Claim No: SCCH-459953

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Waters v. Gill*, 2017 NSSM 12

BETWEEN:

KIM WATTERS and JORDAN LANGEL

Claimants

- and -

JAMES GILL and FINE FOODS

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on February 28, 2017

Decision rendered on March 7, 2017

APPEARANCES

For the Claimants	self-represented
For the Defendants	self-represented

BY THE COURT:

[1] The Claimants sue for damages in the amount of $750.00, which is the stated value of a laptop computer which they say was left in the care and custody of the Defendants.

[2] The named Defendants represent something of a misnomer. James Gill is one of the owners and operators of a catering company, J.D. Fine Foods & Catering Ltd. I will treat that entity as the sole Defendant, as there is no argument to be made that Mr. Gill himself could bear any personal liability, on the facts. If anyone is liable, it would be that company.

[3] The Defendant at the relevant time had the exclusive franchise to cater events being held at the Armdale Yacht Club (the "AYC").

[4] Ms. Watters organized a charitable event in June 2016 at the AYC, and dealt with a member of the Defendant's staff (Cristina MacKenzie) to make arrangements. Ms. Watters recruited her nephew, Mr. Langel, to help with a power point presentation to be used during the event. Mr. Langel put the slides on a laptop computer, and set it up (attached to the AYC's projector) to be used during the event. He was not present for the event itself. Ms. Watters did the presentation.

[5] After the event, Ms. Watters was reluctant to disentangle the laptop from the projector, and instead decided to leave it behind. She asked Ms. MacKenzie if it could be put aside in a secure place, to be picked up later. She was told that it would be put in a secure cabinet in the AYC office, where it would be safe until

picked up a day or two later. Ms. Watters also understood that the band's musical equipment was also being stored, at least overnight, in the AYC office.

[6] To make a long story short, due to some mis-communication, neither of the Claimants made any effort to retrieve the laptop until approximately five months later. By then, Ms. MacKenzie no longer worked for the Defendant and AYC staff simply could not find it. The presumption is that at some time over these months the laptop was taken - either stolen or simply treated as abandoned - by some unknown person.

[7] The theory of the Claimant is that the Defendant was responsible for safeguarding it, and should answer for its value.

[8] The evidence discloses that the cabinet in question is a locked filing cabinet within the office at the AYC. The level of security is minimal, in that anyone with access to the office might find a cabinet key which is kept around.

Findings of fact and conclusions

[9] I find that this was a gratuitous bailment. Ms. MacKenzie, as an agent of the Defendant, took on a minimal level of responsibility on a gratuitous basis, to hold this laptop. It was not part of the catering contract, and there was no extra fee charged.

[10] In *Cole v. Mark Lively Welding Ltd.* 2012 NSSM 23, I described gratuitous bailment, and distinguished it from a bailment for reward, which attracts a higher duty of care:

[17] There are two kinds of bailment: bailment for reward and gratuitous bailment. In the former case, where someone is being paid to store property, they have a much higher duty than someone who is doing it gratuitously, and especially where someone has had the property thrust upon him unwanted, which is typically not considered a bailment at all, but a situation attracting no duty whatsoever.

[18] In my view, the Defendants here were probably "gratuitous bailees," at least for most of the time that the truck was in their possession. For the brief period of time that the work was being done, and a short time thereafter, it is reasonable to see the relationship as one where the Defendants were being paid and had a duty to protect the vehicle. Once the Claimant essentially abandoned the vehicle, it became (at best) a gratuitous bailment where the duties are much lower. Arguably, there was not even a bailment.

[19] These concepts were discussed in the New Brunswick case of Degrace v. Central Garage Sales & Service Ltd. 1979 CarswellNB 28, [1979] N.B.J. No. 45, 24 N.B.R. (2d) 557, 48 A.P.R. 557. Although the facts there were a little different, the principles are important:

> 12 Bailment is defined in 2 Halsbury's Laws of England (3rd Ed.) 94 as follows:
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> A bailment, properly so called, is a delivery of personal chattels in trust, on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on which they were bailed shall have elapsed or been performed. A bailment is thus distinguishable from a sale, the latter being effected wherever chattels are delivered on a contract for an equivalent in money or money's worth, and not for the return of the identical chattels in their original or an altered form. The relationship of bailor and bailee is also to be distinguished from the relationship of licensor and licensee which, in the absence of special contractual provision, carries no obligation on the part of the licensor towards the licensee in relation to the chattel subject to the license.

To constitute a contract of bailment (which derives its name from the old French word bailler, to deliver or put into the hands of), the actual or constructive possession of a specific chattel must be transferred by its owner or possessor (the bailor), or his agent duly authorised for that purpose, to another person (the bailee) in order that the latter may keep the same or perform some act in connexion therewith, for which such actual or constructive possession of the chattel is necessary. Thus a bailment may arise by attornment involving a constructive delivery of possession, as where, for example, a warehouseman holding goods as agent for an owner agrees to hold them for another person pursuant to the owner's instructions.

13 In Ashby v. Tolhurst [1937] 2 All E.R. 837 at p. 844, Romer, L.J. states:

..... in order that there shall be a bailment there must be a delivery by the bailor, that is to say, he must part with his possession of the chattel in question.

.....

16 In my opinion, once the plaintiff located his automobile and conversed with Mr. Cormier, the previous relationship of bailment between the parties was significantly altered. The meeting between the plaintiff and Mr. Cormier did not bring into existence a contract of bailment and therefore the relationship of bailor and bailee never arose between the parties. It is evident that the plaintiff did not deliver or entrust his automobile to the defendant, quite on the contrary, he instructed him not to touch it. It appears clearly from the evidence that he had no intention of having his motor vehicle repaired at Central Garage because his intention was to press Chrysler for a new car to replace the damaged vehicle.

17 The plaintiff had the right, at all times, to remove his car from the defendant's car lot, but declined to do so. In the hope of securing a new vehicle, he chose to abandon the vehicle and allowed it to deteriorate on the defendant's car lot. While the automobile was to stay on the car lot with Cormier's permission there cannot be imputed to this relationship any of the attendant liability associated with a bailment transaction.

> [20] As stated in a BC case, Wienert v. Kelowna Auto Towing (1989) Ltd. 1999 CarswellBC 1644, 44 M.V.R. (3d) 315:
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> > 15 The duty of care of a bailee is determined by the classification of the bailment.
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> > 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. Where a bailee for reward subsequently becomes a gratuitous bailee, the standard of care is reduced. Canadian Encyclopedia Digest (Western) 3rd Edition, 1998, Volume 2, page 36, paragraph 28.
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> [21] I find that the Defendants, as gratuitous (and reluctant) bailees had a very minimal duty of care, and can only be held liable for damages if they were grossly negligent in allowing the truck to be vandalized.

[11] I cannot find on the facts here that the Defendant (i.e. Ms. MacKenzie) was grossly negligent. Storing equipment was never part of the deal. The expectation was that the laptop would be held for a day or two, and thereafter picked up. I have no doubt that, had Ms. MacKenzie been told that it might be weeks or months before the laptop would be picked up, she would likely have either chosen a more secure place, or refused to give any guarantee that the laptop would be secure. What actually occurred, namely a delay of five months, was never within the contemplation of any of the parties.

[12] If there was negligence on anyone's part, it was on the part of the Claimants. I do not mean to be overly critical, because it was an honest mistake, but the onus was on them to retrieve the item promptly or run the ever-increasing risk that it might go missing. They had to have known, or ought to have known, that the Defendant was not synonymous with the AYC and that it was within the AYC that the laptop was being held.

[13] Under all of the circumstances, I cannot find any legal liability on the part of the Defendant, and the claim must be dismissed.

[14] Had I found liability, which I have not, I would have had to consider damages. The evidence was that this was a 2-year old laptop that cost Mr. Langel $700.00 plus tax. He admitted that it was not his primary computer, and that it was seldom used (which explains why he did not appear to miss it). I would have depreciated its value by one-half, and would have assessed damages at $400.00.

[15] As noted above, the claim is dismissed.

Eric K. Slone, Adjudicator