

COURT OF QUEBEC

Small Claims Division

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
Civil Division

No: 500-32-129304-111

DATE: March 27, 2013

BY THE HONOURABLE MADAM JUSTICE MARIE MICHELLE LAVIGNE, J.C.Q.

ULTRAMAR INC.
Plaintiff

v.

ALEXEI BALAKINE
Defendant

JUDGMENT

[1] Ultramar Inc. claims the payment of its invoices for the delivery of furnace oil at Mr. Alexei Balakine's residence in Senneville.

[2] The first delivery was made on November 6, 2010 for an amount of \$534.11 and the second for \$56.12 on December 3, 2010.

[3] Alexei Balakine refuses to pay these two invoices. He alleges that Ultramar had previously informed him of that it would no longer provide service at Mr. Balakine's

residence and that his Protection Agreement would be cancelled. The deliveries were made without his knowledge or autorisation.

The facts

[4] On or about September 9, 2010, Ultramar made a routine service call to Mr. Balakine's residence and inspected the heating system. After this visit, Mr. Balakine received the following letter stating:

"Please be advised that we were unable to perform service on your heating system due to the following:

The installation of your air conditioner is not in accordance with the code; the coil is installed in the return air duct and therefore, it creates too much humidity around the combustion chamber. Please note that if your heat pump is not disconnected from the cooling and/or air conditioner mode, no service will be done and your protection agreement will be cancelled."

[5] After receipt of this letter, Mr. Balakine concluded that Ultramar had cancelled his contract and ceased future delivery of furnace oil. He decided to change his heating system from oil to electrical. This transformation was completed *before* the deliveries that are of the object of this claim. However, Ultramar was not informed of the transformation and it filled the oil tank for the upcoming winter.

[6] Mr. Matthew Petrella testified for Ultramar in support of the claim for payment of the invoices. He produced a copy of the home heating oil contract between Ultramar and Mr. Balakine. He explained that the contract was not cancelled by Mr. Balakine or by Ultramar and that the deliveries were made according to the automatic delivery service offered by Ultramar.

[7] It is admitted that Mr. Balakine did not send any notice of cancellation since he thought that Ultramar had ceased its services.

[8] The contract contains the following cancellation clause:

"STATEMENT OF CONSUMER CANCELLATION RIGHTS

(Consumer Protection Act, section 58)

You may cancel this contract for any reason within 10 days after you receive a copy of the contract along with the other required documents.

If you do not receive the goods or services within 30 days of the date stated in the contract, you may cancel the contract within one year.

...

To cancel, you must return the items received from the merchant to the merchant or the merchant's representative, send the merchant the cancellation form printed below, or send the merchant written notice of cancellation. The form or written notice must be sent to the merchant or the merchant's representative at the address indicated on the form, or at any other address indicated in the contract. You must give notice of cancellation by personal delivery or by any other method that will allow you to prove that you gave notice, including registered mail, E-mail, fax and courier. "

[9] Mr. Petrella also explained that Mr. Balakine has two contracts with Ultramar: one for the delivery of oil and the second is a Protection Agreement for the equipment. He believes that letter of September 9th refers only to the potential cancellation of the Protection contract and that it therefore did not affect the regular delivery of oil.

[10] It is only after Mr. Balakine received the invoices for the deliveries of oil that he called Ultramar to cancel all contracts.

[11] He asked them to take back the unused oil in its tank. Ultramar agreed to take the oil and give the appropriate credit to Mr. Balakine. However, it required a service fee of \$250.00. Mr. Balakine refused to pay this amount. To this date, the oil is still sitting in Mr. Balakine's tank and the invoices remain unpaid.

[12] Can the September 9th's letter be interpreted as a cancellation by Ultramar of its contract for the delivery of oil?

[13] In the Court's view it cannot.

[14] Mr. Balakine had two contracts with Ultramar, one for the delivery of oil and the second one for the maintenance of his equipment. He knew that Ultramar would make automatic deliveries of oil when needed. The September 9th letter states "Please note that if your heat pump is not disconnected from the cooling and/or air conditioner mode, no service will be done and your protection agreement will be cancelled."

[15] The terms, "no service will be done" are conditional upon the non-disconnection of the heat pump. It cannot be considered as a cancellation notice but rather a warning. The use of the words "will be cancelled" refers to a further cancellation by Ultramar. Such notice of cancellation was never sent by Ultramar.

[16] It was Mr. Balakine's responsibility to inform Ultramar that he had made changes to his heating system and therefore would not require further deliveries of oil. He failed to do so and is responsible for the payment of the oil deliveries according to the contract.

[17] However, Ultramar failed to mitigate its damages by taking back the oil. The fee it claims is not unreasonable. It should have taken back the oil and claim its fees (\$250.00 plus taxes) to Mr. Balakine.

[18] **CONSIDERING** Mr. Balakine's consent to remit the oil, it can still mitigate its damages by doing so.

[19] **FOR THESE REASONS, THE COURT**

GRANTS Ultramar's action in part;

GIVES act of Alexei Balakine's tender to Ultramar of the unused oil in its tank;

PERMITS Ultramar to proceed to the recovery of the oil presently in the tank on Mr. Balakine's property;

CONDEMNNS Alexei Balakine to pay Ultramar the amount of \$250.00 plus taxes TPS \$12.50 and TVQ \$24.94 to take back the oil, this totalling the amount of \$287.44; should Alexei Balakine refuse to remit the unused oil, the Court reserves Ultramar's right to claim the full payment of its invoices in lieu of the present judgment;

THE WHOLE with costs.

MARIE MICHELLE LAVIGNE, J.c.Q

Date of hearing: February 19, 2013