

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: LeMoine v. Smith, 2014 NSSM 11

Claim No: SCCH 403083

BETWEEN:

Name Dana LeMoine **Claimant**

Name Laura Smith **Defendant**

Editorial Notice: Addresses and phone numbers have been removed from this judgment.

Dana LeMoine – Self Represented

Laura Smith – Self Represented

Date of Hearing: February 18, 2014

DECISION

This is a claim involving the ownership of two dogs following their placement with a rescue and adoption service. The dogs are an American pit-bull terrier named “Rocco” and a Boston Terrier and pug mix named “Bammer” or “Bam”.

The Claimant, Dana LeMoine, delivered the dogs to the Defendant, Laura Smith, prior to his leaving Nova Scotia to work in Grande Prairie, Alberta. The Defendant owns and operates a pitbull rescue and adoption service out of her home, named Pit Project Rescue. It is a one person operation.

A number of key facts are not seriously in dispute. The parties were introduced through a mutual friend in early October, 2013. While no oral evidence was given on the point, it is clear that throughout the relevant time, the parties’ relationship was for business only. They were not friends or co-workers. They did not meet in any social setting after being introduced.

Mr. LeMoine arranged for Ms. Smith to meet the dogs and give them an opportunity to become acquainted with her own dog. Ms. Smith considered the dogs appropriate and took delivery of them in late October before Mr. LeMoine left for Grande Prairie, Alberta to work. The evidence differs as to what was discussed and intended. That arrangement is the subject of this matter. Mr. LeMoine claims the arrangement was for the dogs to remain with Ms. Smith until he was settled in Alberta and able to take delivery of the dogs. Ms. Smith submits the dogs were given to her shelter for permanent placement. When Mr. LeMoine returned home in December, the dogs had been placed to other homes. He is seeking return of the dogs or compensation in lieu.

The Issues

What are the terms of the arrangement between the parties, a gift or a bailment?

The Evidence

Both parties testified on their own behalf. Neither called any additional witnesses.

Dana Jay LeMoine testified that he and Ms. Smith met through a mutual friend, Craig Lane. Mr. LeMoine retired from the military and accepted a position as an electrician in Grande Prairie, Alberta. He could not take his dogs with him initially, thus, it was necessary to find a home for them. Mr. Lane referred him to Ms. Smith, who runs a rescue facility for pit bulls. He testified that he was looking to board his two dogs, Bam and Rocco.

After contacting Ms. Smith, she told him that she wanted to take the dogs for a walk to ensure that the dogs would get along well with her dog, Hank, which they did. They went for another walk together around the end of October. On three separate occasions, she allowed him to come and take the dogs prior to his departure for Alberta. He called her around the end of October intending to visit the dogs before his departure. She was not available. He testified that he attempted to contact her on November 28 when he was in Alberta and received no reply. He attempted another contact in early December and was advised by somebody that Ms. Smith was on course for primary leadership qualifications and also going through a marital separation. He was told that Bam was with one of Ms. Smith's parents and Rocco was staying with friends. She would try to get the dogs back once the separation was settled.

On December 25, Mr. LeMoine contacted Ms. Smith through Facebook requesting a visit with the dogs. When Ms. Smith said she did not have them, he demanded the dogs back. On December 27, he received a Blackberry message indicating she was sponsored by PetSmart. He testified that he invited her to let him know if there were any veterinary bills. At that point, it appears he was too late. In answer to my question, Mr. LeMoine confirmed for me that there was no contract or anything in writing with respect to compensation. He made a donation to Pit Project Rescue which she acknowledged on her Facebook account. Otherwise, no compensation was paid.

On December 25, he noted that he was deleted from Ms. Smith's Facebook page and then subsequently re-added. He sent a BBM message on his Blackberry about taking the dogs for a walk and he was ignored.

He tendered into evidence several documents which show conversation corroborating his attempts to meet up with the dogs in late December. Ms. Smith was clear the dogs were not with her. He also tendered into evidence the front page of the Facebook site for Pit Project Rescue.

Ms. Smith acknowledges placing the dogs with a friend while she and her husband were separating. She also assures Mr. LeMoine that he will be able to see the dogs. This occurred sometime after December 25. In response to Mr. LeMoine's emphatic request for the dogs, she replies:

"No, it's not fishy, sorry I'm just emotional about everything these days. I'll make arrangements for u to get them, just need a little time. Just a bit thrown off."

He tendered into evidence a copy of the Facebook page. Both parties confirmed that the picture of the dog was Rocco. In response to a question from a visitor to her page, she stated that he is not available for adoption, but that she "holding him for a friend". He also entered into evidence a copy of Rocco's UKC registration application and veterinary bills.

He attempted to contact the woman who received Bam, Tiffany, who made it clear she did not want anything to do with him.

He is seeking damages of \$4900, consisting of \$1500 for Rocco, \$600 for Bam, return flight to Halifax \$950.91, loss of wages, and pain and suffering.

Laura Smith testified that she is the owner of Pit Project Rescue. She met Mr. LeMoine through Mr. Lane. She first contacted Mr. LeMoine through a Facebook conversation and text message. He indicated that he could not keep his dogs any longer because he was moving to Grande Prairie, Alberta. She testified that she made it clear to Mr. LeMoine that she does not keep dogs on a temporary basis because she operates a rescue service. She would take Rocco into her home provided he was a good fit with her dog, Hank. Bam was to go elsewhere. It was a condition of her to accept Rocco that he and Hank would have to get along. Mr. LeMoine made it clear to her that he did not want Rocco and Bam to go just anywhere, which is why he came to her rather than pursuing other alternatives, such as posting for them on Kijiji.

It is Ms. Smith's practice when receiving dogs to require the person leaving them with her to sign a surrender form. She did not tender a copy of a surrender form into evidence. She testified that Mr. LeMoine dropped the dogs off at Pet Smart in Bedford and drove away. She attempted to contact him, to no avail. After that date in November, she did not have any contact with Mr. LeMoine to see how the dogs were faring in his absence.

When Mr. LeMoine returned from Alberta in late December following an argument with Ms. Smith, he expressed interest in wanting the dogs returned to him. She declined to show him the address where they were living as that was considered a breach of privacy. She testified that he called her a thief and dishonest and threatened to phone the police.

She testified it is the average cost to board a dog in the Halifax Regional Municipality is \$25 per day per dog. She had the dogs a total of 105 days or approximately \$5250. She testified that the dogs have not yet been adopted but have been placed for that purpose.

Under cross examination, she testified to telling Mr. LeMoine that originally, she intended to keep Rocco at her house. However, since she was going on course and through a separation, that was not possible. She did not maintain any records of what was said during her conversations with Mr. LeMoine.

Following their closing argument and testimony, Mr. LeMoine confirmed that the rescue literature is associated with her Facebook account. The location for the drop-off of the dogs was not Old Sackville Road but at Pet Smart in Bedford. He testified that he did not squeal away, as stated by Ms. Smith. He was upset that the dogs, Ms. Smith and her children were all in the car. Ms. Smith testified that she did not see Mr. LeMoine crying.

The Law and Findings

Before reviewing the applicable law and findings of fact, it is important to note from the outset that the arrangements between the parties were gratuitous. I find without hesitation that there was no consideration whatsoever exchanged or expected from Mr. LeMoine for the care and custody of the dogs. Consequently, it is not necessary to consider this arrangement contractual. It is either a gift or bailment.

In order to understand the issues, it is necessary to provide a definition of "gift" and "bailment".

A gift has been defined in the case of *Doucette v. Doucette*, 2005 NSSC 46, where Boudreau, J, stated the following:

A gift *inter vivos* has been described as “a gratuitous transfer of property from the owner to another, with the full intention on the part of both donor and donee that the thing shall not be returned to the donor but shall be retained as the donee’s own”. (See *Canadian Encyclopedic Digest*.) The relationship of a condition subsequent or precedent to a gift *inter vivos* is described in *Halsbury’s Laws of England*, 4th Edition, Butterworths, London 1993, volume 20:

A condition precedent is one to be performed before the gift takes effect. A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift; but, if a condition subsequent is void, the gift remains good . . .

On the other hand, a gratuitous bailment has also been considered by the courts in this country. A concise and effective summary of the law was adopted by the Alberta Court of Queen's Bench in

Visscher v. Triple Broek Holdings Ltd., 2006 ABQB 259 where Mr. Justice Marceau stated the following:

“Bailment was defined by Mr. Justice Cory in *Punch v. Savoy’s Jewellers Ltd. et al.*, (1986), 54 O.R. (2d) 383, 26 D.L.R. (4th) 546 at 551 (C.A.) as:

... the delivery of personal chattels on trust, usually on contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form as soon as a time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor and bailee can exist independently of a contract. It is created by the voluntary taking into custody of goods which are the property of another.

[28] Bailment must be voluntary. It cannot be foisted on the bailee: *McCutcheon v. Lightfoot*, (1929), 1 W.W.R. 694 (Man. C.A.), affirmed [1930] S.C.R. 108.”

In looking at the facts of the case, I am not satisfied that either party has provided sufficient evidence of their respective positions.

I find that delivery of the dogs took place in late October 2013. That fact has been agreed to by both parties. Mr. LeMoine left for Alberta in late November 2013. He did not offer to pay Ms. Smith and Ms. Smith did not seek compensation. Following his departure for Alberta, he did not contact her for any purpose. Consequently, Ms. Smith was not paid for a total of two months. It is important to note that the parties are not friends, work colleagues or other personal acquaintances. The relationship was strictly business, albeit gratuitous, and entered into with the sole intention of providing shelter for Rocco and Bam.

What were the arrangements?

Gift

Interestingly, the most telling evidence of this arrangement was provided by Mr. LeMoine. Exhibit #9 is a copy of Pit Project Rescue’s Facebook page entitled "Surrendering". I quote directly from it:

“...Although we try our best to accept and re-home as many dogs as we are able to, being a foster based rescue this is not always possible. With other animals, children and family members in our homes, we’re not able to accept all dogs before a proper assessment is completed. The safety and welfare of everyone in mind, we can only accept dogs into foster homes that are suitable for all.

In finding a suitable foster care home, sometimes it does take time and we’ll need to assess the dog being surrendered and in some cases set up a meeting with a potential foster to see if the dog is a good match. If the dog is not a good match, we will ask the dog remains in its current home while we continue to work on placement. Once, or if an appropriate home is found, we will then proceed with the surrender release form. For Pit Project Rescue to take ownership of a surrendered dog, a form must be completed, approved and signed by both the family

surrendering and a member of Pit Project Rescue. Surrender forms are NOT issued until we have met the dog in need, and feel we have a suitable place for him or her."

I find that a form had not been signed. In tendering this exhibit, Mr. LeMoine highlighted the portion underscored above. However, Ms. Smith's conduct was consistent with the steps taken for assessment and potential placement. The lone exception was the reference to keeping the dogs in their current home. Ms. Smith had the dogs at her place for approximately one month before Mr. LeMoine left for Alberta; he visited them several times and took the dogs for walks; he understood that the dogs had been placed even on a temporary basis in other homes. The only missing piece was the execution of a surrender form. Unfortunately, Mr. LeMoine left in haste, and did not sign the documents. No evidence was called as to why the form was not ultimately presented to Mr. LeMoine. Nevertheless, I do not find the lack of a surrender form fatal to a finding that the delivery of the dogs constituted a gift. As noted below, the legal test has been met.

From the outset, Ms. Smith has stated categorically that the transfer and acceptance of the dogs was intended to be permanent. However, in looking at her conduct and statements to Mr. LeMoine, her actions were equivocal. Indeed, it is not difficult to see how her position would have confused anyone seeking to leave dogs with her. For example, once the dogs were placed, it would be appropriate for Ms. Smith to refuse to obtain the dogs from their "foster homes". Yet she did not. She promised to obtain them for Mr. LeMoine when he came to visit in December. When dealing with the question about Rocco's availability for adoption by others, she need not have stated that she was "holding him for a friend". No excuse was necessary. A simple "no" would have been sufficient. In hearing her testimony and her recalling the sequence of events, Ms. Smith struck me as one who dislikes conflict or disappointing others. In spite of this, I am satisfied that she is not in the business or habit of boarding dogs. Rather, this is a rescue operation and adoption service. Furthermore, I find she did nothing to provide the Claimant with any other impression.

Mr. LeMoine took great care to provide evidence of what took place after December 25 but his evidence at the time of the arrangement is lacking. Mr. LeMoine gave me the impression of one who is easily agitated or excited. Ms. Smith's description of him dropping the dogs off and leaving in a hasty fashion appears consistent with my observations.

I do not accept Mr. LeMoine's evidence that he attempted to reach Ms. Smith before coming home in December. That is not consistent with the evidence. Even if he had, he testified to a mere two attempts.

No evidence or explanation was given to why Mr. LeMoine did not document the nature of the relationship as he described, that the dogs would be held for a reasonable period of time until he was settled in Alberta. He knew from the outset that Ms. Smith operated a pit bull rescue and adoption service. I find it incredible and beyond comprehension that Mr. LeMoine knowingly dropped his dogs off at a rescue and adoption shelter, yet took no steps to confirm that this was a

temporary situation. He had computer access and followed Ms. Smith's Facebook page. Presumably, he had availability to e-mail and other forms of social media. He could have inquired about cost of the service to establish a contract but he did not. I presume that both parties were in contact with Mr. Lane. There is no evidence he attempted to reach Ms. Smith through him.

Given the strictly business relationship that I have found, it is unreasonable for Mr. LeMoine to expect Ms. Smith to keep his dogs without compensation for food, veterinary bills and medicine or other supplies. Indeed, had she been offering that service, it was proper to expect her to charge him.

In his evidence, Mr. LeMoine emphasized that Ms. Smith described the picture of Rocco as being held for a friend. It may well have been Mr. LeMoine to which Ms. Smith was referring, or it may not have been. It could have been for anyone.

There is nothing in evidence to corroborate Mr. LeMoine's position that this was a gratuitous boarding of his dogs. Where the evidence differs on these points, I prefer that of Ms. Smith to that of Mr. LeMoine.

I have no hesitation in finding that it was the parties' original intention to turn the dogs over to Ms. Smith in her capacity as the owner of Pit Project Rescue. I find that at the time of the transfer, the parties intended that property in Rocco and Bam was to be transferred from Dana LeMoine to Laura Smith with the full intention the dogs were not to be returned. They were to be retained by Ms. Smith and Pit Project Rescue as her own with a view to placing them for adoption. I do not find the placement for adoption as a condition subsequent.

Bailment

If I am wrong in making that finding, namely if I were to accept Mr. LeMoine's submission that the terms of the transfer were that Ms. Smith was to hold the dogs until his settlement in Grande Prairie, he has still not discharged the onus.

Gratuitous bailment carries with it less strict terms than bailment for hire. Furthermore, when a period of time is not prescribed, then it is determined by what is reasonable in the circumstances. Ms. Smith unwittingly had two dogs in her care for two months without any communication from their owner or any arrangement for compensation. She was not paid for her services. Mr. LeMoine was a client, albeit unpaid. There was no personal relationship at all. Unlike some of the cases where chattels are left involuntarily with an individual, when one leaves animals with that person it carries an expectation on the part of the bailee to take proper care of the animals.

I find that leaving the dogs with Ms. Smith gratuitously for a period of two months was more than what one would expect to be reasonable. One could even describe the circumstances to that point as involuntary and foisted on her as bailee. Even if her actions could be considered as

accepting a bailment relationship, she was well within her rights to treat the bailment as at an end and place the dogs in a new home.

Just to be clear, I do not find the evidence sufficient to establish a bailment. If the law creates a rebuttable presumption in favour of a bailment to a gift, I find the presumption rebutted. Whether the arrangement was either a gift or bailment, I find Ms. Smith in no way liable to Mr. LeMoine.

Provisional Assessment of Damages and Costs

If I am wrong in the finding of liability, I will make a provisional assessment of damages. Mr. LeMoine claims \$4900. He seeks \$1500 for Rocco and \$600 for Bam. He did not provide evidence of the purchase price of these dogs or any evidence in support of his claims for these amounts. Ms. Smith does not provide any evidence to the contrary. If I had found in his favor, I would have awarded \$600 for Rocco and \$100 for Bam. Rocco has a pedigree while Bam is a mix Boston Terrier and pug and has health problems.

Mr. LeMoine seeks damages for pain-and-suffering. The *Small Claims Court Act* sets a maximum of \$100 general damages. Lost wages to attend court and airfare are more properly characterized as costs. Those items which may be claimed for costs are set out in section 15 of the regulations made pursuant to the *Small Claims Court Act*. Lost wages are not one of those items. The only items available to be claimed are the filing fee of \$96.80 and airfare to pursue his claim. I would have been inclined to award only general damages \$100 and partial costs of \$300, for a judgment of \$1100.

Summary

As indicated, I am unable to find liability in favor of Mr. LeMoine. For all of the reasons stated above, the claim is dismissed without costs. An order shall issue accordingly.

Dated at Halifax, NS,
on April 1, 2014.

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)