

Citation: *Sauer v. 46667 Yukon Inc.*, 2024 YKSM 6

Date: 20241206
Docket: 23-S0002
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Chief Judge M. Cozens

HEINZ SAUER

Plaintiff

v.

46667 YUKON INC. DBA
CERTIFIED AUTO SERVICE and
LEN MCGINNIS

Defendants

Appearances:

Heinz Sauer
Len McGinnis
Tony Fok

Appearing on own behalf
Appearing on own behalf
Appearing on behalf of 46667 Yukon Inc.

REASONS FOR JUDGMENT

[1] This is an action that arises from a contract for the body work repair of a 2006 Ford F350 Supercab (the "Truck") belonging to the Plaintiff Heinz Sauer. The Truck was apparently stolen some time after the Defendant Len McGinnis began work on it in the shop of the Defendant 46667 Yukon Inc, DBA as Certified Auto Service ("Certified").

Position of the Parties

[2] Mr. Sauer states that in March 2021, he contracted with Mr. McGinnis, a mechanic, for the purpose of completing body work repairs to the Truck. It had been damaged in a rollover accident in October 2020.

[3] Mr. Sauer delivered the Truck to Mr. McGinnis at a shop run by Certified. Mr. Sauer provided Mr. McGinnis with significant monies in advance and during the repair process. Mr. Sauer claims that while the Truck was in the care of Certified and Mr. McGinnis, it went missing. He claims \$13,950 in damages as a result of the Truck's disappearance.

[4] Mr. McGinnis agrees that he had contracted with Mr. Sauer to repair the Truck. He says that he lost control of the Truck when he went into custody at Whitehorse Correctional Centre. It was his understanding that Tony Fok at Certified had assured him the Truck would be kept safe while he was in custody. When Mr. McGinnis was released from custody, he learned that the Truck was no longer at Certified, and he assumed that Mr. Sauer had taken it back.

[5] Certified denies that it had made any promises or assumed any responsibility to either Mr. McGinnis or Mr. Sauer to keep the Truck safe. Certified says that, some time after Mr. McGinnis went into custody, the Truck had been moved outside to Certified's lot to allow for roof repairs to the shop area, but that someone unknown had then moved the Truck to an unfenced parking lot not associated to Certified. Certified does not know who removed the Truck from the unfenced parking lot, and assumed either Mr. Sauer or Mr. McGinnis had arranged for this.

The Evidence

Heinz Sauer

[6] Mr. Sauer testified that he delivered the Truck to Mr. McGinnis at Certified's shop on March 12, 2021. He transported the Truck to the shop on a flat deck trailer. The Truck had sustained significant body damage from the rollover. Mr. Sauer testified that the Truck was in drivable condition at the time it was delivered to Mr. McGinnis, despite the significant body damage.

[7] Mr. McGinnis agreed to repair the Truck for a cost of \$6,000. He told Mr. Sauer that it would take about six weeks to two months to complete the work. Mr. Sauer was aware that Mr. McGinnis would be working on the Truck during the evenings and on the weekends. Mr. Sauer paid Mr. McGinnis a \$2,500 cash deposit that same day.

[8] On March 12, 2021, a sales order was signed by both Mr. Sauer and Mr. McGinnis that set out the \$6,000 cost for the work, as well as a description of the work to be done, which included repairs to the cab and box of the Truck, as well as a new paint job. The sales order identifies "Heinz Sauer" and "Econo Auto (Len)" at the top of the document.

[9] Two more deposits were paid by Mr. Sauer to Mr. McGinnis: \$800 in April 2021 and \$650 in May 2021. This amounted to a total paid by Mr. Sauer of \$3,950.

[10] Mr. Sauer testified that his contract was with Mr. McGinnis, and that he did not have a contract with Certified. He assumed that Mr. McGinnis was an employee of Certified since Mr. Sauer delivered the Truck to Mr. McGinnis at Certified's shop. He

agrees that neither Mr. Fok nor Mr. McGinnis ever told him that Mr. McGinnis was an employee of Certified.

[11] Mr. Sauer stated that work on the Truck proceeded slowly from the start. Mr. Sauer lives in Faro and would come to Whitehorse every four to six weeks or so, at which time he would check in on his Truck. Over the course of the summer in 2021, he describes being “strung along” by Mr. McGinnis. The work on the Truck was not progressing and when he asked about the lack of progress, he was assured by Mr. Fok or mechanic(s) that were present that Mr. McGinnis would soon have time to complete the repairs. Mr. McGinnis was never at the shop when Mr. Sauer came by.

[12] By the end of 2021, some work had been done to the Truck. However, at the end of 2021, Mr. McGinnis went to jail, so work on the Truck was put on hold. Mr. Sauer testified that Mr. Fok assured him that the work on the Truck would be completed once Mr. McGinnis was out of jail. Mr. Sauer assumed Mr. Fok was taking care of his Truck while Mr. McGinnis was in jail, although he testified that he never spoke to Mr. Fok directly about this.

[13] In April 2022, Mr. Sauer was told by Mr. Fok that they were doing renovations at the shop and that the Truck would be moved outside. A tarp was put over the Truck to protect it from the elements because the windows were missing. It was moved outside, in front of the shop.

[14] Then, in May 2022, Mr. Sauer noticed that the Truck was no longer outside of Certified’s shop. He was told that it had been moved down the street approximately 100 metres away, across from the Mae Bachur Animal Shelter, on what has been described

as a “city lot”. There was no security in this new location. Mr. Sauer testified that he was upset to see it sitting there with seemingly no intention of anyone to ever repair it.

[15] It was at that point that Mr. Sauer decided to go to the competition down the road. He went to Northside Auto to ask about repairing the Truck. Mr. Sauer testified that a mechanic from Northside Auto inspected the Truck while it was parked on the city lot and said that they would repair the Truck. This inspection occurred in May 2022.

[16] In August 2022, Mr. Sauer came to Whitehorse to take the Truck to Northside Auto, but the Truck had disappeared. It has not been recovered.

[17] Mr. Sauer believes the Truck would have been worth \$16,000 once the repairs had been completed.

Colin Jopse

[18] Colin Jopse is a mechanic at Certified. He testified that he was at Certified’s shop when the Truck was first delivered to the shop on a trailer.

[19] Mr. Jopse remembers Mr. Sauer coming in every two weeks or so to check on status of the Truck. When he came to the shop, Mr. Sauer was always asking where Mr. McGinnis was and whether Mr. McGinnis had done work to the Truck. Mr. Jopse was often the one who Mr. Sauer spoke with since no one else was usually there. Mr. Jopse was not involved in the repair work but had told Mr. Sauer that he would try to find out what he could and update Mr. Sauer on the Truck’s progress. He testified that Mr. Sauer was told that Certified was not working on the vehicle, and that Mr. McGinnis

was working on it whenever he had the time to do so. Mr. Jopse rarely saw Mr. McGinnis because Mr. McGinnis usually worked nights.

[20] Shortly after Mr. McGinnis went to jail, Mr. Sauer was told that the Truck had to be taken out of the shop. Mr. Jopse helped put a tarp over the truck to protect it from the elements.

[21] At one point, Mr. Jopse remembers that the landlord was moving vehicles around. Mr. Sauer came into the shop and said that the Truck had been moved to the lot around the corner. Mr. Jopse was not aware that it had been moved. Shortly after that, Mr. Jopse remembers Mr. Sauer coming back into the shop to say that the Truck had disappeared from its new location around the corner.

[22] Mr. Jopse testified that at the time the Truck was stolen, Mr. McGinnis had completed about half of the repairs. In his view, the Truck was not drivable at that point and would have needed to be taken with a trailer or tow truck.

Tony Fok

[23] Certified was represented by Mr. Fok, who is the sole director of Certified. Mr. Fok testified that there was an area in Certified's shop for larger vehicles that was not used much and that was slated for repairs due to water leaks. From time to time, Mr. Fok asked Mr. McGinnis to do some work for him on jobs booked under Certified, and Mr. McGinnis would do the work in that space. Mr. McGinnis was looking for a space to do repair work for his own clients, so Mr. Fok let Mr. McGinnis use that part of shop. He did not charge Mr. McGinnis any money to use the space. He testified that

the repair work that was done by Mr. McGinnis for Mr. McGinnis' clients had nothing to do with Certified.

[24] Certified denies that it advised Mr. McGinnis that the Truck would be safe in the shop while Mr. McGinnis was in custody. Certified states that in spring of 2022, the landlord wanted to fix the leaks in the shop and the Truck was moved outside to allow the shop to be repaired. Mr. Fok did not know who moved the Truck outside, but at one point noticed it parked in front of the shop near the road.

[25] Mr. Fok testified that at some point in time, he noticed that the Truck was no longer in front of Certified's shop. He assumed that Mr. Sauer had come to pick it up since, in Mr. Fok's view, no one else would have done so since it was not drivable. He testified that at the time, the Truck was missing doors and windows, and the cab was unsecured. He later learned that the Truck had been moved down the street, but he does not know who moved it. He denies having moved the Truck himself.

[26] Mr. Fok stated that Certified never possessed the truck or assumed responsibility for it. He states that Certified had no interest or involvement in the agreement between Mr. McGinnis and Mr. Sauer, had made no commitments to Mr. McGinnis and had received no monetary compensation from Mr. McGinnis for the use of Certified's shop.

Len McGinnis

[27] Mr. McGinnis testified that Mr. Sauer brought the Truck to him for repair through a referral from a friend. At the time, Mr. McGinnis was trying to get his business going, so he took on the job wholeheartedly. Mr. McGinnis intended to repair Mr. Sauer's

vehicle in his spare time with the hope that the work he did on the Truck would help Mr. McGinnis promote his company, Econo Autoworks.

[28] Mr. McGinnis agrees that he contracted with Mr. Sauer to repair the Truck for an estimated price of \$6,000. He testified that he did not take the job to make money, which was reflected in the quote. Mr. McGinnis says that he told Mr. Sauer that the repair job would take approximately six to eight weeks, although it could take longer. Mr. McGinnis acknowledges that Mr. Sauer provided him with a deposit of \$2,500, followed by an additional \$800 in April 2021, and \$650 in May 2021.

[29] Mr. McGinnis testified that Certified had nothing to do with his agreement with Mr. Sauer, except for letting Mr. McGinnis use the space in Certified's shop for the repair. Mr. McGinnis states that he had an arrangement with Certified that provided him space in order to do repair work on vehicles.

[30] Mr. McGinnis testified that the work took longer than initially agreed on due to how busy he was, and to some disagreements that he had with Mr. Sauer. When he went to jail, there was welding left to be done and parts to be installed. He testified that Mr. Fok knew the job was not done and allowed the Truck to remain at Certified's shop while Mr. McGinnis was incarcerated.

[31] When Mr. McGinnis was in jail, Mr. Sauer contacted him. Mr. McGinnis tried to assure Mr. Sauer that when he got out, he would finish the work on the Truck. He does not know who moved the Truck off Certified's lot, or what happened to the Truck at the time it disappeared since he was in jail at that time.

Analysis

1. *Liability of the Defendant, Mr. McGinnis*

[32] Mr. Sauer had a contractual arrangement with Mr. McGinnis to complete repairs to the Truck. Mr. McGinnis started but did not complete these repairs. Therefore, the first question to consider is whether Mr. McGinnis breached his contract with Mr. Sauer by not completing the work on the Truck in a timely manner.

[33] At the time the contract was formed, Mr. McGinnis told Mr. Sauer that it would take about two months to complete the work on the Truck. By the time Mr. McGinnis went to jail, the Truck had been in the shop for about eight months and the work was still not done. The reasons given by Mr. McGinnis for this delay were that he was busier than anticipated, and that he had had some personal disagreements with Mr. Sauer. Further, Mr. McGinnis was facing a period of incarceration of close to one year, during which time the Truck would not be worked on. This delay far exceeds the initial time estimate given by Mr. McGinnis. I note, however, that there was no agreement that time was of the essence, and the conduct of the parties was consistent with time for fulfillment of the contract being flexible.

[34] While time was somewhat flexible and Mr. Sauer accepted the delay, albeit not without concern, Mr. Sauer was certainly able to consider the contract as being breached and to have taken the Truck back into his possession at various points. In particular, he could have done this when Mr. McGinnis informed him that he was going into custody. He chose not to do so and the contract remained in force.

[35] I am satisfied that it was an implied term of contract that Mr. McGinnis would keep the Truck safe. While the doctrine of frustration could have been utilized to allow Mr. McGinnis to be relieved of his contractual obligations, and to advise Mr. Sauer that he should take possession of the Truck, he chose to request additional time to complete the work, and Mr. Sauer agreed. However, not only was the work not completed, the Truck was not kept safe.

[36] Mr. McGinnis' assertion that Certified had told him they would keep the Truck safe, may have given rise to Mr. McGinnis having a Claim against Certified for breaching their promise or guarantee to him. However, Mr. McGinnis chose not to file a Third-Party Claim against Certified, so he has no legal recourse against Certified in this proceeding.

[37] I find that Mr. McGinnis is liable for damages to Mr. Sauer for the loss of the Truck for breaching his responsibility under the contractual arrangement to keep the Truck safe.

2. Liability of the Defendant, Certified

[38] The more difficult question is the issue of liability in respect of Certified. As stated, Mr. McGinnis did not issue a Third Party Notice to Certified and, as such, cannot claim against Certified for any contribution to the damages he is liable for as against Certified. Certified was not in a contractual arrangement with Mr. Sauer, and therefore cannot be found to have breached any contractual obligation.

[39] Certified was in the role of a sub-bailee when it agreed, whether implicitly through conduct, or explicitly in communication with Mr. McGinnis, to “store” the Truck. There is no evidence that Certified was a bailee for reward, but rather it would seem to be in the position of a gratuitous bailee, in which case only gross negligence would make Certified liable for damages. As stated in *Punch v. Savoy’s Jewellers Ltd.* (1986), 54 O.R. (2d) (Ont CA) 383 at pp. 388-389:

Bailment has been defined as the delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or altered form as soon as the time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor or bailee can exist independently of contract. [emphasis added]

[40] In *Letwin v. Camp Mart*, 2021 ONCS 4175 (upheld 2022 ONCA 475), at para. 63, the Court states that:

While bailment is not a traditional “trust” relationship attracting fiduciary responsibilities, there is a duty to hold bailed property safely until its return is demanded: *Gravina v. Welsh*, 2018 ONSC 5638.

[41] The nature of a bailment relationship can change before a chattel is returned to its owner. An example of this changing relationship is set out in *Degrace v. Central Garage Sales & Service Ltd.* [1979] 24 N.B.R. (2d) 557 NB SC (AD) In *Degrace*, the plaintiff was involved in a car accident and the dealer took possession of the car without the plaintiff’s permission to repair it. Two weeks later, the plaintiff instructed the dealer not to repair the car. The car was then vandalized and became a total loss, while on the dealer’s premises. The Court found that a gratuitous bailment arose at the time the dealer came into possession of the vehicle, but that the bailment ended once the owner

instructed the dealer not to repair the vehicle. The Court stated at para. 17 that the plaintiff had the right, at all times, to remove his car from the defendant's lot but did not do so – he chose to abandon the vehicle and allow it to deteriorate on the defendant's lot.

[42] While Certified was a gratuitous bailee with respect to the Truck when Mr. McGinnis went to jail, it is my view that the bailment relationship ended when the vehicle was moved from Certified's lot to the city lot around the corner. The chief characteristic of a bailment is the entrusting of a chattel by one person to another person for some purpose (*Degrace* at para. 15). Once the Truck was moved off Certified's lot, Certified no longer had physical possession of the Truck, which supports a finding that the bailment ended.

[43] The evidence given by both Mr. Fok and Mr. Sauer also supports the end of the bailment relationship at this point. Mr. Fok testified that when he noticed the Truck was no longer outside of Certified's shop, he assumed that Mr. Sauer had picked it up, which implies that Mr. Fok believed the bailment to be at an end. Mr. Sauer testified that when he saw the Truck sitting on the city lot, he was upset and realised that no one was ever going to repair the Truck. He then proceeded to make arrangements to bring the Truck to another mechanic. His evidence supports the conclusion that he believed Certified was no longer looking after his Truck.

[44] I find that at the time the Truck was stolen, Certified was not a bailee. Therefore, Certified is not liable to Mr. Sauer for the loss of the Truck.

[45] I also am not prepared to find that Certified should be liable in negligence. The movement of the Truck to Certified's lot and the covering of it so as to prevent water damage was reasonable in the circumstances. We do not know who caused it to be moved to the unfenced parking lot. That action seems to me to at least give rise to a claim of negligence, but in the absence of any evidence that can attribute this action to a particular party, the fact that Mr. McGinnis was in custody and in the face of Certified's uncontested denial that it did so, there is no one to attribute any such negligent action to. While the possibility of it being the landlord from whom Certified was renting the shop, we do not know this, and the landlord is not a party to this action.

3. Did Sauer mitigate his loss?

[46] The Supreme Court of Canada in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, set out the general principles of mitigation:

24 In *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 (S.C.C.), at para. 176, this Court explained that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong." As a general rule, a plaintiff will not be able to recover for those losses which he could have avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Asamera; Evans v. Teamsters, Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30).

25 On the other hand, a plaintiff who does take reasonable steps to mitigate loss may recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly incurred in mitigation of damages (see P. Bates, "Mitigation of Damages: A Matter of Commercial Common Sense" (1991-92), 13 *Advocates Q.* 273). The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 F.C. 279, at p. 302, "The Court must make sure that the victim is compensated for his loss; but it must at

the same time make sure that the wrongdoer is not abused." Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case. [emphasis added]

[47] In this case, Mr. Sauer took some initial steps to mitigate his loss, such as contacting another mechanic to see if they could complete the work.

[48] However, one step that Mr. Sauer did not take was to move the Truck to a more secure location once he became aware that it was on the city lot. His evidence is that in April or May 2022, he saw the Truck sitting in the new city lot location, unsecured. He was upset to see it there. In response, in May 2022, he arranged for a mechanic from Northside Auto to inspect the Truck on the city lot, who agreed to do the work. Then in August 2022, Mr. Sauer came to retrieve the Truck but it had disappeared.

[49] In my view, from the time Mr. Sauer noticed the Truck had been moved to the city lot, to the time it disappeared, Mr. Sauer had an opportunity to mitigate his loss by moving the Truck to a more secure location, or by arranging for someone else to move the Truck on his behalf. He knew that the Truck was parked in an unsecured location and that it was not being monitored. Unfortunately, he failed to pursue this opportunity. His Truck was then stolen. Had the Truck been moved to a secure location when Mr. Sauer had the opportunity to do so, the loss suffered by Mr. Sauer would have likely been eliminated or minimized (considering whether any amount of the \$3,950 advanced by Mr. Sauer to Mr. McGinnis was perhaps recoverable).

[50] Therefore the failure by Mr. Sauer to mitigate the loss, once he had determined that the contractual arrangement with Mr. McGinnis was ended, and that the Truck was

now not in the possession of anyone, by taking possession of the Truck, serves to reduce the amount of any damages he is to be awarded.

Damages

[51] From a review of the photographs of the Truck, is it clear that the box and cab had suffered extensive damage. This said, Mr. McGinnis advised Mr. Sauer that he would be able to repair the cab and the box for the agreed upon sum of \$6,000, therefore there is a basis to believe that, once these repairs were completed, Mr. Sauer would have an operable vehicle that would be worth in excess of \$6,000. The evidence was that the Truck was able to be driven, despite the body damage, and as such there is no basis to assume that there was any significant problem with respect to the other components of the Truck, such as the engine and transmission for example. Mr. Sauer testified that the power train of the Truck was intact.

[52] Certified asserts that the value of the Truck was minimal, as in Mr. Fok's opinion it was a write-off worth only a few hundred dollars for parts. Certified provided AutoTrader website information that a similar, undamaged and upgraded, vehicle has a value range of between \$6,000 to \$35,000 with a median price of \$12,400 and average price of \$15,544.

[53] In my opinion, had Mr. McGinnis restored the Truck as he had committed to, the Truck would likely have had a market value in line with an upgraded vehicle, likely in the \$12,000 – \$15,000 range.

[54] I assess the value of the Truck as being \$13,500 as a midway point between the estimated valuation. I lack sufficient evidence to assess the value of the Truck in the

Yukon as compared to other locations, so I am, in the nature of proceedings in this court, assessing a value within an acceptable general range.

[55] In order for the Truck to have been worth the figure of \$13,500 that I have valued it at, had the contract been fulfilled and all the repairs completed for the agreed-upon price of \$6,000, Mr. Sauer would have been required to put an additional \$2,050 to go along with the \$3,950 already paid. Therefore, the value of the Truck at the time it was apparently stolen from the City lot was \$11,450. From this amount I deduct the amount of \$3,450 to account for Mr. Sauer's failure to mitigate his damages.

[56] Therefore, judgment is granted to the Plaintiff as against the Defendant, Len McGinnis, in the amount of \$8,000. The Plaintiff shall have his costs associated with filing the Claim and service of the Claim as against the Defendant, Len McGinnis. Post-judgment interest is granted pursuant to the *Judicature Act*, RSY 2002, c.128.

[57] The Claim against the Defendant, Certified, is dismissed with no costs awarded.

COZENS C.J.T.C.