SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Pommerville v. MacLean*, 2019 NSSM 59

Date: 2019-11-21
Docket: SCT 47043
Registry: Truro

Between:

Maurice (Moe) Pommerville

Claimant

- and-

Curtis MacLean

Defendant

Adjudicator:	Eric K. Slone
Heard:	in Truro, Nova Scotia on November 18, 2019
Appearances:	For the Claimant, Jeff Lattie, counsel
	For the Defendant, self-represented

BY THE COURT:

[1] This matter has been before another Adjudicator of the Court on a previous occasion to determine a preliminary issue which, assuming he had agreed with the Defendant, would have resulted in a finding that the court lacked jurisdiction to consider the matter. After a hearing on May 13, 2019, Adjudicator O'Hara issued a lengthy considered decision dated August 8, 2019 (reported as *Pomerville v. MacLean* 2019 NSSM 42), determining that issue in favour of the Claimant and directing that the matter proceed to a hearing on the merits.

[2] The matter was heard before me on November 18, 2019.

[3] I will borrow freely from the opening paragraphs of Adjudicator O'Hara's decision to set out the factual background.

> [1] This is a claim for the return of two motor vehicles. ....
>
> [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]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.

[4] The issue before Adjudicator O'Hara was the value of the two vehicles. The

Defendant had argued that their value exceeded $25,000.00 which, if true, would have ousted the court's jurisdiction. The finding of Adjudicator O'Hara was that the two vehicles together were worth less than $25,000.00. That finding has not been appealed and must be treated as conclusively established.

[5] Now, some five and a half years after the contract was entered into, the Claimant wants his vehicles returned - in whatever condition they may be in.

[6] The evidence leaves no doubt in my mind that the Defendant did not perform his contractual obligation. His many excuses ring hollow. The Camaro is far from restored. I am not even sure whether it can be said to be in one piece.

[7] In the meantime, the Defendant has had exclusive use of the Chevelle, a fully functional "muscle car" which he has kept in his showroom and occasionally takes out for a spin. Despite the fact that he has never had ownership of the Chevelle, he has treated it as his own. I believe him when he says that he has spent money and put in labour on improving (or modifying) it, but what he does not seem to grasp is that this vehicle would only have become his if he had fulfilled his obligation to restore the Camaro.

[8] I listened carefully to the Defendant's evidence to try and understand what legal basis he was raising to defeat the Claimant's clear legal right to have the contract enforced and the vehicles returned "without any cost incurred." The only half-credible argument I heard was this: he claims that when he started to disassemble and work on the Camaro, he found it to be more deteriorated than he had anticipated. He says that the Claimant and he made a new verbal agreement, overriding the written agreement.

As for what that new verbal agreement contained, he was a bit unclear, but he seems to believe that it gave him more time to complete the Camaro and otherwise relieves him of some of his obligations.

[9] The Claimant disputes that he ever agreed to any new contract.

[10] Also, it rings hollow that the Camaro was in unexpectedly bad shape, as both parties knew that it had been salvaged out of a barn in Ontario.

[11] There is a high onus on any party who seeks to prove that a written contract has been replaced with a verbal one. The Defendant is a businessman. He enters into contracts with customers, and he must understand that the way to change a written agreement is either to make a new written agreement, or to amend it in writing in some fashion that can be verified.

[12] Here, the most that one can say is that the Claimant and Defendant likely had many conversations over the years about the vehicles and the state of the restoration, but I would not elevate any of those conversations to the level of a new verbal agreement.

[13] I find as a fact that the written agreement is valid and that it was not replaced by any other agreement.

[14] The Defendant has no arguable defence to this claim. He has only himself to blame for any expenditures of time or money on the Chevelle. Certainly the Claimant never directed him to spend money on the Chevelle. It was not, and has never been,

the Defendant's car.

[15] If as it appears the Defendant did not want to go through with restoration of the Camaro, for whatever reason, he ought to have just said so and returned the two vehicles long ago.

[16] He has had more than five years to complete the work on the Camaro. He has utterly failed in his obligation.

[17] My order will be for the Defendant to return the two vehicles to the Claimant, as is. There will also be an award of costs in the amount of $426.35, consisting of $199.35 to issue the claim, $152.00 to serve it, and $75.00 for costs of reproducing colour photographs and documents for the benefit of the court.

[18] One last comment. Near the end of the trial the Defendant announced that he had registered a mechanic's lien on the Chevelle, to account for the improvements that he had made to it and perhaps for storage fees for some of the years prior to 2014. He appears to expect that the Claimant will somehow be forced to pay him for these improvements and for storage, assuming I order the Chevelle to be restored to him (as I am doing.)

[19] I do not think that the Defendant has any real appreciation for how mechanic's liens are enforced, within the procedures under the *Builders' Lien Act*. I regard his use of the lien procedure to be a misguided attempt to defeat the order of this court.

[20] This court makes the express finding that any work that was done by the

Defendant to the Claimant's Chevelle was done at his own risk, and not at the direction of the Claimant. The written contract between them stipulates that it is to be returned "without any cost incurred." There was no agreement that the Defendant would be compensated for such work, indeed there was an agreement that he would not! I also find no merit in his claim that he should be compensated for storing the Chevelle. It is true that he did store the vehicle for several years, but there was no evidence that this was anything more than a favour to the Claimant who was, at the time, on friendly terms with the Defendant. Moreover, any such claim would be years out of date and unenforceable under the terms of the *Limitations Act.*

[21] Should another court be called upon to consider the merits of the Defendant's claim for lien, I would hope that such court would regard the issue as having already been conclusively determined in favour of the Claimant.

Eric K. Slone, Adjudicator