Citation: *16142 Yukon Inc. v. Cashato*, 2017 YKSM 7 Date: 20170717
Docket: 16-WL001
Registry: Watson Lake

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Chisholm

16142 YUKON INC. and KERRY PETERS

Plaintiffs

v.

DANIEL CASHATO and 5775 NWT LTD.

Defendants

Appearances:
Kerry Peters — Appearing on behalf of the Plaintiffs
Daniel Cashato — Appearing on behalf of the Defendants

REASONS FOR JUDGMENT

Introduction

[1] The Plaintiff, 16142 Yukon Inc., bought a 2008 Kabota excavator (the 'excavator') from the Defendants. The excavator subsequently went missing from the Plaintiffs' property. The Plaintiffs claim damages for an alleged theft of the excavator from their business premises by the Defendant, Daniel Cashato. The Plaintiffs also seek damages for loss of business and revenue, compensation for repairs to the excavator and for the rental cost of a similar machine during that repair period, as well as costs for the recovery of the machine. The Plaintiffs' claim is for $25,000.

[2] The Defendants dispute the Plaintiffs' claim and, although no counterclaim was filed, seek the return of the excavator due to an alleged breach of contract. The

Defendants submit that the transfer of ownership of the excavator to 16142 Yukon Inc. was conditional on the purchase price being paid in full.

Relevant Facts

[3] 16142 Yukon Inc. and the Defendants entered into a purchase agreement (the 'agreement') with respect to the excavator on November 19, 2014. The purchase price was $30,000. Pursuant to the terms of the agreement, 16142 Yukon Inc. made a $5,000 payment at the time of the sale and agreed to make further payments of $1,000 per month commencing January 1, 2015. The Plaintiff took possession of the excavator immediately.

[4] By January 2016, the Plaintiff had paid $18,000 to the Defendants in accordance with the agreement. On January 25, 2016, Mr. Cashato became embroiled in an argument with Mr. Peters' spouse. It appears the dispute may have revolved more around compensation for work Mr. Cashato was performing at the Peters' home than with respect to the alleged outstanding money for the excavator. In any event, soon thereafter and the day before leaving on an extended trip, Mr. Cashato entered onto the business premises of the Plaintiffs, removed the excavator and stored it with a third party.

[5] Due to the time of year, this removal went unnoticed for a number of months, during which time the Plaintiffs continued to make monthly payments to the Defendants.

[6] Mr. Peters discovered the excavator was missing in April 2016. When the Plaintiffs recovered the excavator in early June 2016, they allege it was damaged. The

Plaintiffs had it transported to Whitehorse for repair, during which time they rented another excavator.

Analysis

[7] The first issue to be determined is whether the contract between the parties was a conditional or unconditional contract. I should note that neither party was in a position to file an original of the agreement. The Plaintiffs submitted a photocopied document, purporting it to be a true copy of the original.

[8] Although the Defendants initially took the position in its pleadings that the original agreement contained a term that the transfer of property was conditional on a transfer of registration, Mr. Cashato frankly admitted at trial that the written contract may not have contained that term, even though this was his intention when entering into the contract. He did not take issue with any other aspect of the photocopy of the agreement filed with the Court.

[9] As a result, I am left to conclude that the Plaintiffs have established, on the balance of probabilities, that the document filed with the Court is a true copy of the agreement.

[10] In *Duke Ventures Ltd. v. Seafoot,* 2015 YKSC 14, Gower, J. considered whether the sale of timber harvesting equipment resulted in the transfer of that property to the purchaser, even though a substantial amount of the purchase price remained outstanding. Mr. Justice Gower stated:

> 11 The first issue in this application is whether the property in the equipment passed to Mr. Seafoot when the agreement was made. If it did, then Duke has no right to repossess the equipment and his (extra-judicial) repossession of the skidder and the Ford truck would be unlawful.
>
> 12 Section 19(1)(a) of the *Sale of Goods Act*, R.S.Y. 2002, c. 198 ("the *Act*") states:
>
> > 19(1) Unless a different intention appears the following are rules for determining the intention of the parties as to the time at which the property in the goods is to pass to the buyer
> >
> > ( ) if there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed;
> >
> > …
>
> 13 I conclude that the agreement is an unconditional contract for the sale of specific goods in a deliverable state. Accordingly, the property in the equipment passed to Mr. Seafoot when the contract was made. Duke did not reserve the "right of disposal" of the property in the equipment pending the satisfaction of certain conditions, as contemplated in s. 20(1) of the *Act*. If Duke feels that Mr. Seafoot has failed to pay for the equipment pursuant to the terms of the agreement, then its remedy is to pursue a judgment for the price of the equipment under s. 46(1) of the *Act*. It is not entitled to repossess the equipment: see *Anderson's Engineering Ltd. (Re)*, 2001 BCSC 1476, at paras. 41 through 48. Further, Mr. Seafoot never intended to give up possession of the equipment when he felt compelled to leave the woodlot. In my view, the steps that he took to secure the equipment were sufficient to constitute constructive possession by him since leaving the woodlot.

[11] The agreement between 16142 Yukon Inc. and the Defendants in this matter clearly does not contain any terms which would establish a conditional contract.

[12] Therefore, I find that the contract to have been unconditional in nature; in other words, the transfer of ownership of the excavator was not contingent on all payments having been made by the Plaintiffs.

Trespass to land and chattels

[13] Mr. Cashato unlawfully entered the outside business compound of the Plaintiffs in order to seize the excavator in question, even though the Plaintiff, 16142 Yukon Inc., was not in arrears in its payments. Based on my assessment of Mr. Cashato's credibility, I do not doubt that he believed he was legally justified in doing so. Unfortunately for him, he was in error.

[14] Mr. Cashato's actions of entering onto the Plaintiffs' property without authority constitute a trespass to land (*Fuoco Estate v. Kamloops (City)*, 2000 BCSC 1042, at para. 27) and a trespass to chattels (i.e. property) (*Hudson's Bay Co. v. White*, (1997), 68 A.C.W.S. (3d) 983, (Ont. C.J. - Gen. Div.), rev'd on other grounds, (1998), 1 C.P.C. (5th) 333 at para. 8).

[15] Based on this finding, I must determine what the appropriate damages are for a trespass of this nature.

Nominal damages

[16] As determined in *Hudson's Bay Co. v. White*:

> This view holds that torts which are actionable per se are special because they are the only torts actionable without proof of actual damages. In such cases, nominal damages are available. Damages awards are not restricted to nominal damages, but any claim by the plaintiff for damages in excess of nominal damages requires proof of actual damages as in any other tort. (para. 15)

[17] This reasoning was adopted in *Cantera v. Eller,* (2007) 56 R.P.R. (4th) 39, para. 63, aff'd 2008 ONCA 876, where nominal damages were awarded.

[18] In the present case, even though Mr. Cashato did not do any damage to the Plaintiffs' outside compound when seizing the excavator, his actions in entering the compound and making off with the excavator were, in my view, both brazen and wholly inappropriate. This resulted in a certain amount of consternation for Mr. Peters. I find that an appropriate award is $500 in nominal damages in favour of the Plaintiffs.

Punitive damages

[19] As held in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, punitive damages should be ordered "only in exceptional cases and with restraint" (para. 69).

[20] In the matter before me, Mr. Peters and Mr. Cashato clearly had divergent views about when the transfer of ownership of the excavator was to occur. I accept that Mr. Cashato honestly held the view that he retained ownership until the Plaintiffs made full payment. As noted, however, he did not ensure that the written purchase agreement contained terms to support this position.

[21] Mr. Cashato acted rashly soon after he had been told to leave the Plaintiffs' business premises. His efforts to contact Mr. Peters were unsuccessful and he made the abrupt and unfortunate decision to seize the excavator.

[22] Although Mr. Cashato's actions are worthy of condemnation, I am not convinced that the circumstances of this case fall into the category of exceptional cases in which 'the defendant's conduct is so malicious, oppressive and high-handed that it offends the court's sense of decency' (*Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 (at para. 196), and *Phillips v. Keefe* 2012 BCCA 123 (at para. 112)).

[23] As a result, no punitive damages are payable to the Plaintiffs.

Compensatory Damages

[24] The Plaintiffs submit that there was significant damage to the excavator upon its recovery. Mr. Daman Werrun, an employee of the Plaintiffs, and Mr. Peters both testified that the excavator was working properly in the fall of 2015 when it was stored in the compound for the winter.

[25] When the Plaintiffs recovered the excavator in June 2016, Mr. Werrun described it as being dirty, with scrapes on its side. He also indicated that there may have been some undercarriage issues. Mr. Peters testified that there were scratches to the sides of the excavator, as well as damage to the rollers and tracks.

[26] The Plaintiffs filed a copy of an invoice for repairs to the excavator performed by a Whitehorse company, Totaltrac. The detailed invoice reveals that significant mechanical work was performed on the excavator in June and July 2016. The invoice reveals that the repairs included removing the tracks and replacing the top rollers.

[27] This portion of the repairs is consistent with the damage the Plaintiffs allege occurred while the excavator was in the possession of the Defendants.

[28] On the other hand, Mr. Cashato testified that he had left the excavator in the hands of a third party prior to departing on vacation. The only other evidence to this effect is a letter from Mr. Durocher that he stored the excavator during the time period that Mr. Cashato was in Europe. However, this evidence was not subject to testing by way of cross-examination, and as such I only give it limited weight.

[29] Also, there is uncontroverted evidence that the Plaintiffs located the excavator in the possession of Billy Ellis.

[30] Although it would have been preferable had the Plaintiffs presented inspection reports with respect to the condition of the excavator in the fall of 2015, prior to it being stored for the winter, I find, nonetheless, based on the evidence of Mr. Peters and Mr. Werrun, and the absence of evidence to the contrary from the Defendants, that the Plaintiffs have proved on the balance of probabilities that damage to the tracks and rollers occurred while the excavator was in the possession of the Defendants or its agents.

[31] In order to repair the excavator, Totaltrac personnel expended 22 hours of labour. However, it is apparent from the invoice that more than just the roller and tracks of the excavator were repaired. The Plaintiffs did not lead evidence to assist me in determining exactly what parts and labour were required to remedy the damaged caused by the Defendants or its agents.

[32] It should be noted that the Plaintiffs received payment for all repairs by way of an insurance claim, minus a $1,000 deductible paid by the Plaintiffs. As I am unable to determine with any precision what portion of the servicing/repairs consisted of matters unrelated to the actions of the Defendants, I award the Plaintiffs $500.

[33] The Plaintiffs also seek $4,200 for the rental of a replacement excavator during the period of time the damaged excavator was being repaired. Mr. Peters stated that he had a job at that time for which a small excavator was required. He also indicated that the initial reason for buying the excavator from the Defendants was to fulfill a business

need. I accept that the Plaintiffs had a need for this type of excavator in June and July 2016.

[34] However, the Plaintiffs did not present evidence as to why the damaged excavator remained with Totaltrac for over a month in order to effect the said repairs, thus necessitating the rental of a replacement excavator for that same period of time. At first blush, this amount of time would appear excessive.

[35] Additionally, as noted above, the Plaintiffs did not lead evidence as to the portion of the repairs that flowed from the damage incurred while the excavator was in the possession of the Defendants or its agents. Without further evidence justifying this lengthy repair period of over a month, when only 22 hours of labour was ultimately performed, some of which did not relate to the damage incurred, I am unable to conclude that the amount of money sought for the rental cost is appropriate.

[36] I find that a more reasonable period for this repair would have been two weeks, taking into account the ordering and shipping of parts. I therefore award the Plaintiffs half the amount being sought in this regard, specifically $2,100.

[37] The Plaintiffs also seek compensatory damages for the transportation of both the excavator to and from Whitehorse; and the rental excavator to and from Watson Lake. The Plaintiffs claim $1,680 for each round trip, for a total of $3,360.

[38] Again, the Plaintiffs did not lead detailed evidence in this regard. For example, no evidence was presented with respect to the industry standard price for transporting a small excavator this distance. Also, the Plaintiffs introduced no evidence that they had

received estimates from different companies for this type of transport. Instead, the Plaintiffs agreed to pay Mr. Werrun, a trucker, who is, as mentioned, also an employee of the Plaintiffs, to perform this work.

[39] The total amount of travel for two return trips is in the range of 20 hours. In addition to Mr. Werrun's time, I must also consider the fact he incurred fuel costs associated with the use of the transport truck.

[40] In all the circumstances, I find that a reasonable hourly amount to have been $75 for a total of $1,500. I award an additional $750 for fuel and wear and tear on his transport vehicle. The award for transportation is therefore $2,250.

[41] The Plaintiffs did not present evidence to support a claim for loss of business and revenue, nor did they lead any concrete evidence with respect to cost of recovering the excavator. In regard to this latter issue, the Plaintiffs ultimately located the excavator on a flat back truck in Watson Lake. There is no indication that any expenses were incurred to secure the machine at that time.

[42] Accordingly, the total amount owed to the Plaintiffs is $5,350.

Monies owing to the Defendants pursuant to the contract

[43] As outlined above, the amount of the initial contract for the excavator was $30,000. The Plaintiffs' evidence established payment of $22,129.63 to the Defendants by May, 2016. No further payments were made.

[44] The Plaintiffs attempted to introduce documents at trial with respect to work allegedly done in 2015 by the Plaintiffs at Mr. Cashato's residential property. This may have been an attempt to establish that the balance of the debt owing to the Defendants had been satisfied by other means than cash payments. However, as these documents had not been part of the original Claim and had not been disclosed to the Defendants, I disallowed their entry.

[45] I found that the Claim had not clearly set out that the Plaintiffs were seeking compensation for work of this nature. The Claim made no reference to this in the section entitled 'Reasons for claim and details'. The Plaintiffs filed no invoices in this regard. Despite a comprehensive pre-trial conference having taken place following the filing of the pleadings, it is apparent the Plaintiffs never raised the issue of claiming a monetary amount for work purportedly done for Mr. Cashato.

[46] Therefore, based on 16142 Yukon Inc.'s payments to the Defendants up to May 2016, $7870.37 remains outstanding under the contract.

[47] I offset that amount by the $5,350 that I have awarded the Plaintiffs. Therefore, the total amount owing to the Defendants is $2,520.37.

[48] Although the Defendants did not file a counterclaim, they sought the return of the excavator based on a breach of contract. Without a counterclaim, I am of the view that I do not have jurisdiction to make this order. In any event, as outlined above, the contract

was not conditional in nature, so even if the Defendants had filed a counterclaim, it would have been unsuccessful.

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CHISHOLM T.C.J.