Claim No.370504

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Stevens v. Delta Sydney, 2012 NSSM 11

BETWEEN:

LAURIANNE STEVENS

CLAIMANT

-and-

FORTIS PROPERTIES CORPORATION,
doing business under the business name,
DELTA SYDNEY

DEFENDANT

REASONS FOR DECISION

BEFORE

Ralph W Ripley -Adjudicator

Hearing held at Sydney, Nova Scotia, on March 19, 2012

Decision rendered on March 26, 2012

APPEARANCES

Claimant - Self Represented

Defendant- Tammy Merrill

There is a well known adage that "no good deed goes unpunished". That adage appears to apply to the Claimant in the instant case. Her actions in rendering assistance as a "Good Samaritan" on May 14, 2011, led to others taking advantage of those good acts, she seeks redress in this action.

Ms. Stevens was charged for Credit Card charges on her MasterCard Credit Card for payments to the Delta Sydney ("The Defendant") in the amount of $984.82 noted as processed on May 15, 2011 (Exhibit 2) but which appears to relate to events on May 13 -14, 2011. She claims that a portion of those charges were not authorized by her and should not have been processed and paid to the Defendant and claims a return of those funds. For the reasons noted below I allow her claim.

Interestingly enough, a prime actor in this case, Morley Googoo, was not called by either the Claimant or the Defendant, but the evidence in the case, and in fact, the action itself, centers more on the actions of Mr. Googoo, then on anyone else.

Two witnesses were called for the Claimant, the Claimant herself, Laurianne Stevens, and her friend, Nancy MacLeod.

The Defendant called Tara Little, a bartender who works for the Defendant, and is employed in the "Crown and Moose" a bar/restaurant, in the hotel, Jonathan Timmons, a nightauditor/front desk clerk who works for the Defendants, and George Long, who works in accounts receivable for the Defendant.

Ms. Little testified that Mr. Googoo and his group on May 13, 2011, appeared to be celebrating a promotion or acquisition of a position by Mr. Googoo. Tara Little testified that Morley Googoo, accompanied by at least 2 friends (none of whom were the Claimant), arrived at the "Crown and Moose" at or around 7:00pm on May 13, 2011. She testified that she did not ask for a Credit Card to allow them to run a "tab", a fact I find incredulous given the acts that Ms. Little and the Defendant later took. She made no other enquiry with respect to how Mr. Googoo or his party would settle their "tab" at the end of the night.

Notably, Mr. Googoo was not at that time, a hotel guest of the Delta Sydney, at the time they arrived or for that matter at any time before the bar closed.

In the case of *Philip v.Hunts Limited* (1945) [1947] OWN 529 (Co.Ct.), it was determined that a patron of a beverage room (in a hotel) was not a "guest" of that hotel. Similarly, Mr. Googoo did not have charging privileges to charge to a room. If Ms. Little enquired of the hotel front desk when Mr. Googoo began incurring a "tab" (at approximately 7:00pm), she would have learned that he was not a guest at the Delta Sydney. Ms. Little assumed or was willfully blind with respect to that matter given Mr. Googoo's previous patronage of the "Crown and Moose". The Claimant however, should not bear liability for those actions.

Ms. Little testified that she did not' ask for a credit card or other mode for payment while the group were accumulating the various charges. She indicated that Mr. Googoo was well known to lhe staff, and usually settled up al the end of the night so that she did not seek a credit card or other means to secure payment prior to allowing them to "run a tab".

Attached to the Defence, among other items, and referred to in the testimony, were the accumulated charges from the "Crown and Moose" on May 13-14, 2011 for Table 151, which Ms. Little testified was the group that included Morley Googoo.

The bill accumulated at the "Crown and Moose" by the group with Mr. Googoo, was $750.28, which included $652.42 of food and drink, and $97.86 in HST. Of the $652.42 of the bill before taxes, only $59.95 was for food, leaving $595.47 of accumulated charges for alcohol. The bill also included a 20% gratuity, which equals the sum of $112.58, for a total bill of $862.86.

The Claimant was **not** in Mr. Googoo's group. She arrived at the "Crown and Moose" with two friends, Nancy MacLeod and Elizabeth Cremo. Ms. Stevens indicated that she and her friends were out for dinner and had some drinks. I accept her evidence .

The Claimant submitted as Exhibit 1, an online banking statement, which indicates the transaction at the Delta Sydney, in which she paid $38.47 for food, drink, HST and tip.

The testimony of the Claimant and Nancy MacLeod indicates that while they were out, Mr. Googoo and some of his friends, who were known to them came over to their table to speak to them. Ms. Stevens also testified that while at the bar, she may have received a "shooter" from Mr. Googoo, who was encouraging patrons to have a "shooter" that he had purchased (one of the 35 "shooters" as per his bar bill), but otherwise, Ms. Stevens was not involved with Mr. Googoo's group.

The evidence appears to be clear that Mr. Googoo, by the end of the night, reached a state of high intoxication. Ms. Little when questioned by the Claimant, as to that fact, was to say the least, evasive. She attempted to bolster her testimony with reference to courses she had taken and a certificate that she received on "responsible drinking" and identification of patrons who were intoxicated and how to deal with them. Despite that when asked more than once by the Claimant on cross examination whether Mr. Googoo appeared to be intoxicated it was not until she received a direction from the Adjudicator to answer the question, that she answered.

Mr. Timmons however, candidly admitted that Mr. Googoo, when he saw him at the end of the night, was so intoxicated that he (Mr. Googoo) vomited on the lobby floor. Seeing someone reaching that stage of intoxication, it should have been clear to Ms. Little, that Mr. Googoo was not only intoxicated, but extremely intoxicated. Her evasiveness on that issue when questioned as well has adversely affected my assessment of her credibility.

Ms. Little testified that at the end of the night that she enquired of Mr. Googoo what to do with the bar tab and that he told her to charge it to his room and she should add a 20% tip.

I do not accept that evidence. The printout from the Crown and Moose indicates that it was printed at 1:05 am. That conforms with the evidence that the bar closes at 1:00 am. Mr. Timmons was questioned with respect to the documents also attached to the Defence, which indicate that there was a credit card confirmation no. that were checked on 6 occasions, beginning at 12:54 am on May 14, 2011. The last such check was done at 1:21 am. Mr. Timmons testified that was because he was having difficulty in getting the credit card confirmation from the credit card company, which he indicates was not untoward and not unduly long. That certainly however, was long after the bar was closed and during a time period when according to both he and Ms. Stevens, Mr. Googoo was in the lobby and had been for some time and not in the "Crown and Moose" as was testified to by Ms. Little. Mr. Timmons testified that he did not register Mr. Googoo and provide keys until he received confirmation on the Credit Card.

Mr. Timmons testified that he was a night auditor on the front desk on May 13- 14, 2011, beginning his shift at 11:00 pm and ending his shift at 7:00am.

As noted above, he indicated that he knew Mr. Googoo. Mr. Timmons said that he saw Mr. Googoo in the lobby, and he could tell that he was intoxicated. He indicated that he saw him sitting in a lobby chair. Mr. Timmons, in his testimony, clarified the second paragraph of the Defence. He testified that he was approached by Mr. Googoo, wanting to check into the hotel, bnt Mr. Googoo did not have a credit card, and that as a result, he (Timmons) conld not allow Mr. Googoo to obtain a room.

Mr. Timmons testified that he could tell that Mr. Googoo was highly intoxicated. He testified that he was aware that the hotel had a policy by which they would pay for taxis for those who became intoxicated at the hotel bar, so they would not drink/drive, but was not aware that the policy would offer a free room to such patrons. One wonders how an employee such as Mr. Timmons who indicated that he had been employed at the hotel for 13 months, was not aware of such a policy (until hearing it in the testimony of Ms. Little), and if so, if such a policy was in effect, how it was not offered by the hotel to someone such as Mr. Googoo, who both Mr. Timmons and Ms. Little knew as being a particularly regular and generous patron. That certainly suggests to me that such a policy was not in existence.

Mr. Timmons confirmed the testimony of Ms. Stevens that having seen Mr. Googoo in the intoxicated state in the lobby, Ms. Stevens and her friends confronted Mr. Googoo about his desired wish to drive home to Waycobah (Ms. Stevens testified and I accept, that it was an approximate 1.5 hour drive home). She testified (which conforms with that of Mr. Timmons) that Mr. Googoo advised her that he could not obtain a room for the night as he did not have a credit card. Ms. Stevens testified she then offered to secure a room for Mr. Googoo on her credit card, and Mr. Timmons then undertook the registration process. Ms. Timmons testified that there is a process by which the hotel can, in their computer, note that the patron or guest, has no charging privileges. He did not however tell that to Ms. Stevens on check in or otherwise bring that to the attention of Ms. Stevens. He did however, confirm the testimony of Ms. Stevens that when she arrived home, at approximately 2:00 am, she telephoned and spoke with Mr. Timmons and indicated that she did not wish to be charged for any incidentals to the room that she had paid for Mr. Googoo. Mr. Timmons testified that he confirmed to Ms. Stevens that he had then coded same into the computer and stated to her that "there would be no further charges to her".

When questioned by the adjudicator as to whether at that time he had checked to see if any other charges were already charged to the room, he indicated that he did not. He testified that he could have done so, and could have advised Ms. Stevens at that time, whether any such charges had been incurred, but had not done so.

Seeing the entries later on May 14, 2011, at 3:40 pm, certainly suggests that such confirmation was done when the bar bills, such as Mr. Googoo's were being processed.

When Mr. Googoo arrived at the "Crown and Moose", at approximately 7:00pm, he was **not** a guest of the Delta Sydney.

Furthermore, the testimony of Tara Little indicates that she made no enquiry with respect to charging privileges, whether by virtue of a credit card or otherwise, at the time that Mr. Googoo and his group began consuming food/drink on a "tab".

She testified that as a bartender at the end of the night she watches to ensure that the patrons don't leave without settling up their account. She testified that Mr. Googoo came back into the Bar and when querried told her to bill the amount to his room and to add a 20% tip.

Notably the Bar bill which is attached to the Defence has a place for a signature which is notably blank and that all handwriting including the inclusion of Room number (516) the name and the Tip are according to her testimony in Ms. Little's own hand and not that of Mr. Googoo. I have no doubt that Mr. Googoo was not a guest of the hotel, allowing him to charge to a room at the time that he incurred those charges. I am not satisfied on a balance of probabilities that he was guest at the time Ms. Little testified that Mr. Googoo told her to charge the bill to his room. To the contrary I am satisfied on a balance of probabilities that he was not a guest if such a statement was made, at that time. I am also not satisfied that Mr. Googoo made such a statement to Ms. Little even before he was a guest of the hotel. Even if such a statement was made (and I do not find such was made) hearing the evidence of Mr. Timmons and Ms. Stevens and Ms. MacLeod, and bearing in mind Ms. Little's testimony regarding the certification she received she should have been aware that Mr. Googoo was too highly intoxicated to make any decisions or directions in that regard (which it appears would not have been the case if she had made an enquiry about credit when he arrived at 7:00P.M.)

In cases such as this, the issue turns on whether there was authorization, whether directly or by inference, with respect to the use of the credit card by others. Such has been discussed in the case of *Sundial Travel Club Inc v. Lucky,* 1996 Carswell ATA 1027, which is a decision of Judge Scott.

In paragraph 15 of his decision in that case, Judge Scott cites the case of Bowstead On Agency 15th Edition. 1985, whereby someone can reasonably conclude that they have the authority of another to utilize their credit or in the case of credit cards, their credit card no. or authorization. Those were cited in that case to include the relationship or principal and agent may be constituted by:

a. by agreement, whether contractual or not, between principal and agent, whcih may be express, or implied from the conduct or situation of the parties;

b. retrospectively, by subsequent ratification by the principal of acts done on his behalf;

c. By operation of law under the doctrine of agency of necessity and in certain other cases.

None of those apply in the instant case to suggest that Ms. Stevens authorized that her credit be pledged to pay for the "bar tab" of Mr. Googoo.

Furthermore, in that case, there was reference to the text of Friedman's On Agency 6[lll] Edition 1990 at page 89, where it is indicated that in some cases by conduct an agency by estoppel may be created. In a reference from Friedman at paragraph 17 of *Sundail v. Lucky, supra,* it was stated that:

> *Estoppel means that a person who has allowed another to believe that a certain state of affairs exists, with the result that there is reliance upon such believe, cannot afterwards be heard to say that the true state of affairs was far different, if to do so would involve the other person in suffering some kind of detriment applied to agency this means that a person who by words or conducts had allowed another to appear to the outside world to be his agent, with the result that the third parties deal with him as his agent, cannot afterwards repudiate this apparent agency if to do so would cause injury to third parties; he is treated as being in the same position as if he had in fact authorized the agent to act in the way that he has done.*

That doctrine is certainly not applicable in the instant case.

When Morley Googoo began charging at the "Crown and Moose", the Claimant was not there, let alone intervening and providing a credit card nor did she through act or conduct suggest Mr. Googoo could use her credit card to pay for his account at the "Crown and Moose". To the contrary, in the words of Ms. Little, Mr. Googoo regularly ran a tab of that sort and settled up on his account at the end of the night.

The "Crown and Moose" (or the Defendant), acted to its own detriment on reliance of Mr. Googoo's past practice in allowing Mr. Googoo to run up such a "tab". They did so based upon Mr. Googoo's past acts. They cannot suggest they only extended credit to Mr. Googoo due to Ms. Stevens offering her credit card later that night for a room (for Mr. Googoo). I find that they wrongfully as a result, when left with the unpaid account for Mr. Googoo, attempted to charge that unpaid account to a credit card that was not authorized for such purpose.

Ms. Little (as well as Mr. Timmons), testified that Mr. Googoo, who was well known to the staff, was also well known to accumulate large "tabs" at the hotel.

Both Ms. Little and Mr. Timmons testified that Mr. Googoo was very "generous" to the extent that Mr. Timmons testified that at Christmas, Mr. Googoo tipped the night monitor staff, $20.00 each, which I took was a rare gesture from patrons. Ms. Little testified that Morley Googoo was a regular patron of the bar who spent profusely when there and often spent much on alchol and regularly settled his "tab" at the end of the night. I find as a result she became complacent in that regard on May 13, 2011. That failure was hers, Ms. Stevens should not be liable for Ms. Little's failure to secure her or her employer's position which were in no way triggered by words, acts or deeds of the Claimant..

The amounts in the instant case were all accumulated before Ms. Stevens provided a credit card or credit card authorization to Mr. Timmons at the front desk of the Delta Sydeny.

If (and I emphasize "if", as I was not called upon to decide the issue), Mr. Googoo had ordered room service, drinks, etc, between the time that Ms. Stevens had provided her credit card authorization to Mr. Timmons (1:21am), and when she later called Mr. Timmons and advised him to restrict the liability of her credit card authorization (approximately 2:00pm), I may have found her liable for such charges. **However,** the evidence is clear that Mr. Googoo's charges for food, and to a greater extent, drink, were at the "Crown and Moose" between the hours of 7:00pm and 1:00am.

Ms. Stevens had not provided any credit card authorization to any establishment at the Defendant during those hours.

The "Crown and Moose", whether through Ms. Little or otherwise, having found that Mr. Googoo had not settled his account before leaving at closing, decided to charge it to Room 516.

All during the night when the charges were accumulated however, at the "Crown and Moose," Ms. Little had not made any enquiry as to whether Mr. Googoo had a room at the Delta Sydney, to which those charges could be charged. In fact he did not.

If Ms. Little, and by extension, as her employer, the Defendant, failed to adequately secure their position with respect to the payment of the food/drink at the "Crown and Moose", that Mr. Googoo was accumulating, they did so at their own peril. Mr. Long testified that they have not attempted to secure payment from Mr. Googoo satisfied that they could and have done so from the Claimant.

At the time however, that credit was extended, in law, the Claimant had not given authority to charge her credit card at the time those items were accumulated.

The Small Claims Court is a court of law and I find, based upon the evidence and the law, that the Delta Sydney was not authorized to charge the Claimant's credit card for the amount of $862.86, and I find as a result in favor of the Claimant that she is entitled to reimbursement for those charges that were made and processed and paid to the Defendant without authorization.

I find that the actions of the Defendant were *post facto* acts to attempt to receive payment on a bill accumulated by Mr. Googoo, which could have easily have been avoided if Ms. Little had taken steps at the beginning of the evening, before the charges were accumulated by Mr. Googoo, to determine how he intended to pay for the food/drink. Ms. Little did not.

At the time the charges were accumulated, the Claimant had given no authority to charge her credit card for same. To charge that amount to the room that the Claimant had graciously purchased for Mr. Googoo to avoid him being a danger to himself and others (by virtue of Mr. Googoo driving his vehicle), especially when the Defendant had, financially benefitted from Mr. Googoo's largess in ordering food/drink, appears abhorrent.

Ms. Little testified that she received a certificate with respect to identification of intoxicated persons. She also testified and that it is the Defendant's policy to provide taxis or rooms , free of charge, to patrons who reach a state of intoxication that they should not drive. If that was not done for a patron such as Mr. Googoo (given the description from Ms. Little and Mr. Timmons) one wonders who it would be done for. On May 14, 2011, it was left to the Claimant as the only one that appeared sufficiently concerned about the danger to Mr. Googoo and the driving public to make arrangements for Mr. Googoo, so that he would not drive (which in law also limited the Bar's potential liability from potential civil actions). After that good act to then charge the Claimant's credit card account for Mr. Googoo's bar bill is abhorrent.

More importantly for this case however, though Ms. Stevens candidly agrees that she incurred the liability to pay for a room for Mr. Googoo to avoid such dangers to both him and the driving public, in law, such act did not authorize the Defendant to charge to her credit card, $862.86 of bar charges, which interestingly enough, include a 20% gratuity (equal to $112.58), to Ms. Little.

I find that given that such charge was on a credit card account, and that it would take some time to clear or satisfy that account, the Claimant's claim for interest for one month only at the credit cared rate (as is illustrated in the Exhibits) of 19.97% per annum, is allowed. I calculate the amount due on $862.86 for one month is $14.36.

I also award the Claimant's cost for filing her claim in the amount of$91.47.

I realize that many parties who come before the Small Claims Court, as in the instant case, are self represented and do not realize that the niceties of corporate ownership. The Claimant framed her action against the "Delta Sydney", who in turn had defended. According to the records of the Registry of Joint Stock Companies, however, the "Delta Sydney" is only a business name registered by the body corporate, "Fortis Properties Corporation". As that is the legal entity (as opposed to a mere business name), this decision and any order issued, will refer to the Defendant as "Fortis Properties Corporation" doing business under the business name "Delta Sydney".

The total amount awarded to the Claimant is $968.69 ($862.86 + $14.36 + $91.47).

RALPH W. RIPLEY
ADJUDICATOR

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