SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Cole v. Judge*, 2023 NSSM 32

Date: 20230717
Docket: SCAR No. 496246
Registry: Annapolis Royal

Between:

Kenneth Gary Cole

Claimant

v.

Susan Elizabeth Judge

Defendant

Adjudicator:	Andrew S. Nickerson, K.C.
Heard:	July 10, 2023, in Annapolis Royal, Nova Scotia
Decision	July 17, 2023
Counsel:	Kenneth Cole, Self-Represented Hope Bell, for the Defendant

DECISION

[1] I wish the parties to know that I have carefully reviewed all of the written material supplied and my notes of the oral evidence. If I do not mention a particular piece of evidence in this decision it is not because I have not considered it, but because I have found it does not directly bear on my decision.

[2] These parties were in a common-law relationship for an extended period of time. The Defendant, in his claim, seeks 10 horses, livestock, miscellaneous equipment and 30 round bales of haylige. It is common ground between these parties that they are both very familiar with farming and particularly the handling of horses. They both appeared to me to be quite knowledgeable with respect to the care of horses, and in some respects their value.

EVIDENCE

[3] Mr. David Bent testified on behalf of the Claimant. He says that he has known the Claimant for a very long time and that they were friends. He knew, and was friendly with, both parties to this proceeding. He says that after the relationship between the parties broke down, he was approached by the Claimant to determine what amount was owed to him for services that he had provided related to hay making. These services ranged over a number of years. Mr. Bent produced an invoice that was dated June 15, 2019 in the amount of $12,461.40. Mr. Bent, quite candidly, stated that this invoice was generated at the request of the Claimant, because, as Mr. Bent understood it, Mr. Cole wanted to determine an amount that the Defendant should share in.

[4] In cross-examination notes (Exhibit 2) outlining various services which ranged from June 7, 2011 to June 13, 2017 were provided by Mr. Bent. Mr. Bent stated there were other services provided after the latter date. It was also revealed in cross-examination that the Claimant had provided farrier services to Mr. Bent and his wife over approximately the same time. No funds exchanged hands between Mr. Bent and the Claimant, because they agreed that the hay making services of Mr. Bent and the farrier services of Mr. Cole had approximately equal value and they were set off.

[5] Ms. Pamela Bent testified that she had heard both the Claimant and the Defendant state in respect to the horse “Heidi” that this horse was purchased by the Defendant as a gift for the Claimant. She further testified that she understood that the horse “Boon” was purchased together by the parties. In cross-examination when pressed of her source of knowledge regarding “Boon” she confirmed that she “just heard they bought together”. In cross-examination she verified that the Claimant did not ride this horse and that the Defendant did most of the horse’s care. She did see the Claimant do chores in the barn.

[6] Ms. Bent further verified that extensive farrier work over an extended period of time was done for her and her husband by the Claimant. She verified that she and her husband and the Claimant were friendly and provided services to each other over many years. She confirmed that when the parties to this proceeding split up that that was the first time that her husband had attempted to determine the value of the services he had provided. She confirms that the approximate value of services equaled out as between her husband and the Claimant.

[7] Mrs. Bent testified that the Defendant obtained and paid for the grain for the horses and acknowledged that the Defendant had made improvements to the riding ring and the horse stalls.

[8] Bill Crocker testified that he understood that the horse “Boon” was owned together by the parties. In cross-examination he acknowledged that he does not know who actually paid for the horse “Boon”. With respect to the horse to “Heidi” he testified that the parties had stated that “Heidi” was bought by the Defendant for the Claimant and was a gift to the Defendant. He understood that there was a foal that was born to a horse that was being boarded at the Cole farm. He understood this foal to belong to the Claimant. Mr. Crocker testified that he did not live in the area and only visited the parties every few weeks while going to some other location for his own purposes.

[9] Gregory Crowe testified that he had visited the Defendant’s farm and had gone riding on ”Heidi”. He understood that “Heidi” belonged to the Defendant. When asked who owned the horse “Boon” he indicated that he was not sure. As to the foal, all he knew was that the Claimant had stated that it was his. Mr. Crowe, quite forthrightly, stated that he had some difficulties with his memory.

[10] The Claimant stated that he and the Defendant lived together in a common-law relationship. He testified that the relationship started to deteriorate when the Defendant had requested that the farm be registered in the parties’ joint names. He said that in April 2019, he went to Alberta and was due to return in late May. The day before he was to return, he received a phone call from the Defendant indicating that she was leaving. He stated that when he returned to his farm all the animals were gone with the exception of some of his horses. He particularly claimed the horses “Heidi” and “Boon” as his. He also claimed a foal. He said he had had discussion with the owner of the mare about having the foal in exchange for boarding the mare. He stated that the foal was born the day before he returned and that he never actually saw it.

[11] The Claimant stated that during the time of the relationship the Defendant had cattle, sheep and poultry. These were removed when she left. The Claimant does not make any claim against any of this livestock. He states that over the time of the relationship the Defendant kept acquiring more and more horses. He states that most of these horses were feral horses brought in from Alberta. He says that he did the initial training of them because he was concerned that before the initial training was complete that the Defendant may be injured. This was also true of the horse “Heidi” who experienced an injury in that process. There was clearly some difference

of opinion as to why this injury occurred as between the parties, but I have concluded that resolving that difference does not assist me in the resolution of this case.

[12] The horse “Heidi” had the original name of “Snips”. The registration of that horse shows in Exhibit 3 that the Claimant is the registered owner.

[13] The Claimant states that the horse “Boon” was also brought to Nova Scotia from Alberta. When it arrived, it had a bad knee and the Claimant spent considerable time nursing that injury. He also indicated that he had to work hard to do the initial training and referred to “Boon” as a “handful”. The certificate of registration of “Boon” is shown in Exhibit 4 as being in the name of the Defendant.

[14] The Claimant estimated the value of the horse “Heidi” at between $4500 and $5000. He estimated the value of “Boon” at $20,000, because he stated he was a good stud horse. He estimated the value of the foal born the day before he returned as between $4000 and $5000

[15] In cross-examination there was extensive discussion of a bank account that was initially in the Claimant’s name that eventually he arranged to have the Defendant’s name “put on” so that she could negotiate checks that she received. There was one cash withdrawal of $1600 that the Claimant believes was taken by the Defendant, as it occurred during the time he was in Alberta. That is the only transaction I consider of any significance.

[16] In cross-examination, it was revealed the Claimant worked as a bus driver five days a week from 6:30 in the morning until 9:00 in the morning and then again from 2:00 in the afternoon until 4:30 in the afternoon. The Claimant insisted that he did as much of the chores on the farm as the Defendant. He also acknowledged in cross-examination that she provided fenceposts which were used on the farm and she took the remaining fencepost when she left. He also confirmed that she had paid for one load of screened gravel for the riding ring.

[17] The Claimant states that with respect to hay, the Defendant took all the square bales when she left and she took what he thought was approximately 30 round bales of haylige. He acknowledged that the Defendant did buy hay from third parties. He also stated that they sold some of the hay they produced on the farm. He complained that the Defendant took at least two freezers full of beef that they had raised on the farm when she left. He also acknowledged that she had done a number of things in the nature of maintenance and upkeep around the house while she was there. He also complained that when she left, she took a water hose, a wheelbarrow and a pitchfork.

[18] The Defendant testified that her relationship with the Claimant started in July 2007 and lasted until May 2019. They were not married but lived common-law. She states that when she left, she took what she considered to be her horses, including “Heidi”, “Boon” and the foal. She also took her cattle and other livestock.

[19] With respect to the horse “Boon” she stated that she paid approximately $4000 for that horse and $1000 in transportation. She says that the Claimant did not contribute to the purchase. She stated that she took care of all of the horse’s daily care. She stated that she had shown the horse 10 or 12 times over the time of cohabitation at a cost of approximately $1500 per show. She also stated that she had paid for the horse’s training at a third party facility at the rate of $1300 per month on four occasions. She stated that when she went away, she hired other local people to care for Boon, her other horses and her cattle. She estimates the horse’s current value is $6,500

[20] With respect to the horse “Heidi” she acknowledged that she had purchased this horse as a gift for the Defendant. She says that sometime, not long after the training incident referred to above, the Claimant lost interest in this horse and stated that he wanted nothing more to do with the horse. She alleged that he gave the horse back to her. This horse had a rather gentle disposition according to her, and was used only for trail riding. She estimates this horse’s current value at $3,500.

[21] As for foal that was born the day before she left, she states that the owner of the mare who is the mother of that foal was Lauren Smith. She states that she made the arrangements with Ms. Smith that in exchange for free board of the mare, she could breed the mare and she would get the foal. She states that Lauren Smith registered the foal to the Defendant’s name. She says that Lauren Smith had no discussion with her about what name to put the foal in, as that was always understood as between them. There was no contact by Ms. Smith with the Claimant about the registration. The Defendant says that she took care of all of the mother mare’s needs during her term.

[22] The Defendant acknowledges, that when she left, she did take the wheelbarrow (which she claims was hers) a pitchfork and several buckets, which together were equivalent to what she had brought when she came to the farm. She also said that she had left an outdoor horse shelter of the value of $250. She described various things she did around the house as to maintenance. She acknowledged that she did not use the bank account and that it was in fact the Claimant’s. She was not asked about the cash withdrawal of $1,600 by either party.

[23] As to hay, she testified that she had no need to engage Mr. Bent and that she had never hired him. As to the hay that Mr. Bent bailed, she stated that some was sold and some was used. She stated she only received the invoice produced by Mr. Bent well after the separation had occurred. She testified that she bought the feed for the livestock from third parties. She says that she took 25 round bales of hay when she left, but that she had bought them from a Mr. Saltzman and she had paid for those herself.

LAW

[24] Ever since the Supreme Court of Canada decision in **Nova Scotia (Attorney General) v. Walsh, 2002 SCC 83** the law in Nova Scotia has been clear that there are no property rights arising out of a "common law" conjugal relationship other than on the basis of unjust enrichment.

The elements of unjust enrichment were succinctly stated by the Nova Scotia Court of Appeal in **MacEachen v. Minnikin, 2015 NSCA 81** as follows:

> [25] In short, to successfully sustain a claim for unjust enrichment Ms. MacEachen must show:
>
> (a) an enrichment. She gave something to the respondent (which the respondent received and retained);
>
> (b) a corresponding deprivation. The enrichment must correspond to Ms. MacEachen's deprivation; and
>
> (c) the absence of any juristic reason for the enrichment. In other words, there is no reason in law or in justice for Ms. Minnikin's retention.
>
> *[my emphasis]*

[25] The burden of proof in a civil case is on the "balance of probabilities". This means that I must find facts by determining what is more likely than not, even if by the smallest of margin. The burden always rests on the party who asserts any particular fact or position.

[26] An excellent summary of the relevant jurisprudence as to determining credibility when there are divergent versions of facts, is provided in the decision of Justice Margaret Stewart in **Goulden v. Nova Scotia (Attorney General), 2013 NSSC 253** as follows:

> [20] ***Credibility.*** This proceeding also raises questions of credibility. The Supreme Court of Canada considered the problem of credibility assessment in *R. v. R.E.M.*, 2008 SCC 51. McLachlin C.J.C. repeated the observation of Bastarache and Abella JJ. in *R. v.*

Gagnon, 2006 SCC 17, that "[a]ssessing credibility is not a science" and that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon* at para. 20, cited in *R.E.M.* at para. 28). The Chief Justice went on to say, at para. 49:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[21] The assessment of the evidence of an interested witness was considered in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), where O'Halloran J. said, for the majority, at para. 11:

> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[22] Such factors as inconsistencies and weakness in the evidence, interest in the outcome, motive to concoct, internal consistency, and admissions against interest are objective considerations going to credibility assessment, along with the common sense of the trier of fact: see, e.g. *R. v. R.H.*, 2013 SCC 22. It is open to a trier of fact to "believe a witness's testimony in whole, in part, or not at all": *R. v. D.R.*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8, at para. 93. I have taken these principles into account in reviewing the *viva voce* and documentary evidence in conjunction with counsel's submissions and the relevant law.

ANALYSIS

[27] What I take from the law on credibility that is applicable to this trial, is that witnesses can be honestly mistaken, recollections can vary, and yet I must, in a logical manner, discern what can be considered to have actually happened to the best of my ability using the balance of probabilities burden of proof.

[28] I do not believe that any witness attempted to mislead the Court. Quite the contrary, I found all the witnesses were attempting to recall events as best they could, despite the fact that there were contradictions between witnesses. The differences in memory and perspective can often result in differences in testimony. Also witnesses can make assumptions that become part of what they recall. In this case, I am left to reconstruct as best I can what actually happened. This is an imperfect process, but it is what I am required to do in order to arrive at a decision.

[29] As to the horse “Heidi” the Defendant admits that she gave the horse to the Claimant. She stated on the stand that the Claimant lost interest and re-gifted that horse to her. Her assertion of a regift is contradicted, not only by the Claimant’s testimony, but by the evidence of Pamela Bent, Bill Crocker and Gregory Crowe, all of who said the Defendant made it known to them that the horse was a gift to the Claimant. It is not logical that if the horse had been regifted that the Defendant would not have said this to these parties who regularly frequented the Claimant’s farm. This horse remained registered to the Claimant. I do believe that the Defendant convinced herself from the Claimant’s reactions that “Heidi” had been re-gifted, but I don’t think that there is sufficient evidence that a re-gift actually happened. I conclude that “Heidi” belongs to the Claimant.

[30] As to “Boon” the situation is quite different. This horse was registered in the name of the Defendant. The Defendant acted as if it was hers by showing and placing the horse in training at significant expense without objection from the Claimant. The Defendant is specific and appeared knowledgeable as to purchase costs, while the Claimant was rather vague in his recollection of the price and circumstances. I do acknowledge he nursed the horse to health when it first arrived, but since the parties were in common law relationship this would not be an indication of ownership. I conclude that “Boon” belongs to the Defendant.

[31] As to the foal, although several witnesses stated that they understood that this horse was the Claimant’s this appeared to be solely from what they heard from the Claimant. The actions

of Lauren Smith indicate otherwise. Ms. Smith registered this horse in the Defendants name without consulting the Claimant. The Defendant was very specific in her evidence that she had made the arrangement with Ms. Smith and had paid for this horse. On the other hand, I found the Claimant's evidence on this subject to fairly general and vague. In the end, I prefer the evidence of the Defendant and I find that the foal belongs to the Defendant.

[32] As to any other horse the Claimant's evidence is unclear as to ownership and since the burden of proof is on the Claimant, I can not find in his favour on this point. There is no claim asserted for the cattle, sheep or poultry.

[33] These parties lived together and provided benefits and services to each other as can be expected in any conjugal relationship. I find nothing that leads me to believe that there was any unjust enrichment in relation to the house, stalls, horse shelters or any other matter.

[34] As to the hay, the evidence is not clear that the Defendant requested Mr. Bent's services or benefited from them to the detriment of the Claimant. The Claimant and Mr. Bent setoff the services they each rendered as between them without any discussion with the Defendant. The invoice occurred after the separation. I accept the Defendants evidence that she bought the feed for her livestock. The Claimant acknowledged that she did buy feed from third parties. As to the hay made on the farm, I cannot find in the evidence that there was any unjust enrichment. These circumstances to not establish this claim on the required burden of proof. I accept that the hay the Defendant took was in fact purchased by her.

[35] Overall applying the test set out by the Court of Appeal, I do not find any enrichment by either party or any deprivation affecting any other party.

[36] The bank account is not an issue as both parties acknowledged it was the Claimants. Since the Defendant was not asked about the $1600 withdrawal, I don't know if she admits she took it. The fact of the withdrawal alone is not sufficient to establish that she is liable for it.

[37] Therefore in the result, I allow the Claimant's claim for the horse "Heidi" and dismiss the rest of the claim. As there has been divided success I order no costs.

Dated at Annapolis Royal this 17th day of July, 2023.

Andrew S. Nickerson K.C., Adjudicator