

Citation: *Eaton v. Tails and Trails Dog Hotel*,
2023 YKSM 1

Date: 20230411
Docket: 22-S0025
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before Her Honour Judge K.L. McLeod

COURTNEY EATON

Plaintiff

v.

TAILS AND TRAILS DOG HOTEL

Defendant

Appearances:
Courtney Eaton
Shelly Font

Appearing on her own behalf
Appearing on behalf of the defendant

REASONS FOR JUDGMENT

[1] Ms. Eaton brings a small claims action against Tails and Trails Dog Hotel (the "Hotel") in respect of emergency medical treatment bills and other costs that were incurred as a result of the injuries sustained by one of her dogs, Watson, who got into a fight with her other dog, Bragi, while being boarded at the defendant's business in October 2021.

[2] Ms. Eaton's claim is in the amount of \$10,570.38 which includes the veterinary fees, lawyer's fees, court costs, and loss of wages. The claim is based on negligence; namely that the Hotel negligently allowed her dogs to have interaction with each other and, as a result, Watson suffered serious injuries.

[3] Shelly Font, the owner of the Hotel, denies the negligence and as part of a counterclaim alleges that, in fact, Ms. Eaton was negligent in that she did not adequately alert the Hotel as to the danger her dogs posed with respect to each other. Ms. Font seeks reimbursement of the veterinary bills that she paid for the injured dog's treatment in Whitehorse. Two invoices were produced in the amount of \$1,252.78 and \$877.18. In addition, the Hotel seeks a total of \$601.65 for unpaid hotel boarding fees for the two dogs.

The Issues

[4] There are three main issues in this case:

1. Has Ms. Eaton proved on a balance of probabilities that the Hotel's care of her two dogs amounts to negligence;
2. If she is successful in this, does the waiver of liability in the contract protect the Hotel from liability; and
3. Finally, there is the issue of the counterclaim. Does Ms. Eaton have a contractual obligation to pay the Hotel fees and reimburse the Whitehorse veterinary bills?

[5] What is not in dispute:

1. Both dogs were contracted to be boarded at the Hotel;
2. Both dogs are described by Ms. Eaton's partner, Adrian Dubuc-Kanary as being "big strong dogs". They were described by him as the

following: Watson is an American Bulldog, his father was an American Bulldog, his mother a terrier mix. Bragi is a mix of King Corso and Staffordshire Terrier from one parent, the other parent was full Staffordshire Terrier. In the booking form apparently completed on September 7, 2021, the dogs were described 70-to-90-pound pit bulls.

3. Ms. Font was a new owner of the Hotel. She had taken it over on September 9, 2021, and had agreed to honour all pre-existing bookings with the terms and conditions of the contract originally agreed with the former owner. One of those terms was that the requisite registration forms, waivers etc., need not be provided until the date of check-in of the dogs. The booking for Bragi and Watson was made on September 7, 2021, for an October 8 to 16, 2021 stay;
4. Ms. Font contacted Ms. Eaton on October 1, 2021, confirming the booking asking whether the dogs would be sharing a room and alerting her to the necessity of the completion of the forms. No response was received. She emailed Ms. Eaton again on October 4, 2021;
5. A response from Ms. Eaton dated October 5, 2021, read as follows:
“Yes we would still like two rooms. And I was wondering what if it’s at all possible to have them beside each other”. Ms. Font responded:
“We can definitely try to get them side by side”. This request was repeated at the check-in;

6. There were further email discussions with respect to the drop-off time and the provision of dog beds. Of note is that there is a request that the dogs be dropped off at 11:00 a.m. as Ms. Eaton explained their flight was early afternoon; and
7. Ms. Eaton forwarded the registration documents on October 5, 2021, and a document entitled Owner Agreement & Waiver. Ms. Font says she did not receive it, but did receive these completed forms on check-in.

[6] Of note, in this Owner Agreement, is the following:

3) Owner understands and agrees that Tails and Trails and their Caregivers will not be liable for any problems that might develop with the Dog, including, but not limited to sickness, disease, injury, escape and death. Owner hereby waives and releases Tails and Trails, its employees & owners, representatives and agents ("Caregivers") from any and all liability or any harm which Owner or Owner's Dog may suffer, including specifically, but not without limitation, any injury or damage whatsoever arising from the Dog's attendance and participation at Tails and Trails.

4) Owner further understands that any health problem, infection or infestation that develops with the Dog will be treated responsibly as deemed best by the Caregivers of Tails and Trails at the sole discretion. Owner will assume full financial responsibility for any and all expenses involved in the safe and health maintenance of the Dog while in the care of Tails and Trails; this includes, but is not limited to, vet expenses and medication costs. In the case of veterinary costs payment arrangements will be made directly between Owner and the veterinarian.

[7] At the bottom of that form, there is a question; "Would you like your Dog to socialize? Please circle Yes/No." "**No**" was circled.

[8] On the Registration Form for Watson there are the following questions:

Does your dog play well with other dogs? If no, please explain.

- '**No**' was circled and followed by the comment: 'Can get overwhelmed with excitement of other dogs and become reactive'.

Has your dog ever shown aggression towards people?

- '**No**' was circled.

Towards other dogs?

- '**Yes**' is circled with an arrow pointing to the previous comment about becoming overwhelmed.

...

Does your dog have separation anxiety?

- Answer; **No**.

...

Does your dog come to call?

- Answer; **Yes**.

Are there any restrictions that should be placed on your dog's activity level?

- Answer; **No**.

Additional information that you feel would be helpful.

- Answer; '**sometimes wants to jump up and give hugs but is not allowed**'.

The Evidence

[9] I will now turn to the occurrence itself.

[10] Hannah Colvin was working in the kennel on October 9, 2021. She had been working for the Hotel for about four months and worked 10 hours a week. She is now 18 years old. She testified that towards the middle of the shift on October 9, she had

put the dogs (with the exception of Bragi and Watson) out in a play social area. Watson was put into a separate fenced run.

[11] Ms. Colvin then went to fill up the water bowls in each of the kennels with a watering can. She opened Bragi's door just enough to allow her to get through the door. It should be noted that Ms. Colvin is a diminutive person both in stature and frame.

[12] While she was filling up the bowl, Bragi pushed past her and ran into the hallway. Ms. Colvin testified he was running back and forth and "he wanted to love on me". She tried to get him to go back into his kennel but with no success. She then described how she heard a "ruckus" outside. She looked and saw that Watson was barking from his run at the dogs who were in the social area. It was causing anxiety in the other dogs, and she was concerned matters would escalate.

[13] Ms. Colvin explained how she called Watson, but he ignored her call. The door with direct access to his run was open. She then opened the other door from the hallway "just a crack" to go further into the kennel. Watson came in and pushed past her into the hallway where Bragi was. They apparently locked eyes and jaws with each other. Despite her training to try and distract the dogs, Ms. Colvin knew better than to get between the fighting dogs. She tried to figure out another solution, but to no avail. Ms. Colvin called a co-worker on her cell phone who immediately came and helped to separate the dogs.

[14] In terms of her training at the time, other than distraction, Ms. Colvin had also been told to use a leash around the neck. She was not anywhere near that leash when the fight broke out.

[15] Ms. Colvin also testified that, in her experience, dogs with a history of fighting would not be allowed in range of each other.

[16] With respect to that latter practice, Ms. Font testified that without the owner's insistence that the two dogs be housed next to each other, she would have put them in separate areas of the Hotel where even if they had escaped, they would not have come into contact with each other.

[17] In terms of the disclosure by Ms. Eaton, she described talking to Ms. Font at an earlier meet and greet about these dogs' propensity to fight each other. I find that is not possible, as Ms. Font was not present or the owner of the Hotel at that time. The dogs were booked in on September 7, 2021, and as stated, Ms. Font did not take over ownership of the Hotel until two days later.

[18] In terms of what happened at check-in, it is clear some instructions were given as in the Hotel communication book, there is the following: "Hannah: Bragi/Watson: not SOCIAL, please only let them out in their runs. I will come after work to let them out in other areas. They are very human friendly - unpredictable with dogs and VERY STRONG".

[19] Ms. Eaton testified that at check-in, she gave specific instructions about the dogs' reactivity and aggression; in particular Watson and said and that neither dog was to

interact with other dogs or each other due to the fact that they would be reactive in a high-stress situation.

[20] Ms. Eaton's partner, Mr. Dubuc-Kanary indicated that when the dogs were dropped off, not much was said, as there had been an extensive conversation at the earlier meet and greet. This was not repeated on the forms and/or any written description provided at check-in by Ms. Eaton or Mr. Dubuc-Kanary.

[21] Ms. Font testified that on the morning of the check-in, she was told of the dogs' history of fighting and said she suggested that the dogs be placed in different areas of the Hotel. However, the owners were insistent the dogs be within sight of each other. Ms. Font testified to and clearly, is extremely sad about the whole episode and wished that she had gone with her "gut" either to refuse the booking, although she had agreed to honour all bookings, or to separate them as she had suggested.

[22] Ms. Eaton suggested at trial that Ms. Font could have suggested the booking be denied at check-in. This suggestion ignores the reality that Ms. Font was a brand-new owner of a business who had agreed to honour all the bookings accepted by the previous owner, and, no doubt, she also needed those bookings. Additionally, Ms. Font was aware that the plaintiff's flight was in the afternoon, so there was little wiggle room for a change of mind which would be a breach of Ms. Font's commitment and would have no doubt have incited much criticism from the plaintiff.

[23] Interestingly, Mr. Dubuc-Kanary testified that when he returned from his trip, he went to the veterinarian to pick up the injured Watson, who had been dropped off for treatment again early in the morning of October 15, 2021, because of increased

symptoms. He then went to the Hotel to speak to Ms. Font. He was instructed by the veterinarian to leave Bragi at the Hotel to allow Watson to be alone at home. After a conversation with Ms. Font, Mr. Dubuc-Kanary asked to see Bragi and took the leash with him. As he opened the door to slip into the kennel to see the dog, Bragi pushed past him and ran down the hall.

[24] It was also suggested that Mr. Dubuc-Kanary had told Ms. Font at that time that there had been fighting in the past between the two dogs, and that he had felt it necessary to show Ms. Eaton how to separate them quickly. That was never denied.

[25] In terms of the immediate care after the accident, Ms. Font called Ms. Eaton on October 9, 2021, and received permission to take Watson to the veterinarian, which she did. Ms. Font updated Ms. Eaton by text as to the information she had received from the veterinarian. Nothing was heard in response.

[26] It is Ms. Eaton's view that the Hotel failed to follow instructions and that the staff were not properly trained, thereby allowing the dogs to have contact in a situation of high stress.

Legal Issues

[27] I will now turn to the legal issues that apply in the facts of this case.

What is Negligence?

[28] There are some prerequisites to a finding of negligence. The plaintiff must prove the respondent owed a duty of care to the plaintiff. That is of course the case as Ms. Eaton entrusted Ms. Font with the care of her dogs. The extent of that duty has

been defined in similar cases involving dogs being boarded in kennels. In *Ferguson v. Birchmount Boarding Kennels Limited* (2006), 79 O.R. (3d) 681 (Ont. Sup. Ct.), at para. 13, the Court stated:

...The question to be determined is what care a prudent owner would have exercised for the safety of the article entrusted to him, under similar circumstances. But the law of bailment also imposes on the bailee an onus to prove that he took the appropriate care or that his failure to do so did not contribute to the loss; that is, the burden is on the bailee to show that the damage occurred without any neglect, default or misconduct on the part of himself or his servants. ...

[29] This is the test that has to be met.

Findings

[30] I will now turn to the facts that I find pertain to the issue of negligence.

1. Ms. Eaton and her spouse Adrian Dubuc-Kanary knew their dogs. They knew the extent of their antipathy to each other, especially in stressful situations.
2. Ms. Eaton and her spouse also knew their dogs were large and aggressive dogs who could be difficult to manage thus, the uncontested evidence that Mr. Adrian Dubuc-Kanary had indicated that he had tried to train Ms. Eaton to quickly respond as to aggression between these two dogs.
3. Upon hearing of the history of aggression between the two dogs, Ms. Font suggested they be totally separate at different non-connected

- ends of the Hotel. Despite this, Ms. Eaton and Mr. Dubuc-Kanary insisted they be separately housed but next to each other.
4. Ms. Colvin opened the inside door to Bragi's kennel to fill his water bottle. Bragi pushed past her and let to run into the hallway. The evidence reveals that she opened the door just sufficiently wide enough for her to slip in. Bragi ran past her and escaped and would not come to her despite her trying to entice him back to his kennel.
 5. Of note is that Mr. Dubuc-Kanary in going to visit Bragi also was subject to Bragi pushing past him, despite Bragi knowing him and his experience of this dog. Bragi was free to run around in the hallway just as he had with Ms. Colvin.
 6. It is not in dispute that Ms. Colvin went into Watson's kennel, leaving the door to the main area open while trying to get Watson into his kennel. She had tried to get him in, prior to going into the kennel, but had not succeeded. Watson did not come to his call as the Owner Form completed by Ms. Eaton indicated he would.
 7. The completed forms provided by Ms. Eaton make no mention of the aggression that would occur between her two dogs.
 8. Furthermore, there was nothing in the forms completed by the plaintiff which contained information about the requirement of these two dogs, who live together, be totally separated.

9. It is, however, obvious that the need for separation was mentioned at the check-in. I am confident in this because of:
1. the suggestion by Ms. Font that the dogs be placed in separate areas of the hotel which suggestion was rejected by the plaintiff because it was important the dogs be able to be close to each other (see the testimony of Mr. Dubuc-Kanary);
 2. the statement of Ms. Font of what occurred at the check-in (see document entitled: response to Courtney Eaton negligence claim); and
 3. the noted non-social documentation contained in the communication book (see Exhibit 8 of Ms. Font's reply).

Conclusion

[31] Given the facts and the law I make the following findings:

1. These were two large strong dogs with obviously an aggressive history between them;
2. There was nothing in the forms completed by the plaintiff which indicated the extent of this aggression;

3. The plaintiff was insistent that these dogs be housed next to each other and turned down Ms. Font's suggestion about where the dogs should be housed;
4. The dogs did not respond to being called, which is contrary to the information on the form in response to the question "Does your Dog come to call?";
5. Mr. Dubuc-Kanary himself, knowing his dogs as he did, could not stop his dog, Bragi, from escaping;
6. There was no mention of the dogs' ability or proclivity to push past people to escape;
7. Ms. Colvin made an error in opening the through door a crack to try and alleviate the situation that Watson was causing. However, the dog was not responding to her call to get him to come inside his kennel from the outside run; and
8. Ms. Colvin tried de-escalation techniques but clearly the dogs were not responding.

[32] I have determined that there was no "neglect, default, or misconduct" on behalf of the Hotel. This is based on the extraordinary circumstances of this case; especially the fact that the "prudent owner" of one of the dogs was unable to stop his other dog, Bragi, from escaping; the paucity of information contained on the forms completed by Ms. Eaton; and the fact that Ms. Eaton represented the dogs would respond to being

called. Rather any default, and frankly neglect, was caused by the plaintiff in the completion of the forms and the briefness of the check-in conversation as testified to by Mr. Dubuc-Kanary, and the refusal of the suggestion of Ms. Font that the dogs be housed away from each other.

[33] Thus, I do not agree that the plaintiff has met the onus to prove negligence.

The Exclusion Clause

[34] If I am, however, incorrect in my assessment of negligence, I will now turn to the issue of the application of the exclusion of liability clause. As indicated earlier, Ms. Eaton suggests that a finding of negligence would invalidate the exclusion clause, I disagree.

[35] I make this finding as a result of the decision of the Ontario Superior Court in *Arnold v. Bekkers Pet Care Inc.*, [2010] O.J. No. 2153 (ON Sm. Cl. Ct.). This is yet another dog case in which sadly, the dog who was entrusted to a kennel was injured and was put down after his release from the kennel. While negligence was found in that case, the Court found that the exclusion clause trumped the liability.

[36] The term of that exclusion clause was: “[Kennel] will not be held responsible for loss, injury or accidental escape of the pet.” [para.13]...

[37] At para. 64 of that decision the learned Judge said:

In my view, it would be within the reasonable expectation of the parties not to hold an exclusion clause used by a relatively small family-run pet kennel, which charges essentially a few dollars a day for 24-hour care including walks and feeding, to a complex standard of drafting. It seems reasonable to me that, through a relatively simple clause in a contract

such as the one here, such a kennel should be able to try to avoid potential costly exposure to prolonged litigation about the standard of care in relation to the loss of someone's pet - or if say some calamitous infection struck the kennel, over the loss of a number of pets. I would note that the charges for Riley's stay at the kennel would have been approximately \$20 per day.

[38] The learned judge found that the exclusion clause was effective to preclude liability, even where negligence had been found.

[39] It should be noted that the clause included in the Hotel's contract was much more expansive than in the case referred to above. There is no indication that Ms. Eaton was rushed into signing this contract. Indeed, she testified that she signed and forwarded the contracts on October 5, 2021, three days before the check-in.

[40] I find that the clause excluding liability is effective in this case, but since I do not find a failure of the duty of care by the Hotel, the exclusion clause is not required.

The Counterclaim

The Whitehorse Veterinary Bill

[41] Ms. Font paid the Whitehorse veterinary bill, not out of a contractual duty, but clearly as a result of feeling upset, and as she testified, she felt it was the right thing to do. Clearly this was a moral decision, but also a business decision. She was not asked or forced by the Plaintiff to pay the bill, it was her own decision to pay for reasons other than as a legal or contractual obligation. I do not find Ms. Font has proved she is owed this amount.

The Hotel Fees

[42] The fees for the Hotel are a different issue. There was a contract for Ms. Eaton to pay the Hotel fees. Indeed, even after Watson was taken home, Bragi was left in the Hotel for another day. Liability for the fees of the Hotel fall at the feet of Ms. Eaton.

Judgment

[43] The plaintiff's action is dismissed.

[44] Judgment in favour of the defendant's counterclaim is granted in respect of the fees for the Hotel in the amount of \$601.65.

[45] The defendant's counterclaim with respect to the veterinary bills of the Alpine Veterinary Medical Clinic Inc. in the amounts of \$1,252.78 and \$877.78 is dismissed.

[46] Post Judgment interest will be calculated pursuant to the provisions of the *Judicature Act*, RSY 2002, c. 128.

[47] Each side will bear their own costs of this action.

McLEOD, K.L. T.C.J.