



Civil Resolution Tribunal

Date Issued: March 1, 2018

File: SC-2017-002551

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kettle v. Lino's Sales Ltd. et al*, 2018 BCCRT 60

B E T W E E N :

Fredrick Kettle

APPLICANT

A N D :

Lino's Sales Ltd.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

R. Hoops Harrison

INTRODUCTION

1. In August of 2016, the applicant, Fredrick Kettle, left a 9.9 Honda boat kicker motor (the "Motor") with the respondent, Lino's Sales Ltd. ("Lino's"), to have the mounting bracket repaired. Lino's was later the subject of a theft in October of 2016 and the Motor was stolen.

2. The applicant claims \$1900.00, the amount that he paid to purchase a replacement motor.
3. The respondent Lino's says that it was a victim of theft and denies negligence. It also relies on contractual 'exclusion from liability' clauses and signage on their premises.
4. Mr. Kettle is self-represented and Lino's is represented by Santana Punis.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act (Act)*. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute with some further submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing. No party requested an oral hearing.
7. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Under tribunal rule 121, in resolving this dispute the tribunal may make one or more of the following orders:
 - a. order a party to do or stop doing something,

- b. order a party to pay money,
- c. order any other terms or conditions the tribunal considers appropriate.

ISSUES

- 9. The substantive issues are whether Lino's is liable to compensate the applicant for the loss of the Motor, and if so, for how much.

EVIDENCE AND ANALYSIS

- 10. There was very little evidence submitted by the parties. Both parties rely on the August 30, 2016 work order (the "Work Order"). The applicant submitted the Burns Lake RCMP police report (the "Police Report") and Lino's submitted pictures of two signs on the premises that it says limit its liability.
- 11. Based on the submissions of the parties, I find the timeline of events is as follows:
 - a. On August 30, 2016, the applicant dropped the Motor off to Lino's to have the mounting bracket repaired and Lino's issued the Work Order.
 - b. On September 5, 2016, the applicant also dropped off his boat to have some repairs done to the boat engine.
 - c. On September 20, 2016, the repairs to the boat were completed and the applicant paid for the boat repairs and picked up his boat. At this time the Motor had yet to be repaired.
 - d. Prior to October 14, 2016 the applicant made several inquiries to Lino's on the status of the Motor and Lino's said to leave the Motor with them.
 - e. On October 14, 2016, someone at Lino's told the applicant that the Motor had been stolen over the Thanksgiving weekend. Lino's told the applicant that Lino's was not responsible for loss or damage to the Motor and that the

applicant should notify his insurance broker to report a claim against his home and contents policy.

- f. The applicant says that his house insurance did not cover the Motor's loss.

12. The Police Report indicates that:

- a. On October 10, 2016 at 8:47am, a Mr. Marco Punis reported the break in after he attended Lino's to get his winter tires.
- b. Marco Punis told the RCMP that:
 - i. the Motor and several 'down riggers' were stolen,
 - ii. two boats were rummaged through but nothing taken, and
 - iii. there was no surveillance system available and no alarm system was triggered.
- c. Marco Punis also advised the RCMP that no witnesses, suspects or suspicious activity were observed prior to October 10, 2016.
- d. Cst. Robinson, property crime examiner, attended and conducted an examination:
 - iv. other than foot prints on the doors of the boats, no other evidence was found, and
 - v. neighbourhood enquiries were negative.
- e. The file was concluded with no further leads, witnesses or evidence.

13. When the applicant brought the Motor to Lino's, a relationship known in law as a "bailment" was created. A bailment is a temporary transfer of property under which the personal property of a person is handed over to another person, a 'bailee'. The liability under a bailment is summarized by the Court in *Withers v. Sterling Circuits Inc.* (1988), 1988 CanLII 3352 (BC SC), 47 D.L.R. (4th) 614 (BCSC), at para. 66:

Traditionally, the standard of care imposed upon a bailee has been governed by the existence and location of any benefit or award arising out of the bailment. Where the bailment is a gratuitous one solely for the bailor's benefit, then the bailee has generally only been held liable for "gross negligence": *Brewer v. Calori* (1921), 29 B.C.R. 457 (C.A.). Where the bailment is for reward, the standard is somewhat higher, the bailee being held liable for "negligence", or a failure to exercise due care and diligence: *Zweeres, supra*; *Davis v. Henry Birks & Sons Ltd.*, [1981] 5 W.W.R. 559 (BCSC)

14. Given that both parties do not dispute the existence of the Work Order and the arrangement to leave the Motor to be repaired for a fee, I find that the bailment was 'for reward'.
15. In a civil claim, the applicant generally bears the burden of proof, on a balance of probabilities, to prove negligence. In a 'for reward' bailment case such as this however, the burden of proof shifts and the onus falls upon the respondent Lino's to disprove negligence. This tribunal and small claims courts in British Columbia have recognized this shift in the burden of proof: *Severinson v. Holloway*, 2018 BCCRT 42; *Cahoon v. Isfeld Ford*, 2009 BCPC 334. This is because only the respondent can know what actually happened, putting the applicant at an unfair disadvantage.
16. There is no exact formula as to the factors required for a bailee to disprove negligence. Each depends on their own circumstances. In one case, a security camera on the premises, in part, was held by the Provincial Court as proper due diligence undertaken by a bailee in respect of a theft of property from its premises: *Harris v. Maltman and KBM Autoworks*, 2017 BCPC 273.
17. Lino's does not have security cameras on the premises. Lino's however says that:
 - (a) the entire perimeter of the property is fenced and locked at night,
 - (b) the gate is blocked with a forklift parked in the entrance every night,
 - (c) there are multiple security lights on all of the buildings on the property, and
 - (d) "Curtis Elite" monitors all buildings on the property.

18. Considering the circumstances of the case, including that the Police Report does not indicate a broken window or door lock or evidence of 'forced entry,' and that the alarm system was *not* triggered, I am not satisfied that that the security measures that Lino's did have in place were utilized. While there is little dispute that the Motor was stolen, my view is that Lino's has failed to discharge its burden to prove that it took all necessary steps that a reasonable person would take to safeguard the Motor. Therefore, Lino's is liable as a bailee for damages that occurred while the Motor was in its care and possession.
19. The applicant has supplied an invoice of \$1900.00 for a *new* replacement Motor. The applicant has also supplied screen shots of a value book that display low and average retail prices however the details of the screen shots do not match up the valuation with this brand and make of Motor.
20. Lino's says that at most the applicant is entitled to \$800.00 based on the age and condition of the Motor.
21. Despite the shift in burden for liability, the applicant still must prove his damages. I am not persuaded by the sufficiency of the applicant's evidence as a new Motor would be a windfall for the applicant. I prefer the position of Lino's, valuing the Motor at \$800.00 based upon depreciation and Lino's expertise in the area.
22. As a result, I order Lino's to pay the applicant \$800.00. The applicant is entitled to \$8.45 of pre-judgment interest under the *Court Order Interest Act* from October 10, 2016.
23. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I therefore find that the respondents must reimburse the applicant for tribunal fees of \$125.00 as claimed. There were no dispute-related expenses claimed.
24. In summary, I find the respondents must pay the applicant \$933.45, plus applicable post-judgment interest under the *Court Order Interest Act*.

ORDERS

25. I order the respondent immediately pay to the applicant the sum of \$933.45, broken down as follows:

(a) \$800.00 for the Motor,

(b) \$8.45 of pre-judgment interest under the *Court Order Interest Act*,

(c) \$125.00 in tribunal fees,

plus any applicable post-judgment interest under the *Court Order Interest Act*.

26. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

27. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

R. Hoops Harrison, Tribunal Member