

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *MacNeil v. Melvin*, 2024 NSSM 43

Date: 20240412

Docket: 527633

Registry: Halifax

Between:

Marilyn Magdalen MacNeil

Claimant

v.

Michael Melvin

Defendant

Adjudicator: Eric K. Slone

Heard: April 11, 2024, via teleconference

Decision: April 12, 2024

Counsel: Both parties were self represented

By the Court:

[1] The Claimant is a resident of Dartmouth, Nova Scotia, and is a long-time collector of ornaments and figurines. Some of them are fairly valuable.

[2] The defendant Michael Melvin is associated with the store known as My City Life, which has locations both in Saint John, New Brunswick, and in the Sunnyside Mall in Bedford, Nova Scotia. The business of My City Life is, at least in part, selling items on consignment.

[3] According to the Defendant's evidence, the Bedford location is actually owned by Mr. Melvin's fiancé, Carey Morris. However, the business name of My City Life is not registered with the Registry of Joint Stock Companies in Nova Scotia. As such, someone seeking the actual legal identity of the Bedford store would have no way of knowing that Ms. Morris was the owner. I accept that this was a function of their unfamiliarity with legal and business practices, but the result is that Mr. Melvin became exposed to legal liability as he was the individual with whom the Claimant dealt when she brought in her items to be sold on consignment.

[4] The claim concerns one particular item which was among some 11 items that Ms. MacNeil turned over to Mr. Morris in Bedford on or about December 4, 2022. The item in question is a figurine by a company called Lladro and is named "Couple". This item was the most valuable of the items left with the Defendant.

[5] Ms. MacNeil testified that she had recently noticed the store and decided to bring some of her items in for sale. She admits that she gave all of her personal information to Mr. Melvin and one of his employees who was also involved in the process. She insists that she never signed any form of a contract with My City Life.

[6] The reason that this is significant is that the standard 2-page contract that the business uses contains a limitation of liability in the event of loss. Mr. Melvin produced printouts of other people's contracts which contain a clause:

5. Liability: My City Life will do our best to safeguard your items, however, we cannot assume any liability for the loss, damage or theft of any item consigned. We will always strive to work out any issues that may arise under any of these circumstances.

[7] The claim here arises because at some point unknown the piece known as "Couple" went missing. No one is able to pinpoint exactly when that occurred. However, this situation came to light in September 2023 when Ms. MacNeil went

into the store and retrieved all of her other unsold items and was told that Couple was missing.

[8] Ms. MacNeil sues for what she believes is its value. The original consigned price was to be \$1,499.99. Had it sold for that price, she would have received half, which would have been \$750.00, at most, and less if the item were discounted as it was the practice of the business to do for items that did not sell within a particular period of time. Mr. Melvin was unable to produce a copy of a contract signed by Ms. MacNeil. All that his file contains is a photocopy of the first page of a consignment agreement, in the handwriting of someone who he could not identify but believes was one of his employees at the time. Even that one page, which contains no signature or any handwriting by Ms. MacNeil, does not contain the limitation of liability.

[9] Ms. MacNeil testified that she left the store having given all of her information, but without signing a contract, and had no idea that she would have been agreeing to a limitation of liability such as is contained in the business's other agreements. Mr. Melvin could do no more than insist that it is their practice to sign agreements with every consignor, which is probably true as far as it goes, but does not answer the question of whether or not this step was accidentally missed on this occasion.

[10] Mr. Melvin also believes that Ms. MacNeil actually signed a contract but mistakenly took it with her when she left the store, but that is mere speculation and does not amount to proof that a written contract ever existed. On a balance of probabilities, I find that Ms. MacNeil did not sign a contract and was not aware of the purported limitation of liability. A friend of Ms. MacNeil, Ray Lefebvre, testified that he went with Ms. MacNeil when she put her items up for consignment, and he did not see her sign any form of contract.

[11] The standard form of contract, had Ms. MacNeil signed one, also contains the markdown policy. Ms. MacNeil also claims, and I accept, that she was not specifically aware of this policy. However, it is more than likely that she understood from her discussions with Mr. Melvin on the day she brought the items in, that the original price might have to be discounted if the item didn't sell. I find as a fact that she agreed that the items could be sold for some discounted amount.

[12] The legal term for holding someone's property is bailment. The person relinquishing possession is a bailor, and the person taking possession is a bailee. The responsibility of a bailee at law is to take reasonable care of items in their possession. That is the very reason that businesses would include a limitation of liability, because they otherwise would be exposed to (greater) liability. The onus

in a situation like this would be on the bailee to rebut the presumption that an item was lost or damaged as a result of their lack of reasonable care.

[13] Not all bailments attract the same duty. So-called gratuitous bailments attract the lowest duty. A bailment for reward imposes a higher duty of care. Consignments are a breed of bailment for reward. In the BC case, *Wienert v. Kelowna Auto Towing* (1989) Ltd. 1999 CarswellBC 1644, 44 M.V.R. (3d) 315, the court observed:

15 The duty of care of a bailee is determined by the classification of the bailment. A bailee must use due care and diligence in keeping and preserving the article entrusted but, although he or she is not an insurer, a higher degree of care is imposed on a bailee for reward than upon a gratuitous bailee.

[14] It is not good enough merely to say, “it must have been stolen.” In the absence of a contract limiting his liability, I find that Mr. Melvin must answer for damages as a result of the loss of the item in question.

[15] The damage should be based on one of either of two measures. One measure would be the most probable financial return had the item sold. The other measure would be the current value of the item itself. There is evidence to the effect that the values for these types of collectibles has declined. The very same item that was listed for \$1,500.00 at Mr. Melvin's store, can be had on eBay for under \$600.00 US. That coincidentally approximates the \$750.00 that Ms. McNeil would have most optimistically earned.

[16] Given the uncertainty as to the actual price that the item might have fetched, I am awarding Ms. McNeil the sum of \$500.00 Canadian. She is also entitled to her cost of filing the claim in the amount of \$99.70, plus an additional \$35.00 for incidental expenses.

ORDER

[17] It is ordered that the Defendant pay to the Claimant the sum of \$500.00 plus costs of \$134.70, for a total of \$634.70.

Eric K. Slone, Small Claims Court Adjudicator