \$67,000 as damages for breach of contract and breach of the duty of honesty and good faith.
- [2] The Defendant did not take a position at the summary trial. The Defendant’s counsel advised that the Defendant was a defunct company and he could not get instructions.
- [3] I find that the Defendant breached the executive search contract by not paying the Plaintiff monies due and owing under the contract. I also find that the Defendant breached the duty to act honestly and in good faith in the performance of the contract because the Defendant misled the Plaintiff. The Defendant also did not follow through with the contract and did not allow the Plaintiff to conclude the search for the Chief Financial Officer. I order the Defendant to pay the Plaintiff the amount of \$67,000 as damages plus pre-judgment and post-judgment interest. The Defendant shall also pay the Plaintiff costs in the amount of \$17,832.74 as requested by the Plaintiff.

Facts

- [4] The background facts are set out in the Affidavit of Ron Hulse, a representative of the Plaintiff. Excerpts are set out, in part, below.
- [5] In October 2021, the Defendant contacted the Plaintiff to assist with a search for a global Chief Financial Officer. The parties entered into a letter agreement for the search services (the “Engagement Letter”) dated October 5, 2021.
- [6] The Engagement Letter stipulates that the total fee for the Plaintiff’s services is \$100,000, plus out of pocket expenses. The Engagement Letter states that the fee is to be paid as follows:
1. First payment of \$33,000 will be payable upon signing of this agreement. This fee is non-refundable.
 2. Second payment of \$33,000 will be payable upon presentation of 3 bona fide candidates, which Trade X Group of Companies Inc. agrees to interview.
 3. Third payment of \$34,000 will be payable upon candidate’s acceptance and signing of offer letter.

The term “bona fide” was defined in the Engagement Letter as 3 candidates who met the specifications and whom the Defendant agrees to interview.

- [7] The Defendant made the first payment to the Plaintiff on November 29, 2021, pursuant to the Engagement Letter. The Defendant did not pay the second and third payments to the Plaintiff.
- [8] As part of its recruitment process, the Plaintiff sent a leadership matrix to the Defendant in order to set out several principles that the Plaintiff would look for in its potential candidates. On November 30, 2021, the Plaintiff sent the matrix to Neil Singh Shah, Director of People and Culture of the Defendant and Luciano Butera, Chief Operations Officer. In this correspondence, the Plaintiff also requested content so that the Plaintiff could produce a position description which would be used with the Predictive Index, a talent optimization tool, in order to create a job model. The Plaintiff used a tool called Lumina to create interview guides to screen candidates that the Plaintiff selects through its pre-selection process. The Plaintiff prepared a draft Position Profile and forwarded it to Mr. Shah and Mr. Butera on December 6, 2021. The Plaintiff explained that it would create a model for cognitive and behavioral comparisons and that the Defendant's input would guide the priorities and job competencies necessary for the role so that the Plaintiff could properly assess and screen candidates. Mr. Shah responded with some suggestions for the Position Profile. In January 2022, the Defendant subsequently signed off on the Position Profile.
- [9] The Plaintiff presented candidates to the Defendant for interview and the Defendant interviewed nine of them. The Defendant made a verbal offer to Candidate #3 but she

withdrew from the search because the Defendant had taken a long time scheduling the follow up meetings and there was a lack of face time with the Defendant.

- [10] On May 6, 2022, Candidate #6 wrote to the Plaintiff inquiring about next steps. The Plaintiff advised that the fit was very strong and that it had reached out to the Defendant. Candidate #6 advised he was delaying responses to two other offers and that he had received an offer letter from another company that day. The Plaintiff then forwarded Candidate #6's email to Mr. Shah advising that an interview should be scheduled with Mr. Marcus and Mr. Butera immediately or that the candidate would be lost. Mr. Shah advised he would forward this to Mr. Butera and that if Candidate #6 did not work out, others in the Plaintiff's pool of prospects would be as good.
- [11] Candidate #6 was interviewed by Mr. Butera and Mr. Marcus on May 7, 2022. Candidate #6 thanked them for the interview and Mr. Butera responded to set up a follow up interview with Mr. Davidson. Mr. Davidson's assistant reached out to Candidate #6 to schedule this interview and Mr. Shah wrote to confirm that they were waiting on Candidate #6 to reply. The Plaintiff followed up with Candidate #6, who advised that he had responded and set up the meeting with Mr. Davidson. The Plaintiff also noted that a meeting to review remaining candidates would be scheduled.
- [12] The Plaintiff emailed Candidate #6 on May 10, 2022 to provide assessments he had completed to provide insight on fit for his role with the Defendant, advising that there was very strong alignment. Candidate #6 responded that Mr. Butera had made him a verbal offer of \$350,000 base, with a 33% bonus and 20,000 stock options, but that the Defendant would require board approval before sending the formal offer letter. The Plaintiff then began the next stage of reference checking and Candidate #6 submitted his references to the Plaintiff. On May 18, 2022, the Plaintiff advised Candidate #6 that Mr. Shah had told the Plaintiff that the Defendant's board was putting together an approved offer and that the Plaintiff would forward material to confirm that all of Candidate #6's criteria had been met. Candidate #6 responded advising that Mr. Shah had told him verbally that his written offer was submitted to the Defendant's board on May 13, 2022 and that he was supposed to have received it by May 17, 2022, but one of the board members was on vacation and that the written offer would come by the end of the week.
- [13] The Plaintiff wrote to Mr. Shah advising that the Plaintiff was waiting on two of Candidate #6's references and that his references were excellent. Mr. Shah advised that they were waiting for final board approval before submitting the offer to Candidate #6 and that Mr. Shah had been in contact with Candidate #6 each step of the way. The Plaintiff then forwarded Mr. Shah Candidate #6's complete references, background checks and verification. The Plaintiff asked Mr. Shah what needed to be done to ensure that Candidate #6 got across the finish line given that there was a verbal offer. The Plaintiff requested a timeline for a written offer.
- [14] Two days later, Mr. Shah called to advise that the Defendant Board had not approved an offer to Candidate #6, determining that he did not have the specific experience they felt he required for the role. Candidate #6 then called the Plaintiff to inquire about the status of

his written offer, expressing anxiety about notifying his current CEO of his pending departure but not having yet received a written offer. The Plaintiff requested a call with Mr. Shah to consider next steps and advised that in order to protect the Defendant's interests and be fair and professional to the candidate, that the sooner the parties communicated with Candidate #6 the better for everyone. The Plaintiff emphasized that in its professional opinion that Candidate #6 was a worthy and capable Chief Financial Officer well suited to the Defendant's needs.

- [15] Following the Plaintiff's call with Candidate #6, Candidate #6 emailed Mr. Shah at 12:54 p.m. on May 27, 2022 asking whether he would receive his offer letter and advising that he had told his current CEO that he would be resigning from his position as CFO. Candidate #6 had not formally announced his departure to the board and would have to comply with a 30-day notice period. Candidate #6 forwarded this to the Plaintiff and the Plaintiff advised Candidate #6 that the Plaintiff would be in touch as soon the Plaintiff spoke with the Defendant.
- [16] Later in the afternoon of May 27, 2022 at 3:40 p.m., Mr. Shah emailed Candidate #6 advising that the Defendant would not be proceeding with his candidacy and that they had "understood that the Plaintiff had communicated this and apologized for any inconvenience caused by their failure to do so." This was contrary to the Plaintiff's conversation with Mr. Shah on May 26, 2022 and the Plaintiff's email to Mr. Shah on May 27, 2022 at 12:04 p.m.
- [17] The Plaintiff was not copied on Mr. Shah's May 27, 2022 email to Candidate #6, who forwarded it to the Plaintiff separately, advising that this was unacceptable as he had given up a legitimate offer for the Defendant.
- [18] A few days later, the Plaintiff emailed Mr. Shah to advise him that the Plaintiff had spoken with Candidate #6 and that it would be professional to provide some insight into why the Defendant had not moved forward. The Plaintiff advised that if the Defendant wanted the Plaintiff to continue surfacing candidates that the Plaintiff needed to understand what they thought was missing given Candidate #6's experience met all of their criteria. The Plaintiff also requested the second payment under the Engagement Letter, since more than three candidates that met the Defendant's specifications had been interviewed by the Defendant.
- [19] Mr. Shah responded asking that the parties regroup and that he would set up a call with Mr. Butera, with the goal being to move forward despite the fact that they may have lost quality candidates and that the Defendant would be in touch. Soon after, the Defendant stopped responding to the Plaintiff's communications.

Did the Defendant breach the Engagement Letter?

- [20] It is clear that the Defendant breached the Engagement Letter by not making the second payment to the Plaintiff. Pursuant to the Engagement Letter, the Defendant is required to pay the Plaintiff the amount of \$33,000 upon presentation of three *bona fide* candidates who met the specifications and whom the Defendant agrees to interview. The Plaintiff presented more than three *bona fide* candidates who met the specifications and whom the

Defendant interviewed in satisfaction of the second milestone in the Engagement Letter. The Defendant interviewed nine candidates. The Defendant did not pay the Plaintiff in accordance with the Engagement Letter.

- [21] The Defendant also did not make the third payment to the Plaintiff. There was no breach by the Defendant for failing to make the third payment as there was no written offer that was signed triggering the third payment in accordance with the Engagement Letter. The Engagement Letter requires the Defendant to pay the Plaintiff the amount of \$34,000 upon acceptance and signing of an offer letter. It is arguable that the Defendant is not required to pay the Plaintiff that amount because there was no signed written offer. The Plaintiff did make verbal offers to both Candidate #3 and Candidate #6. The Plaintiff submits that the Defendant delayed the presentation of a written offer to Candidate #3 and Candidate #3 accepted a competing offer in the interim. The communications between Candidate #6 and each of the Plaintiff and the Defendant make it clear that it was Candidate #6's intention to accept the Defendant's written offer. Candidate #6 informed his current employer about his pending departure. The Defendant always communicated that it required board approval prior to presenting a formal written offer. The Defendant explained to the Plaintiff that the Board did not approve an offer to Candidate #6 determining that he did not have the specific experience they felt was required for the role. The Defendant was entitled to seek Board approval prior to making a formal written offer. The Defendant was only required to make the third payment upon signing of a written offer and failing to make the third payment does not constitute a breach.

Did the Defendant breach its duty to act honestly and in good faith?

- [22] The Defendant breached its duty to act honestly and in good faith.
- [23] In *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para 3, Kasirer J. cited *Bhasin v. Hrynew*, 2014 SCC 71 which held that the “duty of honesty applies to all contracts as a matter of contractual doctrine and means “simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract”. Kasirer J. further opined at para 5 that the duty precludes “active deception”.
- [24] In this case, the Defendant breached its duty to act honestly and in good faith by not following through with the Engagement Letter and allowing the Plaintiff to complete the search. The parties worked together on the executive search from October 2021 to May 2022. The Defendant selected two candidates for the role of Chief Financial Officer, both of whom met the specifications in the opinion of the Plaintiff. The Defendant was entitled to seek approval of its Board of Directors prior to presenting a written offer and appointing a candidate as the Chief Financial Officer. However, the Defendant failed to provide insight into why the Defendant had not moved forward with Candidate #6. The Plaintiff did an incredible amount of work and was still willing to continue searching for candidates to meet the Defendant's criteria. The Defendant misled the Plaintiff stating that they would regroup and set up a call with the goal to move forward. The unresponsiveness and silence of the Defendant thereafter constitute active deception. The Plaintiff was not given an opportunity to conclude the search. The Defendant did not act honestly and in good faith.

Disposition and Costs

- [25] I find that the Defendant breached the Engagement Letter by not making the second payment which was due and owing to the Plaintiff. The Defendant also breached its duty to act honestly and in good faith by misleading the Plaintiff, not following through with the Engagement Letter, and not allowing the Plaintiff to conclude the search.
- [26] The Defendant shall pay the Plaintiff the amount of \$67,000, plus interest and costs in the amount of \$17,832.74.
- [27] The Plaintiff requested that this judgment be without prejudice to the enforcement of the judgment against the CEO of the Defendant who personally provided a guarantee during settlement negotiations. The Plaintiff may take such steps as it deems necessary to enforce its judgment. I make no ruling on such steps.

SHIN DOI, J.

Released: July 4, 2024

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Plaintiff

– and –

TRADE X GROUP OF COMPANIES INC.

Defendant

REASONS FOR JUDGMENT

JUSTICE JS. SHIN DOI

Released: July 4, 2024