

Terry BANKS v. FAMILY VISION LTD..

2005
NWTTC 07
File: T-01-CV-2005000005

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER BETWEEN:

Terry BANKS

Plaintiff

- and -

FAMILY VISION LTD.

Defendent

**REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE Bernadette Schmaltz**

Heard at:	Yellowknife, Northwest Territories
Trial Date:	March 7, 2005
Judgment Filed:	June 27, 2005
For the Plaintiff:	Self Represented
Counsel for the Defendant:	Martha Temple, Student at Law Denroche and Associates

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**IN THE MATTER BETWEEN:**

Terry BANKS

Plaintiff

- and -

FAMILY VISION LTD.

Defendent

[1] The Plaintiff seeks judgment against the Defendant in the amount of \$280.00. The Plaintiff claims that the eyeglasses supplied by the Defendant were completely unsuitable, and he is entitled to be reimbursed the amount paid to the Defendant for the eyeglasses. The Defendant claims that it did provide eyeglasses for the Plaintiff and when the Plaintiff was not happy with the eyeglasses, the Defendant agreed to exchange the original eyeglasses. However, the Plaintiff has refused to supply his updated prescription, and therefore the Defendant is unable to provide eyeglasses satisfactory to the Plaintiff.

[2] The eyeglasses originally ordered by the Plaintiff cost \$409.00; the Plaintiff has paid the Defendant \$40.00 personally, and the Plaintiff's insurer has paid the Defendant \$240.00. The Plaintiff refused to accept the eyeglasses, and the balance of \$129.00 remains outstanding.

[3] The Defendant has filed a counter-claim against the Plaintiff in the amount of \$369.00 for breach of contract or damages claiming that the Plaintiff has breached the terms of the agreement to purchase eyeglasses from the Defendant without cause or justification.

[4] This trial took place in Yellowknife on March 7th, 2005. The Plaintiff testified, and Ms. Sherri Dunn testified on behalf of the Defendant Corporation.

I. FACTS

[5] Sometime in September, 2004, the Plaintiff attended the Corporate Defendant's business here in Yellowknife (hereafter called Family Vision) to purchase contact lenses. At that time the Plaintiff made a payment of \$40.00 to Family Vision (Exhibit 1). At some point after this (on or about September 20th, 2004) Family Vision received \$240.00 from the Plaintiff's insurer towards payment for the Plaintiff's contact lenses (Exhibit 2).

[6] The Plaintiff was going on holidays at or around the time that the contact lenses arrived in Yellowknife and, at the Plaintiff's request, the contact lenses were sent to the Plaintiff in Halifax. After returning to Yellowknife, the Plaintiff returned the contact lenses to Family Vision as he was not happy with them, and ordered eyeglasses from Family Vision. The cost of the eyeglasses the Plaintiff ordered was \$409.00. Family Vision agreed to take back the contact lenses, and provide eyeglasses to the Plaintiff. Family Vision confirmed with the Plaintiff's insurer that the payment received for the contact lenses could be transferred to the cost of the eyeglasses the Plaintiff ordered. The balance owing on the eyeglasses was \$129.00, which the Plaintiff was to pay when he picked up the eyeglasses.

[7] When these eyeglasses arrived, the Plaintiff was not happy with the eyeglasses, as he could not see as well with them as he could with his old eyeglasses. The Plaintiff believed he had ordered progressive lenses, however the new eyeglasses were not progressive lenses. The prescription the Plaintiff had supplied to Family Vision was not for progressive lenses (Exhibit 3).

[8] As the Plaintiff was not happy with the eyeglasses, Ms. Dunn from Family Vision called the eye clinic to check to see if the prescription Family Vision had received from the Plaintiff was correct. The eye clinic confirmed that the prescription the Plaintiff had supplied was his prescription (Exhibit 4). The eye clinic also advised that when the Plaintiff's eyes had been examined in

September, 2003, the examination indicated that the Plaintiff required "+1.75" indicating the Plaintiff required progressive lenses. However, the Plaintiff had only wanted a prescription for single vision lenses, so the "+1.75" was not reflected on his prescription (Exhibit 3). The prescription the Plaintiff supplied to Family Vision was not a prescription for progressive lenses.

[9] Even though the fact that the eyeglasses received were not what the Plaintiff wanted, i.e. progressive lenses, this was not due to an error on the part of Family Vision or the eye clinic. However, Family Vision did agree to exchange the eyeglasses for a pair of progressive lens eyeglasses. I find that the Plaintiff agreed to have Family Vision exchange the first pair of eyeglasses for a pair of eyeglasses with progressive lenses.

[10] As it had been some time since the Plaintiff's last eye exam, he decided to have his eyes examined, and to provide an updated prescription to Family Vision before the new eyeglasses were ordered. The Plaintiff has not to this date supplied Family Vision with a new prescription and, consequently, a second pair of eyeglasses with progressive lenses has not been ordered by Family Vision.

[11] Subsequently, the Plaintiff found eyeglasses he wanted from another supplier. He then told Family Vision that he did not want eyeglasses from Family Vision, and he wanted his money back. Family Vision refused to refund the Plaintiff the money paid for the eyeglasses.

II. ANALYSIS

[12] There was a contract between the Plaintiff and Family Vision. The Plaintiff ordered eyeglasses from Family Vision; he agreed to pay Family Vision \$409.00 for the eyeglasses. The Plaintiff supplied a prescription, Family Vision

had the eyeglasses made in accordance with the prescription provided, Family Vision presented the eyeglasses to the Plaintiff, and the Plaintiff refused them¹.

[13] The Plaintiff claims that the eyeglasses presented to him were not suitable. That may well be, however I find that the eyeglasses presented to the Plaintiff were the eyeglasses ordered by the Plaintiff. If the eyeglasses were not suitable to the Plaintiff, it was not the fault of Family Vision. Pursuant to s. 57 of the *Sale of Goods Act*, when the Plaintiff rejected the initial pair of eyeglasses, the Plaintiff then became liable to Family Vision for the loss incurred by Family Vision due to the Plaintiff's refusal to take delivery of the eyeglasses².

[14] Family Vision did not choose to enforce its remedy arising from the Plaintiff's refusal to accept the eyeglasses. Acting as most prudent and reasonable businesses would, Family Vision offered to exchange the eyeglasses, and provide the Plaintiff with another pair; the Plaintiff accepted this on the condition that he could bring in a new prescription. Family vision agreed to this.

¹ Section 28 of the *Sale of Goods Act* states:

28. The seller shall deliver the goods and the buyer shall accept and pay for the goods in accordance with the terms of the contract of sale.

² Section 43(1) of the *Sale of Goods Act* states:

43.(1) If the seller is ready and willing to deliver the goods and requests the buyer to take delivery and buyer does not take delivery of the goods within a reasonable time after the request, the buyer is liable to the seller for the loss caused by the neglect or refusal of the buyer to take delivery and for a reasonable charge for the care and custody of the goods.

Further, Section 57 of the *Sale of Goods Act* states:

57(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against the buyer for damages for non-acceptance.

(2) The measure of damages under subsection (1) is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of contract by the buyer.

[15] Before Family Vision could fulfill its obligations under the contract, the Plaintiff had to bring in his new prescription, which he did not do. The contract was frustrated, and was frustrated wholly by the actions of the Plaintiff in not supplying his new prescription. Therefore, Family Vision is relieved of performing its obligations under the Contract, as it is impossible to provide new eyeglasses without the Plaintiff's prescription.

... Where the event occurs as a result of the default of one party, the party in default cannot rely upon it as relieving himself of the performance of any further undertakings on his part, and the innocent party, although entitled to, need not treat the event as relieving him of the further performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong. (my emphasis) *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, [1962] 1 All E.R. 474

The Plaintiff cannot take advantage of his own wrong, he cannot frustrate the contract and then claim damages. It is not necessary to decide whether or not the Plaintiff's claim with respect to the \$240.00 paid by his insurer was properly before the Court. The Plaintiff's claim is dismissed.

III. THE COUNTERCLAIM

[16] The Defendant Family Vision Ltd., plaintiff by counterclaim, claims \$369.00 against the plaintiff Terry Banks, defendant by counterclaim³, as "compensation for breach of contract and/or damages for loss the Defendant suffered due to the Plaintiff's breach."

[17] As I understand the counterclaim, \$240.00 of the amount that the Defendant is seeking against the Plaintiff, is in anticipation of the Plaintiff's insurer requesting that the \$240.00 that was paid to the Defendant by the insurer on behalf of the Plaintiff be returned. There is no evidence on which to

³ For clarity and consistency, Family Vision Ltd. will continue to be referred to as the Defendant and Terry Banks will continue to be referred to as the Plaintiff.

base this portion of the Defendant's counterclaim. There is no evidence of any action that has been taken, or filed, against the Defendant suggesting that the Plaintiff's insurer is attempting to recover this amount from the Defendant. The Plaintiff's claim having been dismissed, this portion of the Defendant's counterclaim is also dismissed.

[18] The balance of the Defendant's counterclaim (\$129.00) represents the balance due from the Plaintiff upon receipt of the eyeglasses. The Plaintiff refused the eyeglasses he had ordered as he was not satisfied with them. The Defendant attempted to satisfy the Plaintiff, however the Plaintiff's actions, or lack thereof, prevented the Defendant from doing anything further to satisfy the Plaintiff.

[19] As referred to earlier, s. 57(1) of the *Sale of Goods Act* applies to this situation. Section 57(2) states that the measure of damages is "the estimated loss directly and naturally resulting in the ordinary course of events from the breach of contract by the buyer."

[20] The Plaintiff agreed to pay the Defendant \$409.00 for the eyeglasses ordered by the Plaintiff from the Defendant. The Defendant did receive \$280.00 under this contract leaving a balance owing of \$129.00 upon delivery. The Defendant supplied the eyeglasses as ordered by the Plaintiff, and the Plaintiff refused delivery. Through no fault of the Defendant, there is nothing more that the Defendant can do to satisfy the Plaintiff. The Plaintiff has not paid the balance owing on the eyeglasses. The resulting loss to the Defendant is \$129.00.

IV. CONCLUSION

[21] The Plaintiff's claim is dismissed. The Defendant's counterclaim is allowed in part. Judgment shall be entered for the Defendant against the Plaintiff in the amount of \$129.00 plus costs and reasonable disbursements.

[22] The issue of costs and reasonable disbursements is to be addressed in Court upon notice by the Defendant to the Plaintiff and to this Court. Notice of the hearing into the issue of costs and reasonable disbursements is to be given to the Plaintiff no later than 30 days from the filing of this judgment, though the hearing may be held later than 30 days from the filing of this judgment. The hearing shall be on a Monday, at 9:30 a.m. or as soon thereafter as the Court may hear the matter, and shall be scheduled for a date when I am presiding. If the Defendant fails to comply with the notice provision, the Defendant will be allowed costs of \$100.00 plus filing fees.

Bernadette Schmaltz

J.T.C.

Dated this 27th day of June, 2005, at
the City of Yellowknife, Northwest Territories

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