

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Merritt v. LeBlanc, 2017 NSSM 72

Claim: SCD No.465807
Registry: Annapolis Royal

Between:

KENNEDY ELLEN MERRITT

Claimant

– and –

KYLE MADDISON LEBLANC

Defendant

Adjudicator: Andrew S. Nickerson, QC

Heard: October 12, 2017

Decision: October 18, 2017

Appearances: The Claimant, self-represented
The Defendant, represented by his agent, Ms. Jaymee-Lynne Dowell

DECISION

FACTS AND CREDIBILITY

[1] I will review the evidence below but first I will consider the legal context in which I must do so. This case calls upon the court to assess the credibility of the witnesses and to determine which of the diametrically opposed versions of the facts the court will accept. These are always most difficult decisions for the court as it involves an assessment whether or not one party or the other will be believed. I will start the task by reviewing the legal principles which I am directed by law to consider. Justice Stewart in **Goulden v. Nova Scotia (Attorney General), 2013 NSSC 253** succinctly reviewed the law and clearly set out the approach which I must take in accordance with the directions provided by the higher levels of courts and which I am bound to follow. Her Ladyship said:

[20] **Credibility.** This proceeding also raises questions of credibility. The Supreme Court of Canada considered the problem of credibility assessment in *R. v. R.E.M.*, 2008

SCC 51. McLachlin C.J.C. repeated the observation of Bastarache and Abella JJ. in *R. v. Gagnon*, 2006 SCC 17, that “[a]ssessing credibility is not a science” and that it may be difficult for a trial judge “to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events” (*Gagnon* at para. 20, cited in *R.E.M.* at para. 28). The Chief Justice went on to say, at para. 49:

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[21] The assessment of the evidence of an interested witness was considered in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), where O’Halloran J. said, for the majority, at para. 11:

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[22] Such factors as inconsistencies and weakness in the evidence, interest in the outcome, motive to concoct, internal consistency, and admissions against interest are objective considerations going to credibility assessment, along with the common sense of the trier of fact: see, e.g. *R. v. R.H.*, 2013 SCC 22. It is open to a trier of fact to “believe a witness's testimony in whole, in part, or not at all”: *R. v. D.R.*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8, at para. 93. I have taken these principles into account in reviewing the *viva voce* and documentary evidence in conjunction with counsel’s submissions and the relevant law.

[2] The Claimant testified that she started a relationship with the Defendant in August 2014 and they began to live together shortly thereafter. The Claimant wanted a dog of her own and found an advertisement for puppies following which a female Golden Retriever - Labrador mix (Georgia) was acquired for \$500. She says that they each paid \$250.

[3] As time went on the relationship deteriorated and the parties separated on April 1, 2017. The Claimant stated that she had attempted to leave on other occasions and on each occasion the Defendant would hold Georgia down by him and not let her come to her as a deterrent to her leaving. Upon the Claimant leaving on April 1, 2017 Georgia remained with the Defendant and he subsequently took Georgia to his parents' home. The Claimant returned to the residence to obtain her personal belongings accompanied by her parents. At this time she says the Defendant was irate and destroyed a number of items of personal property. She says that she took nothing but her own property. She says that she indicated that she was prepared to go to court to obtain possession of Georgia and then on April 10 the Defendant did allow her to see Georgia and they agreed to share the dog Georgia week on week off.

[4] The week on week off arrangement seemed to work with some difficulties until approximately June 21, 2017. At that time she testified that she had difficulty contacting the Defendant and when she eventually did, he said to her that she was not going to get the dog and it was none of her business where the dog was. She attended at the Defendant's parents' home in an attempt to retrieve Georgia. She indicated that there was some sort of altercation between the Defendant and the Claimant's brother. She freely admitted that her brother has acted inappropriately in the past and was not helpful on this occasion. The police became involved. I considered it a collateral issue and was not helpful in assessing this case. Ultimately the Claimant did not obtain possession of Georgia. She has not had possession of the dog since, which brings this matter to court.

[5] She testified that during the time that they were sharing the dog week on week off she became concerned about the inordinate weight gain of the dog and produced as part of Exhibit 1 photographs which do show an obvious difference in the weight of the dog between the time of separation and the time she last saw the animal in June.

[6] The Claimant testified that she had paid all of the veterinarian bills and produced a veterinary account dated October 6, 2015 for \$82 for the cost of spay of the animal and records from the veterinary clinic showing that the dog was treated for fleas and worms in 2016.

[7] The Claimant testified that during the time that she and the Defendant lived together she was the one who groomed, bathed and walked Georgia. She was concerned that during the time they were sharing the dog week on week off that the animal was returned to her with matted hair, which she had to spend considerable time tending to, in addition to her concern about weight gain.

[8] The Claimant was extensively cross-examined by Ms. Dowell. The Claimant freely acknowledged that the Defendant had not physically abused her but considered that she had been emotionally abused. She was challenged that the Defendant had shared the costs of caring for the dog and she calmly replied that he did pick up the dog at the veterinarian on one occasion, but stated that although he was told of the costs and promised to pay half, he never did. She was also challenged about her knowledge relating to tending to the matted hair particularly behind the ears and she freely acknowledged that she was not aware of the particular point brought to her attention and stated "thanks for the tip". The questions were often long and convoluted but she listened carefully, attempted to understand what she was being asked. Throughout her cross-examination she remained with a calm demeanor, carefully listening to the questions, and was respectfully responsive to the questions. She did not deflect questions with non-responsive answers. I perceived no malice or embellishment in her evidence. I found her evidence to be logically probable, internally consistent, strong and clear.

[9] In assessing the Claimant's evidence, considering all of the factors which the law that I have quoted above directs, I am satisfied that the evidence of the Claimant is credible, reliable and accurate. Where her evidence differs from that of the Defendant's witnesses I prefer and rely upon the evidence of the Claimant.

[10] The Defendant gave evidence. He immediately claimed that he paid for the veterinary spay bill and that he "paid for everything". He emphatically stated "it is my dog" and accused the Claimant of not caring for the sensitive skin of the dog. His evidence was very short, curt and provided no details. For example, he emphatically stated that at he paid the full \$500 purchase price of the dog. If this assertion were true one would have expected that he would recount the details of arranging and completing the purchase. Repeatedly throughout his evidence the court invited him to elaborate upon or provide further detail with respect to the statements he was making. He declined to do so. Of particular interest when comparing with the evidence of the other defense witness, he provided no evidence whatsoever of his interaction or connection with the dog. His demeanor was harsh and dismissive of the complainant. I found his evidence

extremely weak and motivated entirely by his interest in the outcome and provided the court with no basis to support his bald assertions. I reject his evidence as I find it to be self-serving, unreliable and simply not credible.

[11] The defense called Terry LeBlanc, the Defendant's mother. She glowingly described Georgia as part of her family and immediately insisted that Georgia was overweight before the parties broke up. This is completely contrary to the photos in Exhibit 2. She did not comment on those photos. She asserted that the dog was now back at a good weight but provided no photo. She described in detail how the Defendant and Georgia were inseparable, how he took her fishing with him and how happy and healthy Georgia was at their home. She was highly critical of the Claimant's care of Georgia alleging that she used perfumed shampoos and did not properly groom or care for the dog. She was only asked a few simple questions in cross-examination which she took as an opportunity to make extensive negative statements against the Claimant alleging that she had caused nothing but trouble for her family from the inception of the relationship between her son and the Claimant.

[12] My conclusion is that Terry LeBlanc displayed a rather severe animosity towards the Claimant and was defending her son at all costs. I am satisfied that this so clouded her evidence that I cannot consider it to be reliable in any respect. I therefore completely reject the evidence of Terry LeBlanc.

[13] I have reminded myself to consider these credibility findings, not in isolation, but in relation to the whole of the evidence. I find that the evidence of the Claimant is credible and reliable and the Defense evidence is not to be credible or reliable in the context of the whole of the evidence.

ISSUES

[14] I must resolve the following questions:

To which party should I award possession of the dog Georgia?

Has the Defendant committed the tort of conversion and should I award damages for conversion?

Should compensation be awarded to the party I do not award possession to for any costs or expenses in relation to the dog Georgia?

What costs should I order?

ANALYSIS

[15] Section 29 (1) (a) (ii) of the Small Claims Court Act authorizes me to make an order “requiring a party to pay money or deliver specific personal property”

[16] Based on the evidence before me I conclude that The Defendant essentially contributed nothing substantial to the acquisition of the dog or its care other than the initial contribution of \$250. The Claimant initiated and arranged the purchase of the dog, and the Claimant arranged and paid for its veterinary care. There is scant evidence of the Defendant exercising any of the indications of ownership until the Claimant voluntarily agreed to a week on week off arrangement. My conclusion is that on the balance of probabilities that the dog Georgia is and has always been the property of the Claimant. I will grant an order that the Claimant be given immediate possession of the dog Georgia and declare that the dog Georgia is her sole property.

[17] As to the week on week off arrangement, I find that the Claimant made that settlement to avoid conflict and the necessity for court proceedings. She may have been bound by this agreement had the Defendant honoured the agreement but he did not. When he unilaterally withheld the dog, he repudiated the agreement by his action and that agreement became null and void. That arrangement does not bar the Claimant's right to relief in this proceeding.

[18] I find that the Defendant did in fact contribute \$250 to the purchase of the dog. This was not contested. I find that the evidence does not establish that the Defendant contributed to the veterinary bills or other expenses relating to the dog. On the basis of the doctrine of unjust enrichment, and not as a result of any ownership in the dog, as I have found none, I will order that the Claimant pay the Defendant the sum of \$250 which I will set off against the damages and costs I will award.

[19] The tort of conversion is committed when a person does a positive and intentional act of substantial interference with another person's legal possession or right to immediate possession of personal property. It is an intentional tort and requires that the person know that another has a property right and intent to deprive the Claimant of that right. In June of 2017 the Defendant clearly knew that the Claimant had a property right in the dog. At the very least at that time the Defendant was aware that the Claimant had at minimum a one half interest and had agreed to a sharing due to that right. In my view this fulfills the intent required to establish the tort. In my view the Defendant unlawfully, knowingly and intentionally withheld the dog from the Claimant from mid-June until the date of this decision and therefore is liable for conversion. I find that the

manner that the Defendant did this which included, avoiding contact, in effect hiding the dog from her, and making callous remarks to her, as high-handed and deliberately intended to cause the Claimant distress. The Defendant has a legal responsibility for his actions in this regard. I am limited in the amount I may award for damages of this type to a maximum of \$100, but am satisfied that the facts and law support that I should award the Claimant the sum of \$100 damages in respect of conversion.

[20] I will award the Claimant costs consisting of the cost of filing in the amount of \$99.70 together with the costs of service upon the Defendant. The cost of service will include not only the cost of the initial attempts at service but the costs of service relating to the substituted service which was eventually effected. The accounts of the process server presented for these services were \$71.00 and \$60.00 for a total of \$131.00 in service costs.

[21] I award total costs of \$230.70 and damages of \$100.00 for a total of \$330.70 in favour of the Claimant.

[22] I will offset the damages and costs against the \$250 due from the Claimant to the Defendant resulting in a net due by the Defendant to the Claimant of \$80.70.

[23] In the result there will be an order:

- a. That the Claimant be given immediate and permanent possession of the dog Georgia;
- b. That the Defendant pay to the Claimant the sum of \$80.70

Dated at Digby, Nova Scotia, this 18th day of October, 2017.

Andrew S. Nickerson Q.C., Adjudicator