

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Total E-com Home Delivery Inc. v. Smith, 2008 NSSC 97

Date: 20080402

Docket: S.H. No. 267692

Registry: Halifax

Between:

Total E-com Home Delivery Inc.

Plaintiff

and

Jeffrey K. Smith, carrying on business as
Smart Moving & Delivery

Defendant

SUPPLEMENTARY DECISION

Judge: The Honourable Justice Gerald R P Moir

Heard: 25 and 25 October 2007 at Halifax

**Last Written
Submissions:** 4 March 2008

Counsel: Mr. James D MacNeil and Ms. Kate Darling, Articled
Clerk for the plaintiff
Mr. Jeffrey K Smith, on his own behalf

Moir, J.:

[1] I made the main decision in this action on October 29, 2007 but three issues remain: calculation of a setoff, costs, and prejudgment interest.

SET OFF

[2] At paragraph 47 of the main decision I calculated a setoff in favour of the defendant, Mr. Smith, in the amount of \$21,970 “subject to being corrected after any further submissions”.

[3] Mr. MacNeil writes “The setoff calculations at paragraph 47 are not disputed.” However he submits:

Given that the Defendant received \$25,000.00 for selling the stolen goods, and that this amount was never returned to the Plaintiff or Future Shop/Best Buy, it is the Plaintiff’s submission that the Defendant was not owed the amounts set out in paragraph 47 of the trial Decision. The Defendant’s evidence, and as Your Lordship found, was that he seized the goods to secure payment of the outstanding amounts set out in paragraph 47. From his perspective, he was successful in recovering the amounts he felt he was owed by selling the goods.

To then allow the Defendant to setoff the amounts at paragraph 47 is akin to allowing the Defendant to double recover. That is, his Defence of setoff is allowed as per the amount set out in paragraph 47, plus he keeps the \$25,000.00 he realized from the sale of the products (which sale was to recover the amount set out in paragraph 47). It is the Plaintiff’s submission that the sale of the products estopped any claim of setoff because, by the Defendant’s own admission, he recovered the full amount of the setoff claim.

Mr. MacNeil submits the “claim of setoff be disallowed”.

[4] This submission appears to me to be substantially the same as the submission referred to at para. 45 of the main decision, except for the reference to the law of estoppel. I cannot usefully add to the reasons I gave at para. 45, except to say that I have not been referred to any authority on estoppel and cannot see, in principle, how an estoppel would arise in this case. In my opinion, the misconduct is properly dealt with through an award of punitive damages (see para. 57 of the main decision).

COSTS

[5] The total award was \$51,970. Costs on the basic scale are \$7,250 and \$4,000 is added for two days of trial. The plaintiff incurred \$1,569.30 in disbursements. The plaintiff will have judgment for costs in the amount of \$12,819.

INTEREST

[6] Mr. MacNeil agrees with the suggestion at para. 59 of the main decision that prejudgment interest should not be charged on the punitive damages.

[7] The plaintiff will have prejudgment interest at five percent a year on \$31,970 calculated from February 7, 2006 until the final order is issued.

J.