

Claim No: 333425

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Compton v. Hurley, 2011 NSSM 61

BETWEEN:

TRACY LYNN COMPTON

Claimant

- and -

DAVID ROSS HURLEY and ESTHER MARIE LEVAC

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on February 17 and June 27, 2011, with written submissions received July 11, 19, and 25, 2011

Decision rendered on October 5, 2011

APPEARANCES

For the Claimant Rebecca L. Hiltz LeBlanc
 Counsel

For the Defendants Mark Gardiner
 Counsel

BY THE COURT:

Introduction

[1] This claim concerns an approximately 1 acre wooded lot in the Porters Lake area owned by the Claimant.

[2] The Defendants are the owners of the adjacent property. The allegation is that the Defendants trespassed on the Claimant's property and unlawfully cut down some trees. The Claimant seeks damages which were claimed at the maximum of this court's jurisdiction, namely \$25,000.00.

The Claimant's evidence

[3] The subject property was bought by the Claimant in 2005, just shortly before she moved to Alberta, where she still resides (in Fort MacMurray). She paid \$40,000.00, and stated that she was uncertain about whether she would ever build on it or simply hold it as an investment. She had owned several treed lots in the past which she had subsequently sold.

[4] Since 2005 the Claimant testified that she was back in Nova Scotia on approximately an annual basis. She says she walked the property in the summer of 2006 and noticed nothing unusual, in particular no downed trees to the north, which is her boundary with the Defendants. She says that she walked the property again in 2007 to show it to her fiancé, with whom she was talking about it as a potential retirement spot.

[5] In 2008 and 2009 she only did a drive by, but says she didn't notice anything unusual.

[6] In late 2009 she finally decided to sell the property, and came to learn through friends in late 2009 or early 2010 that Jason Bayers might be interested. Mr. Bayers was someone she knew, to whom she had sold a property in the past. She described him as a friend. He verbally offered her \$45,000.00, sight unseen, and said he would have a look at it. She said that she had a good idea of what such properties were worth because she watched MLS listings.

[7] Mr. Bayers later called her and asked if she knew what had been done to her property. He reported that a "huge chunk of trees" had been cleared. She asked Mr. Bayers to go back and take some photos, which he did and emailed them back to her.

[8] The area in question is along the boundary between the Claimant's and the Defendants' properties. According to measurements made by Mr. Bayers, the affected area is a strip measuring 26 by 275 feet, starting almost at the road and going back toward the rear of the property.

[9] The stated significance of a reduced tree cover along this strip is that a home built more or less in the centre of the lot would now have much less of a tree cover to provide privacy and obscure the view of the open area and home of the Defendants.

[10] Mr. Bayers told the Claimant that he was no longer interested at buying the property, at least not at that price. He told her that he might be interested at \$30,000.00. He suggested that the loss of privacy might be addressed with a

privacy fence. The Claimant stated that what attracted her to this lot in the first place was the fact that it was treed right to the lot lines, so a house could be centred with privacy on both sides.

[11] Jason Bayers testified and corroborated much of the what the Claimant had stated. He has developed and built a few properties, and has been interested in this particular area. He said that he actually looked at this lot and nearby ones, even before the Claimant bought it. He had previously bought and built on a lot which he had purchased from the Claimant. He says he based his initial verbal offer of \$45,000.00 on values in the area, and wanting to offer her a small profit. He said he changed his mind when he saw how much had been cut. He priced out a privacy fence, which would cost between \$10,000.00 and \$12,000.00 - labour and materials - for a 250 foot fence. He thinks it would take about 15 years for the area to regenerate naturally. In his opinion, the value was now between \$30,000.00 and \$35,000.00, though he is not an appraiser.

[12] The Claimant also called as a witness a real estate agent, Barbara Hashimoto, who works with Century 21 Trident and has a special interest in the West Porter's Lake area. She had been called by Jason Bayers to give him a quick verbal estimate of the value, and she had stated that it was probably worth \$30,000.00 to \$35,000.00. She conceded that this was not a formal appraisal, which she is not qualified to perform in any event. Her evidence went in over an objection from counsel for the Defendants, who argued that expert evidence could only be offered by someone who can be qualified as an expert, and where notice is given in advance in the form of an expert report so that the other party (here the Defendants) could potentially call their own witness in reply.

[13] I will comment on this evidence in due course.

The Defendants' evidence

[14] The Defendants bought their lot in December of 2005. At no point prior to April of 2010 (when this dispute began) did they have any idea who owned the lot next door. The Claimant never did anything to make her identity known. In particular, there were no signs and there had not to their knowledge been anyone obviously visiting the property.¹

[15] The Defendant Levac testified that their property had been purchased for \$36,900.00. It was treed and quite a mess, with downed trees, dead brush and rocky terrain. In order to build on it, it was necessary to clear a large area fronting on the road, almost all the way over to the property line with the Claimant. She stated that they decided to keep some trees on their side of the property line, but some of them had to go when Nova Scotia Power came in to put poles and run the power line along the boundary.

[16] The Defendants do not deny having cut up some trees on the Claimant's property, but said that they were cut down by Nova Scotia Power. Some may have been cut initially for the line to be installed, while others were cut because they were falling down and represented a threat to the power lines and to their own property.

¹Counsel for the Claimant pointed out that the Defendants could have discovered the identity of the owner by using the Property On Line system, which is used by real estate agents and lawyers. It would appear that the Defendants were not aware of this possibility.

[17] Ms. Levac testified about several occasions when she called Nova Scotia Power to come out and deal with trees either leaning on the power line, or threatening to do so.

[18] Both Defendants testified that the trees on the Claimant's property, and particularly those on the boundary with them, were always something of a mess. First of all, they were the type of tall and spindly conifers that tend to lose their lower branches as they grow taller, which means that at ground level they do not provide much visual cover. Also, they testified, with every major wind storm over the years 2005 to 2009, more of them were coming down and making a tangled mess. There was speculation that these trees could have been late victims of Hurricane Juan in 2003, which brought down many trees, while leaving as many or more standing but severely weakened at the root structure. This is a very real possibility, as it accords with much common experience in Nova Scotia, but I also take notice of the fact that there have been many severe wind events in Nova Scotia over the years since Juan, which could in themselves have brought trees down or weakened them.

[19] The Defendants testified that one of their own trees actually came down in a wind storm and damaged their roof, which made them acutely aware of the dangers of trees within range of their house.

[20] The Defendants further testified that they could not use a portion of their driveway, where they typically parked a trailer, because of trees coming down from the Claimant's property.

[21] The Defendants eventually took the approach that it was better to cut up the downed trees on the Claimant's property, and try to "clean up" the mess,

rather than leave them just lying on the ground representing a hazard (fire perhaps?).

[22] There were a number of photographs placed in evidence. Unfortunately, there were none dating back to 2005. The Claimant entered the photographs taken by Mr. Bayers in early 2010. The Defendants took a number of photos in 2010 and 2011. Some of them show other parts of the Claimant's property, where there are clearly trees falling down and presenting something of a tangled appearance.

[23] The most recent photos also show the area where trees have been cut. The appearance is definitely much better than it had been a year ago, as nature has brought new growth into the affected area.

Factual findings

[24] The Claimant's evidence was not without some credibility issues. She initially denied quite emphatically on cross-examination having had a mortgage on the property, but had to recant when confronted by counsel for the Defendants with a copy of the document. I am prepared to accept that she was probably confused about which property she had mortgaged, but I am a bit troubled by how sure she initially said she had been. Credibility is not just truth-telling; it is the capacity to be accurate, fair and balanced in one's recall.

[25] I am more concerned with her unwillingness to concede on cross-examination that there were still a lot of downed trees in the area dating back to Hurricane Juan in 2003. She also tended to minimize the fact of downed or leaning trees which are clearly shown in the photos. I suspect that either she

actually spent very little time walking the property, or was simply viewing it through rose-coloured glasses.

[26] It is pretty obvious from the evidence that the trees which she claims were a “screen,” were a fairly scruffy and spindly bunch that would have provided sketchy cover, at best.

[27] Counsel for the Claimant argued in her submission that the Defendants lack credibility because in their Defence, they failed to mention that the trees were cut down by Nova Scotia Power. She argued that this was a recent invention and should be rejected.

[28] It is true that the identity of Nova Scotia Power as the cutter of trees is not mentioned in the Defence, although the statements made are not inconsistent with that version of events.

[29] While we are on the subject of pleadings, I note that the Claimant accused the Defendants of cutting up her wood and selling it, with the implication that they also pocketed the proceeds. There was not a shred of evidence to this effect. The Defendants testified that they did cut up some of the wood and burned it to get rid of it. They added that softwood such as these trees has no value as firewood, and they did not attempt to sell any of this wood.

[30] I found nothing in the evidence of the Defendants to cause me to question their credibility. I grant that they too have self-interest, but their story rings true and is consistent with all of the known facts. As for the involvement of Nova Scotia Power, I get the impression that the Defendants are not trying to deflect

responsibility onto that utility, because they support the fact that cutting the trees was a clear necessity.

[31] To the extent that either the Defendants or Nova Scotia Power, at their direction, entered upon the property of the Claimant without permission, that would technically amount to a trespass. That is far from the end of the analysis because there would have to be proof of actual damages for anything to be awarded. Also, even if damages were suffered the Defendants could potentially invoke the positive defence of necessity, as they have pleaded.

Are there damages?

[32] The Claimant's case rests primarily upon a theory that the value of her property has been diminished as a result of the loss of these particular trees. There is no presumption in her favour. If the trees were unsightly or dangerous, the cutting of them could conceivably have enhanced rather than diminished the value.

[33] Some cases have used the cost of "repair" as a measure of damages, which in this case would arguably be the cost of a privacy fence or the cost to replant mature trees.

[34] The evidence offered in support of a loss of value has a number of significant problems:

- a. I cannot attach much, if any, weight to Jason Bayers's verbal offer to pay \$45,000.00 for the property. He had not yet looked closely at it when he mentioned this figure. Had he done so and found it in a

condition with fallen and leaning trees (as described by the Defendants) he may well have thought differently about its value. Also, he testified that he was interested in making sure that the Claimant would earn a profit. This speaks as much to his friendship with the Claimant as it does to value. An arm's length, third party purchaser would have had no concern whether or not the seller was making a profit. He or she would have been interested in driving the hardest bargain for him or herself. As such, I cannot accept \$45,000.00 as any measure of the property's market value (untouched by the Defendants).

- b. The fact that the Claimant paid \$40,000.00 for the lot in 2005 is some evidence of its value, although I note that the Defendants paid \$36,900.00 at about the same time for a property that is considerably larger.
- c. Jason Bayers's later verbal offer to pay \$30,000.00 - after viewing it - is also very weak evidence of its value. Again this is not evidence of fair market value. There is no evidence that the property has been properly exposed to the market.
- d. The evidence of Barbara Hashimoto, the Century 21 agent, carries very little weight. She was not qualified as an expert. The Claimant cannot sidestep this problem by trying to characterize the evidence as something else; either it is opinion evidence or it is not. For her opinion to carry any weight, she would have had to present herself with the necessary credentials as an expert, be qualified as such, and demonstrate that she had arrived at her opinion through a

rigorous process that could be tested on cross-examination and, if so advised, be rebutted by a qualified expert called by the other side.

- e. I can accept that the cost of a privacy fence would likely be about \$10,000.00. The problem with using this as a measure of damages is that the theory presupposes that there was any significant amount of privacy shielding a potential house on the property from the Defendants' land and home. It does not appear that the Claimant ever walked her land after the Defendants cleared their land and built their house. Had she done so, she might well have discovered that her tall trees with no lower branches provided very little, if any, screen. As such, the privacy fence would represent a significant betterment.

[35] In the final analysis, I am not convinced that the land is worth any less as a result of the actions of the Defendants and/or Nova Scotia Power. Indeed, any potential purchaser looking at the property with the trees along the boundary in the state described by the Defendants, may well have concluded that the trees were a liability that reduced rather than enhanced its value.

The defence of necessity

[36] Even had there been some loss of value, I believe the evidence supports a finding that the Defendants acted out of necessity.

[37] The fact is that the Claimant was an absentee landowner with no real sense of the state of her trees and of the damage that they could and were

causing to an adjoining landowner. I am satisfied that the Defendants acted out of a need to protect their own property, and did so to the minimum extent necessary to avoid having trees fall over and impact on their power lines or property.

Conclusions

[38] In the result, I find that any trespass by the Defendants was excused by necessity, and that the Claimant has also failed to prove any damages. As such the claim is dismissed.

Eric K. Slone, Adjudicator