



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Gardner et al v. Dr. Michael J. Abougoush Inc.*, 2019 BCCRT 889

B E T W E E N :

JOHN GARDNER and KAREN GROSCH

APPLICANTS

A N D :

DR. MICHAEL J. ABOUGOUSH INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. This dispute is about compensation for tools and related equipment (collectively, the equipment). The applicants, John Gardener and Karen Grosch, say that the respondent, Dr. Michael J. Abougoush Inc., disposed of the equipment. The applicants say the property is worth \$1,650.00. The applicants are self-represented.

2. The respondent agrees that he disposed of the applicants' property but says the list of tools and supplies that the applicants say he disposed of is exaggerated and the claim amount is also exaggerated. The respondent is represented by Keenan O'Brien, an employee of the respondent.

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*. 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. In some respects, this dispute amounts to a "he said, it said" scenario with both sides calling into question the credibility of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the 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 the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.
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 9.3(2), 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.

ISSUE

7. The issue in this dispute is whether the respondent unlawfully disposed of the applicants' equipment and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, the applicants must prove their claim. They bear the burden of proof on a balance of probabilities.
9. I will not refer to all of the evidence or deal with each point raised in the parties' submissions. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.
10. The respondent runs a dental office where Ms. Grosch is employed. From time to time the respondent also employed Ms. Grosch's husband, Mr. Gardner, to perform construction work and other jobs.
11. The respondent allowed Mr. Gardner to store his tools, supplies, and equipment in a locked mechanical room on its premises. The applicants submit this was so Mr. Gardner would have the things he needed handy when he was asked to perform jobs.
12. Mr. O'Blenis submitted that he was the one who threw out the applicants' personal property. He said he was told by the respondent to do a building clean out, which included the mechanical room where the applicants' property was stored.
13. I find that the law of bailment applies to this dispute. Bailment is about the obligations on one party to safeguard the possessions of another party. The bailor is the person who gives the goods or possessions and the bailee is the person who holds or stores them. In this case, the respondent is what

is known as a “gratuitous bailee”, as the applicant did not compensate the respondent for storing his items.

14. Gratuitous bailees have traditionally only been liable for “gross negligence,” however the courts are moving away from a strict classification between bailment for reward and gratuitous bailments, and instead there is a preference to determine liability based on whether or not the bailee has exercised reasonable care in all of the circumstances (see: *Harris v. Maltman and KBM Autoworks*, 2017 BCPC 273).
15. The respondent does not dispute that it instructed Mr. O’Blenis to throw away the applicants’ possessions and provides no explanation for doing so. The evidence shows that Mr. Gardner did his last job for the respondent in October 2018, the equipment was disposed of shortly after, in or around November 2018 (as this is when Ms. Gorsch says she became aware of the claim). Ms. Gorsch resigned from her position on December 21, 2018.
16. I acknowledge that some of the evidence suggests that the equipment was thought to be garbage and was disposed of accordingly, I also note that the evidence indicates that some of the items, including the paint brushes and rollers, were newly purchased. Although, as discussed later, it is the respondent who paid for these I still think this goes to establishing that the respondent did not consider what was being thrown away. Also, the socket set had value as evidenced by Mr. O’Blenis deciding to keep it. Further, Ms. Grosch worked with the respondent at the time and could have been given the opportunity to remove the equipment before the decision was made to throw it away.
17. Based on the evidence, I find that the respondent failed to exercise reasonable care in all of the circumstances. Therefore, I find that the respondent is liable for disposing of the applicants’ property.

Damages

18. The central issues in this dispute is which items were disposed of and how much the applicants should be paid for those goods.
19. The applicants have provided different lists of what they claim was in the mechanical room. In its submission that applicants say that items not acknowledged by the respondent include an 50' extension cord, pipe wrenches, large and small water pump pliers, moving blankets and a dolly, hacksaw, Sawzall blades, and a ladder. They point to work done for the respondent which required use of these items.
20. Mr. O'Brien itemized the property in the mechanical room as an old rusty socket set, a Sawzall with a frayed cord and rusted blade, painting supplies, sheet metal elbows, dried up bucket of drywall mud, and pieces of sandpaper. Mr. O'Brien said that the socket set was missing some pieces and was rusty, but it would still work so he put it in his car to keep. He took the rest of the property to the dump. He says that he ultimately returned the socket set to the applicants.
21. When Mr. Gardner asked Mr. O'Brien if he had thrown out his property, he acknowledged that he did. Mr. Gardner presented the respondent with a December 10, 2018 invoice for \$1,650.00 showing items he was missing and Mr. O'Brien highlighted the items listed above, as well as a moving dolly, tee, and masking tape, as the things he threw out. It is unclear how much the items are worth or how the applicants came up with the \$1,650.00 figure. The representative says that he did not see or throwaway any of the other items on the list.
22. The respondent submits that it offered to pay \$250.00 for the assorted items but the applicants refused. The respondent argues that unless there is proof the items and materials were in the mechanical room and of their value it should not have to pay for them.

23. I note that Mr. O'Brien acknowledged that he threw out the moving dolly as it is checked off on the invoice. Further, other items on the December 10, 2018 invoice not acknowledged as thrown out by Mr. O'Brien are side cutters, box of marrettes, utility knife, putty knife, a garbage can, screwdriver, multdriver and a carboy tote.
24. In February 2018, the applicants provided another list to the respondent, this one had additional items listed which were not mentioned before (hand held sawing board, tape measures, square, level, 2 wheel hand cart, putty trowel, galvanized pipe, galvanized flange adapter, insulate wire) and Canadian Tire prices for new ones. The price for these brand new replacement items, including the items not previously claimed, comes in at around the \$1,650.00 invoiced in December 2018 and requested in this dispute. The most expensive item is the Stanley socket set at \$479.99.
25. As for the socket set, the parties agree that it was given back. All parties also agree that the set was incomplete when returned. Mr. O'Brien says this is the way it was when he removed it from the mechanical room. The applicants claim that the respondent included the cost of the socket set in discussions over the value of the property and that this is an admission that the respondent was liable for returning it incomplete. An email from the respondent dated January 23, 2019 specifically disputes that Mr. O'Brien or the respondent was responsible for the socket set being incomplete. I find the applicants have provided no evidence to support their claim. The only evidence about the respondent's offer to pay was a blanket offer of \$250.00 to cover the Sawzall and other miscellaneous items, which did not specifically include the socket set.
26. The applicants have not provided proof of the socket set's age, its condition, or that it was complete. I find that they have not proved they suffered a loss about this item.
27. As for the other items the applicants claim were in the mechanical room, the applicants point to invoices for projects completed as evidence that the tools and equipment used were left in the mechanical room. I note that Mr. Gardner was asked to work for the respondent one day a week and refused because it would get

in the way of him doing projects for other people. Because Mr. Gardner was working for others I find that the fact that he used a tool for the respondent does not mean that he left it in the mechanical room. It is just as likely he removed it so he could use it on other projects. I also note that the applicants' lists of materials stored in the mechanical room are not consistent.

28. Based on all of the evidence, I find on a balance of probabilities that the applicants have not proved that they left any property in the mechanical room except those that the respondent admits to disposing of. Namely, a corded Sawzall and blades, sheet metal, elbows, tee, paint tray, rollers, brushes, sandpaper, masking tape, moving dolly and a pail of drywall mud. The respondent has provided receipts which show that it paid for painting materials, so I find the applicants are not entitled to be reimbursed for them.
29. In *Robertson v. Stang*, 1997 CanLII 2122, the British Columbia Supreme Court addressed how to determine the value of property which was disposed of in a bailment case. The Court noted that the general rule is that damages are assessed at the time of loss. In determining the value of property that has been destroyed or lost, as is the case here, the Court considered whether the test should be market value, replacement value, or actual value. The Court determined that actual value was the correct test but noted that in determining actual value one takes into account the amount paid for the goods at the time of purchase, the retail value of the goods, the cost of replacing the goods, and the estimated market value of the items at the time of loss, which includes a consideration of the depreciation in value.
30. The only evidence that the applicants have provided about the value of the goods is how much it would cost to buy brand new ones. I note that replacement cost does not necessarily mean that a party is entitled to replace an old depreciated item with a brand new one. Further, the applicants did not indicate how old any of the property was, how much they paid for it at purchase, how much they had used it (which would go to its depreciation value), or its estimated market value if they had sold it at the time of loss.

31. In summary, the applicants have failed to prove on a balance of probabilities, the value of the goods which were disposed of. Therefore, I dismiss the applicants' claims and this dispute.

32. 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. As the applicants were unsuccessful in their claim they are not entitled to have their tribunal fees or expenses reimbursed.

ORDER

33. I dismiss the applicants' claim and this dispute.

Kathleen Mell, Tribunal Member