

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Lake Erie Towing

Court of Appeals No. E-13-014

Appellee

Trial Court No. CVF 0901184

v.

Jack K. Beatley and 48' San
Trope OH-9751-BK

DECISION AND JUDGMENT

Appellants

Decided: May 9, 2014

* * * * *

William H. Smith, Jr., for appellee.

Kevin E. Humphreys, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendants-appellants, Jack K. Beatley and 48' San Trope OH-9751-BK

(Beatley will be referred to as “appellant”), appeal the March 13, 2013 judgment of the

Sandusky Municipal Court which, following a trial to the court, granted judgment in favor of appellee, Lake Erie Towing, on its monetary claims, and against appellants on their counterclaim for a violation of the Consumer Sales Practices Act.

{¶ 2} This action commenced on May 21, 2009, with appellee Lake Erie Towing's ("LET") complaint for monies it alleged were due and owing following the July 30, 2008 salvage tow and environmental hazard remediation of appellant's vessel that was docked at Cedar Point Marina in Sandusky, Ohio. Appellee also alleged unjust enrichment and requested relief in the amount of \$1,298, plus interest.

{¶ 3} In their June 22, 2009 answer and counterclaim, appellants clarified that the boat at issue, is a 43' Wellcraft San Remo, not a 48' San Trope. Appellants denied a diesel fuel leak that prompted Cedar Point Marina's call to LET. Appellants asserted several affirmative defenses including lack of privity of contract, failure to join necessary parties, and failure to first tender the bill to Boat Owners Association of the United States ("BoatU.S."), of which appellant is a member. Appellants further raised a counterclaim requesting relief pursuant to the CSPA.

{¶ 4} The matter proceeded to a trial to the court on September 1, 2010, and January 26, 2011, and the following evidence was presented. Sandusky Fire Captain Jim Green testified that on July 30, 2008, he responded to a reported fuel spill at the Cedar Point Marina. Captain Green stated the when he arrived an engine was already on the scene as well as Cedar Point safety personnel. Green testified that due to the size of the spill, he notified the Coast Guard and the Erie County hazmat team.

{¶ 5} Green testified that he observed a contaminant coming from the bilge pump of the boat and that it had been reported by Cedar Point personnel that diesel fuel was in the bilge. The bilge was shut off. Captain Green admitted that due to the windy conditions, it was difficult to determine where the spill had emanated. Green stated that the spill was coming from the dock area and that he had observed the sheen on the water. Green did not board appellant's boat.

{¶ 6} Regarding the size of the spill, Captain Green stated that booms were placed around docks 129 and 131, so it had spread out over three docks. Green agreed that diesel fuel floats on the surface of the water.

{¶ 7} Appellant testified that Cedar Point Marina contacted him and informed him that there was a fuel leak on board his vessel. He immediately left his Columbus office and drove to the marina. Upon arrival, he discovered that the boat had been towed to Battery Park Marina in Sandusky, Ohio, and removed from the water. Appellant spoke with Coast Guard members who reported that there was two inches of diesel fuel in the bilge. Appellant stated that he brought five gallons jugs to retrieve the fuel but that, when he examined the bilge, he discovered that it was a black, oily substance. Appellant admitted that there may have been a small discharge of the substance into the marina.

{¶ 8} Appellant was questioned about a photograph depicting a black substance in the bilge of his boat. Appellant denied that it depicted diesel fuel; he stated that it was water from the holding tank. Appellant proceeded to explain that when the bilge water

gets high enough, the float switch is triggered and the pump activated. Appellant stated that the black water was being pumped into the marina due to a broken fitting on the holding tank.

{¶ 9} LET Captain James Kennedy testified that on July 30, 2008, a call was received to respond to Cedar Point Marina because a boat at dock number 131 was leaking fuel. Captain Kennedy stated that when he arrived there was a boom around the dock. Kennedy stated that Spill Tek, an environmental clean-up and remediation company, also responded to the call

{¶ 10} Captain Kennedy was questioned about the billing statement which contained charges from both LET and Spill Tek (separate companies with a common owner) and totaled \$1,298. Kennedy explained that the tow was considered a salvage tow which he defined as “a boat not in its natural state.” Kennedy also stated that the fuel surcharge (\$118) was standard for the length of the tow. During cross-examination, Kennedy explained that in this case, diesel fuel in the bilge and booms surrounding the vessel categorized the status of the vessel as being in an “unnatural” state. Kennedy claimed that the tow was a “more dangerous” situation but, when asked, could not explain why.

{¶ 11} Kennedy was specifically questioned about the hazmat services provided by Spill Tek. He admitted that he was not present when they arrived and had no knowledge of what services they performed. He further admitted that he did not know who owned the booms that were placed around the docks.

{¶ 12} Captain Kennedy acknowledged that LET is an authorized tower for BoatU.S. and that LET will direct bill for BoatU.S. members. Kennedy stated that he did not submit the bill to BoatU.S. because the tow at issue, if covered it all, would have been limited to \$50. Salvage tows are more costly and, Kennedy stated, are not covered under standard boat tow insurance.

{¶ 13} Appellant was questioned about a warning letter he received from the U.S. Coast Guard regarding the incident. The letter stated that 20 gallons of diesel fuel was discharged from his vessel. Appellant was given the option of accepting the warning or challenging the claims through a civil proceeding. Appellant took the warning but denied that it was evidence of his guilt.

{¶ 14} Appellant testified that he used his boat for recreational purposes and as a second residence in the summer. Appellant also testified that he had been a member of BoatU.S. since 2006. He stated that the primary benefit of membership is its towing service. Appellant renewed his insurance in August 2008, and the confirmation letter provided: “This level provides unlimited towing in a TowBoatU.S. Service Area if your boat is disabled at sea or at a restricted use dock.” The towing service agreement excluded coverage for salvage tows. Appellant stated that the August 4, 2008 renewal upgraded his coverage to salt as well as freshwater. He could not recall if the renewal also included an upgrade to “full service” on freshwater. Appellant stated that he neither authorized the services performed by LET nor received an estimate from the company.

{¶ 15} Captain Kenji Sanders testified that he is the owner of LET and a partner in Spill Tek. Sanders explained that on July 30, 2008, LET's dispatcher was contacted by the Sandusky Fire Department; LET then contacted its "subcontractor" Spill Tek. Sanders testified that he responded to Cedar Point Marina, Dock 131, with a hazmat truck. Sanders testified that he boarded the vessel and disconnected the batteries to ensure that bilge pump was disabled. Captain Sanders stated that he observed standing red diesel fuel in the bilge; he estimated that there was between 20 and 50 gallons.

{¶ 16} Captain Sanders stated that when he arrived the fire department had already placed a boom but that he did observe sheen on the water. Sanders stated that Spill Tek's response was "minimal" and that it was reflected in the bill. Nothing was used from the hazmat truck. At the request of Cedar Point Marina to tow the vessel, the spill technician with Sanders assisted in harnessing the vessel.

{¶ 17} On November 15, 2012, the trial court entered judgment in favor of LET for the amount owed, plus interest. Appellants appealed but the appeal was dismissed due to the pending counterclaim. An amended judgment entry denying appellants' counterclaim was filed on March 1, 2013, and a second amended judgment entry, dismissing the counterclaim with prejudice, was filed on March 13, 2013. This appeal followed.

{¶ 18} Appellants raise two assignments of error for our review:

Assignment of Error I.: The trial court erred as a matter of law in granting judgment in favor of the plaintiff and against the defendants upon the claims set forth in the plaintiff's complaint.

Assignment of Error II.: The trial court erred as a matter of law in granting judgment in favor of the plaintiff and against the defendants upon the counterclaims.

{¶ 19} Appellants' first assignment of error contends that the trial court erred in granting LET judgment on its claims. In essence, appellants contend that because there was no contract between LET and appellant, there is no basis for recovery. Appellants further argue that LET's claim for unjust enrichment must fail and that its actions as a volunteer are not compensable. Finally appellants argue that LET lacked standing to assert the environmental claims made by Spill Tek and that the fees charged were in conflict with R.C. 1547.30 which provides the maximum charge for tows from private docks.

{¶ 20} Regarding the contractual and unjust enrichment claims, we find that LET's good faith response to an emergency call from the Sandusky Fire Department is compensable. Testimony was presented that there was contaminant coming from the vessel and that there was a large sheen on the water surrounding it. Although testimony conflicted as to whether or not it was diesel fuel, appellant admitted that there was an

excess of black water in the bilge (containing bio waste) and that it may have been pumped out of the vessel. Further, appellant had over a two-hour drive to reach the marina.

{¶ 21} Appellant next argues that Spill Tek's charges were not recoverable because it was not a party to the action. During the trial, there was testimony presented that Spill Tek was a separate company and that its charges were added to the invoice. Although it was stated that Spill Tek was a subcontractor; when asked, the owner admitted that no contract between the companies existed. There was also no evidence to show that LET had paid Spill Tek for its services. In addition, other than disconnecting the battery on the vessel, there was insufficient testimony presented to substantiate Spill Tek's total charge of \$620.

{¶ 22} Finally, appellants contend that, pursuant to R.C. 1547.30(F), LET was limited to charging a maximum of \$200 for towing services from a private dock. R.C. 1547.30 provides the methods by which and charges permissible in removing an abandoned vessel from private property. Thus, we find that it is not applicable in the instant case.

{¶ 23} Based on the foregoing, we find that appellants' first assignment of error is well-taken, in part. We find that because Spill Tek was not named as a party in the action, it was not entitled to recover its charges. Further, in any event, there was insufficient testimony presented to substantiate Spill Tek's charges.

{¶ 24} Appellants' second assignment of error contends that the trial court erred when it rejected the CSPA claim. Appellants argued that LET improperly commenced services in violation of Ohio Adm.Code 109:4-3-05(A)(1) and (C)(1), failed to honor the BoatU.S. membership, in violation of R.C. 1345.02(B)(1) and/or (B)(9), and charged excessive rates, in violation of R.C. 1345.03(B)(2).

{¶ 25} The purpose of the CSPA is to protect consumers from unfair or deceptive transactions. R.C. 1345.02(A). First, as noted above, LET responded in good faith to a call from the Sandusky Fire Department. Next, regarding the BoatU.S. membership, there was testimony presented that appellant's membership did not cover salvage towing. Further, while LET did advertise that it was a BoatU.S. approved tow service and that it direct billed, there was no indication that appellant was somehow precluded from submitting the invoice on his own. Finally, as to the rates charged, as stated previously, R.C. 1547.30 applies to the towing of abandoned vessels, not those determined to be spilling contaminants into the marina. Accordingly, we find that appellants' second assignment of error is not well-taken.

{¶ 26} On consideration whereof, we find that the judgment of the Sandusky Municipal Court is affirmed, in part, and reversed, in part. Accordingly, we enter judgment in favor of appellee for \$618.00, plus statutory interest from November 12, 2012. Pursuant to App.R. 24, the parties are ordered to equally share the costs of this appeal.

Judgment affirmed in part
and reversed in part.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.