



Civil Resolution Tribunal

Date Issued: March 22, 2019

File: SC-2018-005808

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Wolf Kuehn (dba Canadian Institute of Gemmology) v. Lepine et al*,
2019 BCCRT 358

B E T W E E N :

Wolf Kuehn (Doing Business As Canadian Institute of Gemmology)

APPLICANT

A N D :

Sylvain Lepine, Peter Abou Kalam, and Federation des Caisses
Desjardins du Quebec

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about credit card charges for a spectrometer the applicant, Wolf Kuhn (Doing Business As Canadian Institute of Gemmology), says he sold to the respondent Peter Abou Kalam. On April 19, 2018, Mr. Kalam's credit card was charged \$2,600 by the applicant. However, about 3 months later the respondent credit card issuer Federation des Caisses Desjardins du Quebec (Desjardins) reversed the charge. Mr. Kuehn claims \$2,600, on the basis that 3 months was an excessive time to reverse the charge and because the charge-back was done without consulting him.
2. Desjardins says it reversed the charge because the cardholder Mr. Kalam advised he did not authorize the transaction and because the credit card was not properly electronically scanned and there was no signature or PIN used. Desjardins says the charge-back to the applicant's merchant account was done according to the Payment Services Agreement. The respondent Sylvain Lepine is Desjardins' employee and he adopts Desjardins' position.
3. Mr. Kalam says he did not buy or receive the spectrometer and that is why he disputed the credit card charge.
4. Desjardins and Mr. Lepine are represented by an employee of Desjardins. Mr. Kalam and Mr. Kuehn are each self-represented. For the reasons that follow, I dismiss the applicant's claims.
5. I note the applicant originally named the respondent Desjardins as "Desjardins Trust Inc.". Based on the undisputed submissions before me I find the proper respondent is Federation des Caisses Desjardins du Quebec, and I have amended the style of cause above accordingly.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil*

Resolution Tribunal Act (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.
8. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
9. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUE

10. The issue in this dispute is whether any of the respondents are responsible for paying the applicant \$2,600 for a spectrometer credit card charge.

EVIDENCE AND ANALYSIS

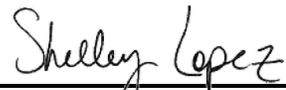
11. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
12. I will deal first with the claim against Desjardins and Mr. Lepine. The applicant was a Desjardins' merchant from April to July 2018, and he used Desjardins' credit card terminal in his business.
13. The applicant acknowledges the Payment Services Agreement, which I find provides for a charge-back if the credit card charge turns out to be insufficiently authorized. In particular, section 3.3.1 of the agreement expressly provides that if a merchant carries out a credit card transaction not read electronically, it does so at its own risk and peril and without any guarantee by Desjardins about the validity of the transaction. That is what happened here. It is undisputed, and the evidence shows, that the applicant (or his staff) entered the credit card number manually into the credit card terminal, and no signature or PIN was obtained to validate the use of the card by its real cardholder.
14. The applicant's argument against Desjardins is that a period exceeding 2 months is excessive, and in this case, it was nearly 3 months. I disagree. There is no time limit in the agreement, as acknowledged by the applicant. I do not find 2 or 3 months to be excessive and there is nothing in the agreement that requires prior consultation with the applicant before a charge-back is done. As discussed below, Mr. Kuehn does not dispute Mr. Kalam's assertion that Desjardins ultimately reversed the credit card charge in June after unsuccessful attempts to reach Mr. Kuehn. Section 3.3.2 of the Desjardins agreement states that Desjardins may in its sole discretion refuse to honour the transaction not read electronically, even if it has been authorized. Section 3.3.3. allows Desjardins to debit the merchant's account for the transaction, which it did on June 29, 2018 because the cardholder disputed having made the transaction and said he was a victim of fraud.

15. Quite apart from the fact that is no evidence whatsoever to support a conclusion Mr. Lepine is personally liable, for these reasons I dismiss the applicant's claims against Mr. Lepine and Desjardins.
16. I turn then to Mr. Kalam's liability for the \$2,600 claim. As referenced above, the applicant says Mr. Kalam bought the spectrometer and that it was delivered to him.
17. Mr. Kalam says he did not order anything from the applicant and he did not receive anything. While the address used by Mr. Kuehn matches Mr. Kalam's address, Mr. Kalam says the quoted phone number is incorrect. Mr. Kuehn did not respond to this assertion, and I accept Mr. Kalam's evidence about the phone number. Mr. Kalam says he first noticed the April 19, 2018 credit card transaction on May 9, 2018. At that point, he immediately called the credit card security department and asked for an investigation. Mr. Kalam says Mr. Kuehn did not respond to Desjardins' efforts and so Desjardins reimbursed him on June 26, 2018.
18. Mr. Kuehn's evidence of Mr. Kalam's alleged debt is an April 19, 2018 "Order Receipt" which I find reflects an order placed over the phone. I note Mr. Kalam was in Quebec and the applicant's store is in Vancouver. Mr. Kuehn's evidence also shows a signature on the courier slip for the delivered spectrometer. Mr. Kalam denies it is his signature. An email from the courier states that they do not ask for identification at the time of delivery.
19. Mr. Kuehn chose not to provide any reply submission, despite having the opportunity to do so. On balance, I accept Mr. Kalam's evidence and submission that someone used his credit card without authorization and that he was not the person who ordered or received the applicant's goods.
20. While it is unfortunate Mr. Kuehn was apparently also a victim of fraud, it was his decision to proceed with the credit card charge as he did, without having electronic or signature or PIN verification. I find Mr. Kuehn has not proved his claims and so they must be dismissed.

21. In accordance with the Act and the tribunal's rules, as the applicant was unsuccessful I find he is not entitled to reimbursement tribunal fees or dispute-related expenses.

ORDER

22. I order the applicant's claims and this dispute dismissed.



Shelley Lopez, Vice Chair