



Civil Resolution Tribunal

Date Issued: May 18, 2020

File: SC-2019-010298

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Samoonah v. Nammos Estiatorio*, 2020 BCCRT 541

BETWEEN:

RITA SAMOONAH

APPLICANT

AND:

NAMMOS ESTIATORIO

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION.

1. The applicant, Rita Samoonah, says she found a sharp metal object in her meal while dining at the respondent restaurant, Nammos Estiatorio. She seeks \$5,000 for emotional distress and for poor customer service.

2. The respondent denies there was a metal object in the applicant's meal and says the applicant has failed to show she suffered any damages.
3. The applicant is self-represented.
4. The respondent is represented by Effie Kerasiotis, its owner.

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 118 of the *Civil Resolution Tribunal Act* (CRTA). 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. In some respects, this dispute amounts to a "he said, he said" scenario with both sides calling into question the credibility of the other. Credibility of 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.
7. 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. In *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the court recognized that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.
8. 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.

9. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

10. The issues in this dispute are:
 - a. Whether the respondent was negligent, and
 - b. To what extent, if any, the applicant should be compensated for her alleged injuries.

EVIDENCE AND ANALYSIS

11. In a case such as this, the applicant bears the burden of proof, on a balance of probabilities. While I have read and considered the parties' submissions in their entirety, I have referred only to the evidence necessary to give context to my decision.
12. The applicant says she was dining at the respondent restaurant on November 25, 2019 with her 2 siblings when she discovered a sharp piece of metal in a mouthful of food. The applicant says she removed the object from her mouth and showed it to her waitress, ST. ST provided a written statement that the applicant showed her a rusty staple "in her food/on plate". Since the applicant did not provide any other description, I accept that the object was a rusty staple (staple).
13. The respondent denies there was a staple in the applicant's meal. It says it did not use rusty staples or staples of that size in the restaurant, including around the kitchen. However, the respondent did not provide another explanation for how the staple could have ended up on the applicant's plate. Based on the evidence before

me, I accept the applicant's statement that she found the staple her meal. I also find the staple came from the respondent's kitchen since the applicant's meal was likely prepared and handled only by the respondent's employees before it was served to the applicant.

14. After the applicant brought the staple to ST's attention, ST apologized. The applicant also had additional complaints about how the food was cooked and it was returned to the kitchen. The applicant also says the customer service was poor because the respondent got her order wrong 4 times. However, the applicant did not provide any details of how her order was incorrect or how long it took for the respondent to remedy it.
15. The respondent did not charge the applicant or her dining companions for the meal. I find this is not an admission of liability. The *Apology Act* states that an action indicating contrition or commiseration cannot be considered when determining fault or liability.
16. The applicant says that she would have died if she had ingested the staple. As this is speculation, I do not place any weight on this statement. The applicant also says she has been fearful of going "anywhere", eating out, and going to a restaurant since the incident. She also says she is unable to enjoy time out with her family.
17. The respondent denies the applicant suffered any injuries. The respondent says it contacted the applicant at some point after the incident and confirmed that she did not see a doctor.

Was the respondent negligent?

18. The test for negligence is set out by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 3. In order to succeed in a claim of negligence, the applicant must prove each of the following on a balance of probabilities:
 - a. The respondent owed the applicant a duty of care,

- b. The respondent breached the standard of care,
 - c. The applicant sustained a loss, and
 - d. The loss was reasonably foreseeable.
19. In *Mustapha*, the plaintiff suffered psychological injury after he saw a dead fly in an unopened bottle of the defendant's bottled water. The court agreed the defendant breached its duty of care by providing contaminated water. The court also accepted that the plaintiff suffered psychological injuries based on the testimony of friends and family that was supported by medical evidence. However, the plaintiff's claim for damages failed because the court found the plaintiff's reaction was unusual or extreme and not reasonably foreseeable.
20. I find the respondent owed the applicant customer a duty of care in its restaurant. A restaurant serving food to a customer intended for consumption is under a duty to take reasonable care to ensure that the meal is not contaminated by sharp foreign objects.
21. I also find the respondent breached this standard of care by serving a meal to the applicant that contained a sharp foreign object. As mentioned above, the respondent denied the restaurant used the type of staple that was found in the applicant's meal. However, the respondent did not provide an alternative explanation for how the staple ended up on the applicant's plate.

Did the applicant suffer a loss?

22. I find that it is reasonably foreseeable that a person would be upset at finding a foreign object in a mouthful of food. However, the law of negligence does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. It must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears people experience. Minor and transient upsets do not constitute personal injury, and do not amount to damage (see *Mustapha* at paragraph 9).
23. The applicant did not provide any medical or other evidence of her emotional distress. The applicant did not state whether she saw a doctor or received any

treatment. Although the applicant says she is fearful of certain activities, she did not explain how this affected her enjoyment of life. For instance, she did not provide evidence of how often she went out to restaurants before versus after the incident. The applicant also did not provide statements from family or friends that witnessed that she suffered a loss of enjoyment of life. Due to the lack of evidence, I am not satisfied the applicant has established that she suffered legally compensable emotional distress as a result of the incident, and I dismiss this claim.

24. Under section 49 of the CRTA 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 find that since the applicant was unsuccessful, she is not entitled to reimbursement of tribunal fees. The respondent is the successful party but did not pay tribunal fees and claimed no dispute-related expenses.

ORDER

25. I order the applicant's claims and this dispute dismissed.

Rama Sood, Tribunal Member