

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Kamm v Harper*, 2022 NSSM 10

SCCH 509812

Between:

John Kamm

Claimant

and

Tommy Harper

Defendant

Adjudicator: Augustus M. Richardson, QC

For the Claimant: John Kamm, claimant

For the Defendant: Sarah L. MacCallum, A/C

Heard: February 8th, 2022 (by Zoom)

Decision: February 10th, 2022

DECISION and ORDER

Introduction

[1] Hurricane Dorian made landfall near Sambro, Nova Scotia on September 7, 2019. It brought high winds, heavy rain and high tide surges. Boats in Sambro Harbour were tossed about like corks on the stormy waters. One of those boats was the Corina, owned by the claimant, and at that time tied to the Sambro Harbour wharf. The Corina was damaged. The claimant says that the damage was caused by the breach of contract or negligence or both of the defendant who, the claimant says, had agreed to look after the Corina during the claimant's absence. He claims \$25,000.00, the maximum allowable in this court, against the defendant.

[2] The defendant denies that there was any agreement on his part to care for the claimant's boat. He denies any negligence. And he says that this claim is out of time because it was filed more than two years after the claimant knew or ought reasonably to have known that he had a possible claim against the defendant.

[3] On the facts and for the reasons set out below I have decided that the claim is out of time; and if not, that the claimant has failed to prove on a balance of probabilities any of the various aspects of his claim.

The Evidence

[4] The hearing took place on Zoom. The claimant was in British Columbia. His witness, Mr Hubbard, was in England. (I placed Mr Hubbard in the Zoom waiting room while the claimant was testifying to ensure that Mr Hubbard's testimony concerning a conversation with the defendant was independent from that of the claimant.) The defendant was with his counsel Ms MacCallum in Halifax.

[5] The claimant had filed material with the court on a thumb drive. It contained copies of various documents such as Bills of Lading, text and email messages; photographs; and videos of the boat and the damage to it.

[6] The defendant filed written submissions to which were attached documents that included text messages between the defendant and the claimant in the summer and fall of 2019.

[7] I heard the testimony of the claimant, his witness Mr Hubbard, and of the defendant. I also heard submissions from the claimant, and from the defendant's counsel, as to why the claim should succeed or fail.

[8] Based on the evidence before me and make the following findings of fact.

The Facts

[9] Sambro Harbour is on the south-west coast of Nova Scotia, near to Halifax Harbour. It has a wharf and a harbour master, who at the time was Mr Gray.

[10] In the summer of 2019 the claimant Mr Kamm was the owner of a 51-foot sailing boat named the Carina. (I note in passing that for some reason not elucidated at trial a marine survey of the vessel dated August 5, 2019 named the owner as one Jean-Francois Menard.) Mr Kamm and a friend, Mr Hubbard, had been sailing in the Caribbean. They arrived in Sambro Harbour in July 2019. (Mr Hubbard left for England a few days or weeks after their arrival).

[11] After arriving in Sambro Harbour Mr Kamm arranged with the harbour master to tie the Corina to a mooring ball in the harbour. His intent at the time was to sell the Corina. However, he had to return to his residence in British Columbia. He needed someone to keep an eye on the Carina, and to ferry prospective purchasers from the wharf to the Corina where it was moored.

[12] The defendant is also a sailor. He has a boat that he docks at Sambro Harbour. He is friendly with the other sailors. He met Mr Kamm and provided advice as to local conditions, and offered some limited assistance by way of the loan of tools or the use of his dingy to get to and from the Corina.

[13] Mr Kamm, Mr Hubbard and Mr Harper all testified as to a conversation that took place shortly before Mr Kamm left for British Columbia in August 2019. The conversation formed the basis of what Mr Kamm alleged was an agreement between him and Mr Harper wherein the latter was said to have agreed to look after the Corina.

[14] Mr Kamm's testimony as to the conversation lacked much detail. He maintained that Mr Harper had agreed for \$120.00 a week to take care of the Corina; to check on its bilge pump periodically; and to ferry prospective buyers back and forth to the Corina from the wharf.

[15] Mr Hubbard testified that he was present at the time of the conversation. He recalled that Mr Kamm had rented the mooring ball from the harbour master (who he says was present). He says that Mr Harper agreed "to act as caretaker, taking buyers to and from the boat and check on it once a week .. Check the mooring lines, check the bilge."

[16] Mr Harper testified that the Carina was moored at a spot that was within his view point from his own boat. His understanding of the conversation was that he had offered to call Mr Kamm if he saw anything amiss. He had been clear that he could not be responsible for anything more. There was vandalism at the harbour and, as well, Mr Kamm had told him that the boat was uninsured, which made Mr Harper all the more leery about accepting any responsibility for the boat.

[17] On balance I accept Mr Harper's version of the conversation, and hence of what he had agreed—or at least offered—to do. It was to alert Mr Kamm if he saw anything untoward happening to the Corina while it was on the mooring ball; to

check on it weekly to inspect the bilge; and to ferry prospective buyers to and from the boat. His version is consistent with the evidence of Mr Hubbard. It makes sense given his knowledge that the boat was uninsured. And it is consistent with the text and email evidence, none of which contains anything more specific, or any express agreement or offer to do anything more than that.

[18] Mr Kamm then left for British Columbia. At this time the Corina was anchored to a mooring ball in the harbour.

[19] On September 4, 2019 Mr Harper texted Mr Kamm to say that they should talk “later today we have some weather coming this way.” The weather was Hurricane Dorian. Mr Kamm responded on the same day: “How safe is Corina where she is now?” They then spoke on the phone.

[20] Mr Kamm says that on this conversation Mr Harper agreed to tie the Carina to the side of a Halifax Ferry that was moored next to the wharf while it was undergoing repairs; and that he would treat the Corina “like his own.” Mr Harper agreed that there was a conversation, but denied that he agreed to look after the Corina. He says rather that he told Mr Kamm to get on a plane to Halifax and to make arrangements once here to safeguard the boat.

[21] On balance, I accept Mr Harper’s version of that conversation. Given that the boat was uninsured it strikes me as highly unlikely that he would have accepted responsibility for moving the Corina from its mooring spot, or to decide where and how to secure it against the hurricane. Mr Kamm’s version is also inconsistent with an email he sent to Mr Harper on September 5th: “I will pay you extra to secure Carian as early as possible. Take how much time you need to do extra lines, & fenders and I’ll pay you for as much time as you need.” Mr Harper did not respond to the email, which by its wording I take to be an offer by Mr Kamm. But there was nothing in the text or email correspondence to support a finding that it was accepted.

[22] It is also clear that at some point someone did move the Corina from the mooring ball to the wharf. Mr Kamm had no evidence as to who moved the Corina. Mr Harper denied moving it. He testified that he did see it tied to the wharf when he went to the harbour, and that two other boats had been tied next to it. He did not know who had done that.

[23] Hurricane Dorian made land fall on September 7th, 2019. The Corina, which at the time was tied to the wharf, sustained damage.

[24] On September 20th Mr Harper sent Mr Kamm some photos of the damage to Corina. Mr Kamm emailed in reply to ask “why is there that much damage on the port side when it was along side starbord?” On September 26th Mr Kamm emailed Mr Harper to say that he had booked a flight and would arrive October 7th. He asked Mr Harper whether he could pick him up at the airport. Mr Kamm arrived on October 7th. He met with Mr Harper. He started to make some repairs to the boat. He testified that at that time the boat was tied to the mooring ball.

[25] Mr Kamm testified that he did not become aware that Mr Harper was responsible for the damage to the Corina until he reviewed some videos that were sent to him on October 16, 2019. The videos showed the Corina tied to the wharf with two other boats tied to it. This he said was the first time he learned that the boat had been tied to the wharf. He maintained that this was contrary to what he said Mr Harper had agreed to do, which was (according to Mr Kamm) to tie the Corina to the ferry. He argued that the ferry would have provided a shelter against the storm.

[26] Mr Kamm then made some limited repairs to the boat. He did not repair all the damage. He eventually sold it on October 27, 2020 for \$26,291.00. He had purchased it for \$73,000.00 US in January 2016. A marine surveyor’s valuation of the boat in August 2019 had set its market value at \$95,000.00 Canadian, and its replacement value at \$659,000.00 US.

[27] Mr Kamm commenced his claim in this court on either October 14 or 19, 2021. (There are two court stamps on the Notice of Claim.) Giving Mr Kamm the benefit of the doubt I take the claim to have been filed on October 14, 2021.

Decision

[28] I deal first with the limitation defence. Section 8(1)(a) of the *Limitation of Actions Act* requires a claimant to commence their claim within two years of the day on which they discovered a claim. Section 8(2) provides that a claim “is discovered on the day the claimant first knew or ought reasonably to have known

- a. that the injury, loss or damage had occurred;
- b. that the injury, loss or damage was caused by or contributed to by an act or omission;
- c. that the act or omission was that of the defendant; and
- d. that the injury, loss or damage is sufficiently serious to warrant a proceeding.”

[29] I am satisfied on the evidence that Mr Kamm knew or ought reasonably to have known that he had a possible claim against Mr Harper on September 20, 2019. He knew at that point that the boat had been damaged in the storm. He knew (according to him) that he had left the boat in Mr Harper’s care. He accordingly knew or ought reasonably to have known that he had at least a potential claim against Mr Harper. Two years from that day is September 20, 2021. His claim was out of time.

[30] In the event that I am wrong in this conclusion I turn to the question of whether there was a breach of contract or negligence on Mr Harper’s part.

[31] First, Mr Kamm failed to establish on a balance of probabilities that Mr Harper had agreed or offered to do anything other than keep an eye on the boat and to alert Mr Kamm in the event that there was any problem. That is what he did. Mr Harper's offer in August did not go farther than that. He did not agree or offer to take control of the boat at any point; or to move it from its mooring ball; or to tie it to the wharf. He did warn Mr Kamm that a hurricane was coming, but he did not agree or offer to do anything to secure the boat against the pending storm. There was no breach of contract because there was no agreement to begin with.

[32] Second, while it is clear that someone did move the boat from the mooring ball to the wharf, presumably in anticipation of the hurricane's arrival, there was no evidence capable of supporting a finding that Mr Harper was the one who did it. Mr Kamm had no evidence to that effect. Mr Harper denied it. His denial, given the lack of insurance on the boat, is credible. And it is a denial supported by the text and email correspondence. That correspondence does contain requests from Mr Kamm that Mr Harper do something to secure the boat, but there is nothing in that evidence to indicate an acceptance of those requests.

[33] While we are on this point, I note that there was also no evidence to support a finding that had the Corina been tied to ferry that it would not have sustained damage in any event. Hurricane Dorian was a major storm. It caused a lot of damage across the province. Given that I would have needed stronger evidence to support a conclusion that there would have been no damage to the boat if it had been tied to the ferry.

[34] Hence there was no failure of any duty of care on Mr Harper's part, nor proof of any causation of damage due to any action or inaction on Mr Harper's part. The negligence claim must fail as well.

[35] Turning to the question of damages, Mr Kamm claimed \$25,000.00. He did not prove that loss. I accept that there was damage to the boat caused by the storm and the fact of its having been tied to the wharf. But Mr Kamm admitted that he

did not repair all the damage. He did not indicate what he had repaired, or the cost of such repairs. (He testified that he left the invoices in the boat when it was sold.) Given the age of the boat, and the significant difference between the replacement cost and the market value set out in the marine survey of August 2019 it seems clear that the Corina was not in the best of shape to begin with. Mr Kamm provided me with nothing that would help me assess the value of the repairs he made to the boat; whether the damage that was repaired was damage caused by the way the boat was tied to the wharf (as opposed to normal wear and tear, or what might have been caused in any event by the storm).

[36] For all these reasons then I dismiss the claim.

DATED at Halifax, Nova Scotia
this 10th day of February, 2022

Augustus M. Richardson, QC
Adjudicator