COURT OF QUEBEC

Small Claims Division

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
Civil Division

No: 500-32-135189-126

DATE: July 10, 2014

BY THE HONOURABLE JEFFREY EDWARDS, J.C.Q.

ALLAN VINEBERG
Plaintiff
v.
ROBERT BARD
Defendant

JUDGMENT

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[1] Plaintiff and Defendant concluded an agreement regarding the purchase, financing and use of a luxury car. Plaintiff makes a claim regarding alleged damages suffered resulting from Defendant wrongfully appropriating Plaintiff's winter tires for the said car. Defendant has made a Cross-Demand claiming damages resulting from alleged breaches by Plaintiff of the agreement.

Context

[2] The parties are two sophisticated businessmen. Plaintiff is a chartered accountant. Defendant is a portfolio manager. Over the period from 2005 to 2012, the parties had a personal, business and employer-employee relationship. They were close as friends and had various business ventures together. In the latter part of that time period, Plaintiff became an employee at Defendant's firm but that relationship was

terminated on a sour note. As their business and employment relationship fell apart, so did their personal relationship.

[3] In July 2010, the parties still had an excellent relationship based upon trust. They came up with an idea for a personal and business agreement. Plaintiff would find a luxury car (2009 Porsche Carrera 4 Coupe) and purchase it in New York State, USA; Defendant would pay for it; Plaintiff would principally use it and would pay Defendant a rental amount per month. Apart from those elements, almost all of the other details regarding the agreement, including the parties' intentions, are subject to contradictory versions emanating from Plaintiff and Defendant. The parties do not even agree on the purpose behind the agreement. Plaintiff states that it was Defendant's idea and for Defendant's benefit. According to Defendant, he agreed to the arrangement only to help fulfil Plaintiff's request to drive a luxury car. According to Plaintiff, Defendant wanted a luxury sports car to use on occasion but felt that a Porsche would not sit well with his professional image for his clients. Accordingly, even though Plaintiff would be the principal user and driver of the vehicle, Defendant could also, upon notice, use it without charge. Plaintiff states that over the approximate 16 month period of use, Defendant used the car around 15 times. According to Defendant, the frequency was much less and he only used it a couple of times at most.

[4] Defendant submits a "Memorandum of Understanding between Robert Bard and Allan Vineberg" with respect to the purchase of the car (Exhibit D-2). However, the document is not signed. Defendant submits e-mails that he sent to Plaintiff presenting the document (Exhibit D-7 *en liasse*). But there is no e-mail reply of Plaintiff accepting the terms drafted by Defendant and found in Exhibit D-2. Plaintiff, for his part, denies that he agreed to Exhibit D-2 or that it represents completely the agreement of the parties regarding the vehicle. In his view, Exhibit D-2 only contains certain criteria which were part of the agreement and were subject to ongoing discussions.

[5] The testimony at the hearing also indicates that both parties saw a commercial interest for themselves in the agreement. Each party hoped to eliminate the charges of the "middleman", in particular the commercial leasing company for vehicles.

[6] The sense of certain paragraphs of Exhibit D-2 is that of a joint agreement for the immediate and eventual mutual and reciprocal benefit of the parties, including:

> "If car sold for proceeds above outstanding balance, profit would be split evenly between AV [Allan Vineberg] and RB [Robert Bard]".
>
> "Either party is responsible for any deductible on accident or infractions during their use".
>
> "Both parties agree to share cost of any Canadian dealer incentive to recognize US car".

> "AV [Allan Vineberg] agrees not to deduct cost/payment from tax unless they have no adverse impact on RB [Robert Bard]".

Analysis and Decision

[7] The parties created an agreement the legal content of which is unknown to our contractual regime of nominate contracts (Articles 1708 to 2643 of the *Civil Code of Quebec*). It is not a contract of lease (Articles 1851 et s. CCQ), sale (Articles 1708 et s. CCQ), leasing (Articles 1842 et s. CCQ) or partnership (Articles 2186 et s. CCQ), but has elements of all of these contracts. Instead, the parties created a *sui generis* contract covered by the general articles of our law of contract (Articles 1371 to 1707 CCQ). Based upon the proof, including the testimony, the documents filed and the balance of probabilities in light of the contradictory versions presented by the parties, the Court will arbitrate the respective claims of the parties.

Plaintiff's claim

[8] Plaintiff claims $2,999.99. He claims the amount of $2,198.01 for damages suffered as a result of the loss of the tires owned by him and put on the car. The balance of $801.98 is claimed for trouble and inconvenience. Regarding the claim for damage and inconvenience, the Court heard no convincing proof of such trouble and inconvenience. Plaintiff freely entered into the arrangement with Defendant. If Plaintiff has suffered inconvenience as a result thereof, it is due to his own fault in not taking preliminary measures to ensure that the required legal details were expressly stated in the agreement.

[9] Regarding the claim of $2,198.01, the facts appear as follows. It appears that Plaintiff purchased the Summer tires for the car. Plaintiff files the original invoice for the purchase on November 16, 2010 for the amount of $1,299.12 (Exhibit P-5) and Defendant does not contest this. Plaintiff also files an estimate dated March 3, 2014 for new tires in the amount of $1,759.12 (Exhibit P-6). On April 1, 2012, after Defendant took back permanent possession of the car, he had a third party install the Summer tires owed by Plaintiff. He then sold the car and the tires. Defendant therefore sold without right the property of Plaintiff and therefore committed a fault under Articles 1457 and 1713 (1) CCQ.

[10] As Plaintiff was the owner of the tires, his claim for compensation resulting from the loss of the tires is valid. The correct amount should not be the recent price for brand new tires (Exhibit P-6) but instead the value of the used tires. The amount of use at the time of appropriation of the tires by Defendant was approximately 1 year and 4 months. Tires are normally replaced every 8 years or so. So the Court will reduce the amount by 8 or 12.5%, being $162.39. Plaintiff is entitled to the residual value, being $1,136.

Defendant's Cross-Demand

[11] Defendant claims the amount of $4,383.43. This is based on 6 separate amounts which are detailed in Exhibit D-6. The amounts are as follows:

1 - Parking Tickets

[12] Defendant claims the amount of $1,188.50 which he says was paid for unpaid traffic tickets incurred by Plaintiff for parking/traffic violations or offences for the period of August 24, 2010 to March 23, 2012. As the Defendant only took back the car as of April 1, 2012, the Court finds that Plaintiff was in custody of the car during the entire period and is the person whose actions gave rise to the tickets in question. Defendant files various e-mails that he sent to Plaintiff requesting the latter to pay them. Plaintiff refused or neglected to do so and he also refused or neglected to contest them.

[13] In Exhibit D-2, there is a specific clause allocating responsibility for "infractions" to the person using the car at the time[1]. Even in the absence of such clause, it is a clear principle of civil law that the person having the custody of property is responsible for costs and damages caused by the use of such property (Articles 1465 to 1467 CCQ). The Court will condemn Plaintiff to pay Defendant the amount of $1,188.50.

2 - Registration / SAAQ Fees

[14] Defendant claims from Plaintiff a refund of the amounts that Defendant paid for registration of the vehicle at the Quebec Automobile Insurance Agency (Société d'assurance automobile du Québec) for January 1, 2011 ($504.15) and January 19, 2012 ($565.05) (Part of Exhibit D-4). This claim is not well founded. There is no clear language in the Exhibit D-2 to allocate this responsibility to the Plaintiff. Furthermore, it is significant to note that the first proof in the Court file showing Defendant's claim for such amount appears in late January, early February 2012 when the relationship of the parties was in the process of disintegrating.

[15] The fact that Defendant paid the first amount for registration without protest indicates that responsibility was allocated to him under the agreement. This amount will not be granted.

3 - Tire Change Cost

[16] Defendant claims costs incurred for the tire change of April 6, 2012 for the amount of $234.32 (Exhibit D-4 *en liasse*). Defendant claims that this amount is owed to him as an expense that was to be added to an amount of "running balance" that was to be paid by Plaintiff in virtue of the document Exhibit P-2. First, as stated above, it is

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1 « Either party is responsible for any deductible on accident or infraction during their use"

unclear whether Plaintiff accepted all the terms of Exhibit P-2[2]. Second, the clause is unclear. Third, another clause limits the ability of Plaintiff to claim payment of expenses as costs for the benefit of Defendant[3]. Fourth, Defendant has made no proof that after the sale of the car, it was not sold at a profit to him. When asked about this question at trial, Defendant had no proof at all to demonstrate the final accounting. If there was a profit, Exhibit D-2 states that the profit was to be shared between the parties[4] and that was not done. Therefore, Defendant is precluded from requesting a refund of an operating expense in this regard in the absence of a final accounting. Finally, as of April 1, 2012 at the latest, Defendant had retaken possession of the car. There is nothing in Exhibit D-2 or in the general civil law which would require that Plaintiff should remain liable for continuous expenses after the vehicle was returned to Defendant. In fact, the agreement indicates that Plaintiff's responsibility would end when the car was no longer in his care[5]. As Exhibit D-2 was drafted by Defendant and the obligation is stipulated against the Plaintiff, the terms of this document should be interpreted against Defendant[6].

4 - Porsche Laval Service Charge

[17] Defendant claims refund of an amount of $414.76 paid for a service charge for the car on May 4, 2012 (Exhibit D-4 *en liasse*) and before he sold the car. The proof showed that Defendant took possession of the car on March 31, 2012 and confirmed this by e-mail of Defendant in the morning of April 1, 2012 (Exhibit D-9). So the service charge was incurred more than one month after the Defendant took possession of the car. There is no ground to support this claim against Plaintiff for the same reasons as those mentioned above in point 3.

5 - Boomerang Tracking Charge

[18] Defendant claims the amount of $80.70 for a charge from Boomerang Tracking Inc. for satellite anti-theft tracking service from April 13, 2012 to October 12, 2012 (Exhibit D-4 *en liasse*). As this was for services to be rendered after Defendant took possession of the car, there is no merit to this claim for the reasons mentioned above in points 3 and 4.

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2 « A running balance will be maintained which will be made up of the full cost (and expenses) of the car paid by RB [Robert Bard] and reduced by any payments made by AV [Allan Vineberg] to RB [Robert Bard] and increased by a reasonable cost of capital (5.0% at inception and continuing unless RB [Robert Bard] cost of capital increased based on current rates and bank spread at which point rate would be raised). »

3 « AV [Allan Vineberg] agrees not to deduct costs / payments from tax unless they have no adverse impact on RB [Robert Bard]. »

4 « If car sold for proceeds above outstanding balance, profit would be split evenly between AV [Allan Vineberg] and RB [Robert Bard]. »

5 « AV [Allan Vineberg] remains responsible for outstanding balance at all times with responsibility over the car in his care. »

6 Article 1432 C.C.Q.

Monthly Lease Payments

[19] Defendant claims for monthly lease payments for the month of April 2012 ($1,100) and for a partial payment of the month of May 2012, namely to May 8, 2012 ($283.87) on which date, the car was sold (Exhibit D-6). These two amounts are subsequent to the taking of possession of the car on March 31, 2012 by Defendant. For the reasons given in points 3 and 4, there is no merit to this claim.

Conclusion

[20] Accordingly, the Court will maintain Plaintiff's claim for the amount of $1,136.

[21] The Court will maintain Defendant's Cross-Demand for the amount of $1,188.50. The Court will operate judicial compensation[7] of the respective amounts owed leaving a balance in favour of Defendant of $52.50.

[22] Plaintiff paid judicial costs of $103.00 which he should normally receive also. However, given the mixed result of the determination on Plaintiff's and Defendant's respective claims and that both parties bear responsibility for sewing the web that led to their legal entanglement, the Court will exercise its discretion conferred by Article 477 of the *Code of Civil Procedure* and reduce those judicial costs to $52.50, leaving each party with a balance of $0 owed to the other.

FOR THESE REASONS, THE COURT:

MAINTAINS Plaintiff's claim for the amount of $1,136 without interest;

MAINTAINS Defendant's claim for the amount of $1,188.50 without interest;

OPERATES legal compensation between the parties' respective claims leaving a balance of $52.50 in favour of Defendant owed by Plaintiff;

CONDEMNS Defendant to pay judicial costs to Plaintiff in the amount of $52.50;

DECLARES that all amounts claimed in the present proceedings between the parties have been acquitted, the one to the other, in full.

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Jeffrey Edwards, J.C.Q.

Date of hearing: March 25, 2014

[7] Article 1673 C.C.Q.