Claim No: 387931

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Norton v. Brightwood Golf & Country Club, 2012 NSSM 55

BETWEEN:

ANN-NOREEN NORTON

Claimant

- and -

BRIGHTWOOD GOLF & COUNTRY CLUB

Defendant

REASONS FOR DECISION DECLARING MISTRIAL

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on June 5, 2012

Decision rendered on October 22, 2012

APPEARANCES

For the Claimant	self-represented initially (now) Michael MacKenzie, counsel
For the Defendant	Jean McKenna Counsel

BY THE COURT:

[1] This case was commenced by Ms. Norton on March 9, 2012, seeking damages in the amount of $2,468.48, respecting alleged injury to her cat as a result of golf balls allegedly coming from the Defendant golf club. When the Claimant issued her claim at the court office, she estimated that it would take no longer than two hours to hear. As is common with many self represented litigants, this estimate would prove to have been overly optimistic.

[2] The matter first came before the court on April 24, 2012, at which time it was adjourned at the request of the Defendant over the objections of the Claimant. Given how obvious it was at the time that the matter required more than two hours, and for other considerations, it was adjourned to a special hearing date of June 5, 2012.

[3] On that day, I heard the testimony of the Claimant herself as well as two other witnesses for the Claimant. At the conclusion of these three witnesses, which was also very close to the time when court would have had to adjourn because of the lateness of the hour, counsel for the Defendant made a motion for a non-suit. The basic thrust of her objection was that there was no expert evidence properly before the court to establish a connection between the alleged incident involving a golf ball striking the Claimant's cat, and the injuries said to have been suffered by the cat as laid out in the veterinary records. There ensued a discussion wherein it was explained to the Claimant, who was self represented, that the court could not rely on statements in the veterinary records without giving the Defendant an opportunity to cross examine the author of those comments. Because of the lateness of the hour, and my desire not to see the

case dismissed on something of a technicality, or perhaps more accurately in fulfilment of my obligation to assist self represented parties, I allowed the matter to be adjourned to a future day when the Claimant could call evidence from one or more veterinarian.

[4] Several things have happened since June 5. There has been a great deal of e-mail correspondence attempting to set up a future hearing date, which has thus far been unsuccessful. The Claimant then indicated that she was planning to retain a lawyer for the continuation of the trial. There was some communication with one lawyer, followed by an indication that that lawyer would not be representing the Claimant, but that she would be represented by someone else. Included in one of the e-mails was a request that the Claimant be permitted to reopen her examination to allow certain questions to be asked, that she did not herself bring out on June 5.

[5] More recently, counsel for the Defendant has made a request that I disqualify myself on the basis that I am potentially biased. This alleged bias stems from the fact that I adjudicated a case on May 8, 2012 between the same Claimant and a store which sold her a washing machine. The main issue in that case concerned whether or not it was possible to make a claim against the store for a defective machine even though the manufacturer's warranty had expired. However, there was a factual question as to whether or not the Claimant had verbally notified the store about the malfunction. As part of my decision, I made the statement that I found the Claimant to have been "totally credible" and accepted her version over that of the store, which simply had no written record of such a complaint having been made.

[6] Counsel for the Defendant here suggests that my finding of credibility in that case renders me unable to make a fair finding of credibility in this case.

[7] The Claimant asks that I continue with the hearing and take the case to its conclusion.

[8] In the very unusual circumstances of this case, for reasons that I will explain more fully, I am declaring a mistrial. As a result, the parties will have to obtain a new date from the court and start the case over again at the beginning before a different adjudicator.

[9] I do not accept the proposition that having made a finding of credibility on one occasion for the purposes of that case renders me incapable of properly considering the evidence in this case, including the credibility of the Claimant. If this proposition were generally true, it would play havoc not only in this court but in many other courts. There are many instances that I can think of where there are a limited number of judges or adjudicators who have the responsibility within a particular jurisdiction. In Dartmouth, for example, we have two adjudicators who regularly sit and hear cases. Over the years, there are repeated examples of the same litigants coming before the court. It is only natural that I might remember faces and names, and even some of the facts of previous cases, but I take seriously my job of listening to the evidence and making findings based on what is before me rather than on what may have been before me on some previous occasion.

[10] Perhaps an even better example would be that of a criminal court judge in a small community who sees the same offenders over and over again. Given

how common it is for the same offenders to come before the courts on many occasions, it would severely tax the resources of the court system to have to supply different judges on every occasion. I daresay it would be impossible and such a proposition has never been floated, so far as I know.

[11] I am not saying that an adjudicator's experience with a litigant could never prejudice his or her ability to hear a future case. However, I believe that the facts would have to support that.

[12] Looking back on the previous decision involving Ms. Norton, I note that despite my use of the words "totally credible" I was dealing with a simple question of whether or not I believed that the Claimant had verbally brought her concerns to the attention of the store. The alternative would have required me to find that she was making the whole thing up. The only evidence that the store had was the fact that they could find no written record of her having done so. In a sense, there was not much of a contest. I did not have to choose between the credibility of the Claimant and that of another witness. Nor were there any hard circumstantial facts that contradicted her.

[13] Having said all that, I am concerned that this question of bias will become a sideshow that serves no one's interest. The Claimant herself does not appear to appreciate that she might be forced to go through the rest of the trial, only to have the result appealed on the basis of alleged adjudicator bias. Furthermore, I have concerns about the fact that the next phase of the trial would involve a lawyer taking over the conduct of the case and seeking to have the Claimant recalled to give further evidence.

[14] There is also the fact that it will be a minimum of five months from the date of the last hearing, which is far from ideal. This is particularly problematic given that the Defendant has raised credibility, and specifically the credibility of the Claimant, as an important issue from its point of view. Whoever hears the case should have the benefit of listening to the Claimant and the contradicting witnesses within a shorter period of time.

[15] In a sense, I see declaring a mistrial as something of a “win-win” situation for the parties. The Claimant gets a chance to present her case through a lawyer from the start, knowing that she will have to call expert evidence on certain aspects of the case. The Defendant obtains a new adjudicator who has no familiarity with the Claimant from previous cases. Again I wish to emphasize that I do not believe that the Defendant has a legal basis to require that such an adjudicator be assigned, but since this appears to be what it wants, and it suits other interests, then this is what it shall have.

Eric K. Slone, Adjudicator