IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: McDonald's Restaurants of Canada Ltd. v. Comeau,
2016 NSSM 48

Claim: SCD No.412623
Registry: Digby

Between:

McDONALD'S RESTAURANTS OF CANADA LIMITED and
JUS-MAR INVESTMENTS LIMITED

CLAMANTS

– and –

COLTON COMEAU, JOEL GRAHAM and CLAYTON LEWIS

DEFENDANTS

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: September 23, 2016

Decision: October 6, 2016

Appearances: The Claimant, Michael P. Blades
The Defendant, Joel Graham, Oliver Janson
The Defendant, Clayton Lewis, Matthew Dill

DECISION

Facts

1. I am advised by counsel that the defendant Colton Comeau has made a settlement with the claimant and the claim against him has been discontinued.

2. With respect to Joel Graham there was an action initially in the Supreme Court of Nova Scotia in which default judgment was granted. By order of the Honourable Mr. Justice A. David McAdam dated May 2, 2013 that default judgment was set aside and His Lordship granted an order upholding the defendant Joel Graham's liability in this matter but referring the question of damages to this court. The operative part of the order reads as follows:

1) The Order for Default Judgment issued against the Defendant Joel Graham and dated August 17, 2012 shall be upheld with respect to the issue of the Defendant Joel Graham's liability to the Plaintiff in this proceeding;

2) The Order for Default Judgment issued against the Defendant Joel Graham and dated August 17, 2012 shall be set aside with respect to the issue of the quantum of damages for which the Defendant Joel Graham shall be found liable;

3) The issue of the quantum of damages for which the Defendant Joel Graham shall be found liable shall be heard and determined in the Small Claims Court of Nova Scotia proceeding bearing Claim No. 412623; and

4) Neither party shall be entitled to costs or disbursements on this Motion.

3. Mr. Graham has filed a defence admitting to causing damage to "the exhaust fan on the roof of the building only" and denying all other damages were caused by him.

4. As to the defendant Clayton Lewis he filed a defence which is essentially a complete denial putting the claimant to complete proof of its claim.

5. On the evening of April 30, 2011 significant vandalism and damage occurred at the McDonald's restaurant in Digby Nova Scotia. This resulted in an insurance claim which was paid with the exception of the $2500 deductible. I am advised that McDonald's Restaurants of Canada's self-insured and therefore claims the total amount of damage less the deductible and its franchisee Jus-Mar Investments Limited claims recovery of the $2500 deductible. These facts are uncontested.

6. Mr. Timothy Tabor, the general manager of Jus-Mar Investments Limited testified that he saw the damage to the property on April 30, 2014. He testified that the restaurant closes at midnight and the damage was not discovered until 9 o'clock the next morning. He attended the property approximately mid-morning. He described the damages in detail in the evidence before me and provided detailed invoices outlining the costs of remedying the damages.

7. In cross-examination Mr. Tabor freely admitted that he was not present on the night of the incident and does not know if anything was damaged further before he arrived on April 30, 2011. He was not aware of what settlement had been made by the defendant Colton Comeau.

8. Mr. Tabor testified that the following items are kinds of damages had occurred during the night of April 30, 2011:

- damage to movable drive-through signs
- damage to a light near ladder leading to the roof
- damage to an exhaust fan cover on the roof
- damage to the cover of a grease vent
- damage to the HVAC system
- damage to the drive-through menu board
- damage to the drive-through speaker port
- damage to a drive-through presell sign
- damage to entry and exit signs
- a hole in the window in the facility
- and damage to a telephone booth belonging to Aliant.

9. Mr. Bob Smith is the owner and operator of Jus-Mar Investments Limited. He testified that the Digby McDonald's is included in his franchise agreement with the other plaintiff. In cross-examination he testified that he did not attend at Digby on April 30 and only saw the damages at some point later. He agreed that he does not know who did the damage, who did what and how any of the damages occurred. He was not aware of whether the former defendant Colton Comeau had paid anything to McDonald's. He confirmed the nature of the damages as testified to by Mr. Tabor. Mr. Smith testified that Jus-Mar Investments Limited received by deposit to the bank account the funds represented by Exhibit 1, TAB 9.

Admissibility of Exhibit 1 Tab 9

10. Placed before me is a document at Exhibit 1 Tab 9 which is a deposit slip deposited to the account of Jus-Mar Investments Limited in the amount of $833.33, which is one third of the $2500 deductible. It is dated February 7, 2013. The particulars noted are as follows:

> Tri-County Restorative Justice
> Chq. #075
> Re: Clayton Lewis Digby incident

11. Mr. Blades submits this as proof of the defendant Clayton Lewis's complicity in the damages which are the subject of this action.

12. Mr. Dill objects to the introduction of this on the basis that he alleges that Clayton Lewis is a youth as defined by the Youth Criminal Justice Act S.C. 2002, c. 1. He submits that the following section of that statute is applicable:

> 10 (4) Any admission, confession or statement accepting responsibility for a given act or omission that is made by a young person as a condition of being dealt with by extrajudicial measures is inadmissible in evidence against any young person in civil or criminal proceedings.

13. There is a fundamental principle that the party who asserts something must offer proof of it. Mr. Blades is asserting that this document is admissible. Even if it were established that it relates to the incident which occurred at McDonald's, in my view, Mr. Blades must establish the underpinning for its admissibility. The Youth Criminal Justice Act prohibits its admissibility unless a foundation establishing that it does not relate to a youth is established. I do not think that Mr. Dill needs to prove that Mr. Lewis is a youth. On the contrary, in my view Mr. Blades must establish that he is not a youth prior to its admission. It is perfectly proper for Mr. Dill to insist upon proof of the admissibility.

14. While it is true that the Small Claims Court can admit hearsay on the principled exception to the hearsay rule, if satisfied of reliability alone, and this court does not have to consider necessity. Acknowledging that this relaxed rule is in place does not override the statutory requirements of the Youth Criminal Justice Act.

15. Mr. Blades suggested that I should not consider this document to be an "admission, confession or statement". I have difficulty with this argument as I cannot see what other basis of admissibility it could possibly be. It seems to me the only evidentiary principle upon which it could be submitted to the court is that it is the nature of an admission against interest.

16. Even if it were to be admissible, it appears to be a document coming from Tri-County Restorative Justice, not the defendant Mr. Graham. At best it suggests that Mr. Graham "must have" made some kind of admission with respect to the subject matter of this litigation, but based on what I have before me I am not sure that is necessarily the only inference.

17. For these reasons I find this document to be inadmissible. Even were I to consider it admissible, in my view, it is insufficient to establish the complicity of Mr. Lewis in the vandalism which is the subject of this litigation.

Disposition as to Clayton Lewis

18. It is trite law to state that any claimant bears the burden to put forth sufficient evidence to establish the essential elements of its case before a defendant is called upon to respond. At the end of the case the claimant has the burden of providing proof of its case on a balance of probabilities.

19. It was suggested by Mr. Blades that I draw an adverse inference against the Defendants because they did not appear in person at trial. I reject that notion. There is no burden on the defendants to appear in person. They are perfectly entitled to appear by counsel. There is no duty for them to testify unless subpoenaed. If the Defendants chose not to call evidence that is their risk. This is an adversarial legal system. It is up to the parties to decide what evidence to call. If the Claimant needs the evidence of a Defendant to establish its case it is free to subpoena that defendant. The Claimant elected to proceed and did not seek an adjournment to obtain subpoenas. Neither the Defendants nor their counsel can be faulted for the way in which they decided to proceed at trial. The Defendants were represented by experienced counsel who exercised their professional judgement as to how to proceed in the best interests of their clients. The Court has no part to play in that.

20. In order to draw an adverse inference there must be evidence before the court that logically raises a situation where the court may conclude that the failure to testify implies an inability of a party to respond. I do not see that in this case. The Claimant, in my respectful view, did not put forward evidence that would establish such a situation.

21. The only evidence against Mr. Lewis is the document that I have ruled inadmissible. I therefore dismiss the claimant's claim against Mr. Lewis in its entirety.

Disposition as to Joel Graham

22. Mr. Blades argues that Justice McAdam's order was simply that I determine what the entire damages for all of the damage that occurred on the night of the vandalism. Mr. Janson argues that the intent of Justice McAdam's order was that I segregate out the value of the damages which were actually caused by Mr. Graham.

23. I have concluded that Mr. Justice McAdam must have had in mind that I was to determine the damages for which Mr. Graham would be responsible. In doing that I understand that His Lordship would have expected that I examine such damages as Mr. Graham actually performed or in which he participated. I come to this conclusion for two reasons. Firstly, it would not have made a lot of practical sense for His Lordship to set aside the judgment with respect to damages if all he expected me to do was to determine what the total damages were. Secondly because I believe His Lordship, as a senior and highly regarded Justice, did in fact have in mind a determination of what damages may arise from Mr. Graham's joint liability with others and the matters that rise out of the discussion of concurrent tortfeasors which I am about to embark on.

24. Mr. Blades argues that because Mr. Graham was an admitted participant in one aspect of the vandalism he thereby becomes a concurrent tortfeasor and thus liable for all of the damages which occurred on that evening.

25. Mr. Blades refers me to section 3 (c) of the Tortfeasors Act RSNS c. 471. I do not believe that that is the relevant section. That section talks about the relationship between tortfeasors who have already been found to both be liable for specified damages. Here we are trying to determine the damages attributable to Mr. Graham. I believe Section 4 is the relevant one.

26. Mr. Blades argues on the basis of the statement in Tort Law by Lewis N. Klar, QC fourth edition which reads as follows:

> *When an innocent victim suffered an injury as a result of a joint or several, concurrent tort, each tortfeasor was liable to the plaintiff for the whole of the loss*

27. From this he argues that Mr. Graham is not a joint tortfeasor but he is a "concurrent tortfeasor". He says that Mr. Graham and other parties committed concurrent torts which contributed to the totality of the damage and therefore Mr. Graham is liable for the entire amount of the damages which were incurred. He says that it is then Mr. Graham's problem to seek contribution from the other parties which may have been involved.

28. I agree with Mr. Blades that Mr. Graham and the other parties cannot be considered to be joint tortfeasors. This is clearly not a situation of vicarious liability. I have no evidence that two

or more persons acted together in furtherance of a common design or plan during which tortious act was committed. I say this because there is no evidence before me that the particular items of damage which I have listed above were committed at the same time. During the period of time from midnight till 9 o'clock in the morning various people could have attended at various times and done various damages, either by a sequence of individual tortfeasors or by various groups of persons. I simply have no way, from the evidence before me, to determine the participation of any individual with the exception of the one item which Mr. Graham admits. There is nothing in Mr. Graham's admission to suggest that any other party was present or participated in the damage which he has admitted.

29. I have not found a Nova Scotia case giving me guidance on the concept of "several concurrent tortfeasors". To instruct myself as to the notion of concurrent tortfeasors I have had reference to the case of **Hutchings v. Dow, 2007 BCCA 148** and in particular the following passage:

> 21 The next issue is whether the trial judge erred in his application of s. 4 of the Act, which provides:
>
> > 4(1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault. 11
> >
> > (2) Except as provided in section 5 if 2 or more persons are found at fault
> >
> > > (a) they are jointly and severally liable to the person suffering the damage or loss, and
> > >
> > > (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.
>
> 22 The appellants submit that s. 4 does not apply in the case of consecutive torts producing separate damage, but only in the case of concurrent torts which produce the same damage. Counsel for Mr. Hutchings agrees with this statement, but says that the trial judge effectively found that the defendants and the perpetrator of the assault were concurrent several tortfeasors whose torts produced the same damage, i.e., the depression.
>
> 23 In addressing this issue, both counsel relied on the authority of Glanville Williams in his book, *Joint Torts and Contributory Negligence*, (London: Stevens & Sons Limited, 1951), c. 1. There, at p. 1, the author addresses the concept of joint and several tortfeasors generally:
>
> > The term 'joint tortfeasor' is, in essence, well understood. Two or more tortfeasors are joint tortfeasors (a) where one is the principal of or vicariously responsible for the other, or (b) where a duty imposed jointly upon them is not performed, or (c) where there is concerted action between them to a common end. Except in the case of nonfeasance in breach of a joint duty, parties cannot be joint tortfeasors unless they have mentally combined together for some purpose.

> Where tortfeasors are not joint they are necessarily 'several', 'separate', or 'independent.' Several (i.e. separate or independent) tortfeasors are of two kinds: several tortfeasors whose acts combine to produce the same damage, and several tortfeasors whose acts cause different damage. ...[Emphasis added.]
>
> 24 The import of the trial judge's findings in this case is that the appellants, on the one hand, and the perpetrator of the assault, on the other, were several tortfeasors whose acts combined to produce the same damage, i.e. the depression. In the words of Glanville Williams, the appellants and the assaulter are several concurrent tortfeasors. This concept is discussed at p. 16 of Glanville Williams' book:
>
> > Several concurrent tortfeasors are independent tortfeasors whose acts concur to produce a single damage. The damnum is single, but each commits a separate injuria. ... [Example omitted.]
>
> Several concurrent torts are of two kinds. There are those, as in the above examples, where each of the two causes is necessary in order to effect the consequence. And there are those where either cause would be sufficient of itself to produce the consequence, as where two persons independently shoot at another at the same time, both shots being fatal. No legal consequences follow from the distinction, which is made here merely in order to indicate the scope of the concept of several concurrent torts. ***[double underlined emphasis is mine]***

30. I find that the facts of this case do not support either concept of several concurrent torts. We are clearly not in a situation where we have two causes each of which is necessary to cause the damage. Neither are we in a situation where there are two causes each of which could produce the damage, or at least there is no evidence to support that proposition.

31. In the case before me, in my view, the law does not establish the proposition which Mr. Blades urges upon me. I think what Justice McAdam had in mind was for me to sort out what damage was caused by Mr. Graham alone, or in concert with other people, and to make an assessment whether the liability that His Lordship upheld extended to what Mr. Graham admits he did or something more. If His Lordship intended it to be all of the damage that occurred he could have easily assessed the damages in a summary way. I hold that His Lordship held Mr. Graham liable for some damage and he tasked this court to determine what damage Mr. Graham actually caused or was legally responsible for. In my view that is the only logically persuasive interpretation of His Lordship's order.

32. I have gone through all of the exhibits and invoices submitted and I find the only invoice or entry in an invoice that tells this court the value of the damage to "the exhaust fan on the roof of the building" is at TAB 12 of Exhibit 1.

33. Page 1 of that TAB is an invoice from Acadia Refrigeration relating to a service call which contains two descriptions: 1) "service call on York roof equipment" and 2) "access for damages

see attached work order". No specific explanation of these entries as to how they related to the roof exhaust fan was provided to me. The work order referenced was not in evidence. This invoice is for $574.31. Page 2 of that TAB says: "supply and installation of exhaust fan" and reference to a quotation which is not before the court. This invoice is for $2,707.10.

34. As to page 2 of TAB 12 I am satisfied that this is proof of the damage to the fan for which the defendant Joel Graham is liable. Page 1 of TAB 12 in the evidence is not quite so clear, however, on a balance of probabilities I find it is more likely than not that this invoice relates to the damage caused by the defendant Joel Graham.

35. I will therefore grant judgment to the claimant against Joel Graham in the amount of $3,281.41 plus costs in the amount of $492.38 as requested by the claimant and set out in the claimant's bill of costs at TAB 2 of Exhibit 1. I note that the amount of costs awarded is for disbursements only and no counsel fees are allowed, as I am prohibited from granting counsel fees by virtue of the provisions of the Small Claims Court Act. The total judgment will be $3,773.79.

Dated at Digby this 6th day of October, 2016.

Andrew S. Nickerson Q.C., Adjudicator