

ONTARIO
SUPERIOR COURT OF JUSTICE Oshawa
Small Claims Court

BETWEEN:

WEI XINGXU

PLAINTIFF

and

SARA STEELE and DAVID SASSEVILLE

DEFENDANTS

Heard: May 1, 2013

Wei XingXu, Self-represented
Tanya C. Walker, Counsel for the defendants

REASONS FOR JUDGMENT

Gollom Deputy J.

This claim and defendant's claim arise out of dispute regarding the property line between the plaintiffs property and the defendants' property. The defendants wanted to build a fence between their lot and the plaintiffs lot. The plaintiff seeks damages in the sum of \$10,000.00 for trespass, breach of contract, nuisance, intentional infliction of mental suffering, and punitive damages. The defendants, by defendants' claim, seek damages in the sum of \$4,000.00 relating to the costs to reinstall the fence posts, and for one-half of the cost of the fence to be constructed.

BACKGROUND

In July of 2010 the defendants wanted to build a fence between their lot number 120 and the plaintiffs lot number 119 in order to provide an enclosed yard for their infant son. David Sasseville (referred to as "Sasseville") approached the plaintiff to discuss the fence. The plaintiff had recently

purchased his house and explained that he preferred to wait awhile before agreeing to the fence. Sasseville accepted this request. He approached the plaintiff again in July 2011. By July of 2011 the defendants' son was a year old, and Sara Steele (referred to as "Steele") Sasseville's wife, was pregnant with a second child. At this time the plaintiff agreed to the construction of the fence provided that Sasseville pay for the construction, and take steps to ensure that the boundary line between the two properties was correctly measured and honoured. The parties entered into an oral agreement (referred to as the "agreement") whereby the plaintiff agreed to the construction of the fence provided that the defendants agreed to pay for the fence, and agreed to ensure that the boundary line between the two properties was correctly measured and honoured.

Prior to marking off the locations for the fence posts Sasseville obtained a copy of a survey of the plaintiffs lot prepared by J.D. Barnes Surveying (referred to as "Barnes"). Sasseville also had a Barnes survey of his lot. He used the two surveys to create 4 points plus a 5th point from a survey of an adjoining neighbour's lot. The two points from the plaintiffs lot did not line up perfectly with the 2 points from Sasseville's property with the result that Sasseville used the 5 points to plot the location for the fence posts. Using these reference points a total of 5 stakes were placed to establish the boundary line. The plaintiff and Sasseville agreed upon the boundary line. Unfortunately several of the stakes were removed by neighbourhood children with the result that Sasseville and the plaintiff had to replace them.

In Mid-August of 2011, after the boundary line was established and agreed upon, Sasseville and two neighbours placed 8 orange fluorescent "X" marks on the boundary line to mark the points where the fence posts would be placed. The plaintiff was not present at this time but that evening he observed the 8 orange "X" marks. According to Sasseville when the plaintiff observed the "X" marks he stated that he agreed with their placement. The plaintiff confirmed that wanted Sasseville to be careful when installing the posts. The plaintiff did not advise Sasseville that he wanted to be present during the installation of the posts. The plaintiff denied that he was consulted regarding either the placement of the orange "X" marks or the installation of the posts discussed below. A period of approximately two weeks elapsed between the

placement of the "X" marks and the installation of the fence posts. During this period the plaintiff did not complain with respect to the location of the marks.

On August 29, 2011, Sasseville, with the assistance of two neighbours and a professional installer from Rick's Posthole Drilling, installed the 9 fence posts. That evening when the plaintiff observed the posts he told Sasseville that he had failed to honour their agreement regarding the placement of the posts. Sasseville informed the plaintiff that the posts were placed at the "X" marks as agreed. According to Sasseville the plaintiff asserted that only his Barnes survey was accurate. Sasseville submitted that the plaintiff failed to account for the width of the posts that evening when he inspected them.

Sasseville called the two neighbours who assisted with the installation of the posts to seek their opinions regarding the placement of the posts in light of the plaintiffs concerns. According to Sasseville there were some small variances in the range of 1 to 2 centimetres on either his property or the plaintiffs property. He testified that he called the installer at Rick's Posthole Drilling who advised that a 100% correct post placement cannot be guaranteed. The matter was left on the basis that Sasseville would not complete the construction of the fence until the issues regarding the placement of the fence posts could be resolved. Sasseville estimated that the meeting lasted approximately 2 hours.

The two neighbours who assisted with the installation of the posts testified. Robert Thomson (referred to as "Thomson") is a teacher and part-time general contractor. He has built approximately 30 to 40 fences over the past 19 years. He has known Sasseville for 10 years and is a neighbour of the plaintiff. He was present on August 29, 2011 when the "X" marks were placed to mark the boundary. He was also present on an earlier occasion when the plaintiff and Sasseville discussed the boundary line using the 2 Barnes surveys and the neighbour's survey. Thomson testified that the plaintiff was satisfied with the placement of the 5 stakes at the time of

A second discussion took place at which time he met with the plaintiff and Sasseville. This time the 5 markers were used to plot a boundary line with a string. Thomson then sprayed the "X" markings with orange fluorescent paint to mark the locations for the fence posts. He testified that the plaintiff did not object to the locations that were marked. He did not attend any further meetings with the plaintiff.

Thomson helped Sasseville install the fence posts along with the specialist hired from Rick's Posthole Drilling. Each post was secured by 2 to 3 bags of cement. Thomson has no knowledge regarding the removal of the posts. He did inspect the area after the new posts were placed by the plaintiff. He observed that some posts were only half way into the ground; that the posts were not level; that they were not lined up where the original posts had been placed; that the concrete was broken; that the holes were larger; and that there was debris in some of the holes. He thought that the posts were on the property line but that due to the nature of the reinstallation some of the posts straddled the line. He testified that the original posts were properly lined up in a straight line whereas the new ones were misaligned.

The second neighbour, Mike McFetters (referred to as "McFetters") is also a teacher. He has personally constructed four fences. He has known Sasseville for 10 years and is a neighbour of the plaintiff. He was present during the discussions between Sasseville and the plaintiff during the 2011 Labour Day weekend, after the fence posts had been installed. According to McFetters the plaintiff disagreed with the placement of the posts. The three surveys were reviewed and the 5 reference points were marked off again. The plaintiff suggested that to determine the boundary line one must only use the 2 points on the survey for his property. McFetters explained to the plaintiff that all 5 reference points must be used to accurately determine the boundary line. McFetters used a tape measure to demonstrate how the boundary line varied when one used 2 points versus 5 points. The plaintiff became upset and asked McFetters if he had graduated from school. At this point in time, McFetters departed.

After the plaintiff removed and reinstalled the posts McFetters returned to the property and observed the newly installed posts. He testified that the new poles were not placed deep enough in the ground, and that they were not in the same location as the original posts.

Sasseville testified that Rick's Posthole Drilling placed 9 posts on the north part of his lot and charged \$270.00 for the cement and installation. The 9 posts were in a straight line and followed the boundary line agreed upon. The plaintiff was upset and retained a lawyer, Caryn Hirshhorn (referred to as "Hirsh-horn") who sent a letter to the defendants, dated September 9, 2011. The letter referenced the local by-law regarding fences. She suggested that the defendants failed to comply with the by-law and accused them of trespass. She directed them to remove the fence within 7 days of receipt of the letter failing which the plaintiff would make his own arrangements to remove the fence posts.

The defendants retained a lawyer, Melissa Belliveau (referred to as "Belliveau"). She sent an undated letter to Hirshhorn on September 12, 2011. The letter advised that the defendants were not prepared to remove the posts at this time but had stopped work on the fence pending resolution of the matter. The letter noted that the defendants took reasonable steps to establish the property line then marked the line with the involvement of the plaintiff. It noted that at no time did the plaintiff object to the location of the "X" marks prior to the installation of the posts.

Belliveau advised that her clients did not breach the by-law and stated that, "It is unreasonable for your client to embark upon any unilateral action, while my client remains open to further discussion and resolution through counsel, if your client takes steps to do so and or if any damage is caused to my client's property please be advised that we will seek all remedies available to us in law including damages, interest and substantial legal costs. " She invited Hirshhorn to contact her to discuss the matter further. The plaintiff acknowledged that he was familiar with the Belliveau letter prior to embarking on his next course of action. Hirshhorn did not contact Belliveau.

On September 26, 2011, the plaintiff removed all of the fence posts with the assistance of one gentleman from BetterHome Ontario. BetterHome charged the plaintiff \$ 169.50 for assisting with the removal of the posts. The bases of fence posts should be placed four feet below the surface of the ground and secured by cement. The plaintiff did not remove the bases but instead cut each post down to ground level. The plaintiff testified that he had the right to cut down the posts based upon the warning in the Hirshhorn letter to remove the posts within 7 days of the receipt of the letter or the plaintiff would make his own arrangements to have them removed. The plaintiff neither called Hirshhorn to testify nor submitted a statement from her to confirm her advice that he had the right to cut down the posts. The plaintiff cut down the posts without any prior warning to the defendants.

On September 26, 2011, Steele was at home sick. She proceeded to her porch and observed him cutting down the posts. She asked the plaintiff what he was doing. He ignored her and continued to cut down the posts. She then proceeded to take a video of the plaintiff and his assistant as they cut down the posts. Steele called the police. Two officers attended at the defendants' premises on September 26, 2011. They advised Sasseville that the plaintiff had no right to cut the posts and stated that they would speak to him. The police were provided with copies of the five letters. They advised the defendants that the plaintiff could either be charged with mischief to property or given the option to reinstall the posts. The defendants chose the option for the plaintiff to reinstall the posts. The officers visited the plaintiff on September 28, 2011 to discuss the situation.

After discussing the matter with the police the plaintiff agreed to reinstall the posts within 8 days failing which he could be charged with mischief to property. The plaintiff was not happy about the visit from the police. That evening he called 911 and obtained the names of the two officers. The next day he attended at the police headquarters and wanted to know why the police were involved. He was told to visit a lawyer. The plaintiff went to see Hirshhorn, who according to him,

advised him to put the fence posts back in. There is no confirmation from Hirshhorn to confirm this meeting.

On October 10, 2011 the plaintiff, with the assistance of one installer, reinstalled the fence posts. He purchased new posts and a total of 3 bags of cement from Home Depot. Steele took photographs and video of the reinstallation. The video confirmed that the new posts were not perpendicular to the ground; that the concrete was watery; that some posts were too high above the ground; that the old concrete was not removed; and that the posts were not parallel to each other.

Sasseville observed the new posts that evening. He determined that the posts were not properly reinstalled as the plaintiff tried to use the existing holes but failed to remove the cement. The new posts were not properly secured, and the bases were not 4 feet below the frost line. The plaintiff used only 3 bags of cement for all of the posts as opposed to 2 to 3 bags for each post as was done on the original installation. The posts were not perpendicular to the ground. As a result some posts were leaning from east to west and north to south. Sasseville concluded that the fence could not be built using the posts installed by the plaintiff. The video further demonstrated that the poles wobbled when pressure was applied. Sasseville notified the police of the situation. A follow up visit by the police was arranged.

The police attended at the property on December 1, 2011 to inspect the new poles to determine whether they were properly installed. In a General Occurrence Report submitted by PC Chmelowsky the following was noted, "The writer viewed the 8 fence posts in line. The posts are loose as they can be move(d) with very little effort, posts appear to be + - 1-2 feet below the surface ofthe grass. It appears to be a sub-standard attempt to secure the posts into the ground.,"

The plaintiff obtained two letters from J. D. Barnes signed by G. C. Laframboise. The first letter, dated March 13, 2012, opined that all of the posts observed on March 13, 2012, "that have been installed are north of the property line and entirely located within your property. The distance

to the centerline of the 10cm x 10cm posts from the property line varies from 5 cm at the westerly end of the proposed fence to 10 cm at the easterly end. " The second letter, date April 19, 2012, revised the size of the posts to 13 cm x 13 cm, and revised the distance from the property line to 6.5 cm at the westerly end of the proposed fence to 11.5 cm at the easterly end. Mr. Laframboise was not called by the plaintiff to testify. No explanation was offered regarding the reason for the revision of the measurements contained in the April 19, 2012 letter. It is noted that the attendance by IVfr. Laframboise occurred after the winter of 2011-2012, and related to a review of the fence posts installed by the plaintiff. Barnes did not review the fence posts installed by the defendants, as they had been removed by the plaintiff on October 10, 2011.

DISCUSSION

Plaintiffs Claim

The plaintiffs claim was issued on November 4, 2011, being a date prior to the above referenced visit by the police. The fence posts installed by the plaintiff have not been removed and the new fence has not been built. The plaintiff claims general damages for trespass, breach of contract, nuisance, intentional infliction of mental suffering, and punitive damages. In addition, he claims special damages for the cost of removing and replacing the fence posts and for remediating the land to remove the concrete and replace the grass. He also seeks damages for economic injury.

The plaintiff testified that he suffered emotional injury as a result of the incidents set out above. He submitted a brief note from Dr. Heung Wing Li setting out that he suffered from anxiety and insomnia as a result of a situational crisis since October 4, 2011. Dr. Li was not called as a witness. A medico-legal report was not submitted. The plaintiff is self-employed. The sum of \$3,000.00 is set out in the claim for time spent by him on this matter. The plaintiff did not adduce any evidence to establish this aspect of the claim. The claim references that he charges \$50.00 per

hour and that he spent 60 hours on this matter. He adduced no evidence to support this aspect of the claim.

The special damages claimed by the plaintiff consist of \$169.50 for material and labour paid to BetterHome Ontario, and \$361.62 paid to Home Depot. In addition, he paid \$14.78 to Shoppers Drug Mart for medication prescribed by Dr. Li. The plaintiffs claims for general damages for trespass, breach of contract, nuisance and intentional infliction of general damages are based upon the facts set out above.

The plaintiff failed to present probative evidence to support his claim for intentional infliction of mental suffering. The only evidence adduced consisted of the brief note from Dr. Li, and the single prescription. The plaintiff did not establish that the events surrounding the fence caused his alleged mental suffering. No evidence was adduced as to the causal connection between the events surrounding the fence and the plaintiffs alleged mental suffering. The plaintiff failed to prove that the defendants intended to harm him. As this element of the plaintiffs claim was not established it will not be considered further.

The plaintiff claims \$3,000.00 premised upon the time expended by him in connection with the events surrounding the fence. The claim alleges that the plaintiff spent 60 hours on matters related to the fence for which he charged \$50.00 per hour. No evidence was led by the plaintiff to prove either the number of hours expended by him or his unsubstantiated rate of \$50.00 per hour. This element of the plaintiffs claim was not established and will not be considered.

The plaintiff seeks punitive damages from the defendants. At trial the plaintiff led no evidence with respect to this head of damage. No basis was presented for punitive damages. The claim for punitive damages will not be considered.

The plaintiff claims that the defendants breached the agreement by failing to honour the placement of the fence posts along the property line between their adjoining properties. In addition, he claims that by failing to honour the placement of the posts the defendants trespassed upon his land. The plaintiff further alleges that trespass constituted a nuisance for which the defendants are liable for damages.

It is not disputed that the plaintiff and Sasseville spent considerable time determining the location for the fence posts. After the 5 points were determined and marked the locations for the fence posts were plotted and marked with the orange "X" marks. A period of approximately two weeks elapsed between the placing of the "X" marks and the installation of the fence posts. The plaintiff did not disagree with the placement of the marks. The first time he expressed concern occurred after the fence posts had been installed. When he met with Sasseville after the installation, Sasseville agreed to suspend the completion of the fence pending the resolution of the placement of the posts. Sasseville also called the installer who confirmed that 100% correct placement of the posts cannot be guaranteed. Thomson and McFetters both confirmed the events surrounding the determination of the boundary line and the events surrounding the installation of the fence posts. Although both Thomson and McFetters are acquaintances of Sasseville's I found their evidence to be credible.

Both prior to and subsequent to the installation of the fence posts by the defendants there were no new surveys conducted by either Barnes or any other surveyor. Accordingly, it is not possible to accurately determine whether or not the fence posts were located on the plaintiffs property. The survey conducted by Mr. Laframboise in March and April of 2012 is of no assistance as he surveyed the fence posts that were installed by the plaintiff after the original posts were cut down. Sasseville acknowledged that the original posts may have been slightly off the boundary line as it was not possible to ensure 100% accurate placement. Sasseville agreed to suspend construction pending a resolution of the placement of the posts. The letter sent by Belliveau to Hirshhorn confirmed that the defendants were open to further discussion and resolution.

Instead of trying to resolve the issues concerning the placement of the posts the plaintiff chose to cut them down without either discussion or notice to the defendants. He justified this action based upon the letter sent by Hirshhorn to the defendants whereby she warned "that the plaintiff would make his own arrangements to remove the fence posts". The plaintiff failed to explain why no response was made to the Belliveau letter. Hirshhorn was not called to confirm that she counselled the plaintiff that he could proceed to remove the posts.

In order for a trespass to occur there must be an unjustifiable intrusion by one person upon another person's land. The person committing the trespass has to voluntarily enter the land, in the possession of another, or place or throw or erect some material object on the land without the legal right to do so. Langille v. Schwisberg, [2010] O.J. 5812 sets out a detailed discussion of trespass at paragraphs 94 to 95. In this case the defendants sought out the plaintiff's agreement to construct the fence. After obtaining his agreement the boundary line was carefully plotted out and the location of the posts were marked with the knowledge and consent of the plaintiff. Prior to the determination of the boundary line the plaintiff had the opportunity to seek the assistance of a surveyor but elected not to do so. The evidence establishes that the plaintiff was satisfied with the determination of the boundary line. After he observed the installed fence posts and prior to cutting them down the plaintiff failed to obtain a survey to determine whether the posts were on his land. Sasseville agreed to put the fence construction on hold pending a resolution of the placement of the posts.

If the defendants technically trespassed upon the plaintiff's land then it was done by mistake. Both Sasseville and the plaintiff agreed upon the boundary line prior to the placement of the posts. In *Henderson v. Volk*, (1982), 35 O.R. (2d) 379 the Ontario Court of Appeal discussed this issue and stated as follows:

The third issue is trespass. The trial judge decided that neither party was entitled to damage for trespass and I agree with his conclusion. Technically, the Hendersons may have trespassed on the Volks! land by the erection of the fence. However, it was a very understandable mistake. The fence had been carefully constructed so that it was in line with an older existing fence. It was only the Middleton survey which

revealed the error. As well, the fence could have easily been removed. In those circumstances, the fence could not have injured the reversion of the Volks and they could not, in the circumstances, maintain an action for trespass.

The facts in this case are similar to those in the Henderson v. Volk decision. I find that there is no basis for the plaintiff's claim for trespass. The defendants did not breach the agreement with the plaintiff to construct the fence along the property line as the parties agreed upon the boundary line and the placement of the "X" marks. If the fence posts deviated slightly from the "X" marks then this resulted from the difficulty in placing the posts with 100% accuracy.

The final element of the plaintiff's claim is for special damages relating to the cost to remove and to install the new fence posts. I find that the plaintiff wrongfully removed the original fence posts, and negligently installed the new posts based upon the discussion above. Accordingly, there is no basis for the claim for special damages.

The plaintiff's claim is dismissed for the reasons set out above. I will discuss costs below.

Defendants' Claim

The defendants' claim was issued on December 21, 2011. They seek damages of \$2,000.00 for the costs to repair the deficient installation of the new fence posts by the plaintiff, and \$2,000.00 for one-half of the cost of the fence pursuant to Oshawa by-law 77-97. Section 7 of by-law 77-97 provides:

The cost of construction of a division fence shall be assigned as follows:

- (a) The adjoining owner shall pay fifty percent (50%) of the basic cost or fifty percent (50%) of the actual cost, whichever is the lesser; and
- (b) The owner shall pay the balance of the actual cost.

Section 8 of the by-law provides that, "the cost of reconstruction or maintenance of a division fence shall be borne equally by the owner and the adjoining owner".

The defendants submit that the plaintiff breached the agreement whereby the defendants agreed to pay the entire cost to construct the fence when he cut down the fence posts. They submit that in the absence of an agreement the plaintiff is bound to pay for one-half of the basic

cost to construct the fence pursuant to by-law 77-97. The defendants did not provide notice to the plaintiff of their desire to construct the fence pursuant to section 5 of the by-law which provides that notice of their intention to do so shall be served upon the adjoining owner at least fourteen day prior to the commencement of any work by either registered mail. Notice was not sent to the plaintiff. The failure to send registered notice of the intention to construct the fence does not defeat the defendants' claim that the plaintiff pay for 50% of the cost to construct the defence.

It cannot be disputed that the plaintiff had notice of the defendants' intention to construct the fence. It would be unfair to find that the failure to provide notice pursuant to section 5 of the by-law defeats the defendants' claim to share the costs. The plaintiff had notice of the defendants' intention to construct the fence at least one month prior to the installation of the fence posts. I find that the notice provision of the by-law has been complied with and accordingly, the plaintiff is liable for 50% of the cost of the fence. These costs are defined in sections 1 (a) and (c) of the by-law.

The plaintiff breached the agreement with the defendants when he cut down the fence posts. He compounded the damage by reinstalling the fence posts in a negligent manner. As a direct result of the plaintiff's actions the defendants must remove all of the fence posts and then properly reinstall them. The plaintiff is liable for the costs associated with the removal and reinstallation of the fence posts.

The defendants submitted two estimates for the reconstruction of the fence posts and the installation of a chain link fence. P. J. Kaiser Enterprises submitted a quote, dated January 8, 2012 for \$3,500.00 for the removal and backfill of 8 fence posts and concrete and the construction of a chain link fence. Oshawa Home Landscaping Inc. submitted a quote dated January 9, 2012 for \$3,820.00 to remove all the posts, remove all the concrete from the holes, and reinstall all posts with concrete, and to construct a chain link fence. The average cost to remove and reinstall the fence posts is \$2,040. The cost to construct the chain link fence averages out to \$1,470.00. The total average cost for all of the work is \$3,510.00.

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CONCLUSION

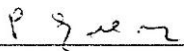
The plaintiffs claim is dismissed for the reasons expressed above. The defendants' claim is granted against the plaintiff for the amount of \$3,510.00. The defendants are entitled to their costs. I am fixing the costs at 15% of the amount of the claim of \$10,000.00 and the defendants' claim of \$4,000.00, subject to the comments below. These costs total \$2, 100.00.

The plaintiff claimed multiple heads of damage in his claim. As discussed above, he failed to present evidence on a number of these heads of damage. The defendants' counsel prepared a comprehensive case book which addressed each of the claims advanced by the plaintiff. She filed submissions which covered all of the claims put forward by the plaintiff. Notwithstanding the fact that the plaintiff was self-represented I find that he unduly complicated the action by advancing claims that he either failed to prove at trial or failed to withdraw prior to trial. Pursuant to section 19.06 of the Rules of the Small Claims Court, I am increasing the costs payable by the plaintiff to the defendants by \$500.00. The costs total \$2,600.00 subject to an offer to settle made pursuant to rule 14.07(2) of the Rules of the Small Claims Court.

The defendants' disbursements are fixed pursuant to section 19.01 (1) of the Rules of the Small Claims Court. The disbursements are to include the defendants' photocopying costs for the case book; submissions; and any other documents filed in the proceedings.

Prejudgment interest on the defendants' claim is fixed at 1.3% per annum from December 21, 2011 to May 30, 2013. Post judgment interest is fixed at 3.0% per annum.

Released May 30, 2013



Gollom Deputy J