Claim No. SCCH 273687

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: T G Industries Ltd. v. Ace Towing Ltd., 2007 NSSM 89

BETWEEN:

T G INDUSTRIES LIMITED

Claimant

- and -

ACE TOWING LIMITED

Defendant

DECISION AND ORDER

Adjudicator: David T.R. Parker

Decision: September 19, 2007

Counsel:

T G Industries Limited was represented by Counsel Peter Landry
Ace Towing was represented by Counsel Brian Church, Q.C.

This matter first came before the Supreme Court of Nova Scotia and subsequently was transferred to the Small Claims Court.

PLEADINGS

The Claim

The pleadings of the Claimant are to the point and in that the claim is for the cost to replace and repair an engine on a Hino truck performed by the Claimant at the Defendant's request.

The Defence

There may have been a Defence provided to the Claimant however there is none filed with the Court as far as I can determine.

A hearing of this matter was held on May 9, 2007. The Claimant, and its solicitor appeared, however the Defendant and its solicitor did not appear. The adjudicator proceeded to hear the matter and made a determination awarding the Claimant $11,165.23 which decision and order was filed with the Court on May 25, 2007.

The same adjudicator on an Application by the Defendant to set aside the Order granted the Applicant/Defendant's Application and ordered the Order be set aside with the matter to be heard before another adjudicator.

It would appear that the Adjudicator set the order aside pursuant to section 23(3) of the *Small Claims Court Act* which reads as follows:

23(3) Where a defendant has filed a defence but does not appear at the hearing and the

adjudicator is satisfied that the defendant has been served with notice of the time and place of the hearing, the adjudicator, if satisfied on the evidence as to the case of the claimant, may, in the absence of the defendant, make an order against the defendant.

Section 23(3) only comes into play when a Defendant has filed a Defence and as I indicated there is nothing in the file to indicate a defence has been filed. There is no provision in the *Act* where a client appears and the Defendant does not and no defence is filed that allows an Adjudicator to set aside an order. This is an anomaly in the *Act* at some point no doubt will be addressed through appropriate legislation.

However both sides appeared and through their appearance I take it that they have agreed to the jurisdiction of this Court. This in my view is another example of how for whatever reason, the Small Claims Court seems to function as intended. That is to allow parties to resolve disputes in a court of law in an informal, inexpensive and expeditious manner within the framework of natural justice.

THE FACTS

In succinct form the facts are as follows:

- The Defendant leased a Hino truck from City Motors, a third party not part of this action.

- Near the end of the lease a former salesperson with City Motors and now working with the Claimant contacted the Defendant reminding the Defendant's owner that the lease would be coming to an end in a few months and inquiring if the Defendant would be interested in obtaining a new

vehicle.

- The Claimant's salesperson viewed the used truck.
- Discussion then took place and the end result was the Defendant would purchase or lease a new truck through the Claimant and the Claimant would purchase the leased used vehicle.
- The Claimant bought out the lease and purchased the used vehicle from City Motors and the Defendant purchased or leased the new vehicle through the Claimant. The used vehicle was sold to the Claimant by City Motors "where is as is."
- The used vehicle was transported on a flat bed vehicle of the Defendant's to he Claimant's then picked up and returned to the Defendant as they were removing part of the used vehicle to put on to the new vehicle as agreed in advance by the parties.
- The used vehicle when it was delivered by flat bed to the Claimant had to have its battery charged in order to start it. When the used vehicle was started the Claimant's mechanic noticed the engine had a knock and immediately turned off the engine.
- It was determined by the Claimant that the engine had been "run dry of oil" and the engine was damaged and had to be replaced or repaired.
- The Claimant had the engine reconstructed at a cost in excess of $10,000.00.
- The claimant started working on the repairs in March and a work order dated March 2, 2005 was initialled by the Defendant's owner.
- The Claimant's salesperson who made the decision to buy the used vehicle sought to have the Defendant's owner sign the work order on several occasions and in September it was initialled by the Defendant's owner.

Position of the Claimant

The Claimant takes the position that when it purchased the vehicle from the Defendant, the Defendant knew that the engine was defective and the Defendant agreed to fix the engine which is evidenced by the signed work order.

Position of the Defendant

The Defendant said the Claimant's salesperson, Millard Steeper, was a seasoned truck salesperson, who viewed and inspected the vehicle himself before purchasing it for the Claimant through City Motors. Millard Steeper was anxious to make the deal and sell the Defendant a new truck as part of the entire deal. Having worked for years at City Motors he knew about vehicles and knew about this used vehicle and it had problems with the frame. In short, the Claimant through Millard Steeper made the deal and as it turned out it was a bad deal which the Claimant now wanted to in effect, change.

The Defendant also argues that the work order should not be considered a valid contract. The Defendant's owner was forced to sign it in the sense that Mr. Steeper indicated to the defendant owner he would be fired, he would be out on the street as would his cats. There was no consideration in the agreement in that there was no benefit accruing to the Defendant, and the Defendant argues duress,

misrepresentation and lack of consideration thus making the agreement to effect repairs. void *ab initio*.

The Defendant also points out even if the facts do not support the Defendant's position, the claimant did not mitigate the damages as it could have purchased another used replacement engine rather that repair the defective engine at a greater cost.

ANALYSIS

The Defendant knew that there was a problem with the engine; he thought it might be an injector which had to be dealt with on two or three previous occasions. He discussed the noise in the engine just before the Defendant had the vehicle sent over to the Claimant. The Defendant also knew the oil indication light did not work on the used vehicle.

The Defendant owner's position was interesting and I appreciate what I considered his straight forward position on the matter. The view expressed was that if he sold the vehicle and it was subject to the conditions under the lease, his company would be responsible for the engine which turned out to be defective due to oil deficiency. On the other hand if the lease was bought out by the Claimant when it purchased the vehicle then the Defendant would not be responsible. In his evidence Mr. Lohnes, the Defendant owner said, "Under a lease agreement you are responsible but it turned out to be the opposite." And later in his testimony he reiterated this

when he said, "I know under a lease I was responsible but I never owned the truck they are responsible."

There is no doubt that Millard Steeper who works for the Claimant Company used poor judgment and did not follow procedure that could have been followed. I have no doubt after listening to the owner of City Motors, his company would have checked out the leased vehicle if it was referred back to his company at the expiry of the lease. Instead, Mr. Steeper just paid out the lease and did not check the vehicle out thoroughly before he did so. When the problem was discovered by the Claimant they started working on the vehicle's engine, and sent the engine block off to Quebec to have it reconditioned and eventually after several months when repairs were being completed on the engine Mr. Steeper had the Defendant's Mr. Lohnes initial a work order. At the time Mr. Lohnes initialled the work order concerning the engine being repaired by the Claimant he was very busy and as he said Mr. Steeping was going on and on saying such things as he and his cats would not have a place to stay and that he [Mr. Steeper] would be out of a job and "that is why I signed it."

Mr. Lohnes said after he signed the work order, "I said damn it, I still don't' know if it was a lease if I was still responsible or was it bought out."

The question becomes is Mr. Lohnes' Company responsible for all the repairs to the engine because he signed the work order. Counsel for the Defendant argues Mr. Lohnes should not be held to that agreement because elements necessary for a valid agreement are missing: These elements fall within the following headings:

was a lack of genuine consent due to (a) mistake, (b) misrepresentation and (c) duress and also the element of consideration which it claims is missing. I do not have to search very far to find consideration in some form, but I do not have to go there as this work order agreement fails to be contractually binding on the Defendant as there was no genuine consent between the parties. It was obvious that Mr. Steeper knew his company was stuck with the repairs to the engine unless he somehow got Mr. Lohnes to sign the work order. His methods of doing so, and withholding information was deceiving and unconscionable. As the element of genuine consent is missing the contract is void ab initio and not just voidable at the option of the Defendant.

However Counsel for the Claimant raised the issue of justice in this case. Mr. Landry posed this question to the court, how is it just that the Defendant knew he would have been responsible under the lease. I agree while there is no juristic reason for the enrichment, the Defendant did receive a benefit in that he did not have to payout the final payments of the lease on the used vehicle and/or did he have to pay for an engine that was oil deprived and beyond what would be considered normal wear and tear under the lease

There is sufficient evidence before me to conclude that a reasonably replacement/used engine could have been obtained for $3,500.00 plus HST and that it would take approximately 50 hours to replace same at $54.00 per hour or $2,700.00 plus HST. The Claimant it can be reasonably inferred from the evidence could have mitigated the loss and in addition the Claimant's witness could not advise what the used vehicle apparently sold for on the market, with the engine

they repaired. It shall draw the inference that they sold the vehicle for more than they paid for it. I have considered trade interest as the Claimant's claimed however there is no information on whether the Claimant is registered to charge for same or if bills were sent out on a timely basis.

I would thank both Counsel for their excellent presentation of their respective cases and for the Memorandum of Law, Mr. Church, Q.C. provided to the Court.

IT IS THEREFORE ORDERED that the Defendant pay the Claimant the following sums:

$3,500.00	for replacement engine
490.00	HST
2,700.00	Labour
378.00	HST
200.00	Court costs
$7,268.00	

David T.R. Parker
Adjudicator of the Small
Claims Court of Nova Scotia