Citation: *Ernewein* v. *Yankee Hat Minerals Ltd.,* 2011 YKSM 01

Date: 20110217
Docket: 10-S0010
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Cozens

Barry Ernewein

Plaintiff

v.

Yankee Hat Minerals Ltd.

Defendant

Appearances:
Barry Ernewein — Appearing on own behalf
Grant MacDonald, Q.C. — Counsel for Defendant

REASONS FOR JUDGMENT

[1] The Plaintiff, Mr. Ernewein, claims $4,260.00 for the storage and servicing of a vehicle belonging to the Defendant that was in the possession of the Plaintiff between September 1, 2008 and October 30, 2009. He also claims costs and disbursements.

[2] Default Judgment was originally granted against the Defendant, Yankee Hat Minerals Ltd. ("YHM"), but was subsequently overturned on application and the matter proceeded to trial.

Evidence

[3] Mr. Ernewein testified in support of his claim. Cale Thomas, Chief Financial Officer for YHM, testified for the Defendant.

[4] Mr. Ernewein's evidence is that in 2008 YHM provided geologist Lee Groat a 2003 Ford F-350 truck (the "Truck") to do work for YHM on various mining properties owned by Mr. Ernewein. Mr. Ernewein believed that Mr. Groat was acting as an agent for the Defendant based upon certain representations made by YHM and information provided to him by Mr. Groat.

[5] In August 2008, at the end of the field season, students working under the supervision of Mr. Groat parked the Truck on Mr. Ernewein's residential property in Whitehorse. The Truck remained there until it was moved in October 2009. Mr. Ernewein testified that he winterized the truck in the fall of 2008 and in October 2009.

[6] Mr. Ernewein's evidence is that he advised Mr. Groat in the summer of 2008 that he would be billing YHM for storage of the Truck.

[7] In October 2009 the Truck was removed from the Plaintiff's property by YHM and taken to the Whitehorse Airport. Mr. Ernewein then brought the vehicle back from the airport to his property. YHM sent Mr. Ernewein a letter expressing concern over this and demanded that the Truck be returned to the airport, which was subsequently done.

[8] Mr. Ernewein provided YHM a letter and invoice on March 3, 2010. This was the first written statement of account for the storage and servicing of the Truck. In choosing to invoice YHM, Mr. Ernewein relied upon YHM's ownership of the Truck and his prior working relationship with YHM that included payment for services provided by Mr. Ernewein without a specific contract or agreement. This prior working relationship included Mr. Ernewein invoicing YHM for certain costs incurred by Mr. Groat and his associates. Mr. Ernewein states that these invoices were paid by YHM without question.

[9] Mr. Ernewein testified that he did not have a specific contract or agreement with YHM regarding payment for storage and servicing of the Truck.

[10] In cross-examination, Mr. Ernewein testified that he had billed YHM in two invoices in the spring of 2008 for services he had provided YHM. In May 2009, Mr. Ernewein commenced Small Claims Court Action 09-S0004 with respect to these invoices, claiming $16,583.49 for unpaid work. He was awarded default judgment on January 18, 2010. There was no claim in that action for the storage and servicing of the Truck, nor was there any separate action commenced at that time regarding the Truck. Mr. Ernewein agreed that, as of January 18, 2010, he had not made a request to YHM for any payment regarding storage and servicing of the Truck.

[11] Mr. Thomas testified that YHM had optioned the Cowley Creek property from Mr. Ernewein and contracted Mr. Groat and David Turner to work on this property in 2008 and 2009. YHM provided Mr. Groat and Mr. Turner the Truck for their use on this project. The Truck was driven to Whitehorse from Vancouver by an employee of Mr. Groat and Mr. Turner.

[12] Mr. Ernewein, who had particular knowledge of the Cowley Creek property on which Mr. Groat and Mr. Turner were working, provided coordination services to assist consultants and contractors hired by the Defendant. According to Mr. Thomas, Mr. Groat and Mr. Turner provided their services to YHM in conjunction with services performed by Mr. Ernewein.

[13] After the Cowley Creek project concluded, Mr. Groat and Mr. Turner continued to work for YHM on the unrelated Selwyn project. On this project, YHM allowed Mr. Groat and Mr. Turner to use the Truck as a matter of convenience. Mr. Thomas stated, however, that Mr. Groat and Mr. Turner were solely responsible for where the Truck was parked. It was Mr. Thomas' evidence that he understood Mr. Groat had been allowed to park the Truck at Mr. Ernewein's residence by way of an informal favour offered by Mr. Ernewein. Mr. Thomas testified that it was his understanding that other equipment was also stored on Mr. Ernewein's residential property. To his knowledge, there was

never any written agreement between Mr. Ernewein and either Mr. Groat or Mr. Turner regarding storage fees for the Truck.

[14] At no time did YHM communicate with Mr. Ernewein regarding the Truck being parked at his residence. Mr. Thomas' evidence is that there was never any request made by YHM that Mr. Ernewein store and service the Truck, nor was there any agreement that YHM would pay fees for storage and servicing of the Truck. YHM was first made aware of Mr. Ernewein's intent to charge storage and servicing fees when YHM received the invoice from the Plaintiff on March 23, 2010.

Position of the Parties

[15] Mr. Ernewein submits that Mr. Groat and Mr. Turner were employees or agents of YHM and were acting on behalf of YHM. The Truck was owned by YHM and the only party benefiting from the Truck being parked at Mr. Ernewein's residence was YHM. Due to Mr. Ernewein's prior history of billing YHM for services provided without a specific contract, no specific contract was required for Mr. Ernewein to invoice YHM for the storage and servicing of the Truck.

[16] YHM submits that there was no contract or agreement with Mr. Ernewein for the storage and servicing of the Truck, or any agreement that Mr. Ernewein would be financially compensated for storage or servicing of the Truck. Anything agreed upon between Mr. Ernewein and Mr. Groat or Mr. Turner was between them only and cannot bind YHM. Mr. Groat and Mr. Turner were not employees or agents of YHM. Mr. Ernewein had the opportunity to advise YHM as early as September 2008 of his intent to charge YHM for storage and servicing of the Truck, but did not do so prior to March 2010.

[17] YHM further submits that there is no basis to award the Plaintiff compensation on the basis of *quantum meruit*.

Analysis

[18] The Plaintiff bears the burden of proving his claim.

[19] It is clear that there was no explicit contract or agreement between Mr. Ernewein and YHM for the storage and servicing of the Truck.

[20] The evidence does not establish that either Mr. Groat or Mr. Turner were authorized by YHM to enter into an agreement with Mr. Ernewein for the storage and servicing of the Truck. To the extent that they may have reached an agreement with the Plaintiff to store the Truck on his property, I find that they did so on their own behalf, and this agreement did not bind YHM.

[21] I am also not satisfied on the evidence that there was an implied contract between Mr. Ernewein and YHM. The fact that Mr. Ernewein had in the past submitted invoices to YHM for services provided outside of any explicit written or oral agreement, and that these invoices were paid, does not mean that YHM had agreed to pay for any and all unsolicited services that Mr. Ernewein provided.

[22] In considering the whole of the trial evidence before me, I find that there is also insufficient evidence for the Plaintiff to succeed on the basis of unjust enrichment or *quantum meruit*. There is some dispute between the parties as to events occurring in the summer and fall of 2009 that may have hampered YHM's ability to regain possession of the Truck. While I find it interesting to speculate as to YHM's thoughts or intentions with respect to where the Truck was and how it was being utilized between August 2008 and at least into the summer of 2009, such speculation does not assist me in reaching my decision.

[23] There is also an absence of evidence as to what the value of the servicing performed on the Truck was. With respect to storage costs, Mr. Ernewein chose a figure of $10.00 per day after speaking with Capital Towing. That may be a reasonable figure for the services provided by Capital Towing. Is it fair and just, however, to assign this or any compensation to Mr. Ernewein for his storage and

servicing of the Truck? YHM certainly received a benefit in that the Truck was safely stored by Mr. Ernewein. I am not satisfied, however, that this benefit was in respect of a cost that YHM would necessarily have incurred or been obliged to incur. Had YHM known that Mr. Ernewein intended to charge them for storage of the Truck, perhaps other arrangements would have been made. I recognize that there is no evidence before me on this point, however, if Mr. Ernewein had a realistic expectation of being paid for the storage and servicing of the Truck, there should have been some communication with YHM to that effect. The only communication was long after the Truck had been left on Mr. Ernewein's property, and well after Mr. Ernewein and YHM had communicated with respect to other issues of dispute between them.

[24] There is also no evidence of any significant deprivation suffered by Mr. Ernewein as a result of storing and servicing the truck.

[25] To the extent that YHM has received a benefit from Mr. Ernewein in respect of the Truck, I find that it would not be fair and just to require YHM to disgorge that benefit.

[26] I find that the claim of the Plaintiff cannot succeed and, as such, I find for the Defendant.

[27] The action is dismissed without costs.

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COZENS T.C.J.