

Citation: *Kmyta v. Pawluk*, 2024 YKSM 9

Date: 20241213
Docket: 23-S0087
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before Her Honour Judge Cairns

DAVID JACK KMYTA

Plaintiff

v.

DIANE PAWLUK

Defendant

Appearances:
David Jack Kmyta
Diane Pawluk

Appearing on his own behalf
Appearing on her own behalf

REASONS FOR JUDGMENT

[1] The plaintiff, David Kmyta, has filed a small claims action against the defendant, Diane Pawluk, seeking repayment of a cash loan and costs. As the plaintiff, Mr. Kmyta bears the onus of proving the claim. The standard of proof is the civil standard of proof on a balance of probabilities, which is often described as “more likely true than not”.

[2] The only witnesses at the trial were Mr. Kmyta and Ms. Pawluk.

[3] Mr. Kmyta claims he loaned \$15,000 to Ms. Pawluk and that this loan has not been repaid despite numerous requests for payment. While Mr. Kmyta claimed additional amounts in the Statement of Claim, he clarified early in the trial that he was only seeking to be repaid \$15,000.

[4] Ms. Pawluk disputes the claim. She agrees that Mr. Kmyta gave her \$10,000. However, she says this money was not a loan but was to pay her back for previous supports she and her family provided to Mr. Kmyta.

[5] The issue before me is whether money provided by Mr. Kmyta to Ms. Pawluk was \$10,000 or \$15,000 and whether it was a gift or a loan.

[6] The trial commenced on September 27, 2024, and continued on November 8, 2024. The break in the trial occurred because, during the first day of trial, Mr. Kmyta advised he had recorded six hours of conversations between himself and Ms. Pawluk that he wished to submit as evidence in the trial. These recordings had not been shared with Ms. Pawluk. Mr. Kmyta agreed that not all six hours of the recordings were relevant but said he did not know how to pinpoint the relevant conversations. The trial was adjourned to allow Mr. Kmyta to determine how to narrow down the recordings to the relevant parts. Both parties were advised to share with each other all evidence they intended to rely upon in advance of the next court date and to return to court with all relevant materials.

Overview of Facts

[7] It is agreed that Mr. Kmyta and Ms. Pawluk were very good friends for several years. They met when Mr. Kmyta was recovering from the effects of an accident. The evidence is that Ms. Pawluk and her family supported him in various undefined ways as he struggled to get back on his feet.

[8] In May 2022, Mr. Kmyta received a financial settlement from his insurance company for the accident. With that money, he says he loaned Ms. Pawluk \$10,000 to buy a horse trailer and \$5,000 to buy a truck. There was no written agreement. Mr. Kmyta says that Ms. Pawluk asked him to loan her the money and he agreed. He also says they went together three weeks before he received his settlement to look at the horse trailer and truck.

[9] Their friendship ended abruptly after they took a trip to Alberta together in late May 2022. Neither party offered evidence to explain what had caused the relationship breakdown. Mr. Kmyta accompanied Ms. Pawluk on the trip in the hopes of visiting his ailing brother in Drayton Valley, Alberta; Ms. Pawluk took the trip for work-related purposes, hauling various things to and from Alberta. Mr. Kmyta says that the money Ms. Pawluk earned on the trip to Alberta was supposed to be used, in part, to pay him back for the loan.

[10] Mr. Kmyta filed copies of two bank statements in support of his claim that he withdrew cash in May 2022 to loan Ms. Pawluk \$15,000. These statements show that on May 20, 2022, there was a cash withdrawal of \$10,000 and on May 21, 2022, a cash withdrawal of \$5,000. Mr. Kmyta had annotated these statements by hand to explain what the funds represented. While I give little weight to the annotations, the bank statements have some weight for the purpose of corroborating of the amounts Mr. Kmyta says he gave to Ms. Pawluk. Throughout his testimony at trial, Mr. Kmyta mentioned other amounts that he says he gave Ms. Pawluk but, as he is not seeking to be repaid for those amounts through this action, I will not discuss them further.

[11] In the course of seeking to have Ms. Pawluk pay him back for the loan, Mr. Kmyta surreptitiously recorded conversations between himself and Ms. Pawluk. Three recordings were submitted during the proceedings and are filed as exhibits. The recordings were played at trial. Mr. Kmyta identified the male voice as his own and the female voice as Ms. Pawluk's.

[12] The first recording is from September 4, 2022. In that recording, after some opening chatter, Mr. Kmyta asks Ms. Pawluk if she has any money. She responds saying that she would probably have some in another week or so, but she is not sure how much. He then says, "out of the 15, figure out whatever you can pay me". He offers her an option to earn money by taking pictures of a trailer he bought that he now wants to sell. Ms. Pawluk then disputes the amount of 15,000, saying he only gave her \$7,000 and that she already had \$4,000. He reiterates that he gave her \$10,000 and then a further \$5,000. She says she "doesn't know how much money" she will have. He replies that she can give him a little bit. Ms. Pawluk can be heard saying she "won't be making [expletive] payments"; she "doesn't have money like that" and that she either has the money or does not. He again offers her the option of earning money by taking pictures of the trailer for him. Ms. Pawluk then complains that Mr. Kmyta has left her notes and messages, referring to them angrily as games. Interspersed throughout the conversation, often in an angry tone, Ms. Pawluk says the following:

I owe you money, I know that. Fine. But after I'm [expletive] done paying you, man, that's it.

I'll pay you the 15 grand then I don't owe you [expletive] all after that. I'll have the money in a [expletive] week.

Before I leave anyways, I'll [expletive] pay you off, I don't give a shit anymore. I'm [expletive] gone. I'm leaving to Alberta. I'll be packed up in another month or so.

I'll phone you when I got your money.

[13] Referring to someone named Donna, Ms. Pawluk says:

how'd she know that you loaned me money, then, you obviously [expletive] told her

[14] The call wraps up with Ms. Pawluk saying:

I'll phone you when I have some money for you.

I'll be gone soon enough; I'll have you paid before I leave.

[15] Mr. Kmyta's voice remains calm throughout the conversation, even with Ms. Pawluk swearing repeatedly about the situation.

[16] The second recording is from October 24, 2022. Mr. Kmyta asks for money. She says no, not right now. The conversation deteriorates and Ms. Pawluk hangs up.

[17] The third recording is from April 24, 2023. Ms. Pawluk is heard saying that she needs a couple of months. This is followed by some back and forth about amounts, with Ms. Pawluk saying that Mr. Kmyta had provided her with "eight grand cash", and she already had "four grand". She also refers to using "two grand" Mr. Kmyta gave her as a deposit for the horse trailer. She also says twice that Mr. Kmyta gave her "ten grand" for the horse trailer but that it was to pay her back. Mr. Kmyta says he gave her "ten grand" and "five grand". During that recording, Ms. Pawluk says:

I wasn't not gonna [expletive] pay you.

I'm going to give you 15 [expletive] grand but why talk so [expletive] bad about me?

I'll pay you.

Not like intentionally not going to pay you.

[18] During cross-examination of Mr. Kmyta, Ms. Pawluk questioned him about why he did not tell her the conversations were being recorded. His response was that he had a “funny feeling” that she was trying to rip him off. Ms. Pawluk also suggested to Mr. Kmyta that he had tried to deceive her, both in relation to the recordings and to get her to believe she owed him more money than she did. Ms. Pawluk challenged his credibility regarding the claim of expenses arising out of the trip to Alberta, forcing him to acknowledge that, contrary to what he said in a document attached to his Statement of Claim, he had not kept receipts. She pressed Mr. Kmyta to agree that the money was given by him to pay her and her family back for the support they had provided him over the previous several years. Mr. Kmyta did not agree.

[19] In her testimony, Ms. Pawluk admitted that Mr. Kmyta had given her \$10,000 but said it was to pay her and her family back for supports they provided to him during the period he recovered from the accident. She said that \$10,000 did not cover the full cost of the supports she and her family had provided to Mr. Kmyta, although she also said she did not keep track as the support was provided out of friendship. She denied he had given her \$5,000. She testified that the truck and trailer receipts pre-dated the money Mr. Kmyta provided but did not provide those receipts. She said she put a deposit on the horse trailer before Mr. Kmyta received the compensation from his

accident and that she had a receipt but is not submitting it. Ms. Pawluk said several times that she did not “feel” she owed him the money, given the support her family had provided him.

[20] Ms. Pawluk said that Mr. Kmyta had threatened her and her family multiple times. She did not give any details about the threats or explain when they had occurred. She said that she was afraid because of these threats and that, when she admitted owing money to Mr. Kmyta in the recorded conversations, it was because she was fearful of him. While she said she had recordings of threats made by Mr. Kmyta, she did not submit them. She stated that her fear of Mr. Kmyta explained the inconsistencies in her story that were heard in the recordings. Ms. Pawluk acknowledges that she was swearing, frustrated and angry during the recordings, stressing that this was due to extensive threats made by Mr. Kmyta.

Analysis

[21] Ms. Pawluk objects to the Court’s reliance on the surreptitiously recorded conversations between herself and Mr. Kmyta. She says she did not know that she was being recorded in those conversations, she did not provide her consent, and that it is unfair to her. She argues that the recordings do not tell the whole story and that, while she admitted to owing Mr. Kmyta money, she did so out of fear, alleging he threatened her. While she can be heard in the recorded call mentioning a note or sign Mr. Kmyta placed near her mailbox, no details of Mr. Kmyta’s alleged threats were provided during the trial.

[22] While I acknowledge Ms. Pawluk's unhappiness about being secretly recorded, the recordings are material and relevant evidence in this proceeding. Even where recordings are made without the knowledge of one of the participants, courts have admitted the evidence on the basis that the court should have all relevant evidence available. The public policy considerations that may push towards exclusion of surreptitious recordings in family or employment law proceedings do not apply here (see *Rooney v. GSL Chevrolet Cadillac Ltd.*, 2022 ABKB 813).

[23] Where recordings are relevant and otherwise admissible, they should be admissible as evidence if their accuracy can be proved, and the recorded voices properly identified. Mr. Kmyta's identification of himself and Ms. Pawluk as the speakers was not disputed. The recordings are, for the most part, of high quality. They are clear and easy to follow. There are times that it is difficult to hear what is being said as the speakers are talking over one another, but that is the nature of human conversations. I find that the recordings tend to aid, rather than confuse or mislead me, as I consider the issues before me. It is also important to note that s. 7 of the *Small Claims Court Act*, RSY 2002, c. 204, relaxes the rules of evidence for small claims actions.

[24] The parties' positions are irreconcilable. Mr. Kmyta says he loaned Ms. Pawluk specific amounts for specific purposes: \$10,000 for a horse trailer and \$5,000 for a truck. He has repeatedly asked to be paid back. He testified to giving Ms. Pawluk other amounts but said that, as those were gifts, he is not seeking repayment. Ms. Pawluk acknowledges Mr. Kmyta provided her with \$10,000 but says that money was given to pay her and her family back for supporting him. She further says that the financial

support she and her family provided him exceeded that amount. She denies he gave or loaned her \$5,000.

[25] Neither party gave evidence in a clear or straightforward manner, making it difficult to understand what happened between them. While testifying, both parties went off track numerous times to describe the trip to Alberta, Happy (the dog), dog food, veterinary bills, fuel, transportation, hamburger meat, cigarettes, and so on. On Ms. Pawluk's side, this information was put before the Court to support her assertion that Mr. Kmyta gave her money to repay her and her family for supporting him. There were numerous references by Ms. Pawluk to threats she says Mr. Kmyta made, but no examples of any kind were provided. Ms. Pawluk also referred to receipts she had and various recordings that would support her version of events but provided none of that evidence, despite having ample time to do so.

[26] Ms. Pawluk did undermine Mr. Kmyta's credibility in relation to receipts he claimed to have kept from the trip to Alberta. In her cross-examination, he admitted that he had not kept those receipts. However, I do not find that his credibility in relation to the key issues in this case is undermined.

Conclusion

[27] The three recordings provide compelling evidence. In the recordings, Ms. Pawluk explicitly admits to owing Mr. Kmyta \$15,000. She admits this on more than one occasion. She says she will repay him multiple times. She refers to the money as a "loan".

[28] Ms. Pawluk has been inconsistent in identifying the amounts in dispute. For example, in the recorded conversation from September 4, 2022, Ms. Pawluk says the amount Mr. Kmyta gave her was \$7,000. Then, in the recorded conversation from April 24, 2023, Ms. Pawluk says the amount was \$8,000. In the same recording, she twice identifies \$10,000 as the amount Mr. Kmyta gave her. These amounts are inconsistent with the times she admits in the recordings that she owes Mr. Kmyta \$15,000. There is a further inconsistency with her testimony in court where she says that she received \$10,000 from Mr. Kmyta. These inconsistencies undermine her credibility and reliability.

[29] I do not accept Ms. Pawluk's explanation that Mr. Kmyta gave her \$10,000 to pay her and her family back for the support provided to him as he recovered from his accident. This explanation was unsupported by any detail as to what that support was or any description that could establish that the cost of that support amounted to or exceeded \$10,000. Further, her evidence that the amount of support exceeded \$10,000 is inconsistent with her testimony that she did not keep track of amounts as the support was provided out of friendship.

[30] While Ms. Pawluk referred to evidence that could have supported her claim – recordings of threats, deposit receipts – she provided no evidence to the Court.

[31] I note that, in her verbal interactions with Mr. Kmyta on the recordings, Ms. Pawluk often sounds forceful and angry. She does not sound at all fearful. In contrast, Mr. Kmyta maintains his composure. Having listened to Ms. Pawluk interact

with Mr. Kmyta on the recordings, and without any evidence of threats made by Mr. Kmyta, I do not find it credible that she was fearful of Mr. Kmyta.

[32] On a balance of probabilities, I accept Mr. Kmyta's evidence that, upon receiving the insurance payout for the accident, he loaned Ms. Pawluk \$15,000 in May 2022 and that she has not paid him back. I accept that she requested the loan, and he agreed to it. I find his credibility on this point is heightened by his acknowledgment that he gave her other amounts but, because those were gifts, he is not claiming them in this action. Mr. Kmyta did not waiver in his evidence about when the loan was made, the amount, or what it was for.

[33] Mr. Kmyta is awarded \$15,000. Pursuant to Schedule A of the *Small Claims Court Regulations*, O.I.C 1995/152, he is awarded costs of \$100 for filing a claim and \$50 for filing a notice of trial. He is awarded post-judgment interest pursuant to the *Judicature Act*, RSY 2002, c. 128, from the date the judgment is payable. Ms. Pawluk has six months from the date of this judgment to pay Mr. Kmyta.

CAIRNS T.C.J.