

Citation: *17154 Yukon Inc. o/a Centennial Motors v. Deano's Electric Service et al.*, 2014 YKSM 1

Date: 20140129
Docket: 13-S0015
Registry: Whitehorse

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

17154 YUKON INC. O/A CENTENNIAL MOTORS

Plaintiff

v.

DEANO'S ELECTRIC SERVICE
DEAN OMILON

Defendants

Appearances:
Mark Heynen
Dean Omilon

Appearing on behalf of the Plaintiff
Appearing on behalf of the Defendants

REASONS FOR JUDGMENT

[1] The Plaintiff operates a car wash business in the City of Whitehorse. The Plaintiff claims for damages against the Defendant(s) as a result of an incident in November 2011 in which a vehicle operated by the Defendant, Dean Omilon, struck an overhead door when driving into one of the car wash bays. The Plaintiff's claim includes \$1,486.55 based on an invoice from Yukon Door and an additional \$346.50 for three hours labour undertaken by staff to make the door serviceable until proper repairs could be made. Costs and interest are also claimed.

[2] Mr. Omilon, on behalf of himself and Deano's Electric Service, the other

named Defendant, does not dispute the fact that the vehicle struck the door, but claims that an employee of the Plaintiff had directed him to proceed into the bay and, therefore, the Plaintiff bears at least some of the responsibility for the damage. Mr. Omilon indicated that he would be prepared to pay half of the costs of repair of the damage to the door, but not, however, for the labour claimed by the Plaintiff. The Plaintiff denies having any responsibility.

[3] Emmanuel Mabilog provided the only eyewitness evidence for the Plaintiff as to what occurred when the truck struck the door. Mr. Mabilog was employed at the car wash by the Plaintiff at the time, although he no longer works for the Plaintiff.

[4] Referring to four diagrams that had been prepared by car wash Manager Mark Heynen, (the "Diagrams"), Mr. Mabilog testified that there were 10 customers in vehicles at the car wash at the time; four were in Bays 1 – 4 and six were waiting outside. He stated that the vehicles outside were in two lanes.

[5] Mr. Mabilog stated that he let one vehicle out of Bay 4, asked the vehicle in Bay 3 to move into Bay 4 and let the vehicle waiting outside Bay 3 move into Bay 4. As he was closing the door to Bay 3, Mr. Omilon moved his vehicle from the line outside Bays 1 and 2 on an angle, cutting off another vehicle and attempting to proceed into Bay 3 as the door was closing, striking the door and damaging it. Mr. Mabilog denies having waved Mr. Omilon to drive his vehicle into Bay 3. He states that if a truck was in Bay 3 it would be approximately two feet from the door. He did not, however, testify as to what type of vehicle was in

Bay 3 when Mr. Omilon attempted to enter the Bay.

[6] Mr. Mabilog stated that he prepared handwritten notes and a diagram (the "Handwritten Notes") that same day that described what had occurred. He testified that the Diagrams were also prepared the same day in the office.

[7] Mr. Omilon testified that when the vehicle in Bay 3 proceeded into Bay 4, he was directed by Mr. Mabilog to move his vehicle into Bay 3, which was empty at the time.

[8] Mr. Omilon stated that he could see clearly into Bay 3 once the door was opened. His roof ladders, which are reset approximately six to seven feet behind the front of the van he was driving, struck the door. He states that he was approximately five feet into Bay 3 when the ladders struck the door. Mr. Omilon says that he would not have been able to proceed that far into Bay 3 if there had been another vehicle there without striking the vehicle. He also says that he did not proceed in front of another waiting vehicle to enter Bay 3. He stated that he believed that, as was his usual practice at the car wash, he was parked in the middle of Bays 1 and 3 in order to proceed into whichever bay was first available.

[9] Mr. Omilon testified that Mr. Mabilog was distressed at the time of the incident and appeared afraid that he would lose his job. He stated that he told Mr. Mabilog to relax. Mr. Omilon states that he offered to pay half of the damage and to contribute electrical work for the other half. This offer was rejected by the Plaintiff and Mr. Omilon testified that, based on information he received from the

RCMP and his insurance company, he did not believe the incident was his fault. Nonetheless, Mr. Omilon remains willing to pay half of the invoiced amount of \$1,486.55, but no portion of labour and interest.

[10] Mr. Heynen testified that he was present in his office at the car wash at the time of the incident. He testified that the visibility was poor in Bay 3 at the time of the incident, due to the high humidity, and that it would be hard for Mr. Omilon to see that another vehicle was in Bay 3 when proceeding into it. Mr. Heynen and his wife prepared the Diagrams after he had discussed the incident with Mr. Mabilog. He testified that he utilized the Handwritten Notes prepared by Mr. Mabilog at the time of the incident in order to make the Diagrams. Mr. Heynen stated that the Handwritten Notes were prepared by Mr. Mabilog either on the day of or within days of the incident, but the Diagrams were prepared only after the pre-trial conference which, I note from the file, was held on October 11, 2013.

[11] Mr. Heynen claimed that another witness had told him that Mr. Omilon was on his cell phone at the time he drove his vehicle into the Bay 3 door. I note that this witness was not present at trial to provide this evidence nor had this witness provided an affidavit or statement for use at trial. This is hearsay evidence and, in particular, unsworn hearsay evidence. Although hearsay evidence can be admissible at a trial in Small Claims Court, any such evidence must be treated carefully. I also note that Mr. Omilon did not testify at trial that he was on his cell phone at the time of the incident, nor was he asked in cross-

examination whether he was on his cell phone. As such, I am not prepared to attribute any weight to this evidence.

[12] Mr. Heynen testified that Mr. Omilon originally stated that he would pay for the damage, but then subsequently offered to pay only half and contribute electrical work for the other half.

[13] I noted from a comparison of the Handwritten Notes and the Diagrams, that there was an additional vehicle in the Diagrams in front of Bay 3 that was not present in the Handwritten Notes. This is the vehicle that the Plaintiff claims Mr. Omilon cut in front of in order to attempt to enter Bay 3. The explanation provided by Mr. Heynen for this discrepancy was, as I understand it, that from his discussions with Mr. Mabilog he understood there to have been one there, so he added it to the Diagrams.

[14] Mr. Mabilog, who was recalled to provide further testimony after Mr. Heynen had introduced the Handwritten Notes in his testimony, stated that he "just wrote the truth" when he prepared the Handwritten Notes. Although Mr. Mabilog did not testify that he had inadvertently failed to note the additional vehicle described in the diagrams when he prepared the Handwritten Notes, he testified that in fact "Vehicle 5" was waiting outside Bay 3 when Mr. Omilon attempted to cross over and enter Bay 3. He placed Vehicle 5 approximately 1.5 metres from the door to Bay 3. This testimony does not, however, accord with the Handwritten Notes which indicate Vehicle 5 was inside Bay 3 when Mr. Omilon attempted to enter it. It does not accord with logic, at least with respect

to the 1.5 metres distance described, as there would simply not have been enough room for Mr. Omilon's vehicle to enter the Bay without also striking this vehicle as well. I am prepared, however, to keep in mind that Mr. Mabilog, whose first language does not appear to be English, may not have properly understood the question asked in answering as he did.

[15] The Plaintiff bears the burden of proving his case on a balance of probabilities. It is possible that there was a vehicle in Bay 3, as Mr. Mabilog testified, and that Mr. Omilon tried to enter the Bay as the door was closing, unaware that a vehicle was present.

[16] It is also possible that Mr. Omilon believed, perhaps by the actions of Mr. Mabilog, that Bay 3 was vacant and he tried to enter, without either of them noticing that the door was too low for the ladders to clear.

[17] I note that Mr. Mabilog, being no longer employed by the Plaintiff, had no apparent motive to fabricate his evidence at trial, such as to protect his employment. I generally found him to be a credible witness who was attempting to be honest.

[18] I also, however, found Mr. Omilon to be a generally credible witness.

[19] Mr. Heynen's evidence was less relevant in that it was not eyewitness evidence and there is no indication that he went out and surveyed the scene, or spoke to other witnesses in a manner that resulted in him bringing credible and reliable evidence before the Court that would assist the Court in resolving the

issue. Mr. Heynen's evidence essentially was structured upon that proffered by Mr. Mabilog.

[20] I find, based upon the inconsistent or contradictory evidence of the Plaintiff, the evidence of Mr. Omilon, and logic based upon my assessment of the entirety of the evidence, that Mr. Omilon did not cut in front of another vehicle in an attempt to enter Bay 3. It is more logical and more consistent with the evidence that there was no other vehicle in line before Mr. Omilon when he attempted to enter Bay 3.

[21] I find that the uncontested and credible evidence of Mr. Omilon with respect to the six to seven foot setback of the ladders on his van, makes it more likely that there was not another vehicle in Bay 3 when the ladders struck the door. That does not mean I am entirely positive that this was in fact what occurred, but it certainly bears upon the ability of the Plaintiff to establish its case to the requisite standard.

[22] In all the circumstances, I find that the Plaintiff has not established its claim to the extent that the Defendants should bear the entirety of the liability for the damage caused to the door. As such, I am not prepared to find for the Plaintiff for the full amount claimed.

[23] In addition, there exists the potential issue of any partial liability on the part of the Defendants, even on the Defendants' best case, on the basis that the Defendants nonetheless had an obligation to ensure that it was safe to proceed

into Bay 3, notwithstanding any direction by Mr. Mabilog. That, however, is not an issue that I am required to resolve, as I find it appropriate and am prepared to accept Mr. Omilon's voluntary offer to pay half of the \$1,486.55 for the damage caused to the door as having addressed this potential issue.

[24] I recognize that there was some inevitable disruption to the Plaintiff's business due to the damage to the door. I am not satisfied that the evidence has established to the requisite degree that \$346.50 is the amount that properly represents any such business disruption. Therefore, in addition to the \$743.27 that the Defendants have agreed to pay to the Plaintiff, I will order that the Defendants pay the Plaintiff an additional \$56.73, thus resulting in an order that the Defendants pay to the Plaintiff a total amount of \$800.00 for damages.

[25] There is no basis in law for interest to be awarded at the 2% rate sought by the Plaintiff. I further decline to order any pre-judgment interest for the period of time from the date of the incident until the date of judgment.

[26] In the circumstances I also decline to make any order as to costs.

[27] I will award the Plaintiff post-judgment interest pursuant to the *Judicature Act*, R.S.Y. 2002, c. 128, commencing March 1, 2014, on any monies outstanding from the \$800.00 that I order the Defendants to pay to the Plaintiff.

COZENS C.J.T.C.