Claim No. SCT 280395

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Yould v. Rafih, 2007 NSSM 101

BETWEEN:

DAVID YOULD & YOULD'S LIMITED

Claimant

- and -

ZAKI RAFIH & PONDEROSA TAP & GRILL

Defendant

DECISION

Adjudicator: David T.R. Parker

Heard: August 8, 2007

Decision: August 20, 2007

Counsel: Alain Begin represented the Claimant
Zaki Rafih, the Defendant was self-represented

Parker:-This matter came before the Small Claims Court on August 8, 2007, at Truro in the Province of Nova Scotia.

The reason for this claim as stated in the Notice of Claim is that the "Defendants had permitted to store on premises but refusing to return items – 19 foot weed harvester with 40 HP motor and trailer plus 16' utility trailer.

The Defendants responded to the Claim and stated in their pleadings, “The Claimant had placed his boat in the building with the understanding of paying rent for the space. Rent at $500.00 per month since purchase of the property on July 14, 2007, till the property is removed.”

The Defendant Zaki Rafih as a preliminary point advised the court that his counterclaim should indicate rent from September 2007 instead of July 2007.

The Claimant David Yould gave testimony that he stored his harvester, motor and trailer in the basement of the property in question which he owned along with his brother-in-law John Cavanaugh. David Yould sold out his interest to John Cavanaugh approximately eight years ago but continued to store his equipment in the basement. There was no charge to Mr. Yould over the 15 years or so that he had it stored during the fall and winter months. Mr. Cavanaugh confirmed this and said he sold the property known as the Ponderosa Tap & Grill to Zaki Rafih and his brother Abdul Rafih in July while his pleadings indicate the year in question was 2007 as does the testimony of David Yould, the parties must have meant the property was sold by John Cavanaugh in July 2006.

At any rate according to Mr. Yould after the Ponderosa was sold by his brother-in-law he approached the Defendant Zaki Rafih and asked him if they were going to use the basement and according to David Yould he was told “no problem, we are not going to use it.”

The Claimant said on cross examination he asked Mr. Rafih “what will it cost me and you [Mr. Rafih] said no costs. The Claimant said, “You [meaning Zaki Rafih] did not ask me for rent.”

As the Claimant had a key to the basement area he put the harvester, motor, and trailer in the basement on September 27. Later the Claimant “took it upon himself” to store an additional trailer in the basement belonging to David Grant. He did not mention this to Mr. Rafih.

In March 2007, the Claimant came to remove the stored goods and found the lock changed. In his testimony he said he went to see Zaki Rafih and he was told by Mr. Rafih he wanted $5000.00 before the equipment would be released. He said Mr. Rafih told him eight years ago he hosed Mr. Rafih for $5,000.00 and he wanted to get it back.

Mr. Cavanaugh in his testimony confirmed Mr. Yould stored the equipment and he was not charged because he was part owner at the time and also he was my brother-in-law.

Mr. Cavanaugh confirmed that Zaki Rafih had told David Yould he could store the equipment on the property. Mr. Cavanaugh said he contacted Mr. Rafih and he denied he ever said $5,000.00 and now talked about rent money owing of $4,750.00. Earlier Mr. Cavanaugh said Mr. Rafih said David Yould squeezed him for $5,000.00.

Mr. Cavanaugh did say in the past when he owned the property he did rent the basement at $500.00 per month. It involved “construction stuff and two vehicles” but it was only rented for three months as the basement was too wet and damp.

Brad McNutt was called as a defence witness and only confirmed there was a trailer and boat in the basement in October/November 2006. He added no additional information.

John Owen gave testimony that equipment was in the basement but “had not idea when it was put there.”

Abdul Rafih provided no information with respect to this matter. He said “I had no idea who owned the stuff down there.”

Zaki Rafih was asked by the Court if he would be providing any evidence or information respecting the matter and he declined to do so.

Analysis

The allegation that Zaki Rafih was “squeezed” for $5,000.00 some eight years ago by Mr. Yould has no bearing on this case. There is no evidence before this Court that that is true or false. In my view it is a non issue.

The only issue before me is, was there and agreement between the parties whereby David Yould would rent space and was the agreement for $500.00 per month.

The only evidence I have that there was an arrangement was the testimony of David Yould and his brother-in-law John Cavanaugh. None of the Defendant's witnesses gave any evidence of a rental agreement.

Their sworn testimony was that the Claimant could store it in the basement for no charge. First of all, I am not convinced Zaki Rafih had the ability to make such an arrangement but like much of the case there is a scarcity of information on who owned the property. I still have no information on this point. It could have been a company; it could have been Mr. Rafih or Mr. Rafih and his brother. The second problem with this apparent agreement all the legal elements of contract are not in place for the existence of a valid contact. There is no apparent consideration and it is not the Court's function to present evidence of valid consideration.

In other words there is no agreement that is valid in law. Therefore the defendant has no contractual right to rent pursuant to his counterclaim. The only possibility which was not argued however a place here has in this Small Claims court action is the equitable remedy of restitution. This remedy was discussed in a recent case of this court Wacky's Carpet & Floor Centre v. Maritime Project

Management Inc., [2006] N.S.J. No. 98 wherein it referred to the law on unjust enrichment as follows:

"This issue of **unjust enrichment** which has been put squarely before this Court by the Claimant is somewhat problematic. It is an equitable remedy which is possibly a remedy not to be doled out by this Court, and if it is within the ambit of this Court then subjective judicial discretion must be avoided in meting it out as a remedy. The superior courts have ensured its objectivity through the use of a three-part test which I shall refer to further on in this decision.

I will first deal with **unjust enrichment** as a remedy and then I shall deal with it as a remedy which this Court can or cannot allow in the exercise of its judicial duties. Another word for **unjust enrichment** is restitution, and while restitution is a remedy that can come about for breach of contract, it is an equitable remedy that exists when there is no contract or in instances where there is a quasi-contract. For example, when the parties thought they had an agreement but due to an operation of law, example, the inclusion of the Statute of Frauds on an agreement, the law will consider restitution. The courts will not allow someone to obtain an unjustifiable benefit when they have provided labour or materials even though there may not be a valid contract between the parties. As Justice MacKinnon said in the now infamous case, *Nicholson v St. Denis* (1975) 8 O.R. (2d) 315,

"The law of **unjust enrichment,** which could more accurately be termed the doctrine of restitution, has developed to give a remedy where it would be unjust, under the circumstances, to allow a defendant to retain a benefit conferred on him by the plaintiff at the plaintiff's expense. "

This doctrine of **unjust enrichment** has been reviewed by Justice Murphy in the case of *Imperial Oil Ltd. v Atlantic Oil Workers Union Local No. 1* [2004] N.S.J. No 38D and it is the most succinct comprehensive review that I have come across and I refer to it here.

In *Deglman v. Brunei Estate*, [1954] S.C.R. 725, the Supreme Court of Canada considered a situation where the Respondent had an oral agreement with his aunt by which he claimed she had promised to leave him a piece of land in her will in exchange for services to be performed in her lifetime. Although he was unable to establish the writing requirements of the Statute of Frauds, the Court found that he was entitled to recover the value of the services on the basis of quasi-contract or restitution as described in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 (H.L.). In that case, when the **unjust enrichment** doctrine was in its infancy, Lord Wright stated that a man could not retain "the money of or some benefit derived from another which it is against conscience that he should keep." Justice Wilson, for the Supreme Court of Canada, put the principle in these terms in *Palachik et al. v. Kiss*, [1983] 1 S.C.R. 623: "Equity fastens on the conscience of the appellant and requires him to deliver up that which it is manifestly inequitable that he retain."

97 The test for **unjust enrichment** was set out by Justice Dickson (as he then was) in *Rathwell v. Rathwell*, [l978] 2S.C.R. 436. and again in *Pettkus v. Becker*, [1980] 2 S.C.R. 834. Justice Dickson held in that case, for the majority of the Court:

[T]here are three requirements to be satisfied before an **unjust enrichment** can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach... is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

98 The Supreme Court has most recently confirmed the reasoning in *Pettkus v. Becker* as the proper approach to **unjust enrichment** in *Garland v. Consumers' Gas Co.*, [2004] S.CJ. No. 21. para. 30, (reported at (2004), 237 D.L.R. (4th) 385). In that case, the Court, per Iacobucci J. held, following the reasoning of Justice MacLachlin (as she then was) in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762. that establishing enrichment and deprivation requires a "straightforwardeconomic analysis", with other considerations being incorporated into the analysis to determine whether there was a juristic reason for the enrichment (Garland, at para. 31). Justice Iacobucci set out the proper approach to the juristic reason analysis as follows:

> The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. ... The established categories that can constitute juristic reasons include a contract .... a disposition of law .... a donative intent..., and other valid common law, equitable or statutory obligations ... If there is no juristic reason from an established category, then the plaintiff has made out a prima facie case under the juristic reason component of the analysis.

The prima facie case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed.

The point here is that this area is an evolving oneand that further cases will add additional refinements and developments, [paras. 44-46]

In my view that passage from *Garland* represents the state of the law on the analysis of "juristic reason. "

Whenever the three-pronged tests have been met in terms of **unjust enrichment,** the cases have shown that there must be some sort of special relationship between the plaintiff and defendant. This in effect puts a fourth hurdle or test in place that must be met. As Justice MacKinnon said in the *Nicholson* case on Appeal:

The law of **unjust enrichment,** which could more accurately be termed the doctrine of restitution, has developed to give a remedy where it would be unjust, under the circumstances, to allow a defendant to retain a benefit conferred on him by the plaintiff at the plaintiff's expense. That does not mean that restitution will follow every enrichment of one person and loss by another. Certain rules have evolved over the years to guide a Court in its determination as to whether the doctrine applies in any particular circumstance."

Based on the counterclaim and the principal of unjust enrichment there should be compensation to whoever is the owner, for storage of equipment.

Mr. Rafih in his summation when asked how he arrived at $500.00 per month said that was a reasonable amount. He based this on the testimony of Mr. Cavanaugh that he had rented the space out at $500.00 per month. That may well be but there is no information on how much space was used then versus now and apparently the space was not suitable due to the environmental problems. Mr. Yould said he could have stored it elsewhere for a couple hundred dollars for the entire season. In both cases, there is no foundation to support $500.00 per month or $200.00 for the entire season. This Court is left with the unenvious task of making a determination. The equipment was put in on September 27, 2006 and Mr. Yould attempted to retrieve it in March 2007. Therefore six months at $250.00 per month as a reasonable amount for storage and would award the Defendant and Claimant by counterclaim $1,500.00. That amount should be paid forthwith and the equipment removed. In the event this does not happen and there has been some sort of conversion then I shall listen to an application by the Claimant as to the value of the equipment and listen to arguments on bailment or conversion. However I do no have to deal with that. Mr. Rafih and Counsel appeared to have a respect for one another and hopefully this can be concluded without a formal order and the money will be paid and the equipment can be delivered up to the Claimant.

In the event a formal order is required I shall be glad to receive one from Counsel. There shall be no order as to costs as both parties were successful.

Dated at Truro, this 20 day of August, 2007.

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David T.R. Parker
Small Claims Court Adjudicator