IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Lyndhurst Farms Ltd v. Rand, 2005NSSC188

Date: 20050707
Docket: S.K. No. 181311
Registry: Kentville

Between:

Lyndhurst Farms Limited, a body corporate

Plaintiff

v.

Richard Rand, carrying on business as Fox Hill Farm

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: April 22 & May 20, 2005, in Kentville, Nova Scotia

Final Written Submissions: June 14, 2005

Counsel: Bill Watts, Esq., counsel for the plaintiff

Chris Manning, Esq., counsel for the defendant.

By the Court:

[1] The plaintiff claims payment for rent of farmland and services provided to the defendant between 1999 and 2001. The defendant claims a set-off for manure supplied to the plaintiff, and counterclaims for the wrongful destruction of the defendant's crop in the fall of 2001.

BACKGROUND

[2] The plaintiff, Lyndhurst Farms Limited, grows crops for cash, leases farmlands to others, and provides farm services and equipment to farmers in the Annapolis Valley. It controls 50 - 100 fields. The defendant, Richard Rand, is a dairy farmer operating under the name of "Fox Hill Farm".

[3] Since 1980 Rand has leased farmland from Lyndhurst. Until 1999, the agreements for the use of land were verbal, made annually, and paid for with cash, and, in part at least, by barter. Beginning in 1999, Lyndhurst sought more formal agreements or contracts for land rentals. Invoices and monthly statements were issued by Lyndhurst, and any barter arrangement was required to be documented by invoices to Lyndhurst.

[4] In 1999 Lyndhurst forwarded to Rand a standard form Land Rental Agreement,(setting out terms for land use, payment, and "clearance dates") but, at no time relevant to this action, did Rand ever execute and return that agreement to Lyndhurst. As between them, agreements for land rental continued to be verbal with the exception of a hand written agreement dated May 1, 2000, referred to later in this decision.

[5] While Lyndhurst leased lands for several agricultural purposes, the defendant rented such lands for forage for his dairy cattle.

PLAINTIFF'S CLAIM

Plaintiff's 1999 Claim

[6] Lyndhurst claims that in the spring of 1999 the defendant verbally agreed to lease eight fields. In October, 1999, Lyndhurst invoiced Rand (Invoice 99113) $5,174,31 for the rent of seven fields, and in the spring of 2000, $1,058.46 (Invoice 20048) for rent of an eighth.

[7] The defendant denies leasing three of the fields. He denies leasing field Deg/W and ED2 referred to in invoice # 99113; he acknowledges owing $3,828.12 on invoice#99113. He denies leasing field EWN/S referenced in invoice # 20048, but rather stated that he plowed, harrowed, and seeded this field for the plaintiff.

[8] Lyndhurst claims that it sold hay from field D1 to Rand and invoiced Rand for three cuts in 1999 - invoice 99114, for two cuts totalling $995.80, and invoice 99129 for the third cut totalling $689.40. Rand says that he only cut twice and denies invoice 99129 is owed. During evidence both parties noted that 1999 was a very dry year and fields did poorly and Rand said the field would not have supported three cuts that year.

[9] Lyndhurst also claims for services provided for three of the leased fields. The services were bush hogging, manure application, S-tine, round up spraying, and mowing. One invoice is for field Deg/W and ED2, which fields Rand denies leasing in 1999. The other invoice for field DT is denied by Rand who says he did not ask for, and did not agree to pay for, any services. If he had needed any such services he would have carried out the work himself. Peter Peill, Lyndhurst's President, produced no records other than the invoice for the services claimed;

Peill says that, if the work was carried out before the rental began in the year 1999 (he could not recall and had no record of when the services were carried out in relation to the commencement of the rental), it was customary that the tenant would pay for such services.

[10] On January 8, 2000, Rand paid Lyndhurst $2,000.00 on his account.

Analysis of 1999 Claim

[11] The evidence consisted of the oral evidence of Peter Peill and Richard Rand. Lyndhurst's invoices and the monthly statement, attached as Tab 2 to the Exhibit Book, were the only documentary evidence; the invoices for rent and services were prepared (dated) in October/November, several months after the services were performed and lands rented.

[12] In May, 2000, Peill and Rand met to discuss the defendant's outstanding account, and the defendant's farmland requirements for 2000. The short handwritten agreement signed by both parties (Tab 3 of Exhibit Book) reads as follows:

May 1, 2000

Stock pile manure until fall for EWN, EWR .
Balance for spring assuming $60/AC for manure and spreading

Jack Van Rostel to confirm: Based on $8,000.00.

Want to keep Degraff E, BD3, EE, orchard in front of Rick [EWO], D.T. for one year.

Can service on a cash basis.

Peter Peill

Richard Rand

[13] The plaintiff asked the Court to infer, from the absence of any objection by Rand to the invoices sent by Lyndhurst (beginning in the fall of 1999) and, and by reason of his payment of $2,000.00 on the account, that he agreed with the invoices. The plaintiff also asked the Court to infer from the words "want to keep Degraaf E, BD3, EE, orchard in front of Rick [EWO], D.T. for one year..." in the May 2000 agreement, that more fields were leased in 1999. The defendant denies that he received all of the invoices, or any statements of account until the fall of 2001, and states that the words in the agreement do not reasonably bear the inference that more fields were leased in 1999.

[14] The onus is on the plaintiff to establish, on a balance of probabilities, its claim. Both the evidential burden and a legal burden remain throughout on the plaintiff.

[15] Peill was a busy business man. I accept the evidence that he was always on the go. My assessment of his evidence was that his memory of events was based on the invoices, not on his personal recollection of the events that occurred five or six years before the trial.

[16] I presume that if the services had been provided in the spring of 1999 to the three fields for which invoices were issued on October 31, 1999, that there should have existed employee time sheets, equipment usage records, or other contemporaneous records, that would have documented the work in the spring that was only invoiced in the fall of 1999. The existence of such records and the production of them would have made a significant difference in the Court's assessment of the plaintiff's claim for services. It would have been easier for the plaintiff to verify its claims by such business records than for the defendant to disprove them. As it is, the Court was left with the obligation to choose between

the memories of Peill and Rand with regards to events that took place six years before.

[17] The fact that the burden of proof was on the plaintiff is determinative on the issue of the claim for services. I find the plaintiff has not discharged this burden.

[18] With respect to the rental of Deg/W and ED2, Rand stated that, when he received this invoice, he tried to contact Peill (to object) several times without success, except once by phone when Peill stated he would take care of it. I am not satisfied that the plaintiff, in the absence of other business records to support the invoice of October 31st, has discharged its burden. With respect to the rental of EWN/S, the defendant stated that he plowed, harrowed and seeded this field for forage for the plaintiff (not himself); on cross-examination, he acknowledged that he never invoiced, nor was he paid for this work; yet, it was not part of his counterclaim. Rand's evidence does not make sense; in light of the subsequent dispute, it would have been logical, if true, for him to have claimed for the work performed for the plaintiff on that field. I find that the defendant leased EWN/S in 1999.

[19] For these reasons I find that the plaintiff has established, as of the January 8, 2000 payment by the defendant, its claim for 1999 as follows: part of invoice # 99113 in the amount of $3,828.12; invoice 20048 in the amount of $1,058.46; invoice # 99114 in the amount of $995.80, for a total, after crediting the $2,000.00 payment, of $3,882.38.

Plaintiff's 2000 Claim

[20] The parties agree that the May 1st agreement lists the lands leased in 2000. The plaintiff invoiced the defendant on April 1, 2000, for one-half the year's rent and on August 31, 2000, for the other half. The invoices total $4,202.80. A correction in the acreage of one of the fields resulted in a credit of $207.00. I confirm the plaintiff’s claim for 2000 totalling $3,995.80. I will deal with the set-off claimed by Rand for manure later in this decision.

Plaintiff's 2001 Claim

[21] The parties agree. The plaintiff claims for, and Rand acknowledges, rental on fields DD3 and Deg/E. He acknowledges responsibility for revised invoice #

20173 dated March 1, 2001, and invoice # 20221 dated August 31, 2001, totalling $1,868.52.

Plaintiff's Interest Claim

[22] The plaintiff claims interest on its account. The **Consumer Protection Act** codifies the definition and regulation of the granting of credit. With respect to interest, section 17 of the **Act** reads:

> 17 (1) Except as provided in subsection (3), every lender shall furnish to the borrower *before* extending the credit a clear statement in writing showing ...
>
> (g) the cost of borrowing expressed as one sum in dollar and cents;
>
> (h) the percentage that the cost of borrowing bears to the sum stated
>
> . . .
>
> expressed as an annual rate on the unpaid balance of the obligation from time to time, which percentage shall be calculated and expressed in the manner prescribed in the regulations; and
>
> (i) the basis upon which additional charges are to be made in the event of default.
>
> . . .
>
> (3) A lender extending variable credit shall
>
> (a) *before* extending variable credit, furnish the borrower with a clear statement in writing setting forth the cost of borrowing

> (i) as an annual percentage or a scale of annual percentages, . . .
>
> (ii) expressed in dollars and cents in a schedule of amounts of outstanding balances and the corresponding charges for the cost of borrowing
>
> (b) not less frequently than every five weeks during the extension of credit, furnish the borrower with a clear statement in writing showing in respect of the period covered by the statement . . . (the outstanding balance and cost of borrowing)
>
> . . .
>
> (6) Notwithstanding any other provision of this Section, where credit is extended and no time or date for payment or repayment is specified at the time the credit is extended the cost of borrowing may be disclosed as a statement of the percentage rate for one year on the credit extended and as the amount in dollars and cents that would be payable by the person to whom the credit was extended if payment or repayment was required to be made one year after the credit was extended.

[23] The plaintiff refers the Court to **Valley Well Drillers Ltd. v. Blueberry Acres Ltd** (1988) 89 N.S.R.(2d) 236, (NSSC), which decision relied upon **Concrete Services Ltd. v. Ancroft Development Ltd.** (1980) 44 N.S.R.(2d) 224 (NSSC). In **Concrete Services**, at paragraph 59, Morrison, J., said:

> I am satisfied that interest is payable if the party charged has expressly or impliedly agreed to pay interest and that the agreement to pay interest may, like any other contract, be inferred from a trade or mercantile usage or from a course of dealings between the parties.

[24] In **Valley Well Drillers**, the evidence was that all invoices sent to the defendant contained the words “Bills Due Upon Receipt; 2% Charged Monthly; 24% Annually”. In **Concrete Services** the evidence was that all invoices contained an interest clause.

[25] In the case at bar, none of the invoices contained any reference to interest being charged. The monthly statement, which the plaintiff's former bookkeeper says would, in the normal course, have been sent out each month, but which the defendant denied receiving until the fall of 2001, said with regards to interest: “2% interest on balances over 30 days.”

[26] The Court accepts Rand’s evidence that, before 1999, all arrangements were verbal and there was never any discussion of interest; either cash was paid, or a set-off made for services or goods bartered. The evidence of the plaintiff's former bookkeeper indicated that, when she did once discuss his account with the defendant, she indicated that the plaintiff “could do something towards the interest”.

[27] The Court accepts that, in 1999, Peter Peill was in the process of putting the plaintiff's business affairs on a more formal footing and intended to charge interest with regards to farmland rental; however, I am not satisfied from the evidence at trial that there was an implied agreement to pay interest, nor that the inclusion of the words - “2 % interest on balance over 30 days”, on the monthly statement, which Mr. Rand denied receiving until the fall of 2001, is sufficient to establish an agreement either expressly or impliedly. I further accept Rand’s evidence that when the issue of interest first arose he was “frustrated” by it and did not agree to pay it.

[28] In the case at bar, there was nothing on any invoice giving notice of an interest charge. In this respect this case differs from **Valley Well Drillers** and **Concrete Services**.

[29] The plaintiff submits that the **Consumer Protection Act** does not apply to this case because that **Act** only applies to consumers and not to parties who, in respect of each other, are not consumers. The plaintiff relies on **Mackin Mailey Advertising Ltd. v. Budget Brake & Muffler Distributors Ltd**, 1987

CarswellBC 1322 (BCCA). The facts in this case are not the same as in the **Mackin** decision.

[30] This was a new initiative by the plaintiff to become more business-like, introduced in 1999, and not brought to the attention of the defendant until the dispute between the parties arose. I disallow the claim for interest.

DEFENDANT'S SET-OFF CLAIM

[31] As part of the May 1st, 2000, agreement to pay his account, Rand agreed to stockpile manure on his dairy farm and to spread it on some of the plaintiff's fields in the fall. The plaintiff agreed to accept this as part payment for field rental. The intent was that the manure would be spread on fields EWN and EWR. The price for the manure and the spreading of the manure was $60.00 an acre (not to exceed $8,000.00), to be confirmed by Jack vanRoestel, an agrologist.

[32] Rand claims to have spread manure in the fall of 2000 on the following fields: EWS, EN, EWR, EWN/N and EWN/S. On December 23, 2000, he invoiced the plaintiff for 57 tonnes of manure at $10.00 per ton, plus the cost of

loading, hauling and spreading for 27 hours at $70.00 per hour, for a total invoice of $7,590.00. This was to be credited against his account with the plaintiff. Rand says that when he spread the manure in the fall of 2000, he did not contact the plaintiff to advise of his activity, as he assumed the plaintiff would be checking its fields anyway. He acknowledges receiving a phone call from Peill in the spring of 2001 complaining about the manner in which the manure was spread, and about not being advised at the time of spreading. Apparently if manure is not worked into the ground right after it is spread, it loses much of its effectiveness.

[33] Peill's evidence was that, while the May 1st agreement was for manure to be spread on fields EWN and EWR, the parties verbally agreed to change the fields to EWS and EN. He stated he was not advised by Rand when the fields were spread so that the manure could be worked into the soil and that its value was substantially less as a result. He was unaware of the spreading until he visited the fields in the spring. He denied that all of the fields claimed by Rand were spread, although he acknowledged that, because he was not aware of the spreading until six months later, some of the manure may not be obvious to the eye. He further complaining that some fields were unevenly spread. In September, 2001, the plaintiff wrote to

Rand (Tab 4) outlining its complaint with regards to the claimed credit for manure spreading and adjusting the credit from $7,590.00 to $3,590.00.

[34] At trial Gregory Whitney testified for the plaintiff. He is a potato farmer. He rented, and planted potatoes on, the plaintiff's field EWS IN 1999; in the year 2000, he rented, and planted potatoes on, fields EWN/N and EWR. He has done no other business with the plaintiff. He signed the plaintiff’s standard Land Rental Agreement. He stated that in the fall of 2000 he left his potato crop in the ground because it was ruined by wire worms, and was last on the field on or about September 28, 2000. As of that date, no manure had been spread on EWN/N or EWR.

[35] The defendant called Christopher Sweeney, presently the dairy manager at Cornwallis Farms. He is 26 years old and was raised on a dairy farm and has worked as a dairy farmer for fifteen years. He worked for the defendant between September 1st and December 31st, 2000, as a herdsman and performing related dairy work. In direct evidence he recalled spreading manure for the defendant on one field from which sun flowers had been cut. He identified the field as EWS. He had no recollection of spreading any other fields. He performed the work in

late September, 2000. It took a full day. The manure he was instructed to spread was piled on a cement slab behind an old dairy barn. He loaded it, hauled it to the field and spread it. He stated he had problems spreading the manure because it had chunks of cement in it and this would stop the spreader. He said the chunks of cement were already in the manure when he loaded it into the spreader. This evidence was important because, previous to his evidence, Peill had complained about the quality of the manure, saying it was contaminated with cement, and Rand had denied it. Sweeney's evidence clearly surprised and disconcerted Rand's counsel who had interviewed Mr. Sweeney by telephone at some point prior to trial. Mr. Sweeney acknowledged he had not advised counsel about the problem with cement - the reason being that he had not been asked about it.

[36] On cross-examination, Sweeney said that Rand had instructed him, and he had used, the entire stockpile of manure behind the diary farm on field EWS. He was not aware of any other stockpiles of manure on the farm at that time, other than in liquid storage. The spreader he was using was not the type that would calibrate or measure the rate of application and he could not say what the rate of application was. He acknowledged that because of wet spots he was unable to spread the manure over the entire field or in a consistent pattern.

[37] The Court found Mr. Sweeney's evidence to be straightforward and credible. It caused the Court to doubt some of the defendant's contrary evidence as to the fields that had been spread, and his credibility generally.

[38] In the Court's view, the defendant's claim for a credit of $7,590.00 was not established because of the evidence of Whitney and Sweeney. In addition, one of the unambiguous parts of the May 1st handwritten agreement was the clause that manure was to be supplied and spread for a price of $60.00 per acre. The only evidence of acreage was given by Rand in answers to questions from the Court. His estimates were: field EWS: 12 - 15 acres; field EN: 8 - 9 acres; fields EWR, EWN/N and EWN/S: 35 - 40 acres. Even if he spread all of the fields, which the Court does not accept, he would only have been entitled to compensation for $60.00 per acre for between 55 and 64 acres ($3,300.00 to $3,840.00).

[39] At trial, Rand claimed that the May 1st agreement did not include the cost of loading and hauling manure to the fields; he claimed to be entitled to more than set out in the agreement. Peill said that the $60.00 per acre was to be the total cost. The defendant called Jack vanRoestel, an agrologist and certified crop advisor, to

give evidence on other matters. When asked whether charging extra for loading or hauling was the custom in this area, or something that he would expect on an invoice, he gave the opinion that, because the fields were so close to the Rand farm, he would not expect any such extra charges.

[40] I find that the agreement of May 1, 2000, unequivocally required Rand to supply and spread manure for a total all-inclusive price of $60.00 per acre.

[41] Based on the totality of the evidence, the defendant has failed to discharge the burden of proving that he spread all of the fields as claimed. Even if he did, he failed to notify the plaintiff when he spread the fields, and, as a result, the value of the manure was greatly diminished.

[42] I therefore confirm that the credit given by the plaintiff to the defendant of $3,590.00 for the manure supplied and spread is very generous, and reject the claim for $7,590.00.

DEFENDANT'S COUNTER-CLAIM

[43] The defendant says that in September, 2001, the plaintiff wrongfully and without notice repossessed the fields that Rand was renting, and destroyed the forage crop on them. Forage crops have a life cycle of about three or maybe four years. Rand says that he had re-seeded the field in the spring of 2001 and would have expected three or four years of crops. In October, 2001 he invoiced the plaintiff $10,940.32 as the estimated cost to re-establish forage crops on two fields of the same acreage, and, in addition, invoiced $17,028.00 for the estimated loss of production from those fields over the next three years.

[44] Peill testified that the plaintiff repossessed the fields in November, 2001, after notice had been given to Rand that the plaintiff intended to do so because of the unpaid account, and that at the time of the repossession there were no crops on the fields. In support of his position, he refers the Court to his letter of September 13, 2001, (Tab 4) where he noted that the fields leased by the defendant were finished their four year forage cycle and that the plaintiff intended to use the land to complement the hog production base for the 2002 crop year. This implied, according to the plaintiff, that the plaintiff would repossess the field in the fall of 2001, after the crops were off it, in order to make it available for use in the spring of 2002. He further refers to the registered letter of November 2, 2001(Tab 5).

The November 2nd letter does not give notice of an intention to repossess the land, but rather to send the overdue account for collection.

[45] During his evidence, Jack vanRoestel stated that he inspected a forage crop on parts of the two fields leased by the defendant. He had no field notes and, because of the passing of time since the event, he was not sure what year he visited the fields - it could have been anywhere between the year 2000 and 2003. At the time of his visit, he felt the forage stand was "a little thin". He confirmed the estimate to re-establish or plant a field with forage to be about $400.00 per acre. He also confirmed that, depending upon the weather conditions and the scarcity of forage crop in a given year, the value of the crop was about $100.00 per dry metric tonne.

[46] Even if the Court rejects the plaintiff's evidence as to when it repossessed the fields and its justification for repossession, and finds that Rand's crop was still on the field, the fact is that the defendant did not sign the plaintiff's formal Land Rental Agreement, operated on a year to year verbal agreement, and did not have an agreement or right to use the fields after 2001. This intent (that is, to lease on an annual basis only) is consistent with the May 1, 2000 agreement which provided

that the agreement was "for one year"; it is reasonable to infer the same intent for subsequent years in the absence of evidence of a change in the parties' intentions.

[47] There was no evidence of any agreement between the plaintiff and the defendant to lease any fields for more than one season at a time, and therefore any legal right to the future crops from them. For that reason, the Court rejects the claim for the loss of the value of future years' crops ($17,028.00). If I am wrong, I find that any agreement with respect to the use of the fields in future years, not made in writing, would be unenforceable because of the Statute of Frauds. Furthermore, the evidence of Jack vanRoestel was to the effect that there were likely fields in the area which would be available for lease. It is reasonable to infer that the defendant's loss would be limited to the cost to re-establish a crop on another field, and not the loss of future crops.

[48] With respect to the claim for $10,940.32, being the estimated cost to re-establish the forage crop, the same reasoning applies. In the absence of any agreement for future years, there is no legal basis for such a claim.

[49] If the court accepts the defendant’s evidence that his crop was still standing, and that he should not reasonably have known from the letters of September 13 and November 2, 2001, that the plaintiff would be repossessing the fields before the defendant had an opportunity to get his crop off the field, the defendant would be entitled to the value of that crop, less the cost of harvesting it.

[50] Peill was not personally involved in the repossession of the fields in the fall of 2001; although I have some concerns about Rand’s credibility, I find, on the whole of the evidence, that the repossession and destruction of the crop probably occurred before the crop was harvested in the fall of 2001.

[51] There was no direct evidence of the value of the lost crop. I deduce from the defendant's invoice to the plaintiff # 5427 (part of Tab 6), claiming three years lost production totalling $17,000.00, and from the oral evidence that the defendant could have harvested two or three cuts of forage per year (or six to nine cuts in three years), that the destruction of one cut may have a value of approximately $2,300.00. For that reason I allow the counter-claim to the extent of $2,300.00.

[52] The plaintiff disputes the defendant's claim for $500.00 for two loads of manure picked up by the plaintiff. The plaintiff claims that the manure contained bits of cement and was therefore not worth the amount claimed. In light of the evidence of Mr. Sweeney, I accept the evidence of Peill and credit the defendant $140.00 for invoice #5428.

SUMMARY

[53] A summary of the accounting between the parties is as follows:

1. The plaintiff's 1999 net claim
3,882.38

2. The plaintiff's 2000 net claim
3,995.80

3. The plaintiff's 2001 net claim
1,868.52

4. The defendant's set-off for manure -
3,590.50

5. The defendant's counter-claim for crop destruction -
2,300.00

6. The defendant's counter-claim for manure picked up - 140.00

Net amount owed by defendant to plaintiff
$3,716.20

COSTS

[54] Success was divided between the parties; therefore, the party and party tariff is not the appropriate scale. I rejected the defendant's set-off amount and counterclaim (about $32,000.00). I accepted most of the plaintiff's claim, except its interest claim and claim for services. The plaintiff has succeeded in most of the positions it took at trial. In view of this, and the quantum of the judgment, the court awards costs to the plaintiff , fixed in the amount of $1,000.00.

J.