

Citation: *Gabor v. Lane*, 2015 YKSM 1

Date: 20150721
Docket: 14-S0033
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON

Before: His Honour Judge De Filippis

GUSTAV GABOR

Plaintiff

v.

JORDAN LANE

Defendant

Appearances:
Gustav Gabor
Allan Lane

Appearing on his own behalf
Appearing as Agent for Defendant

REASONS FOR JUDGMENT

[1] This is an action for breach of contract. The amount involved is so small that it invites the question why the lawsuit survived judicial pre-trials and took one and one-half days of trial time. The answer is that the parties are entrenched litigants, each convinced of the rightness of their cause, and suspicious that the other side had cheated. I find that neither side acted dishonestly. These reasons explain why I conclude that the plaintiff succeeds.

[2] It is not disputed that, by an exchange of email messages, the parties contracted for purchase and sale of six cords of wood at \$200/cord. It is also agreed that the terms of the contract provided that the wood be delivered by the defendant to the plaintiff's home in two instalments; four cords on July 15, 2014

and two cords on July 17. The plaintiff paid \$800.00 paid on the first delivery for four cords. Prior to the second delivery being unloaded, the plaintiff complained that he had not received four cords as promised.

[3] The plaintiff claims he actually received 2.62 cords of wood and, thus paid \$276.00 more than he should have. If he is correct, there is no question these are the damages. He seeks this amount “plus the amount of this suit and costs”. The defendant rejects the claim and asks for “the maximum fees for inconvenience and expenses”.

[4] The plaintiff is a self-employed cabinet maker. He testified that when the defendant arrived with the wood, he did not look inside the trailer to see how it was stacked. However, when the defendant opened the back gate of the trailer, he noticed that the wood was not, on average, stacked to the height of the trailer and that there was a 14 to 16 inch gap at the back. The plaintiff testified that he questioned the defendant about this and was assured he was delivering four cords of wood.

[5] The plaintiff testified that on July 17, he stacked the “533 pieces of wood” that had been delivered two days earlier. This took 2.5 hours to complete and upon doing so, he became concerned that it did not amount to four cords. He called his spouse to assist him in measuring the stack and confirmed it was 3.35 cubic feet, or 2.62 cords of wood. The defendant had called this day to advise he would deliver the remaining two cords the next day. The plaintiff decided to wait until then to discuss the shortage in the first load.

[6] On July 18, the defendant called to confirm the delivery and to advise that he only had 1.5 cords available. On arrival, the plaintiff told him the first load was less than four cords. According to the plaintiff, he measured the stack in the presence of the defendant and they agreed it was not four cords. However, the defendant quickly changed his mind and asserted that his trailer holds four cords and that is what had been delivered. He accused the plaintiff of hiding some of the wood and the latter responded by allowing him to search his property. This offer was not taken up and the plaintiff demanded that the defendant refund him \$200.00 or provide him with another cord of wood free of charge. The defendant refused and made efforts to leave. The plaintiff, assisted by his spouse, blocked his exit. The defendant called the police. The latter instructed the plaintiff to let the defendant leave and advised the dispute could be resolved in the civil courts.

[7] On July 19, the plaintiff emailed the defendant to advise that “after a bit of cooling down period, I’m hoping we can resolve this dispute”. He explained how he had stacked and measured the wood and asked again for a refund of \$200.00 or the delivery of another cord of wood. Two days later, the plaintiff sent another email asking for an answer and threatening a lawsuit. A response was not received.

[8] On July 30, the plaintiff complained to Measurement Canada (an agency of Industry Canada), the federal department responsible for the *Weights and Measures Act*, R.S.C.1985, c. W-6 and received information about the purchase and measurement of firewood. He testified that he restacked the “same 533 pieces of wood” from the “diagonal one to a rectangular shape” that measured

21.5 feet long by 8.5 feet high by 22 inches wide” and obtained the same result – 2.62 cords. The next day, the plaintiff launched the present action.

[9] A letter to the plaintiff, dated October 7, 2014, from Peter Harrett, an official with Measurement Canada, confirms that on September 23, he attended at the plaintiff’s residence and measured a stack of wood. He calculated it to be 326.2 cubic feet or 2.55 cords. Mr. Harrett also observed that “Volume included airspace as defined in Regulation 355 of the Weights and Measures Regulations. Inspector was not present at the time of purchase [of the wood on July 15]”.

[10] The plaintiff produced two photographs of the stack of wood in question. He said that one was taken by him on July 17 and the other by Mr. Harrett on September 23. He testified that both depict the same stack of wood and that this is what was delivered to him by the defendant on July 15.

[11] Agent for the defendant challenged the plaintiff’s credibility and reliability. He asserted the plaintiff failed to act in accordance “with the doctrine of caveat emptor” by not inspecting the goods at the time of delivery and suggested some wood had been stolen by others before it was stacked and measured by the plaintiff. The latter replied that looking at the goods while it was inside the trailer would not have assisted as wood must be properly stacked to obtain a true measure. In rejecting the suggestion wood had been stolen, he testified that he pursues his livelihood by working on a shed at the property, did not see any person there between July 17 and 18, and has never been a victim of theft in the many years he has lived at this residence. The plaintiff concedes he jumped to

the conclusion the defendant had deliberately “shorted” him.

[12] Ms. Marie Gagnon is the plaintiff’s spouse. She was present when the defendant delivered the wood on July 15. She testified she noticed “a space at the back of the trailer” and added that the wood was not stacked inside the trailer; instead it “was thrown in there”. She also confirmed assisting the plaintiff in measuring the stack on July 17 and stated photograph taken of it is an accurate depiction.

[13] The defendant generally agrees with the plaintiff’s account what transpired between July 15 and 18. He added that the plaintiff became quite agitated on July 18 and aggressively prevented him from leaving the property, before the police were called to the scene. The defendant insists he delivered four cords of wood as he contracted to do and believed the plaintiff was trying to take advantage of him. Much of the defendant’s testimony related to the measurement of his trailer as well as the size, shape, and nature of the square container he installed on it. He produced photographs and specification sheets to corroborate his testimony. The constructed trailer measures 80.5 inches wide by 50 inches high by 215 inches long. The width of the unit is actually several inches more due to the runner and the flexibility of the siding which bows out when fully loaded. The defendant testified that this unit holds “a true four cords of wood” and that “my trailer is my measure”. He added that he not only uses the trailer as the measure of wood he sells but for that which he buys for resale. He also noted that the government accepts this trailer measure as the basis of fees charged to him in accordance with his harvesting licence. I need not review the evidence

about the trailer in more detail because I accept the defendant's testimony that it holds four cords of wood.

[14] Ms. Anna Smith works for the defendant. Her duties include harvesting wood and transporting it to the defendant's trailer. On occasion she stacks it in that trailer. She described how to properly stack the wood so as to minimize the air gaps. This description is consistent with the recommendations of Measurement Canada. In this regard, she testified that the wood must be placed in rows and not "simply tumbled into the trailer". Ms. Smith assisted the defendant in delivering the load of wood to the plaintiff on July 15. She fairly conceded she cannot recall how the wood was stacked in the trailer on that day; indeed, it is obvious to me that she does not remember if she was the one who loaded it into the unit. Ms. Smith stated, however, that the standard practice is to properly stack it, not "toss it in".

[15] In submissions, the plaintiff abandoned the claim that the defendant's trailer may not be a true measure of four cords and retracted any suggestion that he deliberately breached the contract by delivery of less wood. He relies on his testimony, as well as that of his spouse, to support the argument that the wood had not been properly stacked in the trailer, with the resultant shortage caused by the excessive number of air gaps.

[16] The defendant maintains that any shortage in wood could be explained by the plaintiff's act in hiding it or because a third party stole it. He argued that the plaintiff's credibility is much in issue because his "false claims" about how much

wood the trailer could hold shows a “fraudulent mind”. He emphasized the principle of *caveat emptor* and relied on the *Sale of Goods Act*, RSY 2002, c.198 to argue the plaintiff is deemed to have accepted goods in compliance with the terms of the contract.

[17] The defendant does not admit that the photograph taken by the plaintiff on July 18 accurately depicts the stack of wood that existed at that time; he testified “it could be, it could have been altered”. In any event, he disputes the manner in which the plaintiff measured the wood and, thus, he cannot accept the observations made by Mr. Harrett as contained in his October 7 letter. According to the defendant, “the best way to measure a cord of wood is by a rectangular pile of 4 x 4 x 8 [feet]”. In this regard, relying on a bulletin issued by Measurement Canada, he pointed out that the plaintiff failed to exercise due diligence.

[18] As already noted, I accept the defendant’s testimony that his trailer holds four cords of wood and have no doubt he genuinely believes that is what he delivered to the plaintiff. However, it is more probable than not that he is mistaken and that he delivered 2.62 cords of wood. In this regard, I accept the evidence of the plaintiff and his spouse that the wood had not been properly stacked in the trailer. This testimony was not undermined in cross examination and there is no other reason to doubt it. I reject the argument that the plaintiff’s pleadings show that his credibility is suspect. The pleadings from both parties show that there was a legitimate dispute about how much wood the trailer could hold. When this was clarified at trial, the plaintiff abandoned his position. In the

circumstances of this case, this enhances his credibility. Ms. Smith, who I find to be a truthful witness, does not assist in my findings of fact. She cannot recall how the wood was stacked in the trailer on the day in question and may not have been the one who performed the task.

[19] I also accept that the plaintiff's evidence that he properly measured the wood as delivered by the defendant. There is no air of reality to the suggestion that some of that wood had been hidden by the plaintiff or stolen by others. That the plaintiff correctly stacked and calculated the amount of that wood is confirmed by the Measurement Canada bulletin relied upon by the defendant for other purposes. It provides as follows: Firewood is sold in bulk or bags. In bulk, it is measured as a stacked cubic metre or a cord. A cord is 128 cubic feet (3.6 of neatly stacked cubic meters). Firewood should be stacked – and measured - on the delivery truck. In the alternative, a buyer should immediately stack the wood in neat rows, with all individual pieces parallel and touching and few gaps. Measurement Canada accepts measurement by cords but recommends the use of cubic metres. The federal agency provides guidance on how to measure the length, width, and height of the stack to ascertain the number of cubic metres.

[20] *Caveat emptor* or “buyer beware” is a common law principle that provides that in the absence of fraud or a fiduciary relationship a party to a contract is expected to look out for himself and not act foolishly. The defendant argued that the plaintiff's failure to promptly inspect goods delivered means he can no longer complain and his action fails.

[21] The *Sale of Goods Act* provides as follows:

32(1) When goods are delivered to the buyer that the buyer has not previously examined the buyer is deemed not to have accepted them unless and until the buyer has had a reasonable opportunity of examining them for the purpose of determining whether they are in conformity with the contract.

(2) Unless otherwise agreed when the seller tenders delivery of goods to the buyer the seller is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of determining whether they are in conformity with the contract. ...

33 The buyer is deemed to have accepted the goods when the buyer intimates to the seller that the buyer has accepted them or when the goods have been delivered to the buyer and the buyer does any act in relation to them that is inconsistent with the ownership of the seller or when after the lapse of a reasonable time the buyer retains the goods without intimating to the seller that the buyer has rejected them.

[22] The plaintiff did not violate the principle of *caveat emptor*. Indeed, his actions are consistent with the *Sale of Goods Act*; within a reasonable time, he examined the wood and objected that the delivery was not in conformity with the contract. In determining what is reasonable, I take into account the nature and quantity of the product deposited on his property as well as the fact that both parties knew the defendant would return within days to deliver the second load of wood.

[23] There is no question that the plaintiff and defendant are honest and decent people. Neither one set out to cheat the other, but both quickly came to this conclusion. I am confident the defendant is mistaken about how much wood he delivered because he did not realize it had not been properly stacked in the

trailer. A shortage of 1.38 cords was caused because the wood had been tossed inside and not laid out as should be to reduce air gaps.

[24] The plaintiff is awarded judgment in the amount of \$276.00. Pre-judgment and post-judgment interest is payable in accordance with the *Judicature Act*. I award costs to the Plaintiff in the amount of \$250 for filing and preparation fees.

DE FILIPPIS T.C.J.