

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W169/81

BETWEEN	REUBEN WHITE	PLAINTIFF
A N D	BANK OF NOVA SCOTIA	DEFENDANT

Burchell Brown for Plaintiff

E.P. Delisser instructed by Orville Cox & Company for Defendant.

Heard on: 24th & 25th February, 1983; and 25th July, 1983

JUDGMENT

GORDON J:

The Plaintiff seeks to recover from the Defendant "damages for breach of hire purchase agreement, breach of contract, trespass, illegal distress, excessive distress, detainue, damage to property, loss of goods and loss of earnings arising out of the wilful and malicious act of distress, by the servants and/or agents of the Defendant on or about the 29th day of July, 1981" (sic).

Plaintiff and his wife Theresa borrowed from the Defendant's branch at New Port West the sum of one thousand two hundred and twenty (\$1,220) dollars which together with costs amounted to one thousand four hundred and sixty four (\$1,464) dollars. A bill of sale dated 16th July, 1979 was executed by Plaintiff and his spouse pledging as security for the loan -

- 1 Sony Component Set
- 1 Serv-Wel 2 burner range
- 1 Mahogany Buffet
- 1 Mediterranean Headboard with 4'6"
- Firm Sleeper Divan
- 1 10 Cubic foot Serv-Wel Refrigerator
- Serial No. 17259.

These goods were stated as being located at Plaintiff's residence Lot 644 Garveymeade, Bridgeport. The loan was acquired to purchase a 19ft. refrigerator. Plaintiff was then a supervisor at Western Storage and the monthly payments were made by salary deductions to the Defendant. The

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account was subsequently transferred from New Port West to the King Street branch of the Defendants.

In April 1981 Plaintiff, who had by then left his former employment, fell in arrears with his payments to the bank. The Defendant sent him notices and messages and finally a Bailiff was sent by the Defendant to take possession of the items pledged in accordance with the terms of the bill of sale. The Defendants allege that the Plaintiff then owed on account a balance of \$255.00.

On 29th July, 1981 Plaintiff was the operator of a business which involved the sale of ice cream on the upper floor of premises at Greendale in St. Catherine. Thither Herbert Gordon, a licensed Bailiff went on 29th July, 1981 with his assistants and police officers and, being armed with a copy of the bill of sale, he seized and took away:
on the Plaintiff's evidence,

a component set

a deep freezer

a four burner gas stove

2 bedside tables.

Plaintiff protested the seizure as illegal and unwarranted to Mr. Noel Harper the Scotia Plan Loan Officer at the bank. Mr. Harper and Mr. Heron from the bank visited Plaintiff's premises after he protested and a day or two later the stove, the bedside tables and parts of the component set were returned. The deep freeze was not recovered until some two months later from Homelectrix where it had been sent by Mr. Gordon.

The Defendant admitted an error had been made in that the articles seized were not covered by the bill of sale. The only articles Defendant admitted seizing are the stove and the freezer. Defendant also denied damaging the counter in or under which the freezer was located in order to assist in its removal.

The defence pleaded in paragraph 4 reads:

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" - - - - That the Defendant admit that it hired the services of a Bailiff, an independent contractor, to repossess the goods which were the subject of the Bill of Sale as the Plaintiff was in breach of his agreement, - - - -."

The defence submitted that the Bailiff was an independent contractor and the Defendant was not responsible for his acts. Plaintiff contended that the Bailiff acted on the instructions of the Defendant through its officer Mr. Harper. The Bailiff testified he acted on Mr. Harper instructions reported to Mr. Harper the seizure of the goods received further instructions from Mr. Harper and returned the stove to Plaintiff and subsequently delivered the freezer to Homelectrix.

The Defendant's position is similar to that of a landlord who distrains for rent. A landlord is liable for an illegal distress levied by a Bailiff who is acting within the scope of his authority. For illegal acts outside the scope of such employment the landlord is not liable without proof that he actually directed them or ratified and adopted them with knowledge of what had been done, or that he chose without inquiry to take the risk upon himself and adopt such acts (see Haseler v. Lemoyne (1858) 50, B.N.S. 530). Mr. Harper and Mr. Heron of the bank visited Plaintiff at his business place on 28th April, 1981 and 26th May, 1981. Mr. Harper sent the Bailiff to that address to collect the outstanding balance or repossess the goods. Mr. Harper - despite the defence raised admitted in cross-examination.

"Bailiff an agent of ours he does work for us - I informed the Bailiff to return the articles as I discovered they were not ours."

The question to be resolved is "was the Bailiff an independent contractor or was he the servant or agent of the Defendant?"

The Bill of Sale contract contains several clauses - clause 7 reads:

" At any time during the continuance of this security without any further consent on the part of the Mortgagor (and whether the monies hereby secured shall or shall not be actually due and payable) the Mortgagee may by its officers, servants or agents take possession of the Property for which purpose any party or parties appointed by the Mortgagee may enter into or upon any premises where any

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such goods may then be and may also at any time thereafter sell the same or any part thereof either together or in such lots as the Mortgagee may determine and either by public auction or by private treaty and shall with and out of the monies to arise from any such sale or sales in the first place pay and retain the costs and expenses attendant upon such seizure and sale and Solicitors' fees and expenses or otherwise incurred in relation to these presents and in the next place apply such monies in or towards satisfaction of the monies hereby secured (whether the same shall be actually due and payable or not) and shall pay the surplus, if any, to the Mortgagor." (Underlining mine)

The Bailiff is not an officer of the bank so he must fall in category of "servant or agent" of the mortgagee i.e. the Defendant. The Bailiff was sent by Mr. Harper and he acted on Mr. Harper instructions. I hold the bank is liable.

I find that the Bailiff seized the articles complained of by the Plaintiff namely -

- a deep freezer
- a component set
- a gas stove
- 2 bedside tables.

The Plaintiff failed to prove all the particulars of special damage stated in the Statement of Claim. He was without the use of his deep freezer for two months and the profit he would have made on ice cream sales in this period he claimed was \$90-\$100 per month. The ice cream he had in the deep freezer at the time of its seizure he valued at \$260-\$270. He claimed \$250. The cost of repairing the counter was not given nor was any evidence led of the loss of future business prospect. Evidence was led that with the seizure of the articles the Plaintiff's business collapsed. He failed to prove aggravated damages.

Before I finally dispose of this case it is of interest to note that the Defendant tendered in evidence as Exhibit 3 a photo-copy of the Plaintiff's account. This statement of account shows an entry dated 24th June, 1981 of a payment of \$255.00 on account leaving a nil balance. No explanation was offered for this entry.

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There will be judgment for the Plaintiff for \$450.00 Special Damages with interest @4% from 29th July, 1981 to date. For General Damages I award the global sum of \$10,000.00 with interest thereon of 8% from 2nd September, 1981 to date. Costs to Plaintiff to be taxed if not agreed.

U.D. GORDON
Judge.