Claim No: 371845

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Kelly v. Aitken, 2012 NSSM 16

BETWEEN:

TANYA KELLY

Claimant

- and -

CHRISTOPHER AITKEN

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on June 12, 2012

Decision rendered on June 21, 2012

APPEARANCES

For the Claimant	Self-represented
For the Defendant	Thomas Singleton Leora Lawson Legal Counsel

BY THE COURT:

[1] This is a case arising out of a common-law relationship.

[2] The Claimant and the Defendant are both relatively mature individuals. It appears that both of them have been married before, or at least were in long-term relationships that produced children. They are both employed in responsible positions, the Claimant as a sterile technician in a hospital, and the Defendant as a weapons engineer with the Canadian military.

[3] The Claimant owns her own home in Eastern Passage. The Defendant had recently moved down from New Brunswick when he and the Claimant started dating in early 2011. In June 2011 they decided to live together and the Defendant moved into the Claimant's house.

[4] Unfortunately, the relationship ended very poorly barely six months later. Under those conditions, the issue of property division was dealt with under less than ideal circumstances.

[5] As is so often the case in these situations, the threshold issue to determine is what arrangement was made between the parties that was intended to govern their financial relationship. Unlike the case with married couples, there is no default model for determining how finances are to be arranged and property divided upon separation. Common-law couples are free to make whatever arrangements they choose, and these contractual arrangements are what the court is bound to enforce, or at least try to enforce.

[6] The parties presented different views as to their financial obligations to one another. It appears that these positions are irreconcilable and the court is obliged to make a finding as to which position is most probable.

[7] The Claimant contends that the understanding arrived at when the Defendant moved in with her in June 2011 was that all household bills would be split half-and-half. In the category of household bills, she included her mortgage payments, property taxes, cable, phone, electricity, food and incidentals. Her version of the agreement was that the Defendant would contribute these amounts in installments, twice a month when he was paid. According to the Claimant, the Defendant did not have funds to pay the first month of his occupancy with her (June), and instead of him making up that amount later she says that there was a side agreement that he would pay for a garden shed to be placed in her backyard, and further that in the event they separated the garden shed would remain as her property.

[8] It is an uncontested fact that on or about December 3, 2011, there was an argument that resulted in an abrupt ending of the relationship. During that argument, the Defendant is alleged to have physically assaulted the Claimant, and was charged with a criminal offense. As a term of his release from custody he was forced to vacate the house immediately, and the taking of his property followed later under supervised conditions. I do not know what the outcome was of that criminal prosecution, or even if there has yet been an outcome.

[9] At the hearing before me, the Defendant neither admitted nor denied having committed the assault, but in the context of this civil proceeding the fact of the assault must be considered to have been proved. The Claimant's evidence stands uncontradicted. This is important because one of the claims by the

Claimant is that she lost a day's work obtaining therapy for the injuries sustained in the assault. She produced evidence to the effect that she was able to take a sick day covering only one of the days that she was off work after the assault occurred. Her wage loss for that one day was $145.

[10] The Claimant further seeks amounts to cover one half of her expenses for the month of November 2011, which was the Defendant's last full month in the home. She produced bills showing the amounts of her power bill, water bill, cable package and mortgage. A one-half share of these amounts totals just under $600. She also claims a further $89.70 for a truck which took some of the Defendants items left behind to the dump. Her total claim is $825.32 plus costs.

[11] The Defendant has counterclaimed for the value of items which he claims were not returned to him at the end of the relationship. He further denies that he owed anything to the Claimant for the time that he lived with her.

[12] His version of the agreement is a very different one from that presented by the Claimant. He says that the agreement was that he would pay the Claimant $450 per month, as a flat amount inclusive of all expenses. He testified that at the beginning of each month, starting in July 2011, he signed over to the Claimant a cheque for $700 that he was receiving from a tenant that was renting a property he owned in New Brunswick. He said that the Claimant would cash the cheque, keep $450 for herself as his contribution to the household expenses, and give the other $250 in cash to him. He produced cancelled cheques for four of the five months in question, which indicate an endorsement by the Claimant. For the other month he said that he was on leave in New Brunswick at that time and cashed the cheque himself, and later gave the Claimant the $450 as agreed.

[13] The Claimant did not deny that she cashed these cheques for the Defendant, but stated that it had nothing to do with their agreement. She testified that she believed that there was a reason that he did not want the money going through his bank account, and she had no objection to cashing the cheques for him whenever he asked.

[14] The Defendant testified that he brought a house full of furniture into the relationship, approximately two months after moving in with the Claimant. In anticipation of this material arriving, he purchased a shed at Home Depot at a cost of $918.85 which was placed in the backyard of the Claimant's property. The purpose of this shed was to provide additional storage because there would not have been sufficient room elsewhere in the Claimant's house. He testified that the agreement was that this was his shed; or, more accurately, he denied that there was any agreement that the Claimant could keep his shed in the event of separation.

[15] The Defendant produced a handwritten list of approximately twenty items that he claims were either kept by the Claimant, or simply not returned to him. The total value of these items is $2,858.85, which includes $50 for one month's rent in a friend's garage where much of his property is being stored currently. At present, the Defendant is living in a rented room and does not have storage space for much of his possessions.

[16] The Claimant denies that she has withheld any property belonging to the Defendant. The shed, which is the single largest item, has already been commented upon. She says that to remove the shed now would seriously damage her backyard, which was the reason that she insisted at the outset that it would remain, no matter what. For many of the items on the Defendant's list, the

Claimant simply states that she believed when she was packing up his stuff that everything of his was included, and she did not retain anything of his. There were a couple of exceptions, such as a barbecue tank which she insisted was hers, and an “entertainment centre” which she believed the Defendant had given to her son, and which remains in her son’s room being used.

[17] The Claimant also suggested that at least some of the items which the Defendant is claiming were likely lost or disposed of during the course of the relationship, and the Defendant is either forgetting or trying to obtain compensation for items that he knows, or ought to know, were no longer in the house at the time of their breakup.

Credibility and findings

[18] This is a classic “he said, she said” situation. Particularly on the question of what was the arrangement at the outset, there is not much middle ground. Either the agreement was to share expenses half-and-half, or the Defendant was to pay a flat $450 per month.

[19] Justice Warner of the Nova Scotia Supreme Court laid out something of a template for assessing credibility, in *Re Novak Estate* 2008 NSSC 283, at paragraphs 36 and 37:

> [36] There are many tools for assessing credibility:
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> a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.

> b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
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> c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in Faryna v. Chorny, [1951] B.C.J. No. 152, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.
>
> d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution R. v. Mah, 2002 NSCA 99at paragraphs 70-75).
>
> e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. R. v. J.H., [2005] O.J. No. 39 (Ont. C.A.) at paragraphs 51-56).

[20] I have gone through all of these processes, although not strictly in this order.

[21] Faced with equally credible but irreconcilable versions of the agreement, I have asked: what is the most inherently probable story? In my experience, that is usually the safest ground, because trying to determine which party is lying and which is telling the truth based only on demeanor is a very difficult task. Rarely does one party or the other betray his or her lack of truthfulness in such a way that it is obvious on its face. Sometimes an effective cross examination will reveal an inconsistency or other weakness in a party’s case, which will taint his or her entire testimony, but I cannot say that this has happened in this case. Both parties have an inherent bias and motive to be less than perfectly truthful, and neither was a perfect witness, but neither of them was obviously not telling the truth as he or she believed it.

[22] In the case at hand, there was no disinterested witness whose testimony might tilt the balance to one side or the other.

[23] In the final analysis, despite a healthy skepticism, I generally found myself believing both parties equally. If one of them is lying, as I believe must be the case, he or she has done a good job of it.

[24] As to which version of events is most probable, that too is difficult to discern. As I indicated at the outset, people entering common-law relationships make all sorts of agreements with one another. This court sees quite a few such relationships, and tries to sort out their financial affairs. Experience has shown that there are many different models that people adopt. People typically enter these relationships with the best of intentions and hope for the best. Many people in this situation pay very little attention to the details of the arrangement, implicitly hoping that it will never come down to a process such as this.

[25] If I were to hazard a guess, I would say that the Defendant's proposed model of $450 per month, all-inclusive, is slightly less likely in the sense that fewer couples would likely try to peg the number so precisely. Nevertheless, it is not a far-fetched model by any stretch of the imagination.

[26] The Claimant's proposed model of splitting all bills equally would seem to be a more likely scenario, in the sense that it is easier to say "let's share expenses" than it is to arrive at a specific number. However, I can easily envision someone in the position of the Claimant doing a quick mental calculus and coming up with a number such as $450 and being willing to accept that, at least for the time being. It must be remembered that the Claimant was the sole wage earner in the house, and any amount that she might have received from the

Defendant would relieve her of some of her financial burden. It is true that something like food bills would fluctuate, depending on circumstances, but this does not render that model totally improbable.

[27] As such, I cannot find that one party or the other is lying, or that one theory or the other is inherently improbable. In such an unusual circumstance, the court is forced to determine this case on the basis of burden of proof. Ultimately, a case cannot succeed unless the party who puts the case forward proves it on a balance of probabilities. It is not sufficient to establish a case that is met with a defence of equal and opposite force. The same would be true of a counterclaim.

[28] As for the Claimant, she has not succeeded in proving her case for expenses, on a balance of probabilities. She has succeeded in proving - on balance - that she incurred a wage loss of $145 because of the assault, and this amount should be awarded to her.

[29] As for the counterclaim, I also find that the Defendant has not proved his case on a balance of probabilities. The counterclaim is a little less of a “he said, she said” scenario because there is room for middle ground. It is quite possible that the Defendant is making claims that he believes have merit, while being mistaken about his contention that these items were left behind and are being withheld from him by the Claimant. I am inclined to believe that his list includes items that were likely disposed of during the course of the relationship, and it is equally possible that he took some of these items or that some of them were lost in the course of the rather tumultuous separation. As for the items that the Claimant says she should be able to retain (barbecue, entertainment centre), the Defendant has not proved his entitlement to them.

[30] Where neither party has proven their case, matters are left to lie essentially where they stand. The *status quo* has simply not been dislodged. That means that all property has been divided and all rights to claim such property from the other have been exhausted.

[31] In the final result, the Claimant shall have judgment for $145 plus her costs of $91.47, for a total of $236.47.

Eric K. Slone, Adjudicator