



Civil Resolution Tribunal

Date Issued: April 23, 2019

File: SC-2018-007320

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Menard v. Mayert*, 2019 BCCRT 490

BETWEEN:

Sacha Menard

APPLICANT

AND:

Mandy Mayert

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about whether in March 2018 the applicant, Sacha Menard, gifted or loaned an elliptical exercise machine to the respondent, Mandy Mayert. The parties

were in a romantic relationship from November 2017 until July 2018, but never lived together.

2. After the break-up, the applicant asked for the elliptical machine back. The respondent says it was a gift and that she had given it away. The applicant claims \$4,500, which includes \$1,000 for “loss of enjoyment”. The parties are each self-represented.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 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.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a “he said, she said” scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal’s mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal’s process and found that oral hearings are not necessarily required where credibility is in issue.

5. 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.
6. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUE

7. The issue is whether the applicant gave or loaned an elliptical machine to the respondent, and if it was only a loan, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
9. The applicant says he loaned the elliptical machine to the respondent in March 2018, because she was training for an event in early June. The applicant's March 1, 2018 text to the respondent read, "I might leave early today to get the elliptical ready for the woman I love. ...". The text exchange shows the applicant was offering the machine and there is no indication of it being a loan or an outright gift.
10. The respondent says the applicant gave her an "old obsolete elliptical machine ... Period". The respondent says she never wanted the gift and she gave it away. The respondent emphasizes the applicant only ever asked for the machine back after the parties broke up in early July 2018, and that he has done so out of spite because the applicant was unhappy about the break-up.
11. Based on the parties' text messages in evidence, the applicant did not ask for the machine back until August 8, 2018, when he appeared to realize the respondent

was not going to resume the relationship. In the parties' texts in July 2018 after they broke up, there is no mention of the elliptical machine.

12. The applicant says he would never have gifted such an expensive item only 3 months into a dating relationship. However, he also submitted texts with the respondent to show the parties' relationship was serious. This is relevant in that a gift of the machine may be more likely because the parties considered the relationship serious at the time.
13. Significantly, the respondent says the applicant verbally asked her to refer to the machine as a loan in texts so that the applicant could tell his ex-spouse that the machine was "on loan to a friend". The respondent says the applicant repeatedly refused to take the machine back, saying "It's a gift, I want you to have it".
14. Yet, in another undated text exchange written while the parties were still romantically involved, the respondent wrote, "I love that Nordic Track!!!!!! Thank you so much for borrowing it to me my friend. My amazing boyfriend." (quote reproduced as written). In another undated text, the respondent wrote, "I just did 30 min on your elliptical." In another exchange, the respondent said "I spent a good 30 min on the elliptical which was awesome. I appreciate it so much honey." The applicant responded, "I'm happy you like it ... I sure hope she loves me for this one".
15. The respondent submits that the applicant became excessive with gift-giving, and that at one point she asked him to stop bringing them. She says that after the elliptical machine was delivered and set up in her home, she discovered how massive it was and asked him to take it back, but he refused. However, while the parties apparently frequently texted, there are no texts in evidence to support the respondent's position.
16. So, what is the law about gifts? Generally speaking, the burden of proof shifts to the person alleging it was a gift, in this case the respondent (see *Pecore v. Pecore*,

2007 SCC 17). The context of the parties' romantic relationship at the time of the alleged gift is relevant, but not determinative.

17. On balance, I find the parties' text messages show the respondent happily received and used the elliptical machine, contrary to her statement that she did not want the machine. I place significant weight on the respondent's texts quoted above that show she understood the machine was "borrowed". I find that to some extent both parties mischaracterized their conduct in the relationship, and in that respect both parties' credibility is negatively impacted. However, the ultimate point is that I do not accept that the respondent wrote the machine was "borrowed" only because the applicant wanted his ex-spouse to believe it was only loaned. I find that suggestion simply does not have the ring of truth given the totality of the parties' other text messages.
18. On balance, I find the weight of the evidence shows the elliptical machine was not an outright gift, but rather on indefinite loan during the parties' romantic relationship. It was therefore not the respondent's to give away, which is what she did. There is no evidence that she ever tried to return it to the applicant and the respondent has not explained when or to whom she gave the machine away.
19. The difficulty for the applicant is that he has provided no evidence about the elliptical machine's value. There are no photos, no model or make description, no year. There is no receipt from the machine's original purchase and no invoice or quote for the machine's replacement, even though the applicant knew from the outset the respondent stated she no longer had the machine and so his claim was framed as a request for compensation. If the machine were as valuable as the applicant alleges, I expect he would have been able to provide evidence of it, as noted by the respondent.
20. I find the applicant has not proved the elliptical machine had any significant value. On a judgment basis, I allow \$100 for the elliptical machine. The applicant is entitled to pre-judgment interest under the *Court Order Interest Act* (COIA) on the \$100, from August 8, 2018, the date the applicant asked for the machine back.

21. I find the applicant has also not proved any claim for “loss of enjoyment”, bearing in mind the applicant happily loaned the machine to the respondent indefinitely and only asked for it back when he knew their relationship was not going to resume. I find the applicant is not entitled to “loss of enjoyment” compensation.
22. The applicant was partially successful in this dispute. In accordance with the Act and the tribunal’s rules I find he is entitled to reimbursement of half the \$175 paid in tribunal fees, namely \$87.50.

ORDERS

23. Within 14 days of this decision, I order the respondent to pay the applicant a total of \$188.68, broken down as follows:
 - a. \$100 in damages,
 - b. \$1.18 in pre-judgment interest under the COIA, and
 - c. \$87.50 in tribunal fees.
24. The applicant is entitled to post-judgment interest, as applicable. The applicant’s remaining claims are dismissed.
25. 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.

26. 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.

Shelley Lopez, Vice Chair