

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: Pommerville v. MacLean, 2019 NSSM 42

2019

Claim No. SCT475043

BETWEEN:

MAURICE (MOE) POMMERVILLE

Claimant

- and -

CURTIS MacLEAN

Defendant

Hearing Date: May 13, 2019

Appearances:

Claimant - Jeff Lattie, Barrister & Solicitor

Defendant - Ian Dunbar, Barrister & Solicitor

DECISION and ORDER

[1] This is a claim for the return of two motor vehicles. At the hearing before me on May 13th, the sole issue was whether or not the claim was properly before the Small Claims Court. Specifically, the Defendant asserts that the value of the two vehicles is, in the aggregate, greater than \$25,000 and therefore, by virtue of Section 9(c) of the *Small Claims Court Act*, R.S.N.S. 1989, c.430, this Court has no jurisdiction.

Background

[2] The Claimant is seeking the return of his two motor vehicles – a 1967 Chevelle and a 1967 Camaro. Both of these vehicles are owned by the Claimant but are presently in the possession of the Defendant. Under a written agreement dated May 11, 2014, the Defendant agreed to provide to the Claimant, a complete restoration of the 1967 Camaro in exchange for ownership of the 1967 Chevelle. The agreement has a section headed “Scope and Manner of Services” which includes many specific items of work which were to be completed on the Camaro. Significantly, for the purposes of this matter, is the following paragraph in the written contract:

If for any reason such as physical impairment, bankruptcy, or death, Curtis MacLean and/or Curtis Customs cannot fulfill the contract as set out above, both vehicles known as (1) 1967 Chevelle, Vin

#1361771113767 and (2) 1967 Camaro, Vin #123377N206264, shall remain the sole property of Maurice Pommerville and returned without any cost incurred.

- [3] As will be seen, essentially the Defendant was to refurbish the Camaro and for his labour and parts he would get to keep the Chevelle.
- [4] According to the Claimant's Notice of Claim, the Defendant has not completed the restoration work and refuses to return his vehicles. Additionally, he has modified the 1967 Chevelle, has sold the original parts from both vehicles, and has caused damages to both vehicles.
- [5] In his written Defence, the Defendant states that the original assumed build time as six months turned out to be impossible based on the Camaro's condition and it was made clear that time was not to be a concern since the Defendant was doing this in his personal time. The Defendant states that he has spent countless hours on the restoration of both vehicles and thousands of dollars.
- [6] While not pleaded in the written Defence, before me the Defendant argued that this Court has no jurisdiction because the value of the two vehicles exceeds \$25,000. That is the sole issue for determination in this decision.

Jurisdiction

- [7] The Small Claims Court is a creature of statute and only has the specific subject areas of jurisdiction as granted by the legislation. Relevant here is Section 9(c) of the *Small Claims Court Act* which reads as follows:

9. A person may make a claim under this Act

...

(c) requesting the delivery to the person of specific personal property where the personal property does not have a value in excess of \$25,000...

- [8] Clearly, if personal property in question has a value exceeding \$25,000, this Court would have no jurisdiction to hear the claim. The Defendant says that in fact the value of the two vehicles does exceed \$25,000. On the other hand, the Claimant asserts that the value is less than \$25,000. I should note here that both parties seem to acknowledge that the claim is not divisible as between the two vehicles and that therefore it is the value of the two vehicles in the aggregate which is the issue to be addressed.
- [9] Essentially, the question to be resolved is a factual one which, must be based on the evidence before me to which I now turn.

- [10] The Defendant, Curtis MacLean, testified. He entered in evidence a one-page appraisal for each vehicle from B. Miles Auto Appraisal who, Mr. MacLean stated, is a respected appraiser. Both appraisals were dated May 11, 2109 – two days before the hearing.
- [11] I would note here that Mr. Lattie, on behalf of the Claimant, objected to the admission of Exhibit D2 and D3 which are the appraisals from B. Miles Auto Appraisal. As I will comment on further, Mr. Miles was not present at the hearing. Mr. MacLean indicated that Mr. Miles advised him that he had a previous engagement and was unavailable for the hearing. While noting the objection, I allowed the appraisals to be entered.
- [12] Mr. MacLean referred to the contract he had with the Claimant stating that under the deal he could do any upgrades while the vehicles were in his possession. He stated that Mr. Miles came to the shop a week prior to the hearing to do the appraisals. As to the Camaro, Mr. MacLean stated it was approximately 55% complete. On cross-examination he stated that he rebuilt the Camaro on his own. He stated his view that the Camaro was worth \$12,500 as it sits in an unfinished state. He felt it would have been perhaps \$10,000 when it came in.
- [13] With respect to the Chevelle, Mr. MacLean was aware that Mr. Pommerville had tried to sell for \$35,000 but eventually put it down to \$25,000 but couldn't sell it because it was not street legal. He stated he did not do an appraisal when the vehicles were brought in. As to why he would not allow the Claimant's appraiser to inspect the vehicles in October, 2018, he simply stated it was "Moe's appraiser". No other explanation was given for that.
- [14] Tony Smith was called by the Claimant. He is a Red Seal Auto Body repairman who has been licensed since 1984. He worked for Mr. MacLean for the years 2013 – 2015 and was there when the Camaro and Chevelle came in. He stated that a lot of parts were taken off both cars and put in other ones in the shop or sold to third parties. In particular, he was aware that the dash was sold out of the Chevelle. He stated that most of the bolt on parts in the Camaro had been removed and it was sagging because it was on what is referred to as a "rotisserie," which I understand to be some apparatus used to hold up a car while it is being worked on. In Mr. Smith's opinion, the Chevelle would have a value of \$15,000 based on the last time he saw it in July 2015. The Camaro he felt would have a value of \$2,000.
- [15] On cross-examination Mr. Smith stated that his valuation of the Camaro was without an engine but if it had an engine he would put it in the range of \$8,000 - \$10,000, if the vehicle was driveable. He acknowledged that he was a plaintiff in a lawsuit against Mr. MacLean. He also confirmed that he had seen pictures of the Camaro and despite the appraisal from Mr. Miles, he confirmed that he considered that the Chevelle was of a

\$15,000 value. He acknowledged that he was not a licensed appraiser but he has done appraisals in the past for damage repair. He also referred to his 35 years in the business. Mr. Smith was aware of Mr. Miles.

- [16] Mr. R.J. McConnell gave evidence. He was doing a course and as part of that worked for Mr. MacLean for a period of time. He is somewhat of an amateur car enthusiast and also offered his opinion of value. He felt the Camaro would be worth \$2,000, at least in 2016 when he left. As at that time it was only a shell. The Chevelle, he stated that he might have invested \$20,000 for it.
- [17] He is aware of Mr. Miles and stated that he was a friend of Mr. MacLean's.
- [18] The Camaro, in his view, if driveable, would be worth \$8,000 to \$10,000.
- [19] Maurice Pommerville, the Claimant, gave evidence. With respect to the Camaro, he stated it was running when he took it in. Since then all the interior parts have been removed. The last time he saw it was in October 2018 when he went to the premises with an appraiser from Canavan's but they were denied the ability to take a close look and examine it which the appraiser of Canavan's would need to do.
- [20] Mr. Pommerville said he was flabbergasted by the condition of the Camaro. It had been painted and this was after he had started the action. The body work was wavy. There was no paint on the inside of the doors and the job was quite unsatisfactory. The hood could not be closed. The body had been cut incorrectly and the door would not fit.
- [21] Mr. Pommerville stated that there were two original equipment manufactured fenders and the Defendant sold them to a third party. There has been so much done to it he feels that now it might be worth \$2,000 as it is basically a white elephant. With respect to the Miles' appraisal, he noted that it does not make note of the various issues with the measurement of the Camaro's body being out of line.
- [22] With respect to the Chevelle, he did had an appraisal done in 2011 for insurance purposes and the fair market value was stated to be \$27,000. It is not the same car now. The Miles appraisal states that it has all original panels. This is completely inaccurate. It does have not even have the original frame. The hood has been cut up, the bumper was removed, the fenders are scratched, and the dash was removed and sold to a third party.

[23] Mr. Pommerville confirmed that he had tried to sell the Chevelle for \$25,000 but probably would have settled for a few thousand dollars less than that. In his view, it is now worth in the range of \$10,000 to \$12,000.

Analysis

[24] If the only evidence here of valuation was from the Claimant's witnesses, the result would be that the evidence of value of the two vehicles would be seen, on a balance of probabilities, to be less than \$25,000.

[25] However, the Defendant has put forward the appraisals from B. Miles which indicate a value of \$34,500 for the Chevelle and \$12,500 for the Camaro.

[26] For the reasons that follow, I prefer the Claimant's evidence as to value over that of the Defendant.

[27] Most significantly, I was impressed with the evidence of Mr. Smith. While he might be considered to have an axe to grind, his evidence did not reflect that. To the contrary, I found him to be fair, thoughtful, and not given to overstatement in his evidence. He has 35 years in the automotive industry and has in the past given appraisals.

[28] In the Small Claims Court the admissibility of evidence is on a much more relaxed basis than in the Supreme Court. This is statutorily mandated by Section 28 of the **Small Claims Court Act** which reads as follows:

Evidence

28 (1) An adjudicator may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceedings and may act on such evidence, but the adjudicator may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing that

(a) would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) is inadmissible by any statute.

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

- [29] This provision has been the subject of judicial comment in the Nova Scotia Supreme Court. In *Towle v. Samad*, 2013 N.S.S.C. 260, where after reviewing some of the previous decisions, Justice Moir ruled that the adjudicator had to admit estimates of damage from people who were not called to testify although he added that he would “defer” to the adjudicator’s weighing of the evidence (see para. 79).
- [30] In my view, Section 28 would also authorize the acceptance of opinion evidence from a non-qualified witness.
- [31] Two comments should be made at this juncture. First, evidence given in court is, as a general rule, either factual in nature or is opinion evidence. Factual evidence is historical and is typically based on what the witness observed with his or her senses. Opinion evidence is, in the traditional sense, only to be given by an expert qualified in the subject area and is typically based on his or her expertise against a given scenario and often provides a prognosis or prediction of what is likely to occur or a more nuanced description of what is occurring.
- [32] Secondly, evidence of the value of an item is, in my view, opinion evidence since it is a prediction of what the item will sell for in the marketplace.
- [33] In Small Claims Court, experts do by times give evidence. In some cases it is the practice to “qualify” the expert, which means accepting the witness as an expert witness, through evidence of his or her education, training and experience to give testimony about the subject matter which forms his or her opinion. Often, the Court will be provided with a CV and perhaps some questioning of the witness to establish his or her credentials. In the Supreme Court, this process of qualifying a witness can be somewhat rigorous. Not so in Small Claims Court in my experience.
- [34] However, other witnesses can also give opinion evidence. Ultimately, opinion evidence will be accepted from a witness so long as it is relevant. All of this is consistent with section 28, referred to and quoted above.
- [35] What it most often comes down to is how much weight is to be given to the evidence.
- [36] For example, if an individual highly educated with a great deal of experience was qualified with a resume and direct examination and cross-examination in Court, their evidence would typically be deserving of a great deal of weight.

- [37] Here, no such witnesses gave evidence.
- [38] However, I considered Mr. Smith's evidence to be credible and worthy of acceptance. I also would note that his evidence of the value of the Chevelle is generally consistent with other evidence which I had heard. Specifically, that Mr. Pommerville had tried to sell the Chevelle for \$25,000 and was not able to at that level. While Mr. Pommerville stated that he probably would have sold it for a few thousand dollars less, that is quite a different thing than concluding that a buyer who would have offered a few thousand dollars less was out there.
- [39] Secondly, I note the earlier appraisal done in 2014 for \$27,000 and which is a detailed appraisal which appears to consider a number of factors. On its face, it is more cogent and compelling than the appraisals from Mr. Miles.
- [40] Given the evidence I heard about the removal of various items and damage to the Chevelle that has occurred since it went in, the valuation of \$15,000 in light of that previous appraisal is credible. On a civil balance of probabilities standard, I consider that it is more likely than not.
- [41] Turning to the Miles' appraisals, the first issue is that he did not attend. As I have explained above, in my view this is certainly not fatal to the acceptance of the report. However, it is a significant factor to consider in ascribing weight to the document. Counsel for the Claimant was unable to challenge the veracity of the report through cross-examination. The ability to cross-examine a witness is considered one of the hallmarks of the civil (and criminal) justice systems in this Country.
- [42] I also observe that in neither of Mr. Miles' appraisals does he provide any "comparables". That is, there is no mention of similar sales of such vehicle(s) in the local area or actual sale prices from Nova Scotia, Canada, or the United States. I note that on the Miles letterhead it states:
- " Sources: Canadian Black Book, Nada Price Guides, Hemmings Motor News, Old Car Price Guide, Kelly Blue Book, various internet sites, local papers, and the experience of over 29 years in the industry as a licensed appraiser, used car dealer and owner/operator of an automotive repair facility."*
- [43] Despite this, there is no reference at all to actual sales prices in the reports.
- [44] For these reasons, I conclude that the Miles' appraisals are not to be given little weight.

[45] That leaves me with the evidence of the Claimant. As I said earlier, based on that, the result would be that the evidence of value of the two vehicles would be seen, on a balance of probabilities, to be less than \$25,000. I so find.

[46] A further factor is this. In evidence was the fact that in October, 2018, the Claimant and an appraiser from Canavans went to the Defendant's place of business to inspect the vehicles for appraisal purposes. The Defendant would not permit the Claimant's appraiser to access the vehicles to do inspections and appraisals. No legitimate reason was given for this by the Defendant. Given the significance of the valuation issue, I draw a negative inference against the Defendant for this lack of cooperation. I infer that the reason he would not permit it is because of the likelihood that the aggregate of the valuations would be within the jurisdictional limit of this Court. This inference is consistent with and supports a conclusion that his refusal to allow access to the appraiser from Canavans was purely strategic.

ORDER

[47] It is Ordered that the motion to dismiss this proceeding for want of jurisdiction is dismissed. The matter is to be set down for a hearing on the merits.

DATED at Halifax, Nova Scotia, this 8th day of August, 2019.



MICHAEL J. O'HARA
ADJUDICATOR