

Citation: *Gareau v. Grey Mountain Housing Society*, 2014 YKSM 3

Date: 20140219
Docket: 13-S0017
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Chisholm

MARCEL GAREAU

Plaintiff

v.

GREY MOUNTAIN HOUSING SOCIETY

Defendant

Appearances:
Marcel Gareau
Kelly McGill

Appearing on own behalf
Counsel for Defendant

REASONS FOR JUDGMENT

[1] This is a matter in which the Defendant, Grey Mountain Housing Society, admits liability for significant amounts of water running onto the property of the Plaintiff, Mr. Marcel Gareau, for a period of days.

[2] The ultimate issue to be decided is the amount of damages to be paid to Mr. Gareau.

[3] I heard evidence for the Plaintiff from the following witnesses: Lydia Bailey, Matthew Ferguson, Timothy McClland, Marcel Gareau; and for the Defendant: Rick Reaume.

[4] The matters in issue with respect to the damages are:

- Whether the Plaintiff properly mitigated damages;
- Whether the hours of work claimed by the Plaintiff to address the issue he faced are reasonable in the circumstances; and
- Whether the remuneration per hour sought by the Plaintiff is reasonable.

Relevant Facts

[5] The Plaintiff, Marcel Gareau, discovered water coming onto his property at 38 Klondike Road (the 'property') on March 28, 2012 at approximately 5:30 p.m.

[6] The situation was serious as the water threatened to enter the basement of the property through window wells and cause damage to his tenant's suite. Mr. Gareau immediately commenced bailing with buckets the areas beside his house where he found water pooling. He was unable to discover the source of the water. Mr. Gareau testified he spoke to his tenant that evening and worked throughout the night due to the fact that as soon as he would get the water level down to a safe level, it would start rising again.

[7] Although Mr. Gareau secured some pumps the next day and was able to stop bailing by hand, he constantly monitored the pumps over the course of approximately three days. On April 1st, Mr. Gareau discovered that the source of the water problem stemmed from a broken exterior faucet on a house (71 Teslin Road) owned by the Defendant. Once discovered, the leaking water was redirected and the pooling of water on the Plaintiff's property ceased. The Defendant subsequently had the leaking faucet repaired.

Proper mitigation of damages

[8] In *Omega Salmon Group Ltd. v. Pubnico Gemini*, 2006 BCSC 59 (rev'd on other grounds, 2007 BCCA 33), the Court stated at para. 12:

A plaintiff is entitled to damages which, "so far as money can, put the plaintiff in the same position as he would have been had the tort not occurred": *Nan v. Black Pine Manufacturing Ltd.* (1991), 55 B.C.L.R. (2d) 241 at para. 19, 80 D.L.R. (4th) 153 (S.C.). Once a plaintiff has proven damage and quantum of damage, "the burden of proof moves to the defendant if he alleges that the plaintiff could have and should have mitigated his loss": *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 16 D.L.R. (4th) 1 at 14.

[9] In terms of whether Mr. Gareau properly mitigated his damages at this point, based on the serious situation he was facing, I find his initial actions were reasonable. He worked during the evening and throughout the night. He is entitled to full compensation for the time he spent bailing over the night of March 28 – March 29.

[10] The following day when the issue had not resolved itself, Mr. Gareau also took steps to bring in some equipment, specifically a small pump purchased by him as well as a pump supplied by an acquaintance of his. The Defendant argues that the pumps used were not appropriate for the situation as they had to be constantly monitored, whereas the Plaintiff could have bought more expensive pumps that engage automatically as water rises.

[11] The witness called by the Defence, Rick Reaume, although not qualified as an expert, has experience in this area. He is the owner of a property management company which does building maintenance and construction.

Although Mr. Reaume does work for the Defendant, his testimony was candid and forthright and there was no indication of partiality to the Defendant. He testified that based on the situation the Plaintiff was experiencing, installing three separate higher end pumps (one beside each window well), and checking on them four times a day would have been sufficient. When questioned further, he agreed that depending on the outside temperature, the hose attached to such a pump could freeze, rendering the pump ineffective. In such a situation, a more frequent monitoring schedule would be advisable.

[12] The difficulty is that the temperature was hovering around zero during this incident (above zero during the day and at or perhaps just below zero at night). The Plaintiff submits that the pumps he employed were adequate. He states that even more expensive pumps would have to be monitored closely due to the temperatures and the risk of water freezing in the hose.

[13] I find that continuous monitoring of an automatic pump in these circumstances would have been unnecessary. I also find that the Plaintiff could and should have called a professional to assess this issue and provide advice in order to help mitigate the damages. He did not. Accordingly, he is entitled to partial, but not full, compensation for the time he spent monitoring the water pumps.

Hours of work claimed by the Plaintiff

[14] Based on all the circumstances, I find that a reasonable monitoring schedule would have been once every two hours after proper pumps had been

installed. I find that pumps could have been installed by noon on March 29th, with monitoring to occur every two hours thereafter.

[15] From the discovery of the issue on March 28th to the time when pumps could have been installed, the Plaintiff is entitled to compensation for 18 ½ hours.

[16] From March 29th at noon until the discovery of the water source on April 1st at approximately 2:00 p.m., a total of 74 hours, the Plaintiff is entitled to credit for 37 hours of work.¹ He is entitled for another two hours of work on April 1st from 2:00 p.m. to 4:00 p.m. during which time he took measures to resolve the situation. The total hours of work for which he is credited is 57 ½ hours (18 ½ hours plus 37 hours plus 2 hours).

Hourly rate claimed by the Plaintiff

[17] Mr. Gareau claims 106 hours of work at a rate of \$50 an hour.² He submitted documentation from companies indicating that the hourly rate charged to deal with a flood is in the range of \$100. It is true that the Plaintiff's work prevented the flooding of his basement where a tenant was residing. However, as the basement was not flooded, the Plaintiff cannot claim the hourly cost of engaging a professional to deal with flooding. The hourly rate of such a professional is irrelevant for the purposes of reimbursement of hours worked by the Plaintiff.

¹ The Defendant's witness, Mr. Reaume, testified that each time he would attend to monitor a pump, he would charge an hour's work. The Plaintiff should be able to claim for his time in a similar fashion.

² In fact, from the discovery of water until resolution of the issue, 94 ½ hours elapsed.

[18] What is an appropriate rate of pay per hour in these circumstances? The Plaintiff was not employed at the time of the incident. In the text, *The Law of Damages*, 2nd ed. (Toronto: Canada Law Book, 1991), Professor S.M. Waddams states at paragraph 15.310:

More difficulty arises in a case where the plaintiff does not forego earnings. In such a case, the plaintiff has, in effect, foregone leisure time in order to mitigate the loss. If the plaintiff had employed another person to perform the mitigating service, the plaintiff could presumably have recovered the expense. It would seem that, in principle, up to the same amount should be recovered if the plaintiff performs the service. If the plaintiff's own time is less valuable than that of the person that might have been employed, the value of the plaintiff's time will be the limit of the recovery.

[19] The question which results is how to value the Plaintiff's time. The Defendant's witness suggested that he pays casual employees in the range of \$20 an hour. These casual employees are in many cases students who would not have any specific expertise. The work performed by the Plaintiff did not require any specific expertise.

Conclusion

[20] I find that the appropriate average rate of remuneration for an individual dealing with this type of situation is \$30 an hour. In determining this figure, I have taken into account the necessity to check the pump and hoses every two hours would have encompassed some overtime (i.e. during the night time hours). As the total numbers of hours is 57 ½, the overall labour amount payable is \$1,725.00.

[21] The Defendant does not take issue with the following costs also being

payable to the Plaintiff:

Inspection cost of \$200

Cost of pump in the amount of \$62.99

Court costs of \$150

Miscellaneous costs in the amount of \$72.72

[22] The total amount payable to the Plaintiff is \$2,210.71. Pre-judgment and post-judgment interest is payable in accordance with the *Judicature Act*.

CHISHOLM T.C.J.