

Citation: *Gillespie v. Cuthbert*, 2017 YKSM 2

Date: 20170120
Docket: 16-S0041
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Lilles

EMERALD GILLESPIE

Plaintiff

v.

SHELLEY CUTHBERT, Operating as Any Domesticated
Animal Rescue and Boarding Kennels

Defendant

Appearances:
Graham Lang
Shelley Cuthbert

Counsel for Plaintiff
Appearing on own behalf

REASONS FOR JUDGMENT

[1] On December 16, 2016, judgment was given in court, however I advised counsel that I would be filing written reasons in due course. These are those reasons. They are substantially the same as what was read in court.

[2] In May of 2015, the plaintiff, Emerald Gillespie, adopted a dog from the local Humane Society (Mae Bachur Animal Shelter). Over a year later, in May 2016, her dog (Buddy) began displaying some behavioural issues. On the advice of a friend, she took Buddy to a kennel and animal training business operated by the defendant, Ms. Cuthbert.

[3] It is unnecessary to set out in detail all of the interactions between the plaintiff and the defendant after Buddy was taken to Ms. Cuthbert's shelter. I would note that

Ms. Gillespie sought Ms. Cuthbert's assistance because Buddy had bitten two children. She accepted Buddy into her 30-day program beginning May 24, 2016. Buddy was returned to Ms. Gillespie on June 28, 2016.

[4] Three days later, Buddy unexpectedly bit a person who was rubbing Buddy's head. Ms. Cuthbert told Ms. Gillespie to bring Buddy back for a further assessment. Ms. Gillespie did so on July 6, 2016. It was discovered that Buddy had developed an ear infection and this may have triggered the bite that concerned Ms. Gillespie.

[5] Both parties agreed that there was a telephone conversation between them on July 19, 2016. This is a critical conversation because Ms. Cuthbert alleges that Ms. Gillespie "surrendered" meaning transferred ownership of Buddy to Ms. Cuthbert during this conversation. As paraphrased from the Reply, Ms. Cuthbert recalls Ms. Gillespie saying:

"I thought long and hard while away and buddy does not respect me as a leader. I feel it is for the better that I surrender buddy to you, but I feel bad to leave you with another mouth to feed."

Ms. Cuthbert responded: "I respect your decision and he will remain here until he is adopted".

Ms. Gillespie replied: "I agree and please let me know if there is anything I can do to help in anyway".

Ms. Cuthbert: "You can help at the fundraiser".

Ms. Gillespie: "What is the date?"

Ms. Cuthbert: "July 23 2016 noon until 4:00 pm".

Ms. Gillespie: "See you then".

[6] Ms. Gillespie remembers the conversation differently and stated:

After the two week period Ms. Cuthbert (*sic*) provided me with a final assessment which, in summation, was that she was unable to trigger any aggressive tendencies in Buddy but, regardless, her assessment was the Buddy would be unsafe in public without a muzzle and would never be safe around kids.

Given the assessment I decided that my busy work schedule and my social life would not be the best fit for Buddy and set out finding a better home for him in which he could run around all day and not be at risk for biting anyone even though he did not have any aggressive tendencies.

Ms. Cuthbert (*sic*) told me that she would keep him at the kennel and I could visit him and take him for walks whenever I wanted until I found him a new home.

[7] Ms. Gillespie said she agreed to help with Ms. Cuthbert's fund raising because "she was helping me".

[8] There were numerous friendly interactions between Ms. Gillespie and Ms. Cuthbert between July 19 and August 15, 2016. On August 12, 2016 Ms. Gillespie advised Ms. Cuthbert that she had found a perfect home for Buddy in Tagish. Ms. Gillespie replied that Buddy was not up for adoption "but if the right owner comes along before six months is up...I will consider just have them contact me and they can come out...".

[9] On August 15, Ms. Cuthbert posted the following facebook message to Ms. Gillespie: "I would like to remind you that you surrendered buddy to the rescue one you surrendered you gave up all rights to buddy's ownership the rescue will proceed with training care and eventual adoption".

[10] According to Ms. Gillespie, this was the first time she heard anything about her surrendering Buddy to Ms. Cuthbert. Until this facebook message, she understood that Buddy was staying with Ms. Cuthbert until she, Gillespie, found a new home for him.

[11] Ms. Gillespie attended Ms. Cuthbert's property with three friends on August 15, 2016. Ms. Gillespie also contacted the police that same day. Ms. Gillespie initiated these legal proceedings on September 2, 2016. She obtained an *ex-parte* order directing the return of Buddy to her, but days before that document could be served. Ms. Cuthbert caused Buddy to be transported out of the jurisdiction. She claims that Buddy subsequently escaped at a rest-stop and has not been found. In her pleadings Ms. Cuthbert also claimed ownership of Buddy pursuant to the *Dog Act*, RSY 2002 c. 59. It is readily apparent that the Yukon *Dog Act* applies to situations such as nuisance dogs and has no application to the circumstances of this case.

[12] The Adoption Contract Ms. Gillespie signed with the Yukon Humane Society in May, 2015 is also relevant. It provides: "I AGREE...7. To surrender the animal back to the Mae Bachur Animal shelter (shelter)/Humane Society Yukon (Society) should the adopter no longer wish to keep the animal. The adoption Fee will not be refunded". Ms. Cuthbert acknowledged that she was aware of the contract and its terms. Ms. Gillespie was obviously aware of it, and had contracted the Humane Society Yukon in relation to the caregivers she was proposing for Buddy and who lived in Tagish. Ms. Cuthbert took the position that this clause did not affect the transfer of ownership between Ms. Gillespie and herself.

Findings

[13] I am satisfied that Ms. Gillespie did not and never intended to transfer ownership of Buddy to Ms. Cuthbert. I accept Ms. Gillespie's version of the July 19, 2016 telephone conversation. The explanation most favourable to Ms. Cuthbert is that she misunderstood Ms. Gillespie's stated reasons for leaving Buddy with her. The least favourable is that Ms. Cuthbert simply decided that she knew what was best for Buddy and assumed ownership of him without any regard to Ms. Gillespie's rights.

[14] It was not until August 15, after Ms. Gillespie told Ms. Cuthbert that she had found a home for Buddy in Tagish that Ms. Cuthbert told her that Buddy had been surrendered to her and that she would not return Buddy to Ms. Gillespie.

[15] Ms. Gillespie's actions following Ms. Cuthbert's claim of ownership of Buddy are consistent with her position that there was no agreement to transfer ownership to Ms. Cuthbert. For example, she immediately contacted the RCMP who told her that it was a civil matter. She then obtained legal advice and initiated legal proceedings, serving Ms. Cuthbert with notice on September 2, 2016. In other words, she took steps immediately to correct the situation.

[16] Shortly after she became aware of the legal proceedings initiated by Ms. Gillespie for the return of Buddy, Ms. Cuthbert arranged for Buddy to be taken out of the jurisdiction. While this amounted to an abuse of process, it also indicates that Ms. Cuthbert knew that she was unlikely to persuade the court that ownership of Buddy had been transferred to her.

[17] Ms. Cuthbert was aware of the condition in Ms. Gillespie’s adoption contract that precluded the transfer of Buddy to a third party without the Humane Society’s involvement. She ignored that condition, asserted ownership and transferred Buddy out of the jurisdiction. At the very least, this constitutes bad faith on the part of Ms. Cuthbert.

Conclusion

[18] I find in favour of the plaintiff, Emerald Gillespie. I find that the plaintiff did not transfer ownership of Buddy the dog to Ms. Cuthbert. I am satisfied that, due to the actions of the defendant Cuthbert, Buddy cannot be returned to Ms. Gillespie.

[19] I award the following costs:

Cost of Adoption	\$200.00
Filing Fees	\$150.00
Counsel Fee at trial	\$250.00
Fees granted in the cause per Nov 7, 2016 application	\$500.00

Subtotal	\$1,100.00

[20] The plaintiff has requested punitive damages in the amount of \$2,500. That claim is based on the deliberate actions taken by Ms. Cuthbert to remove Buddy the dog from the territory and out of the jurisdiction of the Court after these legal proceedings were initiated by Ms. Gillespie. In law, her actions proved a legal basis for awarding punitive damages. Punitive damages are designed to send a clear message to parties not to abuse the court process.

[21] Although the basis for a claim of punitive damages has been made out, I decline to make the order. Such orders are rarely made in Small Claims Court. I am satisfied that I can send a message to Ms. Cuthbert, and the community at large, that her actions in removing Buddy the dog were inappropriate and wrong and an abuse of the Court's process by making an increased award of counsel fees pursuant to s. 58(2) of the *Small Claims Court Regulations*, O.I.C.1995/152:

Despite subsection (1), the court may allow counsel fees that exceed the amounts set out in subsection (1) where there are special circumstances.

[22] The application of this subsection was considered at length in *16142 Yukon Inc. v. Bergeron General Contracting Ltd.*, 2012 YKSM 5. As stated, these special costs are awarded in circumstances where one party has engaged in conduct deserving of rebuke. I find that the defendant's conduct in removing Buddy the dog from the jurisdiction of the court in order to thwart the court process constitute special circumstances and is deserving of an order for special costs.

[23] Counsel for the plaintiff advised that very conservatively he has spent 10 hours on this file.

[24] I hereby make an order for counsel fees in the amount of \$2,500. The total award is \$3,600.

LILLES T.C.J.