IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Manuge v. Sweeney's Home Centre Limited*, 2021 NSSM 33

Claim: SCY No. 507066
Registry: Yarmouth

Between:

MARIANNE MANUGE

Claimant

-and-

SWEENEY'S HOME CENTRE LIMITED

Defendants

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: September 16, 2021

Decision: September 27, 2021

Appearances: The Claimant, self-represented
The Defendant, self-represented

DECISION

Facts

[1] The facts in this case are not substantially in the dispute. I heard both the Claimant and Mr. Thomas Sweeney on behalf of the corporate Defendant. I consider them both to be credible witnesses and to have given their evidence truthfully. I do not find that I need to make any credibility findings and therefore I will set out my findings of fact essentially based on the evidence I heard from both of them. I remind the parties that if I do not mention a particular piece of evidence, it is not because I have not heard it, it is because it is not directly relevant to the

decision that I must make.

[2] In March 2017 the Claimant purchased a number of bundles of eastern cedar shingles and some lattice. Some of this material was picked up prior to the issue that arose in this trial. I am satisfied, and the parties essentially agreed, that the value of the items that were not picked up based on their initial purchase price at the time of sale would have been $888.69.

[3] The Claimant testified that for personal reasons, which I won't go into, she asked the Defendant to hold the items for her to pick up later, and she says that the person at the store indicated yes. No time limit was discussed. The Claimant does not deny that she purchased these items on what was referred to as an "scratch and save" sale. I have been provided with the card that describes the terms of that sale, and it does indicate that the terms of that sale were "cash and carry". The Claimant acknowledged that she did purchase these at the "cash and carry" sale. Mr. Sweeney indicated that although it was not unreasonable for the items to be left at the store for a short period of time, he did not consider three years to be reasonable.

[4] In any event, it wasn't until the spring of 2020 that the Claimant returned to pick up the remaining items. She indicates in her testimony that she had visited the store at least 60 times over the period from 2017 to 2020. When challenged in cross-examination, she agreed that she had not brought these remaining items to the attention of anyone at the store on any such visit.

[5] It is to be noted, that the Claimant was not issued a “pick up slip”, and the only document she has is her invoice for the material. Due to this, Mr. Sweeney

says that they would have had no way of knowing which specific goods were held for the Claimant. The goods were not segregated, set aside or labelled.

[6] Regrettably when the Claimant eventually did wish to pick up the items in the spring of 2020, they had been sold to another customer and the store was, due to the changed market conditions for building materials by Covid, unable to find a replacement of those particular items. She was offered a refund of the $888.69 that she had paid. She did not find this acceptable; she wanted the items.

[7] In the spring of 2021, the Claimant replaced the items, but the price had dramatically increased. The Claimant presents an invoice from an alternate supplier for the equivalent items dated March 26, 2021 in the amount of $3,187.90. This was clearly due to the effect of the Covid pandemic.

Position of the parties

[8] The Claimant submits that she had bought and paid for the items and that the store had agreed to hold them until she required them. Since the Defendant could not replace them, she submits she should be reimbursed the current day replacement cost.

[9] The Defendant submits, that while it is not unreasonable for someone to ask them to hold the items for a few weeks or even a few months, they are not in the warehousing business and it is unreasonable and unfair to go for such a long period of time without the Claimant even mentioning the items to the store. He argues that if they had been notified within a reasonable time, they could have dealt with the situation, either by setting the goods aside or by demanding that the Claimant remove them long before the dramatic effects of the Covid pandemic.

Analysis

[10] The items in question were bought and paid for. In my view, the property in the items passed to the Claimant at the time of sale. Therefore, during the relevant times in this matter the goods were the property of the Claimant.

[11] I fully acknowledge the terms of the cash and carry sale. However, the Defendant did not insist on those terms and agreed, albeit in a somewhat casual manner, to hold the goods. I also find that by not issuing a pickup slip and documenting the ownership of the goods, the Defendant deprived itself of the ability to contact the Claimant, but that was not as a result of the Claimant's actions and she cannot be held responsible for that.

[12] The Claimant correctly pointed out that the law of bailment is relevant to this case. Bailment occurs when one party has possession of another party's goods. The legal relationship of bailer and bailee can exist independently of a contract, and is created by one party voluntarily taking into custody goods which are the property of another: **Punch v. Savoy's Jewellers Ltd. et al. (1986), 26 D.L.R. (4th) 546 (OntC.A.) at 551.**

[13] There has been historically much debate about what standard of care the bailee must take with respect to the bailor's goods. I reviewed a number of cases from various Canadian jurisdictions which I will not outline in detail. I adopt a concise review of the jurisprudence that was done by Justice Acton of the Alberta Court of Queen's bench in **Gaudreau v. Belter, 2001 ABQB 101** as representing the current state of the law. Her Ladyship stated as follows:

> [7] A review of Canadian jurisprudence reveals that there is conflicting Canadian case law; some courts have held that a bailee will only be liable for gross negligence, and

> others have held that the standard of care for bailment, whether gratuitous or for reward, is the standard that is reasonable in the circumstances. The general trend, however, is to favour the latter.
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> [8] Among those courts advocating a "reasonable care" standard, many cite 2 Halsbury's Laws of England (4th) ed. This excerpt is from ***Kinsella v. Club "7" Ltd.,*** [1993] N. J. No. 365, 115 Nfld. & P.E.l.R. I 50 (Nfld. S.C.T.D.) at para. 95-96:
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> > In terms of the responsibility of the defendants as gratuitous bailees in the circumstances of this case, the parties again refer to the provisions of Halsbury's, op. cit., in terms of the degree of care and diligence required. Again it will be useful to set out the passage relied on in particular in this regard from p. 833:
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> > > Of the various rights and duties of bailors and bailees, the most discussed is the degree of care and diligence required of the bailee in each kind of bailment. That degree has, from the time of the Roman Empire until fairly recent times, been held to vary according to the benefits derived from the bailment by the bailor and the bailee respectively. Thus, an ordinary degree of care and skill was traditionally required where both benefited from the transaction; slighter diligence, perhaps, where the benefit was wholly that of the bailor (as in the first two classes above); and greater diligence where the benefit accrued only to the bailee (as in the third class). More recently, however, it has been recognized that the common law duty of every bailee is to take reasonable care of his bailor's goods, and not to convert them. The standard of care required is therefore the standard demanded by the circumstances of each particular case. To try to put a bailment into a watertight compartment, such as gratuitous bailment or bailment for reward, can be misleading. It must be remembered, however, that bailment is frequently a contract, and the parties may always vary the incidents by the terms of the contract.
> >
> > From this passage, the test now appropriate in all cases of bailment, of whatever classification and under whatever circumstances, is to apply that degree of care which reason dictates in the circumstances of the case. Also, Halsbury's notes that as to this, the requirements of the bailment may be affected by written or oral contract between the parties. In this latter regard, however, there is no evidence here of either type of specific term.

[14] I find that there was a lack of care on the part of the Defendant. Firstly, by not issuing a proper pickup slip or adopting some other system to identify who the purchaser of these goods was, and also by not segregating or labelling the goods, that it had already sold to the Claimant. The fact that the Defendant was unable to trace or locate the customer, in my view, cannot be attributed to the Claimant. I am

satisfied that the Defendant failed to meet the standard of care that was appropriate in the circumstances.

[15] However, that is not the end of the matter. As much as the Defendant had a duty to care for these goods, the Claimant had a duty to mitigate her damages. There is a responsibility on a party who has been injured by a breach to take all reasonable steps to avoid losses flowing from the breach. A claimant is not entitled to recover for losses which could have been avoided by taking reasonable action: **H. McGregor, McGregor on Damages, 16th ed. (London: Sweet & Maxwell Limited, 1997)** at paragraph 285; **British Westinghouse Electric & Mfg. Co., Ltd. v. Underground Electric R. Co. of London, Ltd., [1912] A.C. 673 at 689**. The principle is essentially this: a wronged claimant is entitled to recover damages for the losses suffered, but the extent of those losses will depend upon whether that party has taken reasonable steps to avoid their unreasonable accumulation.

[16] I am satisfied that the Claimant failed to meet her obligation under the mitigation principle. I am satisfied that although the Defendant agreed to hold the goods, no specific time was agreed. By her own admission, she was in the store 60 times between 2017 and 2020. She could have easily brought the matter to the attention of the store and ensured that her goods were still there and in good order. I am also satisfied that she should have realized that it was placing a significant burden upon the Defendant to hold these goods at its facility for an extended period of time. In my view, that should have raised in her mind the need to check on the status of her goods. Had she done so the matter could have been resolved at an early date, and the problem created by the unexpected and dramatic rise in the cost of building supplies occasioned by Covid could have been avoided.

[17] I am satisfied that had the Claimant brought the matter to the attention of the

Defendant in a timely way, the case would have been resolved well before the advent of Covid. It would be unjust to make the Defendant responsible for the dramatic increase in materials cost, when the Claimant could have easily mitigated this by simply bringing the fact that she had goods remaining there to the attention of the Defendant.

[18] I have therefore concluded that the proper measure of damages would be to order that the Defendant pay to the Claimant the sum of $888.69 together with the costs normally awarded by the Small Claims Court. The Claimant served the Claim herself so the only costs I can award is the filing fee.

Dated at Yarmouth this 27th day of September, 2021.

Andrew S. Nickerson Q.C., Adjudicator