Citation: *Ellert v. Vowk,* 2011 YKSM 2

Date: 20110415
Docket: 10–S0060
Registry: Whitehorse

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

KEITH WARREN ELLERT

Plaintiff

v.

LISA MARIE MARY VOWK

Defendant

Appearances:
Keith Warren Ellert — Appearing on own behalf
Lisa Marie Mary Vowk — Appearing on own behalf

REASONS FOR JUDGMENT

Overview

[1] The Plaintiff claims $3000.00 plus costs and interest from the Defendant for monies he states she wrongfully retained from the sale of the house they owned as tenants-in-common (the "House").

[2] The Defendant counterclaims against the Plaintiff for $3,006.70, plus interest and costs. She acknowledges that she retained $3,000.00 from the Plaintiff's share of the sale of the House. She claims, however, that she was entitled to do so in compensation for her as yet unpaid share of the boat, motor and trailer she and the Plaintiff had jointly purchased (the "Boat Package").

[3] The Plaintiff further claims the amount of $2,500.00 from the Defendant for having performed the entirety of the $5,000.00 of work done on the House which

work, he asserts, was to have been shared equally between the parties. He seeks to have the Claim amended accordingly to include a claim for compensation based upon what he terms the "sweat equity" issue. The Defendant is opposed to this amendment being made.

[4] The Plaintiff filed as Exhibit 8 at trial a document he entitled "The New Math", which outlines the calculations for his claim, resulting in a claim for $5,500.00, less the value of the interest that the Defendant may have in the Boat Package, plus $152.50 in costs. In addition he seeks compensation in an unnamed amount for two days of lost work.

[5] The parties were in a common-law relationship which ended in February, 2008. At the time of separation on February 14, 2008, the parties agreed to divide the assets they jointly owned on an equal basis. They assigned each asset a dollar value, using the current retail value of the items they had originally purchased at discount prices. An agreement was not reached, however, with respect to the Defendant being compensated for her share of the Boat Package.

[6] The Plaintiff retained possession of the Boat Package for his sole use. He filed as an Exhibit 7 at trial an estimate dated July 26, 2010 from Listers Motor Sports, where the Boat Package had originally been purchased. The value assigned to the Boat Package in this estimate was between $3,400.00 – 3,800.00.

[7] The trial took part over two days, commencing on February 7, 2011 and continuing on February 22, 2011. The only witnesses to testify at trial were the Plaintiff and the Defendant. Judgment was reserved.

Analysis

The Boat Package

[8] Firstly I will deal with the Plaintiff's claim and the Defendant's counterclaim with respect to the Boat Package, leaving aside for the moment the sweat equity issue.

[9] The evidence shows that the Defendant was asserting from the time of dissolution of the relationship and division of the assets that she should receive her share of the purchase value of the Boat Package.

[10] The Boat Package was a jointly owned asset and the Defendant was entitled to receive her equal share of it at the time that the parties divided their assets. Both parties had contributed towards the payments on the Boat Package. The Plaintiff claimed that many of the other assets had been purchased at greatly discounted sale prices as compared to the Boat Package; therefore distinguishing the appropriate assessment of their value for the purposes of division from the assessment of the Boat Package's value.

[11] Filed as Exhibit 13 in the trial was an e-mail from the Plaintiff to the Defendant dated May 13, 2008. I note that in this e-mail the Plaintiff stated that "It was also me who found the boat, and the deal we got on it was due to my friendship with Greg." It would appear from this e-mail that the Boat Package was likely also purchased at a discounted value, although in his testimony in cross-examination the Plaintiff agreed that the Boat Package was purchased for a price which accorded with its retail value at the time.

[12] Regardless, I see no basis upon which to treat this asset any differently than the other assets that were divided by the parties. The Boat Package does not appear on the evidence to have been accorded any special or differential treatment by the parties prior to their relationship ending. I do not accept the

submission of the Plaintiff that the Boat Package should be valued differently and in accordance with the estimate provided by Listers Motor Sports, over two years after the relationship ended. The Plaintiff had exclusive use of the Boat Package for these two years and this use and passage of time would likely have resulted in a diminishment of the value of the Boat Package by the time that Listers provided the estimate.

[13] While there was likely some depreciation in the value of this asset from the date of purchase to the date of separation, the other assets were not depreciated in value when the division of assets occurred. The Defendant, however, acknowledges in her e-mails to the Plaintiff that she recognizes that some allowance should be made for depreciation. She claims that the price of the Boat Package and additional accessories was in the range of $7,000.00 and seeks compensation for only $3,000.00 due to depreciation. The Boat Package appears to have been worth more than the purchase price paid for it. I do not have before me an estimate of the retail value of the Boat Package at the time of separation in February, 2008. The Plaintiff acknowledged in cross-examination that he had previously agreed that the Defendant's share of the Boat Package would be $3,000.00 less the value of his sweat equity work. I find that the Defendant is entitled to $3,000.00 for her share of the Boat Package.

Sweat Equity issue

Amending the Claim

[14] The Plaintiff seeks to amend the Claim to include a claim for compensation for sweat equity, which he asserts should be used to offset any of the Defendant's monetary interest in the Boat Package.

[15] The Plaintiff's sweat equity claim did not form a part of the Claim. In an e-mail from the Defendant to the Plaintiff, dated July 21, 2010, filed as Exhibit 3 in these proceedings, she makes reference to the Plaintiff having previously

communicated to her his position that he had "worked off" the Defendant's share of the Boat Package and, as such, was entitled to retain the Boat Package for his own use without compensating the Defendant.

[16] The first indication in the filed Court documents that the Plaintiff intended to seek compensation based upon sweat equity appears in the Plaintiff's Documents filed January 28, 2011. Included are the following three documents:

a) Renovation Agreement between R.J. Contracting and the Plaintiff and the Defendant dated December 13, 2007. This document is signed by the Plaintiff and the Defendant (Exhibit 4 at trial);

b) Handwritten RJ Contracting document crediting the Plaintiff and the Defendant for $5,000.00 for work to be performed by them. This document is unsigned and undated (Exhibit 5 at trial); and

c) Typed and annotated document entitled "Boxwood reno list to complete". This document is also unsigned and undated (Exhibit 6 at trial).

[17] I also note that at the pre-trial conference held October 29, 2010, the Plaintiff indicated that he intended to call Randy Wiebe (R.J. Contracting) to provide testimony regarding the sweat equity issue. The Defendant indicated at the time that her documents would include e-mails and other documents relating to this issue. Mr. Wiebe, although apparently writing a letter on February 6, 2011, did not testify at the trial.

[18] An amendment of this nature, which includes a substantially different claim than that originally set out, cannot be allowed on the date the trial commences if it catches the Defendant by surprise and could not have been contemplated by her, thus causing her to suffer an unfair prejudice. That is not the case here. It was apparent from at least October 29, 2010 that the Plaintiff was going to raise this issue. The Defendant contemplated her response to it.

[19] The correct procedure would have been for the Plaintiff to have filed an Amended Claim in advance of the trial date, thus providing the Defendant the

opportunity to file an Amended Reply. I find, however, in the circumstances of this case, that allowing the late amendment is not prejudicial to the Defendant, given her earlier knowledge of the Plaintiff's intent to raise this issue. I will allow the amendment such that the Plaintiff can pursue his claim for compensation on the basis of sweat equity.

Merits of the Claim for Sweat Equity

[20] The Renovation Agreement filed as Exhibit 4 makes reference to work that the Plaintiff and the Defendant were to complete as part of the Contract with RJ Contracting. This work included:

(a) completing all kitchen cabinet removal and painting;

(b) removing existing window trims, spray foaming the windows and installing new trims; and

(c) all of the main bathroom de-construction and painting.

[21] Exhibits 5, referred to by the Plaintiff as the "Sweat Equity List" contains the following list:

Keith + Lisa

Remove existing front deck
Gut kitchen down to drywall
Gut bathroom down to studs
Remove existing interior casing on all window[s] (A + B)
*1 day labour to help install new windows
Spray foam all new windows (A + B)
Install new in[t]erior casings all windows (A + B)
Assemble new kit[chen] cabinets

Keith only

_____

$5,000.00
To be applied against elec[trical] work ie) meter/split service

[22] The Plaintiff testified that the Defendant was present when the Sweat Equity List was prepared. The Defendant denies any knowledge of the preparation and existence of this list.

[23] Exhibit 6, the “Boxwood reno list to complete”, is a list prepared by the Plaintiff that contains coloured highlighting indicating who did what with respect to work on the House. The Defendant was aware of the existence of this list and does not dispute its accuracy. According to this document the Plaintiff removed the window casings and measured the windows, he assembled the cabinets, he measured and installed the baseboard casing, he deconstructed the kitchen and the bathroom, and he put 12 hours labour into the front deck. I infer from the evidence that the deck work was related to removing the deck.

[24] Exhibit 6 also details certain other tasks completed by the Plaintiff, as well as a number of tasks completed by the Defendant, which coincides with the testimony of both the Plaintiff and the Defendant that, outside of the Sweat Equity List, each party contributed considerably to the renovation work. The Plaintiff agreed in cross-examination that there were many lists exchanged between the Defendant and himself. It appears from the evidence that much of the renovation work occurred after the Defendant moved out of the House, while the Plaintiff continued to reside there. As a result, some effort related to coordination of schedules was required in order for the Defendant to come to the House and work at convenient times.

[25] The Plaintiff claims that the work on the Sweat Equity List was to have been shared equally between the Defendant and himself. In cross-examination he testified that the use of the phrase “Keith + Lisa” implied that the work would be shared equally between them. He asserts, as shown by Exhibit 6, that he did all of the work on the Sweat Equity List, and that therefore he should be credited the $2,500.00 worth of work that the Defendant was obligated to, but did not, do.

[26] Filed by the Plaintiff as Exhibit 9 was a letter from Randy Wiebe of RJ Contracting and Consulting dated February 6, 2011. In this letter Mr. Wiebe confirms that:

> ..there was a spoken and anecdotal agreement made between RJ Contracting and Keith Ellert and Lisa Vowk regarding owner-equity work that would transpire on the renovation at 30 Boxwood, Whitehorse, YT (see attached documents). The work that the owners would be responsible for is as follows:
>
> - remove and haul away existing front deck
> - gut kitchen down to drywall
> - gut bathroom down to studs
> - remove existing interior casing on all windows (suite and main)
> - one day labour to help install new windows
> - spray foam all windows (suite and main)
> - install new interior casing on all windows (suite and main)
> - assemble new kitchen cabinets
>
> I can also confirm that I observed that the above work had been performed as per agreement.

[27] This letter is remarkably similar to the Sweat Equity List. I note that several items on both these lists are not included in the Renovation Agreement filed as Exhibit 4, while others are. In the absence of Mr. Wiebe and testimony from him in this regard, I cannot determine the reason for the similarity between these two documents.

[28] The Plaintiff, in an e-mail to the Defendant dated May 13, 2008 and entered as Exhibit 13, placed a value for his work on the House for which he believes he should be compensated by the Defendant as being $3,080.00. This figure represented $1,750.00 for the deck removal and gutting of the kitchen and bath, as well as $490.00 for 24.5 hours work preparing the kitchen walls for painting, installing and foaming the windows and building the cabinets. He also requested $800.00 for taking a week off work and $40.00 for packing the Defendant's kitchen property.

[29] The Defendant, in a document she prepared for trial purposes and which was filed as Exhibit 12, detailed her view that the Plaintiff's work on the renovations took a total of 38.5 hours. At the Plaintiff's rate of $20.00 per hour, this amounts to $770.00. I note that the 12 hours she assigned for the deck/kitchen would appear to be based upon the annotation on Exhibit 6 referring to 12 hours for the deck. This fails to account for the gutting of the kitchen and the bathroom, which, using the Plaintiff's $20.00 an hour figure and total of $1,750.00, apparently took him 75.5 hours in addition to the 12 hours.

[30] The Defendant assesses her own contribution to the renovations of the House as involving 44 hours, with a monetary value of $880.00. She asserts that she took four days off work to work on these renovations as compared to the Plaintiff's five days.

[31] The Defendant, in the July 21, 2010 e-mail marked as Exhibit 3, stated that the Plaintiff "working off" the Boat Package was never discussed or agreed to by either party. In cross-examination, the Plaintiff acknowledged that he had stated in an e-mail to the Defendant dated June 27, 2008 that he never intended on "working off the boat". This latter e-mail was not made an Exhibit at trial. The Plaintiff further agreed in cross-examination that there was no oral or written agreement between the parties to this effect.

[32] The Defendant testified that she was doing her share of the renovations based upon the Renovation Agreement (Exhibit 4) and the Boxwood reno list to complete (Exhibit 6), not on the basis of the Sweat Equity List (Exhibit 5).

Findings on the Sweat Equity Issue

[33] What is clear is that there was a signed contract between RJ Contracting and the Plaintiff and the Defendant to have renovation work completed on the House. This work involved a contribution in labour and materials from the

Plaintiff and the Defendant. It is also clear that the Plaintiff and the Defendant each made significant contributions to these renovations.

[34] There was no oral or written agreement between the Plaintiff and the Defendant that contemplated a monetary contribution from one to the other should one of the parties complete more of the work than the other. It is further clear that there was much work done by the parties that was not included in the Sweat Equity List or the Renovation Agreement. I cannot find on the evidence before me that there was an inequality in either the Plaintiff's or the Defendant's contribution to the renovation work that would justify one party being compensated above the other.

[35] I find that the Defendant did not agree at any time that she would do an equal share of the work set out in the Sweat Equity List or otherwise compensate the Plaintiff for failing to do so. This document is not a contract between the parties. It is also unsigned and incomplete when viewed in consideration of the totality of renovations completed. I have my doubts that this document was even brought to the attention of the Defendant.

[36] Upon consideration of all the evidence, I decline to award the Plaintiff any compensation for his claim for compensation on the basis of sweat equity contribution.

Conclusion

[37] The Plaintiff is awarded $3,000.00 for her interest in the Boat Package. She has already retained this amount from the sale of the House. The Plaintiff is

denied his claim for compensation on the basis of sweat equity. I decline to award costs to either party or interest to the Defendant. As such, there is no requirement that any further monies be exchanged between the parties.

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COZENS C.J.T.C.