Claim No. 351874

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Collins v. Cape Breton Richmond Federation of Agriculture, 2011 NSSM 51

BETWEEN:

JOSEPH COLLINS

CLAIMANT

-and-

CAPE BRETON RICHMOND FEDERATION OF AGRICULTURE

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, Joseph Collins (hereinafter referred to as "Mr. Collins"), bought a 1985 Imperial Motor Home in October 2009. He testified that he paid $7,700.0 for the motor home and tendered as an Exhibit a copy of the certified cheque that he tendered to purchase it. He stored it for the Winter of 2009/2010, in an indoor storage facility in the Glace Bay area. Mr. Collins paid $110.00-$120.00 per month for such storage. He used that motor home during the Summer of 2010, placing it on land that he owns in the Baddeck area. Mr. Collins used it for the entire Summer.

Having heard about the storage facility at the "Cape Breton Exhibition" site in North Sydney operated by the Defendant, by which items were stored inside in the arena on the Exhibition grounds, Mr. Collins contacted them about storing his motor home.

Mr. Collins was aware that the storage fee was $2.00 a day, payable at the time the item was removed, as at that time, the number of days the item was stored could be calculated.

Mr. Collins testified that when he arrived with his motor home in the Fall of 2010, he dealt with an individual whose name he did not know, but from the description that was provided, the witnesses for the Defendant acknowledged, met the description of the interim manager of the Defendant at that time, Collie Sparling. Mr. Sparling was not a witness in the proceeding.

Mr. Collins testified that in particular because of its age, he specifically enquired and directed, that the motor home, be stored indoors. He testified that he did so because of concern that the motor home, given its age, "wouldn't take ice and snow". Mr. Collins testified that he had stated that to the man now identified as Mr. Sparling. He testified that he was told by Mr. Sparling at the time that he delivered his motor home to the Defendant, that there could be 24-48 hour disruption when the motor home would have to be placed outside when there was work being done on the arena's sprinkler system. Mr. Collins testified that was the extent of what was told to him in that regard.

Mr. Collins also called as witnesses, Terrence Jackman and Brad MacIntosh, both of whom also had arranged for storage of their boats with the Defendant during the same season. I infer, that the reason for calling them, was to place evidence with respect to what was stated to them at the time that they dropped off their items. Their evidence indicated that the reference by employees of the Defendant to the disruption that would occur in regard to the work on the sprinkler system at the time they dropped off their boats, was similar to that told to Mr. Collins.

Ms. Maureen 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. Collins, 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. The aforementioned Mr. Sparling previously held the position she held.

In questions from the Adjudicator, Ms. Murphy acknowledged that such disruption requiring that the arena in which boats, motor homes etc. would be stored being vacant, lasted until approximately May 24, 2011, or virtually the entire storage season. In other words, many people such as Mr. Collins, who dropped off items for storage, anticipating (and paying for) indoor storage could have had their items stored outside the arena and exposed to the weather for the entire Winter. Her evidence however, was that Mr. Collins' motor home, because of his telephone calls, was one of the first items placed back in the arena. It was however, outside for several months and was outside into February. That I find certainly was not in contemplation of the Parties, and not what Mr. Collins had contracted for.

Donald MacDonald testified on behalf of the Defendant. He indicates that he rather than Mr. Sparling dealt with the Defendant. He did acknowledge however that Mr. Sparling was "his boss" at the time the Defendant brought his motor home for storage. He would have been one of the 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.

Mr. MacDonald's testimony on what words were used in telling Mr. Collins about the anticipated disruption (despite Mr. Collins testifying his conversation was with Mr. Sparling) about the potential for removing the motor home from the arena was vague. He indicated that he told customers "could be 2 weeks, could be 3 weeks, could be a month". That, if he did have that conversation with Mr. Collins I do not find is educating or informing potential contracting parties that their items, such as Mr. Collins' motor home , could spend an entire Winter outside. I am also mindful that Mr. MacDonald if he had such conversation before the sprinkler company arrived let alone began work and that they would have had many such conversations. Mr. Collins had specific recollection in describing (without knowing his name) an individual who the Defendant acknowledged met Mr. Sparling's description, and described with much precision their exchange. Where their evidence on that point materially differs between Mr. MacDonald and Mr. Collins I prefer that of Mr. Collins.

Mr. Jackman testified that in February 2011, after he discovered that his boat had not been

stored indoors, that he had attended at Defendant's site, and spoke to Donnie MacDonald, while they were shoveling snow to clear around his boat. Mr. Jackman testified that at that time, Donnie MacDonald said words to the affect that "They (I inferred meaning the Defendant or representatives of the Defendant), should have contacted the people who had left their boats and items for storage and advised them of what had occurred (that their items were left outside)).

Donnie MacDonald on questions from the Adjudicator confirmed that he had said those words to Mr. Jackman. That appeared to be a wise observation on the part of Mr. MacDonald, and leaves the impression that if representatives of the Defendant had done so, a lawsuit, such as in the instant case, may have been avoided. It is clear however that the Defendant did not take such steps.

Mr. Collins called as witnesses as well, his brother, Alan Collins and his sister-in-law, Lorraine Collins. Both of them testified that they had been at Mr. Collins' camper in Baddeck a number of times over the Summer of 2010, and that they had been inside the camper and had not noticed anything untoward. They also both testified with respect to their observations of the state of the camper when retrieved from the Defendant in the Spring of 2011, including the strong smell of mildew and the evidence of mold and mildew.

They, most notably, Alan Collins, testified with respect to the amount of water in the camper and how it became particularly evident as he and Mr. Collins drove the camper from North Sydney to Whitney Pier.

Lorraine Collins also took the photographs that were marked as Exhibit 1, and also testified with respect to the location depicted in the photograph and related photographs 2-8 to the location depicted by reference to photograph 1. Ms. Collins indicated that photographs 2-4 and 7-8. were in the area mid way in the length of the camper, approximating where the rectangular window depicted in photograph 1 was located but across from that window Photographs 5-6 are in the mid way of the camper, but looking towards the back.

Photographs 2, 4, 5, 6, 7 and 8, clearly show black mold according to the Collins evidence in those areas of the motor home.

The Defendant took the position at the hearing, that such mold would have only been in existence as a result of long-term exposure to the elements.

Ms. Maureen Murphy, acted for the Defendant, as well as giving evidence. She indicated that

in February 2011, she had asked Donnie MacDonald to go down and check on the motor home, after she had received a telephone call from Mr. Collins. Donnie MacDonald also testified, and indicated that when he went to check the motor home, he did not smell any mold, and I state that to put into context the document which the Defendant entered into evidence as Exhibit 8, being a letter from Colin Vickers of Cape Breton Trail Sales Limited, dated September 20, 2011.

Mr. Collins agreed to the submission of that Exhibit without the necessity of Mr. Vickers testifying and being subject to cross-examination. I asked Ms. Murphy whether she wished to have an adjournment to allow Mr. Vickers or any other witnesses who had attended September 19, 2011 to attend to testify. Ms. Murphy when Mr. Collins agreed to the introduction of Exhibit 8 declined to make such an application.

I do note however, that Mr. Vickers' letter simply indicates that he is the "Service Manager of Cape Breton Trail Sales Limited". It indicates that he has been employed with the Company since the Summer of 2005. It does not however, indicate any other particular training or experience, in particular, with respect to the onset of mold or mildew, other then any other layman, such as someone having experience with flooded basements.

Mr. Vickers in his letter states that:

> *We have viewed the pictures and from what we can see the wood was badly deteriorated and decayed. Being in this industry, we know that this amount of damage would not happen in this time frame. You would need heat or humidity for this deterioration to occur, which would not have been present in the Winter months.*

If as Mr. Vickers suggests, such mold and mildew had been present or onset for sometime previous, it begs the question as to why in addition to Mr. Collins, Alan and Lorraine Collins did not detect the smell of such mildew previously.

In addition, Donnie MacDonald was specifically asked the question whether he smelled anything of that nature when he went to check on the motor home in February 2011, and he testified he did not. One would think that if the mold and mildew was such an extensive and longstanding problem, as noted by Mr. Vickers in Exhibit 8, that Mr. MacDonald would have noted same the smell of same at that time.

I may (and it would be improper to speculate) have been persuaded on the issue if such evidence came from someone whose trade and experience involved the cleanup or restoration of flooded premises, or areas that were subject to mildew and mold. I am not prepared to

accept that evidence by someone who describes their position as a "Sales Manager" for Motor Homes has sufficient expertise to persuasively render that opinion.

At the hearing as noted above I offered Ms. Murphy the opportunity to adjourn the matter so as to have Mr. Vickers testify (as he had appeared on an earlier night when the matter was adjourned) she chose to tender the letter (without objection from Mr. Collins) , which unlike testimony cannot be cross examined. That letter I would think as a result would be framed so as "to put the best foot forward" for the Defendant. I do not find that it persuades me in the face of the other evidence as well as common every day experience of anyone who has encountered flooded basements, and the resultant onset of mold and mildew.

Mr. Vickers in his letter stated that:

> *RV's are supposed to be properly maintained by their owners. They must visually inspect all the seams to make sure there are no cracks in the seals, or nay loose screws. If there is, this must be sealed and/or addressed right away to prevent any long term damage.*

Mr. Collins testified that he stored his motor home during the Winter of 2009/2010. He also testified that knowing the age of the motor home, that he had made the decision to store it again for the Winter of 2010/2011. He testified that because of the age of the motor home, he had decided it needed indoor storage, and that it was for that reason that he specifically told Mr. Sparling that with the age of the motor home, he wanted indoor storage.

Certainly one can accept that with a motor home of that age, that the seams may not have been properly sealed as Mr. Vicker's letter suggests. However, if stored inside, such measures would have had no consequence during the Winter 2010/2011, as the motor home would not have been exposed to wind, rain and snow. All witnesses appear to concede that the winter of 2010-2011 was particularly bad with heavy rain through December (during which one can see how those conditions would create an environment for mildew and mold).

At the hearing, during the testimony of Mr. MacIntosh, Mr. Collins attempted to introduce evidence which took place in a Small Claims Court action which Mr. MacIntosh had initiated against the same Defendant. I ruled such evidence was not admissible. I indicated to Mr. Collins at the hearing, however, that if he wished to provide any written decision that may have emanated from the action of Mr. MacIntosh for any precedential value it may have in law, that he was not precluded from doing so.

As Mr. Collins did not have a copy of the written decision at the time of his hearing, I indicated to him that I would hold rendering any decision for 10 days to allow him to obtain a copy of that decision and to provide it to both the Defendant, and through the Clerk of the Court, to myself.

I received a communication on September 21, 2011, from the Clerk indicating that Mr. Collins had determined there was no written decision in Mr. MacIntosh's case, and that he would not be submitting anything further. I prepared this decision without awaiting that decision.

At the hearing, the Defendant's representative appeared to make an argument that the storage payment of $2.00 per day could be for either indoor or outdoor storage. I do not accept that position. The fact that someone such as Mr. Collins was prepared to pay $2.00 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. Collins would pay $2.00 per day to the Defendant, and the Defendant would provide in door storage.

BAILMENT

I find that the relationship between Mr. Collins and the Defendant, was one of bailor (Collins) 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. Collins' motor home 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 motor home of Mr. Collins 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. Collin's motor home 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 7 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. Collins reasonably expected his motor home would be stored in side. In that case it was determined that the term "Left at owners risk" meant that the plaintiff was to continue with ther 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 7 as worded, does not absolve or limit the liability of the Defendant for Mr. Collins's loss.

DAMAGES

At the hearing Mr. Collins at the conclusion indicated he was only seeking the amount reflected in the quote from Eagle RV Ltd., as noted in Exhibit 2, which with HST is **$4,824.25.** At the hearing I asked Mr. Collins if he had any evidence with respect the value of a motor home of that value in 2010-2011 given that he bought it in October 2009. He did not. However his evidence confirmed by Exhibits was that he purchased it in October 2009 for $7,700.00. There was little if any Cross examination from the Defendant on the matter of quantum of loss and no evidence proffered by the Defendant on cost of repair or the value of the motor home.

I indicated to the parties at the hearing that in the case of damage to chattels long established case law sets out that the measure of damage is the lower of the cost of repair or the appraised value of the chattel. Given the Purchase price of $7,700.00 in October 2009, and absent any evidence from either party on the issue, but recognizing that by the Spring of 2011, there would be some lesser value on the motor home than the price for which it was purchased, given the evidence before me, on a balance of probabilities, I find that the cost of repair would be the lessor figure. I award the Claimant Mr. Collins **$4,824.25** (inclusive of HST) as reflected in Exhibit 2.

Mr. Collins sought general damages for what I took from his submissions to be for upset, inconvenience etc. I asked Mr. Collins at the hearing whether he had any further evidence with respect to those claims than what I heard. He indicated he did not. On the evidence before me, I find a claim for those damages was not proven.

On the matter of costs, Mr. Collins submitted the receipt for the filing of the Small Claims Court claim in the amount of **$182.94**. I award that as a disbursement.

In addition, by virtue of the ***Small Claims Court Act***, wherein it indicates that Mr. Collins was required to bring action in Cape Breton County, rather then in Halifax County (the County he resides), Section 15 of the Regulations of the ***Small Claims Court Act*** indicates that an adjudicator may award certain costs to the successful party. Section 15(f) indicates reasonable travel expenses can be awarded to the successful party if they reside or carry on business outside the County where the hearing is being held. I take guidance from Reg 91/2009 as amended, which sets fees for witnesses and their rate of payment for travel (which I find provides guidance in the instant case), and sets the rate under Tariff D 1(2)(a), at 0.20¢ per km, return.

Mr. Collins indicated the distance one way from Lower Sackville to Sydney would be 350 kms, but indicated that he did not measure that. Using the various sources available for measuring that distance, not the least of which is my own experience in setting my odometer and driving to Halifax, this suggests Mr. Collins was extremely conservative on that estimate. I therefore award the rate of 0.20¢ per km for 700 kms round trip, for a total of **$140.00**.

As I pointed out to Mr. Collins at the hearing, and which he appeared to understand and accept, costs for matters such as attending in Cape Breton to file a claim, etc. would not be awarded as there were other means such as directing the claim form by mail, by which that could have been otherwise affected other then travel to Sydney. It also does not fall within the definitions provided in Section 15 of the Regulations of the ***Small Claims Court Act*** .

In summary I allow the claim and award the sum of **$4,824.25,** and disbursements in the amount of **$322.94**, for a total of **$5,147.19**.

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RALPH W. RIPLEY
ADJUDICATOR