

Federal Court



Cour fédérale

Date: 20170301

Docket: T-2039-15

Citation: 2017 FC 250

Ottawa, Ontario, March 1, 2017

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MORAY CHANNEL ENTERPRISES LTD.

Plaintiff

and

**MacDONALD B. GORDON,
THE SHIP “GORDON VESSEL”,
And the owners and all others interested in her and her cargo**

Defendants

JUDGMENT AND REASONS

I. Introduction

[1] The Plaintiff brings this motion for a summary trial pursuant to Rule 216 of the *Federal Court Rules*, SCR/98-106 seeking an order awarding judgment and damages in the total amount

of \$17,025.10 and costs on a solicitor-client basis in the amount of \$18,142.10 arising out of the failure to pay charges pursuant to the Float Home Moorage Agreement [the moorage agreement] with the MacDonald Gordon [the Defendant] and against the Defendant vessel. In addition, the Plaintiff seeks relief in the form of summary judgment dismissing the Defendant's counterclaim pursuant to Rule 215; or alternatively, an order that the Defendant's counterclaim be struck out pursuant to Rule 221.

[2] The individual Defendant [the Defendant], who is not represented, argues that the Plaintiff's claims are based upon false allegations, misrepresentations, fraud, gross negligence and malice. These allegations, along with others, form the basis of his counterclaim. The Defendant also appears to contend that the Court lacks jurisdiction, because the matter falls under provincial jurisdiction, and in particular, is better addressed as a matter of British Columbia landlord and tenant law, in respect of which he has unsuccessfully sought redress before the Residential Tenancy Board [the RTB].

II. Background

A. *The Parties*

[3] The Plaintiff owns and operates the Richmond Marina [the Marina]. On September 14, 1998, the Plaintiff entered into the moorage agreement with the Defendant regarding his float home, which is a registered vessel. The agreement provides that the Plaintiff will provide moorage and related services, principally hydro-costs, in exchange for monthly fees. The

agreement also provides that the Defendant will comply with the rules and regulations [the Rules] of the Marina, which are subject to amendment from time to time.

[4] Since 2009, there were repeated instances where the Defendant failed to pay the monthly moorage and other fees in a timely fashion. As a result, the Plaintiff charged the Defendant with monetary penalties said to be in accordance with the Rules. The Plaintiff further alleges that by his untoward conduct after he stopped paying his service charges, the Defendant breached the Marina's Rules. The Plaintiff's most recent demand letter, sent to the Defendant, is dated January 21, 2015 [the January 21, 2015 letter].

[5] The Plaintiff claims that at no time since the January 21, 2015 letter have the arrears been fully paid and that, moreover, the Defendant has not made any payment since June 30, 2015. In reply, the Defendant claims that false representations were made in respect to these charges, commencing with the January 21, 2015 letter, which was accompanied by a spreadsheet mis-describing the history of the charges and payments.

[6] In July 2015, the Plaintiff hired a bailiff to recover monies owed by the Defendant. These efforts for the most part were unsuccessful. The Plaintiff claims costs incurred for the bailiff's expenses in the amount of \$3,998.01.

[7] The Plaintiff filed its Statement of Claim in Federal Court on December 3, 2015. The Defendant (along with the ship "Gordon Vessel"), filed a Statement of Defence and Counterclaim on February 8, 2016. On March 3, 2016, Justice Phelan granted the Plaintiff

injunctive relief against the Defendant, providing that a Marshal be appointed to take possession of the Defendant vessel. The Court further ordered the Defendant to remove the ship, and failing to do so, granting the Marshal the power to sell the Defendant vessel and pay sale proceeds into court.

[8] The Defendant was responsible for the fees under the moorage agreement until the Defendant vessel was arrested and the Marshal took possession on March 9, 2016. Since March 9, 2016, the Marshal became responsible for the cost of the moorage. These costs are not at issue in this matter.

[9] The Defendant having made representations that he would remove the vessel pursuant to the Court order, the Plaintiff undertook work for this purpose at a cost of \$2,298.00. The Defendant failed to remove the vessel which was thereafter sold *in situ*. These costs are also claimed by the Plaintiff.

[10] The Marshal entered into an agreement for purchase and sale, dated August 11, 2016 for a price of \$165,000.00 with inspection subject clause. Inspection revealed deficiencies which effectively cancelled the planned sale. The Marshal entered into a new contract of purchase and sale with the same purchaser dated August 23, 2016 with a purchase price of \$145,000.00. The sale was completed on September 1, 2016 with \$132,172.26 paid into this Court after closing costs.

[11] It is intended that the amounts found owing to the Plaintiff will be paid out of the monies in Court in accordance with the usual priority rules.

III. Issues

[12] The Plaintiff submits three issues to be determined:

1. Should the Plaintiff be granted judgment totaling \$17,025.10 which includes \$10,729.08 in moorage arrears, \$3,998.01 in enforcement expenses; and \$2,298.01 for the cost of preparing and removing the Defendant vessel pursuant to the March 3, 2016 Order?
2. Should the Defendant's counterclaim be dismissed upon summary judgment or alternatively the Defendant's Statement of Counterclaim be struck in whole or in part?
3. If the Plaintiff successfully obtains judgment against the Defendant, should the Plaintiff be entitled to costs on a solicitor-and-client basis, or alternatively elevated costs?

[13] The Defendant raises the issue of the Court's jurisdiction to hear this matter.

IV. Submissions of the parties

A. *Jurisdiction*

[14] In his written submissions, the Defendant appears to raise, as a constitutional jurisdictional issue, that the Court lacks competence in this matter as its pith and substance relates to property rights, in particular landlord and tenant rights within the jurisdiction of the Province of British Columbia. The Defendant unsuccessfully sought redress before the RTB and is seeking judicial review of its most recent decision.

[15] This issue is not pleaded in the Statement of Defence and Counterclaim. The Plaintiff did not therefore plead or respond to the issue. It does not appear that the constitutionality of these proceedings was raised before Mr. Justice Phelan. His injunction decision was not appealed, nor any motion made to amend the Counterclaim to plead the issue. These proceedings are with the view in part to enforce the order of the Court in order to permit the Plaintiff to proceed with the sale of the vessel. The Court concludes that the Court's jurisdiction is not properly an issue in this matter, and rejects the Defendant's arguments, in effect seeking a stay of these proceedings pending the determination of his judicial review application in the Courts of British Columbia.

B. *Judgment on Debt and Related Costs*

[16] The Plaintiff submits that the Defendant breached the valid month-to-month contract for moorage charges, which includes the related hydro services. Despite the Defendant vessel's continuous moorage at the Marina and use of related services up to the point of the bailiff taking

possession of the vessel in July 2015, the Defendant failed to pay these charges in the total amount of \$10,729.08.

[17] The Defendant submits that the Plaintiff grossly and intentionally misrepresented these charges and by this conduct precipitated the unnecessary intercession of the bailiff in July 2015 and, eventually, the injunction and sale of his vessel.

[18] In defence of the Defendant's conduct, the Court finds that misrepresentations concerning the charges and payments were made to the Defendant by the Plaintiff's Marina Manager, Ian Vance, [the Manager] who was responsible for bookkeeping and managing accounts. However, the Court concludes, based on the analysis that follows, that these misrepresentations, do not justify the Defendant's refusal to pay on-going moorage and related fees commencing May 2015, which ultimately precipitated the need to retain the bailiff and commence the sale process.

[19] The Court's analysis is primarily based upon the Plaintiff's documents. In particular, the Court relies upon a comparison of the final spreadsheet compiled by the Plaintiff outlining all charges and payments with a running account balance from December 31, 2011 to March 7, 2016 [the 2016 spreadsheet] with other spreadsheets provided to the Defendant from time to time commencing January 2015. There are significant differences in some of the amounts found on earlier spreadsheets.

(1) The Plaintiff's Demand Letter of January 21, 2015

[20] By the January 21, 2015 letter, the Manager threatened to retain a bailiff and terminate the agreement if \$4,137.69 was not paid on February 1, 2015. The letter was accompanied by a spreadsheet of charges and payments for the period of December 31, 2011 to February 1, 2015.

[21] The Defendant claims that this was the first time that he had received information showing a complete listing of charges and payments for a given time period. The Court notes that in his affidavit the Plaintiff's manager deposed that he "generally prepared and provided the Defendant with an invoice each month". However, no invoices were introduced by the Plaintiff into the evidence, apart from two later invoices dated May 1, 2015 for moorage and hydro costs. In light of the over-claiming in the January demand letter, the Court finds that the Plaintiff has not established that a regular monthly billing procedure for charges incurred using invoices was its practice, as this appears to have occurred commencing only in May 2015.

[22] The January 2015 spreadsheet indicated that the Defendant's outstanding balance for moorage and hydro costs as of January 1, 2015 was \$3372.69, with a projected deficit of \$4139.69 if the February moorage charge was not made. In contrast to this, the Plaintiff's 2016 spreadsheet showed a balance due as of January 1, 2015 (the Defendant being late in January's payment) of \$1737.90, representing an overclaim by the Manager of \$1634.79 owing.

[23] An amount of \$1292 of the overcharge differential on the Plaintiff's January 2015 spreadsheet appears to be accounted for by several late payment charges of \$15 a day dating

back to May 2014. The Rules provided for a late payment fee of \$15 on the first day and thereafter at \$10 a day. Demand letters of March 11, 2009 and November 10, 2011 indicate that the \$10 a day charge was being applied. It is not indicated whether the charge on the 2009 letter was waived, but it was (\$700) on the 2011 statement. These letters demonstrate that the Defendant had a long history of late payments of charges. That of 2009 also recounts an incident where complaints were being lodged for accumulation of dog droppings on the Defendant's roof, indicative of a failure to follow basic community rules. I find from this and other evidence on the record, that the Defendant was far from the model tenant and was fairly treated by the Plaintiff given his lapses.

[24] On the other hand, the Plaintiff's documents include a notice to clients indicating an increase would be made to \$15 a day effective February 1, 2015. The demand letter of January 21, 2015 included late fee charges at \$15 a day back to May 2014. The Plaintiff has now reduced these charges to those commencing May 2015, the date on which invoices were provided indicating that such charges would be levied. The Court concludes that the increased late payment charges in the January 2015 spreadsheet were improperly applied, but only by the amount of \$5 a day.

[25] The Defendant responded to the demand letter by making a payment of \$1530, bringing his account balance as of January 27 down to \$207.90 according to the 2016 spreadsheet. However, with the late payment charges and the subsequent February 1, 2016 missed payment, the Defendant's balance on the 2016 spreadsheet was \$1182.58. This still represents a substantial difference from the \$4137.69 being demanded by the Manager effective that date.

(2) The Plaintiff's Demand Letter of April 8, 2015

[26] A further demand letter was issued by the Manager on April 8, 2015 to which was attached a new spreadsheet that indicated the Defendant's arrears were \$4049.16 as of April 1, 2015. This amount included past and additional late payment charges of \$15 a day totaling altogether \$2071.75. The demand letter indicated that if arrears were not paid by April 13, 2015 the Defendant's hydro would be disconnected and he would be evicted effective May 7, 2015. Again, in contrast to the April 2015 spreadsheet, the 2016 spreadsheet indicated that the arrears effective April 1 were for \$2121.44, of which more than \$1000 were late fees, again charged at \$15 per day.

[27] The Defendant met with the Manager on April 9, 2015. The Plaintiff explained that he was only paying the moorage fee, because he had no idea what the hydro charges were. He complained to the Manager that he was not getting monthly billing, as was previously the case, and would pay the hydro charges once presented with a detailed accounting. Although acknowledging that hydro payments were in arrears, he insisted that it was unfair to charge him a late payment fee when he was not advised of the amounts owing. He also raised the unfairness of charging a late payment fee prior to February 2015 given the notice issued that they would be charged effective that date. The Manager acknowledged that he was "very aggressive" and that the Defendant should "forget the dollars and cents", as the purpose was to have the Defendant respond to the arrears issue.

[28] The Plaintiff deposed that later the same day the manager provided him with a new spreadsheet indicating an arrears total of \$1470 as of April 8, 2015. The spreadsheet contained no late payment charges.

(3) The Plaintiff's April 17, 2015 Spreadsheet

[29] The Plaintiff again met with the Manager on April 17, 2015 to question why a payment of \$1184.34 in August 2013 had not been accounted for on the previous spreadsheets, which it turns out was an error. The Plaintiff indicates that the Manager acknowledged the payment and his error in not crediting the account. He issued a new updated invoice which had an arrears balance of \$924.44 taking into account the April 1, payment of mooring charges. I calculate that this figure should be further adjusted downwards on the final 2016 spreadsheet to \$876.44 (backing out the uncorroborated NSF charge and late pay charges which the Plaintiff was not collecting: \$2121.44 less \$105 NSF, \$155, \$45, \$80, \$125, \$75, \$195, \$465).

[30] The Plaintiff further questioned the Manager as to why he was only credited with \$545.66 of the uncredited \$1184.34 when there was no explanation for the other \$638.88 of the payment. He was never satisfied with the explanation provided for which there is no evidence, except that it led to a heated exchange between the Defendant and the Manager. Based on the 2016 spreadsheet, I find that the credit was properly taken into consideration by the Plaintiff.

[31] The Defendant also raised as a further issue that one of two payments of \$710 in June 2012 was not credited to his account as described on the January 2015 spreadsheet. Based on the Defendant's banking statements, the Court concludes that the two cheques were cashed in July.

This included the June payment. These were described on the spreadsheet as a \$1420 payment for that month. The Court concludes that the Defendant should have recognized that this amount included the June payment, and frankly has little sympathy for him raising this as an issue.

[32] Moreover, because of scribbles on his first cheque, it cannot be ascertained whether the first check was provided in June as the Defendant alleges. The Plaintiff's 2016 spreadsheet indicates that no payment was made in June 2012, which the Court concludes is accurate. This would explain the NSF charge on the January 2015 spreadsheet, which the Court concludes is inaccurate as there is no evidence that any cheque of the Defendant was not honored at that time. The 2016 statement modified the NSF fee to a late fee charge of \$100, but described the late payment as occurring in November 2011 without explanation. The November 2011 late payment charge is not corroborated because the 2016 spreadsheet only commences in 2012.

[33] In summary concerning the June 2012 and August 2013 disputed amounts, the Court is satisfied that the Plaintiff was properly credited with both. However, the Court agrees with the Defendant that there is no corroboration for the June NSF charge shown on the January 2015 spreadsheet. The Court does not accept that the charge of \$100 shown on the 2016 spreadsheet was a late fee charge for November 2011, applied retrospectively and coincidentally in July 2012. Given the dispute of the parties concerning this amount in 2015, the Court would have expected corroboration of this standalone late fee payment. The charge also lacked a description of the number of late days accounted for and the daily amount, a description of which was found on all other late payment charges.

(4) The Plaintiff's May 1, 2015 Invoices

[34] On May 1, 2015, the Plaintiff issued two formal invoices for payment on May 5, 2015. The first was for mooring fees in the amount of \$1055, comprising the monthly fee of \$765 plus the balance forward of \$290 which comprised NSF and late charge fees at a reduced rate. These amounts were not contentious. The second invoice was for hydro charges and the total amount of \$1247.67, comprising the monthly charge of \$67.57 and the balance forward of \$1180.10. The combined invoices totaled \$2302.67.

[35] Unfortunately, there was no spreadsheet accompanying these invoices that would explain how these amounts were arrived at. The invoices indicated that no late fees were being charged, but would be charged on the invoices starting May 5, 2015 if unpaid. Mooring fees were shown to be generally up-to-date, with only the carry forward of \$290 referred to above.

[36] The principal problem at this time therefore centered on the outstanding hydro fees said to amount to \$1180.10. It is difficult to reconcile these hydro fees with the 2016 spreadsheet which shows that effective January 25, 2015 the outstanding total balance for mooring and hydro fees was \$339, with an accumulation of hydro fees after that date to May 1, 2015 of approximately \$300.

[37] Based upon the April 17, 2015 spreadsheet balance of \$876.44, in addition to the May moorage fee and hydro charge of \$842, these amounts, appear to be approximately \$530 higher than would have been anticipated by the Plaintiff. Additionally, based upon the 2016

spreadsheet and backing out all of the charges for late payments, the May 1, 2015 invoices would appear to be only \$594.66 in excess of what the Defendant should have properly expected of \$1708.01.

(5) Post-May 2015 Events

[38] The Defendant did not pay the May, June, or July 2015 invoices. No explanation was provided why he refused to do so in his affidavit. During the hearing, he indicated that it was due to his frustration with not being able to obtain an explanation for the hydro amounts.

[39] Having failed to pay the May 2015 invoices, the Plaintiff reinstated the late payment charge in a separate June invoice in the total amount of \$2504.25. Those before February 15, 2015, when notice of increase was effective, were reduced to \$5.

[40] On June 24, 2015, the Defendant initiated an application for dispute resolution before the RTB, which ultimately was dismissed.

[41] Further demand letters were issued and on June 29, 2015 the Manager had the hydro shut off. The following day, the Defendant paid \$931.40 under protest in outstanding hydro fees plus an additional \$150 connexion fee to restore the power service.

[42] Settlement discussions ensued thereafter without success, with the totals continuing to accumulate and the Defendant continuing to refuse to make any payments.

(6) Analysis

[43] The Court is satisfied that, apart from the one NSF charge of \$100 attributed in November 2011, the Plaintiff's 2016 spreadsheet accurately portrays the mooring, hydro and related tax charges from 2012 going forward. However, I conclude that the Plaintiff was negligent in its invoicing procedures, causing much confusion to the Defendant. The late payment charges were applied inconsistently, although they could have been applied at a higher rate than five dollars a day. In addition, the \$15 a day charge, when first applied, appears to have some element of duress in its application prior to the announcement of its application in February 2015. However, it was for the purpose of bringing the Defendant to the table, because of his numerous occasions of NSF cheques and late payments, all of which are itemized on the 2016 statement and there is no question that the Defendant was regularly delinquent in making payments and could have been treated more severely in accordance with the Rules.

[44] Ultimately, I find that the Defendant must accept responsibility for not continuing to pay the mooring and monthly hydro charges as they accumulated after May 1, 2015 when he was some \$1700 in arrears. He continued to reside in the vessel and appears to have stopped payment based upon the incorrect assumption that he had not been credited with either the full amount of the missed payment or the \$710 moorage payment, when this was not the case. The Plaintiff had made a reasonable effort to resolve most of the issues in dispute in May 2015, including forgoing the significant late payment charges to which it was entitled at the time, including the increased amounts after February 1, 2015. These appear to have been the principal stumbling blocks at that time.

[45] In addition, from the conversations recorded by the Defendant in the April 17, 2015 meeting, it was apparent that throughout the Manager was attempting to have the Defendant commit to pay some amount once the hydro charges were sorted out, which the Defendant studiously evaded committing to. There are admissions that he was having financial difficulties that contributed to his inability from time to time to pay for services.

[46] While I have some sympathy for his position with respect to the confusion over the hydro charges, they were never incorrectly stated on any of the spreadsheets. Indeed, apart from the failure to credit the \$1184 payment in 2013 and the NSF charge backdated to 2011, the statements were accurate for the basic charges. The Defendant also acknowledged at the hearing that amounts were due on his hydro account, but that he was not being invoiced and therefore was not paying them. For almost the total period shown on the statements, he was always in arrears. The Defendant's complaints were not sufficient grounds to refuse to pay the basic mooring and hydro charges on an ongoing basis from May 1, 2015 forward, while working to sort out the problems. It was apparent that the late fee charges were a bargaining chip to regularize his payments for the use of the Marina's services.

[47] The late payment charges however, are rejected. The Court is of the opinion that their prime function throughout was to encourage the Plaintiff to pay his monthly charges. Despite the leniency of the Plaintiff in not applying late fee charges and despite the Defendant's poor payment record, the failure to provide clear and concise invoices and supporting statements contributed to the exacerbation of the situation, disentitling the Plaintiff to claim these charges. The elimination of the earlier late payment charges totaling \$1,935, in addition to the rejected

\$100 NSF fee for November 2011, reduces the Plaintiff's debt claim to the total amount of \$8694.08.

[48] As I conclude that the debt claim is sustained for the most part, I find that there is no basis to deny the charges for the bailiff of \$3,998.01. Similarly, as the Plaintiff was required to incur unnecessary costs to prepare the dock area for the removal of the Defendant's float home based on his representation that he would remove the vessel himself, the Plaintiff is entitled to its costs for that purpose in the amount of \$2,298.00, given that the vessel was sold *in situ*.

[49] Accordingly, the Plaintiff is entitled to an award of damages in the total amount of \$14,990.09 dollars with interest applicable at Admiralty rates effective the date of filing the Statement of Claim.

C. *Dismissal of Counterclaim*

[50] The Counterclaim as pled shows no genuine issue for trial and should be struck. The Counterclaim contains numerous causes of action plainly outside this Court's jurisdiction as determined by s. 22 of the *Federal Court's Act*, RSC, 1985, c F-7 including: rendering false accounts; posting seizure notices without a properly commenced legal action or court order; defamation and misrepresentation; spreading of false and malicious claims; frustrating a potential sale of the Defendant vessel; theft and vandalism; statutory breach for hydro charges; and harassment. The Defendant provided no probative evidence in support of most of these allegations, apart from the issues relating to the mistakes on the spreadsheets, which I find do not come near raising a cause of action for any of the nature claimed. Regarding the alleged misconduct by the Plaintiff which is unsupported, the evidence regarding his own misconduct in

terms of connecting power sources of other boat owners and disputes entered into with the Manager and other staff of the Marina, all detailed in affidavits, support the injunction and this Court's conclusion finding in favour of the Plaintiff's evidence.

[51] The salient evidence of the Defendant has been limited primarily to matters of misrepresentations in the invoicing of charges, which have been considered above and rejected as a factor in the claim for non-payment of mooring and related charges. The evidence has been relied upon however, to reject the Plaintiff's claim for costs.

D. *Costs*

[52] The Plaintiff submits that elevated costs under Rule 400(3) and solicitor and client costs under Rule 400(6)(c) are warranted. The Plaintiff has not presented a bill of costs, to support its claim for legal fees of \$18,142.10. Most of its claims supporting an elevated cost order are not pertinent to the serious issue of the assessment of the debt owing, including costs in opposing the RTB applications.

[53] As indicated, I find that the Plaintiff was negligent in its recording and billing practices. I discount the allegations of misconduct as justifying an award of increased costs. While the Defendant may not have acted appropriately, his conduct is not serious, representing at best minor misdemeanors. The Plaintiff's poor billing and payment recording practices justifies somewhat the Defendant not paying his accounts. Given the amounts involved in this matter, and the history of the file, I award the Plaintiff \$3,000 in costs inclusive of disbursements and taxes on the Claim and Counterclaim.

V. Conclusion

[54] The Plaintiff is entitled to an award of damages in the total amount of \$14,990.09 with interest applicable at Admiralty rates effective the date of filing the Statement of Claim. The Defendant's Counterclaim is dismissed. The Plaintiff is entitled to costs in the total amount of \$3,000.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Plaintiff is awarded damages in the amount of \$14,990.09 with interest applicable at Admiralty rates effective the date of filing the Statement of Claim;
2. the Defendant's Counterclaim is dismissed; and
3. the Plaintiff is awarded costs of \$3,000.

"Peter Annis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2039-15

STYLE OF CAUSE: MORAY CHANNEL ENTERPRISES LTD. V.
MACDONALD B. GORDON, THE SHIP "GORDON
VESSEL", AND THE OWNERS AND ALL OTHERS
INTERESTED IN HER CARGO

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JANUARY 24, 2017

JUDGMENT AND REASONS: ANNIS J.

DATED: MARCH 1, 2017

APPEARANCES:

Matthew Melnyk FOR THE PLAINTIFF
Darren Williams
MacDonald B. Gordon FOR THE DEFENDANT (ON HIS OWN BEHALF)

SOLICITORS OF RECORD:

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