SMALL CLAIMS COURT OF NOVA SCOTIA
Citatin: *Tarry v. Rotin*, 2021 NSSM 46

Date: 20210907

Docket: SCCH 504332

Registry: Halifax

Between:

Brendan Tarry and Julie Tarry

Claimants

- and -

Lynn Rotin

Defendant

Adjudicator: Eric K. Slone

Heard: July 8, 2021 in Halifax, Nova Scotia

Appearances: For the Claimants, self-represented

For the Defendant, Jason Edwards

BY THE COURT:

[1] The Claimants are seeking $25,000.00 in damages for trespass, specifically for the Defendant's (now admitted) cutting of several mature trees on the Claimants' land. The amount sought is the maximum that this court may award.

[2] The Claimants and the Defendant are neighbours in West Pennant, Nova Scotia, a small community not far from the popular Crystal Crescent Beach. The lots they occupy are both more than an acre in size and can fairly be described as more rural than suburban. Both lots have trees of various size and species, gardens and trails. They both have somewhat distant water views of Fawsons Cove.

[3] Until recently, the location of the shared boundary between the properties was a bit fuzzy, which is not uncommon for rural properties in Nova Scotia. Oftentimes, it does not matter. But where relations between neighbours are strained, it can matter very much. And such is the case here.

[4] The Defendant has owned her property since about 2005 or 2006. The Claimants acquired theirs in 2013. I believe that both parties love their respective properties, both for the natural beauty they possess as well as the sense of privacy that they enjoy.

[5] I am not clear about precisely when it started, but relations between the Claimants and the Defendant became testy a few years ago. It appears that they were both concerned about the precise location of the boundary line. The Defendant had been piling up brush in an area very close to the property line, creating a form of screen. The Claimants apparently believed that these brush piles were encroaching and complained. The Defendant showed the Claimants her survey, which I gather was fairly old and not necessarily accurate. The Claimants said that they intended to get their own survey done.

[6] Some months later, in early 2017 the Claimants had a survey done, which resulted in orange boundary markings being located in a few spots. This is rough terrain, with something of an escarpment running through it, and even with survey markings I accept that it can be a bit difficult to discern precisely where the line is.

[7] In an email from April 17, 2017, having observed fresh survey markers, the Defendant expressed her disappointment that the Claimants had not shared the results of their survey with her. I am not sure that this paper survey was ever shared, and I am also unsure whether the Defendant ever completely understood

where the line was. The fact that such a communication occurred attests to the poor relationship and strained communication.

[8] In both 2017 and 2018 the Defendant had some trees cut on what she believed to be her own property. The Claimants took issue with the Defendant's actions, believing that these, or some of them, were boundary trees. This issue was not directly before the court in this case, though the events are important parts of the history. I will observe that what are called "boundary trees" are typically found where they have been deliberately planted along what is once believed to be a property line, perhaps just to mark the line or for the purpose of creating a hedge or fence-like barrier. Boundary trees belong to both property owners and cannot be unilaterally interfered with. In the case before me, the trees that are suggested to have been boundary trees were most likely naturally growing and the odds that any of them sat precisely on the boundary are slim. I believe it is more probable than not, that these trees were actually on the Defendant's side of the line, though they might have been pretty close to the boundary.

[9] Against this backdrop of unfriendliness, in August 2019 there was an incident where the Defendant was criminally charged with assault for allegedly trying to hit Mr. Tarry with her vehicle. (The details of that incident were not discussed at the hearing, and really do not matter here.) Long before that case was resolved, on April 15, 2020, the Defendant was allegedly seen trespassing on the Claimants' property, which prompted a call to the police based on an alleged violation of the Defendant's release conditions in connection with the assault charge.

[10] Two days later, on April 17, 2020, the Defendant took the actions that are the subject of this lawsuit.

[11] The Defendant testified that a fairly large tree had fallen down, and while she had a tree cutting company out there to cut it down, she instructed them to cut down three additional trees that were blocking her distant view. The Claimants contend that five trees, not four were cut down. In their evidence they identified four trees as a 28-year-old yellow birch, a 25-year-old white birch, an 18-year old yellow birch and a 24-year old white pine. It is not clear what the fifth tree was, if there was a fifth tree. Nor is it clear which, if any of them had fallen down prior to being cut.

[12] We know the age and species of the four trees because the Claimants took detailed cross-section photographs of the stumps.

[13] On that day, April 17, 2020, Mr. Tarry heard the sound of chainsaws and ran to where the sound was coming from, filming on his phone. The video of this event was shown in court. Mr. Tarry confronted the cutters, contending that they were trespassing on his property. He demanded they stop what they were doing, though it appears the damage was already done. They insisted that they were simply following the Defendant's instructions and that they believed they were cutting exclusively on her own land. Realizing that there was a controversy over whose land they were on, the tree cutters stopped what they were doing and left.

[14] The Defendant insisted at the time that the cutting had been confined to trees on her own property. She later commissioned her own professional survey which confirmed that the subject trees were on the Claimants' land. The Defendant professed to have been shocked by this finding.

[15] In cases of trespass, the state of mind of the trespasser is technically irrelevant, though in some cases involving deliberate trespass it may attract an award of punitive damages. In this case, no claim of punitive damages was argued, and I believe it is dubious that this court has jurisdiction to consider them (although there are some adjudicators who believe otherwise). As such, I do not need to make a finding as to the Defendant's actions.

[16] Did she know that she was having trees cut that she had no right to cut? Was this a good faith error, or a deliberate provocation? The timing of the cutting, a mere two days after the police were called for an alleged trespass, is interesting though ultimately equivocal. Only the Defendant knows for sure what was in her mind, though the Claimants undoubtedly see her actions in the worst light. Their anger and suspicion has undoubtedly contributed to their resolve to hold the Defendant to account for her actions.

Damages

[17] I note that there was no expert evidence provided to assist the court in assessing the loss. I am not suggesting that expert evidence is always required, since it is expensive to hire experts and this court is designed to make justice relatively affordable. But I observe that experts are nonetheless often involved in these kinds of cases to assist the court in arriving at damage awards that have a basis in fact rather than in speculation.

[18] In a filed summary, the Claimants break down their damages claim as

follows:

a. $1,406.25 for surveying costs incurred in April of 2017.

b. $7,054.00 for the value of the lost trees.

c. $10,218.75 for "loss of amenity."

d. $549.35 for various items of "costs."

e. $5,771.65 for "loss of privacy & screening/sense of security, future losses of tree value & potential landscaping usage, and costs of new flag project."

[19] These items add up to precisely $25,000.00.

[20] I will address items a and d first.

[21] The 2017 survey was not done as a consequence of the Defendant's 2020 actions. It cannot be seen as either damages or an item of costs. There is no basis to allow the cost to be recovered in this Claim.

[22] Item d includes filing and service fees, which are not part of the damages calculation (and not counted in the $25,000.00 limit) and are normally dealt with after the damages are assessed. Given that the Claimants have been successful in the claim (even if not in the amount hoped for) they will be entitled to their costs. However, there are items claimed under this head which will need to be considered individually such as "$50 travel + $50 time + $130 cost of *Trees and the Law in Canada* book." I will comment on these items later.

[23] Items b, c and e appear to be different and to an extent overlapping methodologies for placing a value on the subject trees, or the loss thereof. In particular, I see the items under e (loss of privacy etc.) being subsumed within "loss of amenity" which is separately claimed as item c.

[24] As I understand and reframe the arguments, the claims roughly fall into three categories:

a. The inherent value of the trees to the Claimants;

b. Loss of value to the property;
c. Cost of remedying the loss, such as by planting new trees or otherwise rehabilitating the affected area.

[25] The breakdown by the Claimants does not correspond exactly to this analysis, but it generally fits.

[26] The largest item of damages claimed is for "loss of amenity." This is a term most often used in describing someone's loss of enjoyment of their normal functions, after (for example) an accident. In that context it is a species of general damages, which characterization would not assist the Claimants given how limited is this court's jurisdiction to award general damages (limited to $100.00). But the term has been used in tree cases, such as *Kates v. Hall*, 1991 CanLII 1127 (BC CA), where that term was used (initially it appears by the trial judge) to describe the loss of enjoyment that the plaintiffs would suffer during the time it would take for replacement trees to grow to a more respectable height. The trial court in that case had already rejected the plaintiff's request for the cost of planting 40-foot trees; the court adopted the much more modest cost of 20-foot trees.

[27] In my reading of the cases, some courts have chosen one method to arrive at a number, while other courts (such as *Kates*) appear to have used more than one methodology. In any event, the final number (however arrived at) is supposed to be fair and reasonable.

[28] In looking at the inherent value of the trees, the Claimants put forward a website that allows one to calculate the value of a tree, which they used to arrive as a total value for the four trees of $5,695.00 USD. I am unwilling to resort to such a web-based tool, as it effectively delegates fact finding to some unknown person or algorithm.

[29] In some cases, the approach is to look at commercial value. There was no evidence before me to establish what the trees might be worth as lumber, and I do not think it is appropriate to approach the exercise as if this were a commercial woodlot. The issue is what they were worth aesthetically, not commercially. As such, the exercise contains both objective and subjective elements.

[30] On the available evidence, with the greatest of respect to the Claimants, these four trees were nothing special - four trees of a common, native variety among the likely hundreds of similar trees on these two rural properties. They were not ornamental. One of them may well have been falling down, as the Defendant

testified.

[31] The damages awarded should be tempered with an objective view of their value, or at least with a view that is within a range of what reasonable people might experience. This point was made by the B.C. Court of Appeal in *Kates* (above) where they rejected the proposition advanced by the plaintiffs that because of the defendant's wilful trespass, *"the test is not that of a reasonable person but that of the "express wishes" of the appellants* ... [and that] ... *the appellants are entitled to be unreasonable."* On this basis the court rejected an expensive plan advanced by the plaintiffs to import 40-foot trees and plant them with great technical difficulty.

[32] On the evidence here, the Claimants have reacted very strongly to the loss of these trees, which reaction has as much to do with their poor relationship with the Defendant as it does with the inherent value of the trees to them. On the evidence, the loss of these trees does not damage the Claimants' privacy to the extent argued. It might be different if the tree removal had opened up a clear sight line between the Claimants' home and the Defendant's home, which would be problematic given the poor relationship.

[33] Any damages should also be proportionate to the value of the property as a whole. This is a rural lot with at least dozens, if not hundreds of mature trees of various native species. If every tree on this property had value to the degree argued, it would add up to a number out of all proportion to the value of the land itself. The Claimants' evidence is that their property has an appraised value of $163,500.00. This must include the house on the property. There is no indication that the land itself has been valued. I find it difficult to conclude that the value of the land has been significantly diminished.

[34] The Claimants also spoke about their options to try and restore their privacy. They are already using flags on poles as a way to create some visual privacy. They have looked into the cost of erecting a fence (some $11,900 + HST) and have considered having some replacement trees planted (about $3,000.)

[35] The Claimants also spoke of the value of the trees in a larger sense, including their provision of shade, erosion protection, wildlife shelter, oxygen generation and so on. They extrapolate these losses into the future and come up with some large numbers. In my respectful opinion, this is not a valid methodology, as it does not really represent losses incurred by the Claimants. These losses can, to a small extent, be seen as part of the loss of amenity.

[36] Assessing damages is not a precise science. I believe that the sum of $6,000.00 is a reasonable assessment of the losses incurred by the Claimants. This provides them with a fund which they can use to plant replacement trees and contributes to the cost of other measures such as the flag project. It provides some compensation for the loss of amenity claimed. With respect, however, I believe that any larger amount would be disproportionate to the real value of the trees, and to the losses that the Claimants have objectively incurred.

Set-off

[37] The Defendant accuses the Claimants of cutting some small trees and branches on her property sometime in the fall of 2020. She essentially counterclaims for what she says she lost and says that this should be offset against any damages awarded against her. She asserts that the loss of these trees and branches equals the losses incurred by the Claimants.

[38] The Defendant did not actually witness any of these trees or branches being cut. She infers that it was the Claimants as no one else typically is on or near the property. The Claimants denied cutting these trees and branches.

[39] I believe the inference that the Claimants are responsible is a reasonable one to draw. I believe the Defendant when she says that she did not cut these trees and branches herself. I am less inclined to believe the Claimants' denials. All of the indications point to them. The timing (fall of 2020) is highly suspicious. The parties were feuding. The Claimants may well have thought that they had cause to cut branches that overhung their property. However, it appears that they trespassed on the Defendant's property and improperly cut small trees and branches that they had no right to cut.

[40] As for the value of these trees and branches, the Defendant offered very little proof. My sense is that these areas will fill in quickly and there is little lasting damage. These were not mature trees. I am prepared to assess this loss at the relatively nominal amount of $500.00, which amount will be deducted from the amounts otherwise payable by the Defendant to the Claimants.

Costs

[41] As indicated, because they have been substantially successful the Claimants are entitled to their filing costs of $199.35 and $120.00 for serving the claim.

[42] They have also asked for $50 travel, $50 time and $130 for the cost of a book “Trees and the Law in Canada.”

[43] As a general rule, the court does not compensate parties for the time they spend making a trip to the court office to file a claim. There are good policy reasons not to try to establish how much value to place on people’s time. This is simply the cost of engaging with the court’s process. The $130 cost for the book is a reasonable expense, as it enabled the Claimants to make more cogent arguments to the court. I will allow it.

Conclusion

[44] The Claimants are accordingly entitled to receive:

Damages	$6,000.00
Less set off	($500.00)
Cost to file	$199.35
Cost to serve	$120.00
Cost of book	$130.00
Total	$5,949.35

[45] A separate order will issue accordingly.

Eric K. Slone, Adjudicator