Claim No: 390831

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Cole v. Mark Lively Welding Ltd., 2012 NSSM 23

BETWEEN:

STEPHEN COLE and White Star ICI Plastics Management

Claimants

- and -

MARK LIVELY WELDING LIMITED and MARK LIVELY

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 15, 2012

Decision rendered on May 24, 2012

APPEARANCES

For the Claimant self-represented

For the Defendants self-represented

BY THE COURT:

[1] This is a claim brought by Mr. Cole and (as described by him on his Claim Form) an entity named “White Star ICI Plastics Management.”

[2] The records of the Registry of Joint Stock Companies do not disclose the existence of any such entity named “White Star ICI Plastics Management.” What those records do show is that “White Star ICI Polymer Management & Plastic Recycling Services” is a trade name that was registered by N.W. Cole Associate Appraisers Limited, a company of Mr. Cole’s, but that trade name has been struck as not having been renewed. The corporate registration for N.W. Cole Associate Appraisers Limited has also been struck since sometime in 2010. As such, for purposes of this claim, I will treat the name White Star ICI Plastics Management as a misnomer for “White Star ICI Polymer Management & Plastic Recycling Services,” which I will refer to as “White Star.”

[3] If Mr. Cole intends to use “White Star ICI Plastics Management” as a new business name, it has no status to litigate until or unless he registers it. I will return later to consider the consequences of bringing a claim by a registered entity that has allowed its status to lapse.

[4] The claim seeks compensation in the amount of $4,900.00 for damages allegedly suffered by a 2001 Ford F150 truck while at the facility operated by the Defendants.

[5] The Defendants have counterclaimed for $2,106.00 for work done that has not been paid for.

[6] Mr. Cole testified that in September 2010 he brought his truck to the Defendants to have some spring hangers installed. He says he was quoted a price of $600.00 to $800.00 to install the hangers that he himself supplied. He says that because of health problems, he was unable to reclaim the truck until approximately March 2012. He says that when he came to the Defendants' facility, the truck was in a damaged condition. In particular, he says that the windshield was cracked, the rear chrome bumper was dented, some interior upholstery was ripped and interior contents strewn about. He produced estimates for the parts and labour that he says are needed to return the truck to its previous condition.

[7] He also questions the $2,106.00 bill which the Defendant is attempting to enforce, which he says is much more than the original estimate.

[8] Mr. Cole produced a doctor's letter which appears to have been written to a lawyer as support for a motor vehicle accident claim. It does document that Mr. Cole has had some leg problems requiring orthopaedic surgery and ongoing care, although there is nothing in that report that substantiates his claim that he lacked the mobility to reclaim his truck, nor that his physical problems would have put him out of commission for that length of time. Nor does it say anything about his ability to send someone else, or at least pick up the phone and call Mr. Lively to make some arrangement.

[9] Mr. Lively tells a somewhat different story. He says that he was originally contacted by Mr. Cole (with whom he had dealt before, on behalf of White Star) about doing some frame repair, for which he quoted $800.00. Only after inspecting the frame did he determine that new spring hangers were needed,

which would involve more work. Mr. Cole brought the spring hangers and the work was done. An invoice to White Star was issued.

[10] After that, he says that he was unable to get in contact with Mr. Cole to have the bill paid and the truck picked up. Phone calls were not answered. A collection agency was unsuccessful. He made several trips to Mr. Cole's office where he found the business apparently closed down; he believed that it might have been in receivership (which Mr. Cole denies).

[11] He says he was able to find Mr. Cole in his office one time. On that occasion, he says, Mr. Cole promised that his wife would drop off a cheque to pay the bill the next day. This never happened. (Mr. Cole denied ever making such a promise because (he says) his wife does not handle payables for his business.)

[12] In the meantime, Mr. Lively says, he was forced to leave the truck parked in his yard. He does not have a secure place to store vehicles. Also, the vehicle was a bit of a nuisance and had to be moved several times. Now it won't start.

[13] Mr. Lively does not deny that the vehicle may have been vandalized, but says that he cannot be held responsible as Mr. Cole basically abandoned the vehicle. He doubts that the vehicle is even worth the amount of the outstanding bill, especially in its current condition, not having been driven for almost two years. He also denies that the windshield is cracked; it only has a small chip, he says. He says that there is a sign in his office which cautions customers that he cannot be responsible for vehicles left on the property. (Mr. Cole denies ever seeing such a sign.)

[14] Mr. Lively's position is that he should be permitted to sell the truck under his lien rights, in order to recoup some of the bill which he frankly does not expect to be paid by Mr. Cole or White Star.

[15] Mr. Cole relied on the *Occupiers Liability Act* as support for his claim that the Defendants should bear responsibility for damage done his truck while on their property. That Act codifies the common law duties that an owner or occupier of land has to prevent damage to people or personal property while on the landowner's or occupier's property. This most typically involves dangerous conditions, such as unmarked holes, booby-traps, icy conditions or the like.

[16] I do not see this case as an occupier's liability case. It is more of what the law refers to as a "bailment," which defines the duties someone has when personal property is entrusted to another party's possession.

[17] There are two kinds of bailment: bailment for reward and gratuitous bailment. In the former case, where someone is being paid to store property, they have a much higher duty than someone who is doing it gratuitously, and especially where someone has had the property thrust upon him unwanted, which is typically not considered a bailment at all, but a situation attracting no duty whatsoever.

[18] In my view, the Defendants here were probably "gratuitous bailees," at least for most of the time that the truck was in their possession. For the brief period of time that the work was being done, and a short time thereafter, it is reasonable to see the relationship as one where the Defendants were being paid and had a duty to protect the vehicle. Once the Claimant essentially abandoned

the vehicle, it became (at best) a gratuitous bailment where the duties are much lower. Arguably, there was not even a bailment.

[19] These concepts were discussed in the New Brunswick case of *Degrace v. Central Garage Sales & Service Ltd.* 1979 CarswellNB 28, [1979] N.B.J. No. 45, 24 N.B.R. (2d) 557, 48 A.P.R. 557. Although the facts there were a little different, the principles are important:

> 12 Bailment is defined in 2 Halsbury's Laws of England (3rd Ed.) 94 as follows:
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> > A bailment, properly so called, is a delivery of personal chattels in trust, 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. A bailment is thus distinguishable from a sale, the latter being effected wherever chattels are delivered on a contract for an equivalent in money or money's worth, and not for the return of the identical chattels in their original or an altered form. The relationship of bailor and bailee is also to be distinguished from the relationship of licensor and licensee which, in the absence of special contractual provision, carries no obligation on the part of the licensor towards the licensee in relation to the chattel subject to the license.
> >
> > To constitute a contract of bailment (which derives its name from the old French word bailler, to deliver or put into the hands of), the actual or constructive possession of a specific chattel must be transferred by its owner or possessor (the bailor), or his agent duly authorised for that purpose, to another person (the bailee) in order that the latter may keep the same or perform some act in connexion therewith, for which such actual or constructive possession of the chattel is necessary. Thus a bailment may arise by attornment involving a constructive delivery of possession, as where, for example, a warehouseman holding goods as agent for an owner agrees to hold them for another person pursuant to the owner's instructions.
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> 13 In *Ashby v. Tolhurst* [1937] 2 All E.R. 837 at p. 844, Romer, L.J. states:
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> > ..... in order that there shall be a bailment there must be a delivery by the bailor, that is to say, he must part with his possession of the chattel in question.
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> .....

> 16 In my opinion, once the plaintiff located his automobile and conversed with Mr. Cormier, the previous relationship of bailment between the parties was significantly altered. The meeting between the plaintiff and Mr. Cormier did not bring into existence a contract of bailment and therefore the relationship of bailor and bailee never arose between the parties. It is evident that the plaintiff did not deliver or entrust his automobile to the defendant, quite on the contrary, he instructed him not to touch it. It appears clearly from the evidence that he had no intention of having his motor vehicle repaired at Central Garage because his intention was to press Chrysler for a new car to replace the damaged vehicle.
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> 17 The plaintiff had the right, at all times, to remove his car from the defendant's car lot, but declined to do so. In the hope of securing a new vehicle, he chose to abandon the vehicle and allowed it to deteriorate on the defendant's car lot. While the automobile was to stay on the car lot with Cormier's permission there cannot be imputed to this relationship any of the attendant liability associated with a bailment transaction.

[20] As stated in a BC case, Wienert v. Kelowna Auto Towing (1989) Ltd. 1999 CarswellBC 1644, 44 M.V.R. (3d) 315:

> 15 The duty of care of a bailee is determined by the classification of the bailment.
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> A bailee must use due care and diligence in keeping and preserving the article entrusted but, although he or she is not an insurer, a higher degree of care is imposed on a bailee for reward than upon a gratuitous bailee. Where a bailee for reward subsequently becomes a gratuitous bailee, the standard of care is reduced. Canadian Encyclopedia Digest (Western) 3rd Edition, 1998, Volume 2, page 36, paragraph 28.

[21] I find that the Defendants, as gratuitous (and reluctant) bailees had a very minimal duty of care, and can only be held liable for damages if they were grossly negligent in allowing the truck to be vandalized. I accept the evidence of Mr. Lively that he is not equipped to store and protect vehicles for lengthy periods of time, and that this vehicle was no more than a nuisance which he simply locked up and parked while hoping that Mr. Cole might pay his bill and come and pick up his truck. I also find that he acted reasonably in making many efforts to contact Mr. Cole.

[22] Under the circumstances, I am unable to find any gross negligence on the part of the Defendants and the claim should be dismissed.

[23] While it is not strictly necessary for me to assess damages, in the event I am wrong about the duty of care, I find that the damages claimed are excessive. I am not convinced that less expensive repairs would be insufficient to return it to its previous condition. Also, this is a vehicle approximately twelve years old. Not much is known of its condition. It would not be reasonable to spend $4,900 or more on a truck that is worth much less than that.

[24] I also question whether Mr. Cole, who is the only Claimant with legal standing, has the right to bring this claim. There is no evidence that suggests that he is the owner of the vehicle. If the vehicle is owned by White Star (as the Defendants apparently believed when the invoice was made out), then Mr. Cole is not the proper party to make this Claim.

[25] It is also a fact that under s.20 of the *Partnerships and Business Names Registration Act* a partnership or proprietorship (i.e. White Star), or under s.17 of the *Corporations Registration Act,* a corporation (i.e. N.W. Cole Associate Appraisals Limited) may not bring or maintain any action in the Province of Nova Scotia, because they are not <u>properly</u> registered to carry on business in Nova Scotia. It is clear that they are not properly registered if their status has been allowed to lapse. These statutes create an absolute bar, which (however) can be cured by subsequent registration. As such, any action brought by White Star simply cannot proceed (let alone succeed) because it has no status to litigate.

[26] Mr. Cole should be well aware of these provisions. In January or 2008, he was in court when his company successfully argued this point in a case (SCCH

#288166) brought by Kee Human Resources. I was obliged to dismiss that claim because the Claimant was not properly registered.

[27] As for the counterclaim, the Defendant Mark Lively Welding Limited has satisfied me that it is entitled to judgment for $2,106.00, which was the amount of its invoice for work done. There is still a question of who should be responsible. The invoice is made out to “White Star.” As such the judgment on the counterclaim will be against White Star only. This will at least pave the way for the truck to be sold to cover some part of the bill. In the unlikely event that there is an excess, I direct that Mr. Lively bring the matter back before this court to determine who might be entitled to the excess.

Eric K. Slone, Adjudicator