Claim No. 352256

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Jackman v. Cape Breton Exhibition, 2011 NSSM 50

BETWEEN:

TERRENCE JACKMAN

CLAIMANT

-and-

CAPE BRETON EXHIBITION

DEFENDANT

REASONS FOR DECISION

BEFORE

Ralph W. Ripley - Adjudicator

Hearing held at Sydney, Nova Scotia, on September 20, 2011

Decision rendered on September 26, 2011

APPEARANCES

Claimant - Self Represented

Defendant - Maureen Murphy

The Claimant, Terrence Jackman (hereinafter referred to as "Mr. Jackman"), owns, and at all material times to this action owned, a 19 foot power boat. According to the evidence, for many years prior to 2010, Mr. Jackman had stored that power boat for the Winter in the covered arena at the "Cape Breton Exhibition" site in North Sydney (hereinafter known as the "Defendant") .

Mr. Jackman brought action against the Defendant named in his claim as "Cape Breton Exhibition".

Exhibit 3 in the proceeding, introduced by the Defendant, notes the "Winter Storage Contract" to be with the "Cape Breton Federation of Agriculture".

Ms. Maureen Murphy, who acted for the Defendant, as well as giving evidence, acknowledged that the appropriate name of the Defendant was "Cape Breton Richmond Federation of Agriculture". When asked if the Defendant raised any technical defences with respect to the naming of the Defendant in Jackman's claim, Ms. Murphy, to her credit, indicated that she did not. Ms. Murphy acknowledged that the appropriate party to be sued would be the "Cape Breton Richmond Federation of Agriculture", and would respond as if the appropriate party had been sued by Mr. Jackman.

The decision is predicated on that acknowledgment and any Order, if necessary, should be made with respect to the "Cape Breton Richmond Federation of Agriculture", as the Defendant.

Mr. Jackman testified that he owned a power boat, and that he had for many years (7-8), stored his power boat for the Winter at the arena at the Cape Breton Exhibition site in North Sydney. It provided "covered" or "indoor" storage.

Mr. Jackman testified that in October 2010, as he had in earlier years, he brought his power boat to the Cape Breton Exhibition site, with the understanding that it would be stored indoors.

Mr. Jackman indicated that he spoke with Donnie MacDonald (with whom he was familiar), an employee of the Cape Breton Exhibition, who indicated that they were having some sprinkler work done on the arena, and that there would be a "couple of weeks" when they would have to remove items from the arena to have that work done.

Mr. Jackman testified that in 2010, as in past years, he did not pay for the storage at the time he dropped off his power boat, but was aware that the charge was $1.50 per day for a power boat of that length (19' and over - including hitch) and as was the case in previous years the charges would be paid when the boat was removed as the number of days the boat was stored could be calculated at that time. Mr. Jackman's testimony in that regard is supported by Exhibit 3, which indicates that charge. Exhibit 3 notes Mr. Jackman signing that document on November 4, 2010. Mr. Jackman's evidence on the manner in which payment was made and charges calculated is also supported by evidence called by the Defendant.

There appears to be no contest that the intention of the Parties was that the power boat was left with the Defendant to be stored for payment. I find that the Defendant later waiving the charges does not alter that characterization of the relationship.

I find that it was certainly intended by all Parties that the storage of Mr. Jackman's power boat was to be "indoor" storage.

At the hearing, the Defendant's representative appeared to make an argument that the storage payment of $1.50 per day could be for either indoor or outdoor storage. I do not accept that position. The fact that someone such as Mr. Jackman was prepared to pay $1.50 per day for storage, when they could leave the power boat in someone's uncovered yard without payment, certainly underlines what I accept as the intention of the Parties, namely that Mr. Jackman would pay $1.50 per day to the Defendant, and the Defendant would provide in door storage.

I accept that Mr. Jackman was informed that there may have been some time when the boat would be removed for a short period of time from covered or indoor storage. I do not accept that he was informed that it would remain out doors as long as it did.

Brad MacIntosh was called by Mr. Jackman, and Mr. MacIntosh similarly stored his boat at the Defendant's premises in 2010 and had done so for 3-4 previous years.

Mr. MacIntosh's testimony with respect to the discussion with representatives of the Defendant in regard to the anticipated disruption while sprinkler work was done in the arena, is similar to that of Mr. Jackman.

I accept the evidence of both Mr. Jackman and Mr. MacIntosh in that regard.

Ms. Murphy, in addition to presenting the Defendant's case, gave evidence. Candidly, Ms. Murphy acknowledged that she began her employment on February 8, 2010. As a result, she would have not been in charge when boats and vehicles, including that of Mr. Jackman, or Mr. MacIntosh were taken into storage. Ms. Murphy testified that the individuals storing their items were "properly educated" by employees with respect to the possible disruption.

Having said that however she was not present or for that matter employed by the Defendant at the time such proper "education" would have taken place.

In questions from the Adjudicator, Ms. Murphy acknowledged that such disruption requiring that the arena in which boats etc. would be stored being vacant, lasted until approximately May 24, 2011, or virtually the entire storage season. In other words, people such as Mr. Jackman, who dropped off items for storage, anticipating (and paying for) indoor storage would have had their items stored outside the arena and exposed to the weather for the entire Winter. That I find certainly was not in contemplation of the Parties, and not what Mr. Jackman had contracted for, to have his power boat remaining outside until February 2011.

Donald MacDonald and Claude Shephard testified on behalf of the Defendant. Both were employees who Ms. Murphy would have referred to as providing "proper education" to the customers with respect to the appropriate disruption that might occur when the sprinkler work was being done.

According to both Mr. Jackman and Mr. MacDonald, Mr. MacDonald would have dealt primarily with Mr. Jackman. Mr. MacDonald's testimony on what words were used in telling Mr. Jackman about the potential for removing the boat from the arena was vague to say the least. He indicated that he told customers "could be 2 weeks, could be 3 weeks, could be a month". That, I do not find is educating or informing potential contracting parties that their items, such as Mr. Jackman's power boat, could spend an entire Winter outside. I am also mindful that Mr. MacDonald and Mr. Shephard had such conversation before the sprinkler company arrived let alone began work and that they would have had many such conversations. Where their evidence on that point materially differs (and I do not find there is much difference) from Mr. Jackman and Mr. MacIntosh I prefer that of Mr. Jackman and Mr. MacIntosh.

Once it became apparent that the items would remain outside for an extended period of time, it would appear prudent on behalf of the Defendant to have a representative contact those individuals (they did have contact information as noted in Exhibit 3) to inform them of that potential danger, and allow the contracting parties, such as Mr. Jackman, to decide for themselves whether they wished to accept that risk.

The evidence indicates that the Defendant's employees did not do so. Mr. Jackman himself, only as a result of attending at the site, became aware of the fact that his boat was stored outside, and there was a apparent damage to it (power boat), as a result of being exposed to the weather.

BAILMENT

I find that the relationship between Mr. Jackman and the Defendant, was one of bailor

(Jackman) and bailee (Defendant). In circumstances such as this, where there was to be a payment for the storage, the Defendant is what has been referred to in the cases as a "bailee for hire". I do not find that the later decision by the Defendant to waive the charges once the problem with Mr. Jackman's boat became apparent alters that characterization. In such circumstances, a bailee has a duty to use ordinary diligence in care and preservation of property. In such cases, case law has found that the bailee has the burden of establishing that the damage was in no way attributable to its fault, or that of its employees. While a bailee for hire is not an insurer, he must "exercise reasonable care, and a special skill is required in the performance of his duties, and he and his employees must possess and use that skill ...".

A short and concise statement of the law on this issue was stated by Currie, J. in the case of ***Scrimbit v. Schmaltz***, 2005 SKQB 171 (CanLII), 2005 SKQB 171; 263 Sask. R. 67 (QB) In which he stated at paragraphs 10 and 11 that:

> *[10] A case of property being damaged while in the possession of someone other that the owner leads one to the law of bailment. Bailment typically arises as a matter of agreement between the owner of the property (the bailor) and the person receiving possession of the property (the bailee):*
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> > *A bailment, traditionally defined, is a delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on, which they were bailed shall have elapsed or been performed. Under modern law, a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor). The legal relationship of bailor and bailee can exist independently of any contract, and is created by the voluntary taking into custody of goods which are the property of another, as in cases of sub-bailment or of bailment by finding. The element common to all types of bailment is the imposition of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods ...*
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> > *Halsbury's Laws of England*, 4th Ed. 1991-Reissue), vol. 2 (London: Butterworths), at p. 830, para. 1801.
>
> *[11] If the bailee is to derive some benefit from the arrangement, he or she is a bailee for reward. If the bailee is not to derive some benefit, he or she is a gratuitous bailee: Halsbury's Laws of England, supra, at p. 832, para. 1802*

Where goods are given into the sole custody of a person and accepted by him as a bailee, and the goods are lost, destroyed or damaged while in a bailee's custody, the onus lies upon the bailee to show the circumstances of negligence on his part.

The case law has also stated in another way, in that a warehouseman is to exercise care and diligence in regard to the goods in his care, as would a careful and vigilant owner of similar goods.

Cases in support of those principles include ***Page v. Austring*** (1986) 51 SASK R 154 (SASK QB), ***Beverage Sales Limited v. Canadian National Railway*** (1974) 7 N&PEI R 84 (NFLD TD) affirmed at 13 N&PEI R 395 (NFLD CA), and ***Rose v. Borisko*** (1981) 33 OR (2d) 685 (ONT HC), affirmed (1983) 41 OR (2d) 147 (ONT CA).

I find that in allowing the power boat of Mr. Jackman to remain outside without contacting him and advising him of that risk, so as to allow him to make a decision with respect to further storage, was **not** exercising due diligence and due care on the part of the Defendants. It was not treating Mr. Jackman's boat in a manner as if the Defendant was a careful and vigilant owner of similar goods. The Defendant has not dislodged the onus or burden of proof upon it as a bailee for hire.

WAIVER

The Defendant relies in its defence upon Exhibit 3 which it suggests limits its liability. A waiver of liability in a bailment case was discussed in the case of ***Letourneau v. Otto Mobiles Edmonton (1984) Ltd*** 2002 ABQB 609 in which Johnstone J. stated beginning at paragraph 49 that:

> *A waiver of liability clause must be strictly construed:* ***Murray v. Bitango*** *(1996), 184 AR 68 (C.A.), following* ***Canada Steamship Lines Ltd. v. The King****, [1952] 2 DLR 786 (PC).*

In ***Brown v. Toronto Auto Parks Ltd***, [1955] 2 DLR 525 at 527 (Ont. CA), Laidlaw JA discussed the duty of a bailee of reward and how contractual limitations of liability factor into the bailor-bailee relationship:

> *A custodian for reward may limit or relieve himself of his common law liability by special provisions and special conditions in the contract made by him. In such cases it has been held that such provisions and such conditions will be strictly construed and will be held not to exempt the bailee from responsibility for losses due to his negligence unless the words used are clear and adequate for the purpose or there is no other liability to which they can apply.*

I also find the case of ***Boire v. Eagle Lake*** 2009 SKPC 84 helpful. Like that case I find that in this case, Mr. Jackman reasonably expected his boat would be stored inside. In that case, it was determined that the term "Left at owners risk" meant that the plaintiff was to continue with their household insurance, not that it absolved the defendants of their duty of care. I ascribe similar meaning to what are similar words in this case. I find that Exhibit 3 as

worded, does not absolve or limit the liability of the Defendant for Mr. Jackman's loss.

DAMAGES

I have reviewed in particular, Exhibit 1-C, which shows the snow on Mr. Jackman's power boat, on February 8, 2011. Mr. MacDonald and Mr. Shephard acknowledge that when they saw the power boat, it had that same appearance. When compared with Exhibit 1-E, which shows the power boat with canopy, Exhibit 1-C fully illustrates that the load of snow and the weight of rain and snow, collapsed that canopy. Though trite, it is worth saying that if the power boat had been stored inside, it would not have been subject to the weight of rain and snow that resulted in the collapse of that canopy.

The Defendant's witness Shephard acknowledged that the Winter of 2010/2011 was subject to a great deal of rain early in the season (December), and a great deal of snow in 2011. That certainly would cause the damage illustrated in Exhibit 1-C and complained of by Mr. Jackman. I do not hesitate, in accepting Mr. Jackman's evidence that the canopy was damaged and needed to be replaced.

Mr. Jackman presented Exhibit 2, which is a receipt from Bras'dor Autobody in regard to quantifying the cost of repair.

The Defendant did not cross-examine extensively (if at all) on the nature of those expenses. I do note that receipt under work refers to "replace floor, **change bilge pump**, dash repair top" and lists 14 hours for same [emphasis added]. There was no evidence that the change of the bilge pump was necessitated in any fashion by the exposure to the elements at the Defendant's property.

Under parts as well, it lists an item that appears to be a 750 pump for $80.00, which would appear to be the aforementioned bilge pump. That is slightly over 5% of the total cost for parts in that invoice. As there was no evidence with respect to that being necessitated by the exposure the elements, I have deducted that amount ($80.00) from the amount awarded to Mr. Jackman.

As well, absent evidence on the point but mindful of the amount of work in replacing a pump as opposed to replacing a canopy, I have reduced the labor rate by 1 hour with respect to time allotment for changing the bilge pump (given that there was no cross-examination on that item, and Mr. Jackman offered no evidence it that regard, but evident that there would have been some time allotted to that of the overall total of 14 hours).

The labor rate is noted in the invoice as $720.00, which when divided by the 14 hours, equates with an hourly rate of $52.00 per hour.

I allow Mr. Jackman's claim, but reduce the amount awarded for parts by $80.00. I allow Mr. Jackman's claim, but reduce the claim for labor by $52.00 equaling 1 hour of labour. That reduces the amount awarded to $2,190.00 for parts and labour plus HST, for a total of $2,518.50.

Though Mr. Jackman did not offer evidence with respect to a claim for costs, I recognize that the normal filing fee for a claim of this amount in the Small Claims Court is $91.47 and I award Mr. Jackman that amount in disbursements.

RALPH W. RIPLEY
ADJUDICATOR