

Citation: *Dornian v. Kwiat*, 2007 YKSM 1

Date: 20070212
Docket: T.C. 06-S0015
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON

Before: His Honour Chief Judge Faulkner

DONNA DORNIAN

Plaintiff

v.

LARRY KWIAT

Defendant

Appearances:
Donna Dornian
Larry Kwiat

Appearing on her own behalf
Appearing on his own behalf

REASONS FOR JUDGMENT

[1] FAULKNER C.J.T.C. (Oral): In this case, Donna Dornian, who is the executor of the estate of Joseph Searight, is suing Larry Kwiat. It is common ground that Mr. Searight stayed at Mr. Kwiat's house for periods of time following his separation from Ms. Dornian and that he left, that is Mr. Searight, left a number of -- actually quite a quantity of personal possessions in Mr. Kwiat's care. Ms. Dornian claims that a number of these items have gone missing. Mr. Kwiat claims that the items that he had, he has given up to the estate other than certain items which he said were given to him by the deceased.

[2] This is a situation where the matter can be decided by looking at who bears the onus. The onus of proving that Mr. Kwiat has goods belonging to the estate is upon the

plaintiff. In my view, she has not been able to discharge that onus. She has a list of what she knew to be Mr. Searight's possessions. The evidence that he still had these items at the time of his death or that they ended up in Mr. Kwiat's house is vague hearsay at best. So there is, in my view, not a preponderance of evidence on which I could find that Mr. Kwiat has the items that Ms. Dornian claims he has, with certain exceptions.

[3] There are a number of items that Mr. Kwiat admittedly has, because he says that Mr. Searight, now deceased, gave those items to him.

[4] In this case, the onus is quite different. The onus, where someone claims that items which would otherwise form part of an estate and go to the estate's beneficiaries are not part of the estate, because they were gifted by the deceased in his lifetime, is upon the person who claims that the gift was made. Now, it is clear that although they may have had their differences, that Mr. Kwiat and the deceased were friends and that Mr. Kwiat allowed the deceased to stay at his residence from time to time. I think it is reasonable to accept that some items may have been given by the deceased to Mr. Kwiat on account of the favours that had been extended by Mr. Kwiat, and that would certainly cover items like books and the stereo and so on.

[5] However, there are, in my view, a couple of items where the status of Mr. Kwiat's claim does not meet the onus upon him, and I refer to the outboard motor. An outboard motor normally on being given to another person, even as a gift, would be accompanied by a bill of sale or some documentary evidence to that effect. Certainly, in the case of the motorcycle, a gift would clearly include documentary evidence because such is

required in order to transfer that item on the records of the Motor Vehicles Branch. With respect to the motor, Mr. Kwiat says he never had any such evidence, and with respect to the motorcycle, Mr. Kwiat says he had it but cannot find it, this in spite of the fact that this claim has been going on since May of last year.

[6] Accordingly, with respect to the motor and the motorcycle, I find that Mr. Kwiat has not met the onus on him of proving that these items were given to him by Mr. Searight.

[7] With respect to the value of those items, the executor has claimed a value of some \$1700 for the motor. That strikes me as high given the age of the motor. Outboard motors, chainsaws, skidoos and all these kinds of things plummet inordinately in value the minute you take them out of a store. I accept that the original price of the motor may have been in the order of \$1900. I fix its present value at no more than a thousand dollars. With respect to the motorcycle, I will accept the evidence that it has a present value somewhere in the area of \$1800.

[8] So at the end of the day, the judgment of the court is that the bulk of the plaintiff's claim is dismissed. However, the estate is entitled to the return of the boat motor and the motorcycle. Failing return of those items within a period of 14 days, the plaintiff will be at liberty to enter judgment for the amount of \$2800, which I find to be the present value of those two items.

[9] I want to make it clear that I am not making any finding here that anybody is being honest, dishonest or otherwise, but this is a court of law and there is an onus on the parties which they have to meet. As I say, with respect to those items where the

plaintiff bore the onus, she has been unable to meet that. With respect to the items where the defendant bore the onus, he has, in large part, been unable to meet that onus.

[10] So the bottom line is you will have to return those two items to the estate. If you do not, they will have judgment against you for \$2800.

[11] In view of the divided success, each party will bear their own costs.

[12] You had a question?

[13] THE DEFENDANT: The boat motor is easily returned. It's easy to get to. The motorcycle is in the back yard behind some snow and what have you, and it would be costly to remove it at this point in time. Who would bear the costs of the return of these items?

[14] THE COURT: You will. I have directed you return the items. If you have to do some shovelling to get at it, well, you are going to have to do that. I am prepared to listen to reason if you think 21 days is better than 14, but --

[15] THE DEFENDANT: I don't think the snow is going to go within 21 days, Your Honour.

[16] THE COURT: But I am not prepared to wait until spring, and I do not think the plaintiff should either.

[17] THE DEFENDANT: My question is, is more in regarding if I do bear the cost for removal of the equipment and return to Ms. Dornian, can I then sue for those costs?

[18] THE COURT: I am sorry?

[19] THE DEFENDANT: Can I then sue for those costs?

[20] THE COURT: No. If you are required to bear them, why would you be able to sue somebody to recover them?

[21] THE DEFENDANT: I just find it odd --

[22] THE COURT: You can only sue to recover costs that were not legally your responsibility in the first place.

[23] THE DEFENDANT: I see. Thank you.

[24] THE COURT: All right. Given what has happened in the past, we need to talk about where are you going to make these items available to her. Do you want her to pick them up at your place or do you want to deliver them to some neutral location? What do you want to do?

[25] THE PLAINTIFF: I can probably get people to help me take them away, but I do not want to be shovelling snow.

[26] DAVID DORNIAN: Excuse me, as executor, may I offer a suggestion?

[27] THE COURT: Sure.

[28] DAVID DORNIAN: I would suggest that he deliver them to Graham Henderson, who is a third party in this procedure. He's a doctor who lives just east of Whitehorse and he has a rural place.

[29] THE PLAINTIFF: Graham Henderson was the one who helped us with the rifles. Yes. I don't know; it's up to you.

[30] DAVID DORNIAN: Just a suggestion.

[31] THE COURT: Well, it is not one that finds favour with me.

[32] DAVID DORNIAN: Thank you, sir.

[33] THE COURT: I do not know what involvement Mr. Henderson has had and whether he could be considered to be a neutral party or not. Do you have any problem with just delivering them at your house?

[34] THE DEFENDANT: Your Honour, as far as I am concerned, I will see them at the front gate of my property and she can pick them up there.

[35] THE COURT: All right, and you will tell her when they will be available to be picked up?

[36] THE DEFENDANT: Yes.

[37] THE COURT: Again, you want 14 days or 21 days?

[38] THE DEFENDANT: Twenty-one, please.

[39] THE COURT: All right, but just be certain that if you have not delivered the goods to them and got their receipt for them within 21 days, they can enter judgment for that amount.

[40] THE DEFENDANT: Yes.

FAULKNER C.J.T.C.