

In the Provincial Court of Alberta

Citation: Nargang v Tran, 2019 ABPC 20

Date: 20190124
Docket: P180160016
Registry: Drumheller

Between:

Garry William Nargang and Frances Natalie Nargang

Plaintiffs

- and -

Thanh Vu Tran, Gary Cox and Ken Flater

Defendants

Decision of the Honourable Judge J. Shriar

Introduction

[1] The Plaintiffs are the owners and operators of a restaurant known as Old Grouch's Cozy Café, located on Highway 9 in Drumheller, Alberta. They also own and reside in the property at the location. The Defendant Mr. Tran owns the neighbouring property to the north. The Defendant, Mr. Flater, is a local carpenter contracted by Mr. Tran in late July 2017 to build a fence along the property line shared with the Nargangs. And the Defendant, Mr. Cox, was in turn subcontracted by Mr. Flater to assist with that work.

[2] The dispute between the parties concerns a dense row of old caragana bushes running east to west, on or adjacent to the shared property line, and alongside the outdoor patio of the Plaintiffs' restaurant. The caragana bushes were cut down by or on behalf of the Defendants in order to build that fence.

[3] The Nargangs claim the bushes were on their property and were wrongfully cut down by the Defendants without their knowledge or consent. Further, the Plaintiffs claim the thick row of shrubs formed a necessary wind and noise barrier for their property and restaurant. They allege trespass causing financial damages including loss of income and costs to repair or mitigate the loss of the trees, and general damages for the loss of amenity.

[4] The Defendants all deny any wrongdoing, and Mr. Tran asserts he obtained the consent of the Nargangs who he said changed their mind after the work was done.

Evidence

[5] Up until Mr. Tran decided to build that fence, the parties' properties were separated by the thick row of tall caragana shrubs running west to east, from the street front toward the back alley. According to Mr. Flater who has lived in the area a long time, those shrubs were planted around 40 years ago by prior owners of the Tran property.

[6] Mr. Tran's property at the location was occupied by tenants, and he hoped to build a noodle shop there. He testified that based on his communications with town officials he understood that before a permit would be granted for his planned restaurant, his property would have to be cleaned up and fences with neighbouring properties repaired or constructed.

[7] Mr. Tran said that on July 24, 2017 prior to cutting down any bushes, he went to the Nargangs' residence with Mr. Flater, introduced himself and explained his intentions including to clean up the boundary line and build a new fence. He said that Mr. Flater spoke for him because his English language skills are imperfect. And that Mr. and Mrs. Nargang consented. Mr. Flater agreed he went with Mr. Tran to talk to the Nargangs but said Mr. Tran did most of the talking. Mr. Flater's recollection of the meeting very vague.

[8] The Nargangs strenuously deny any such meeting ever took place.

[9] Mr. Tran's defence is based on his assertion that during that alleged meeting the Nargangs agreed he could "clean up" their property line and build a fence but that later, after all the shrubs were cut down, they called him and said they changed their mind. If that were true the Plaintiffs' claim could not fairly succeed.

[10] Based on the evidence tendered at trial, however, I am not convinced the meeting alleged took place, or if it did, that the Nargangs ever consented to the cutting down of the entire length of the old row of tall caragana shrubs.

[11] Further, I do not find that the Nargangs would have consented had they understood what was being proposed. Either the meeting did not occur as alleged by Mr. Tran and Mr. Flater, or else Mr. Tran and Mr. Flater were not sufficiently clear about what was proposed. The evidence showed the Nargangs used those bushes as a noise and wind barrier and they were important to the value of the Plaintiffs' restaurant business.

[12] Mr. Cox's testimony was helpful. Though he did not attend the alleged meeting between the other parties, he confirmed the Plaintiffs' testimony that on July 25th once the cutting of those shrubs was at least half way done, Mrs. Nargang came outside, apparently upset about what was happening and that she proposed they stop their work and confirm their instructions and ensure the bushes were in fact on Mr. Tran's property.

[13] Mr. Tran was not there at the time and Mr. Flater claimed no recollection of Mrs. Nargang coming out of her house upset as the cutting continued from back to front. Mrs. Nargang testified that when she came out, the caraganas had been cut down to near the ground from the back alley and until close to the deck. Had the Defendants stopped there, the shrubs protecting the outdoor patio would have remained intact.

[14] Both the Nargangs and Mr. Flater recalled that sometime that afternoon they searched along the property line looking for survey stakes. Mr. Cox too recalled the parties looking to

determine the exact location of the property line. This is consistent with Mrs. Nargang's testimony that she clearly expressed her concerns about the ownership and right to cut down the caraganas before the work was completed.

[15] Mr. Flater recalled looking unsuccessfully for some property line markers but his testimony was confusing about why he was doing that, given his lack of recall about Mrs. Nargang ever insisting or even inquiring about the caraganas being on her side of the line and that the cutting stop.

[16] The Nargangs admitted the work stopped at that point in the afternoon of July 25th, and that they understood nothing further would be cut. They left for a few days' vacation. While they were gone though, Mr. Tran instructed Mr. Flater, and at least indirectly Mr. Cox, to complete the work insisting the bushes were on his side of the property, and his to cut.

[17] On their return the Nargangs were of course dismayed to find the row of bushes had been fully removed exposing their patio to the wind and other elements and to increased noise from the nearby highway. They testified about the impact of the removal of the trees.

[18] The Plaintiffs retained Mr. Hunter a local surveyor whom all parties agreed was an expert. Mr. Hunter undertook a new survey of the property line and prepared a drawing clearly showing the property line between the parties' lands, and also where the caragana trunks fall along that line. Exhibit 11 shows that the row of bushes followed the property line reasonably closely but not perfectly.

[19] Mr. Hunter testified that historically rural property owners often marked property boundaries by rows of trees or shrubs. Though not necessarily 100% accurate, the practice was effective for most purposes.

[20] According to Exhibit 11, the trunks of the shrubs toward the front of the property that ran adjacent to the deck were in fact on the Nargangs side of the property line. Further back the trunks were mostly on Mr. Tran's side of the line.

[21] Mr. Cox testified that he was assured by Mr. Tran that the shrubs were on his property. Mr. Tran seemed to be an experienced business and property owner and Mr. Cox trusted him. But if he, Mr. Cox, had better more fulsome information, he thought he, Mr. Flater and Mr. Tran could have come up with a mutually agreeable solution perhaps by leaving some of the caraganas intact or by constructing a decorative and effective wind and noise barrier. He seemed almost emotional by how relations between the parties had deteriorated, depriving him of the chance to even try to work to alleviate both parties' concerns.

[22] Mr. Tran insisted he had the right to cut down the row of old shrubs, because the Nargangs first consented and later changed their mind reneging after he relied on their agreement to allow him to "clean up" the property line. He testified, or tried to testify, about his unpleasant sounding and counterproductive without prejudice communications with the Plaintiffs' counsel.

[23] I tend to believe Mr. Tran, that being new to town he did not want to "burn bridges" with neighbours or with town officials, and that he thought he had the right to cut down those bushes. Nevertheless, I find he misunderstood the situation.

[24] I find that the caragana bushes were not all on Mr. Tran's land. Moreover, while the Nargangs were not opposed to Mr. Tran building a noodle shop nearby, they did not consent to his cutting down all those caraganas and undermining the attractiveness and value of their outdoor patio.

Border Trees

[25] After trial and argument, Plaintiffs' counsel, Mr. Goruk, forwarded a decision from the Small Claims Court of Nova Scotia, *Isaac v Harris*, 2018 NSSM 92, concerning similar facts. At issue in that case was a 40 year old barberry hedge on or close to the property line separating the two parties' properties.

[26] In *Isaac* as here, the defendant believed they had the right to cut down the hedge. Mr. Tran said he had permission from the Plaintiffs, and in the *Isaac* case the Defendant, Harris, thought the bushes were on their side of the property line. In *Isaac* and in this case, surveys obtained for trial showed that the hedge swerved slightly, ending up partly on or straddling the line, partly on the defendant's side and partly on the plaintiff's side. The judge in *Isaac* described the hedge as "border hedge" and as such it was jointly owned property.

[27] In *Anderson v Skender*, 1993 BCJ 1769, the British Columbia Court of Appeal discussed "border trees", defined as trees whose trunks, at ground level, stand either on or beside the property line and which have roots or branches extending into adjoining properties. In terms of the definition of a border tree and for the purposes of the law of trespass, the court expressly stated there was no difference if the trunk actually straddles the property line.

[28] The definition of border trees was adopted in the *Isaac* case and the judge noted that that though somewhat different from hedges, the same principles apply. All the more so here, where the caragana bushes are as tall as trees. Having heard the evidence of the expert surveyor, Mr. Hunter, and having reviewed Exhibit 11, I find that the entire row of caragana shrubs in question here falls within the definition of border trees.

[29] Like the Nova Scotia Small Claims Court, this court does not have jurisdiction to adjudicate claims where title to land is in question, but as in *Isaac*, the issue here is trespass regarding a jointly owned hedge, and title to land is not in issue.

[30] In *Anderson v Skender*, the court stated (paragraph 8) "Plainly such tress cannot be felled by one landholder without the consent of the other". The court referred to jurisprudence upholding this point going back to the late 17th century.

[31] I did not understand Mr. Tran to dispute that. He effectively acknowledged that given the proximity of all the caraganas to the property line, he needed permission to cut them down. His position was that he had obtained that permission but that it was unfairly retracted once it was too late. As stated, I am not convinced that he had the permission he claims. Accordingly, he is liable to the Plaintiffs for their damages.

Proper Defendants

[32] At trial the Court asked why Mr. Cox and Mr. Flater were named as parties. There is no dispute they were contracted and subcontracted to Mr. Tran, the owner of the lot adjoining the Plaintiffs. The evidence was that Mr. Cox was only ever paid \$150.

[33] None of the case authorities provided by counsel addressed the question directly, but in none was any worker or agent of the defendant tortfeasor named as a party, let alone held liable for damages.

[34] In *Horseshoe Bay Retirement Society v SIF Dev. Corp.*, 1990 BCJ 201, also a tree cutting case, a sub-issue concerned who was liable for the wrongful cutting of the plaintiff's trees. *Petrie v. Lamont*, (1841) Car. & M. 93, was cited in support of the proposition that all persons who aid or counsel direct or join in the trespass are joint trespassers. A later decision, *The "Koursk"*, [1924] P. 140 (C.A.), is cited as authority for the proposition that persons are joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design. And that there must be concerted actions towards a common end.

[35] Other cases were cited to the same effect leading the court in *Horseshoe Bay* to find both the company and its principal jointly liable.

[36] On this basis it is hard to see how Mr. Flater and Mr. Cox could be liable. There was no common purpose. Their joint goal was to get paid for the limited service of cutting down shrubs. I find they reasonably believed they were acting on the lawful instructions of Mr. Tran. It was not suggested that they had a duty to challenge those instructions and independently inquire into ownership and boundary lines as set by surveys.

[37] Neither Mr. Cox nor Mr. Flater were enhancing the value of their property, or seeking authorization to build a restaurant. They were hired for a much smaller subsidiary purpose. Despite that they may have physically trespassed on the Plaintiffs' property they did so in their limited capacity as agent for Mr. Tran. In the circumstances, the claim against each of them is dismissed. The Plaintiffs are liable for costs to each of Mr. Cox and Mr. Flater in the amount of \$300, for a total of \$600.

Damages

[38] The Plaintiffs, Mr. and Mrs. Nargang claimed total damages in the amount of \$10,000 including costs to replace some of the trees cut down and to construct an artificial wind barrier along the edge of the restaurant patio. Also included in the \$10,000 claim are amounts to compensate for loss of amenity, inconvenience, stress and loss of business income.

[39] They tendered evidence regarding their special damages as follows:

(a) \$3,150; being a quote from a local contractor regarding the price to build a wind and noise barrier by raising the height of the existing deck walls.

(b) \$1,034.25; being a quote from a local landscaper regarding the price to purchase and plant two large Swedish aspen trees, while waiting for the regrowth of the caragana bushes.

[40] Regarding business income, Mrs. Nargang estimated that the patio business was down about 20% in the year after the trees were cut down. She provided no business or accounting records to back that up nor did she quantify it more specifically.

[41] Nevertheless, she testified credibly that after the trees were cut down people do not want to sit outside anymore. In hot weather, they do not want to sit inside and so they walk away.

She estimated about 4 or 5 clients per week in the summer months were lost in that way. She also described people sitting outside but having to hold an umbrella to prevent it from toppling over in the wind, and perhaps having one drink and leaving instead of staying for longer, and ordering more food and drink.

[42] That testimony was corroborated by the evidence of Arla Mepham a long-time friend and former employee of the Plaintiffs. She described the sheltered, private, natural feeling on the deck before, when it was surrounded by the large caragana hedge. Now since the trees were cut, she described feeling more exposed to wind and sun and traffic noise. I find that credible.

[43] Mrs. Nargang also testified about the effect of the loss of the weather barrier, showing photographs of snow inside the restaurant doorway, having blown in off the deck. She testified this never happened before the trees were cut down. She also provided photographs of decorative items that had been on the patio including a lantern and other decoration, but that had been blown over and damaged by wind, again only since the trees were cut.

[44] She talked about stress especially given Mr. Nargang's heart condition.

[45] In *Gibson v F.K. Developments Ltd.*, [2017] BCSC 2153, another trespass and wrongful cutting of trees case, the court considered the claim for general damages noting it was based on the plaintiff's loss of privacy, shade, seclusion and "violation of the sanctity of her own backyard" (para. 36).

[46] The case of *Dykhuizen v Saanich*, (1989) 63 DLR (4th) 211, was cited as authority for the proposition that damages for loss of trees can extend to compensation for loss of amenities for the sense of invasion and violation suffered by the plaintiff as a result.

[47] *Durham v Bennett*, 2009 ABPC 66, also concerned a dispute about trees. The court referred to Halsbury's Laws of England in asserting that the measure of damages in general in a trespass case is to be guided by the principle of full restitution, restoring the successful plaintiff's land, to the fullest extent possible by way of a monetary payment, to the same position it was in before the trespass.

[48] However Judge Burch in *Durham* stated that there are limits to which a trespasser can be required to restore land to its previous condition and while the wishes of the owner are relevant, the court must consider what is reasonable, practicable and fair in all the circumstances. To similar effect is the decision in *Kates v Hall*, 1991 CanLII 1127 (BCCA).

[49] I am convinced that in the circumstances including the diminution in the commercial and aesthetic value of the patio, the Plaintiffs are entitled to an award of \$5,815.85 for the loss of amenities claim. This amount was calculated by subtracting the proven special damages claim from the total claim of \$10,000.

[50] In argument Mr. Goruk urged the Court to award punitive and exemplary damages. In *Whiten v Pilot Insurance Co.*, 2002 SCC 18 (CanLII), the Supreme Court stated (para. 36) that punitive damages can be awarded in exceptional cases for malicious, oppressive and high handed misconduct that offends the court's sense of decency, quoting from its decision in *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130.

[51] Despite finding that the defendants were remiss in their efforts to resolve the dispute amicably, and that the trespass was intentional, Judge Burch in *Durham* refused to award punitive damages, noting they are only rarely awarded.

[52] By contrast, punitive damages were awarded in *Rowe v Thomson*, 2011 BCSC 430, also relating to cutting down the plaintiff's trees. The court stated relevant factors include whether the defendant sought permission, whether the defendant cut more trees than was necessary, whether the plaintiff acted reasonably and whether the defendant's conduct constituted any cynical disregard of the plaintiff's rights.

[53] Despite the Plaintiffs' denial that they never had a conversation with Mr. Tran or Mr. Flater about cutting the caragana trees, I am unable to conclude that both Mr. Tran and Mr. Flater lied under oath about that meeting. I have no doubt that the Plaintiffs never consented but do not disbelieve Mr. Tran that he thought he was justified in proceeding. He was wrong and thus liable, but I am not convinced Mr. Tran's misconduct rose to the level of the exceptional cases calling for punitive damages to further denounce his conduct.

[54] I accept the Plaintiffs estimate of their damages as reasonable and fair in all the circumstances. And judgment is granted in their favour, as against Mr. Tran only, in the amount of \$10,000 part as special damages (\$4,184.25) as set out above and part as general damages for loss of amenities (\$5,815.75) also as described above.

[55] Costs are also awarded including disbursements for filing fees, Mr. Hunter's survey work for this litigation, and other out of pocket disbursements incurred. Legal costs are awarded in the amount of \$1,000 being ten percent of the successful claim, in accordance with long standing standard practice of this court. As stated, the Plaintiffs are liable for costs to Mr. Cox and Mr. Flater. Regarding costs I note this award was made after review and consideration of the new practice note and tariff regarding the costs in civil matters in this court.

Heard on the 3rd day of August, 2018 and the 2nd day of November, 2018.

Dated at the Calgary, Alberta this 24th day of January, 2019.

J. Shriar

A Judge of the Provincial Court of Alberta

Appearances:

J. Goruk
for the Plaintiffs

Self-Represented
for the Defendants