Civil Resolution Tribunal

Date Issued: July 26, 2018

File: SC-2017-003633

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Reynolds v. Delta municipality / corporation,* 2018 BCCRT 381

B E T W E E N :

Peter Reynolds

APPLICANT

A N D :

Delta municipality / corporation

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This is a dispute about damage caused by branches from a Douglas fir tree (Tree) owned by the respondent Delta municipality / corporation[1]. The applicant, Peter Reynolds, says the respondent failed or neglected to maintain the Tree as required, resulting in the Tree's branch falling and extensively damaging the applicant's pool liner. The applicant seeks $4,654.00, the replacement cost for the pool liner. The applicant also seeks an order that the respondent "remove potential falling tree limbs from trees in the general area".

2. The respondent says it is not legally responsible for the Tree's branch falling, because it established a reasonable inspection practice, with the Tree last being inspected in February 2014. The respondent says a falling tree limb does not give rise to strict liability. The respondent says their expert arborist determined that the Tree was "healthy and stable" and the cause of its branch failure was "snow load and winter conditions". Mr. Reynolds is self-represented and the respondent is represented by Jennifer Clarke, a Risk Manager employed by the respondent.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 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.

4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear

[1] The parties' names in the style of cause are shown exactly as written in the Dispute Notice, which is based on the applicant's application for dispute resolution.

this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

5. 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.

6. 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.

ISSUES

7. The issue in this dispute is to what extent, if any, must the respondent municipality compensate the applicant for damage to his property caused by the respondent's Tree.

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only referred to the evidence as necessary to give context to my reasons.

9. It is undisputed that the Tree is located on the respondent's property, within a designated forested park reserve. It is also undisputed that the Tree's branches were overhanging onto the applicant's property, and, that on around February 10, 2017 the Tree branch in question fell onto the applicant's property from about 30 feet above. The respondent came to the applicant's property on February 16, 2017 and removed the branch and debris. I note the applicant had only moved into the home a few weeks before the incident.

10. The respondent says that due to the large number of city-owned properties and with limited staff and budget, the respondent does not inspect trees located on this type of property, which was a green belt. Rather, the respondent operates

primarily on a “call of service” approach, which it says is reasonable due to the balancing of resources. This means the respondent does not proactively inspect trees, and only does so when a resident calls them about a problem, which last happened in 2014.

11. The respondent submits the applicant could have trimmed any overhanging Tree branches or he could have insured his property against this type of damage. Based on the evidence before me, including photos, I accept the Tree was significantly overhanging over the applicant’s property and likely had done so for several years. I do not need to determine the extent with precision.

12. The law of nuisance is set out below. The respondent is correct that a homeowner is entitled to trim the branches of their neighbour’s tree to the extent those branches extend over the property line onto the homeowner’s property (see *Anderson v. Skender*, 1993 Canlii 2772 (BCCA) at paragraph 15). In other words, the applicant was entitled to trim the Tree’s branches that extended over onto his property. However, I find there was no obligation on the applicant to do so. The respondent made an operational decision to take a reactive approach. However, the respondent nonetheless remained responsible to reasonably maintain the Tree.

13. A person is entitled to use and enjoy their land without unreasonable interference. This is a general principle of the law of nuisance. When there is physical damage, there is a strong indication that the interference is not reasonable (see *Royal Ann Hotel Co. v. Ashcroft*, 1979 CanLii 2776 BCCA). Given the submissions and evidence, including photos, I find there is no question the fallen Tree branch damaged the applicant’s pool liner.

14. However, in the area of nuisance from trees, case law indicates that an award for damages may not always follow just because there is actual damage. An award of damages will depend upon whether the nuisance was known or ought to have been known, and whether reasonable steps were taken to remedy the nuisance

(*Hayes v. Davis 1991 CanLII 5716 BCCA* and *Lee v. Shalom Branch #178 Building Society, CanLII 2001 BCSC 1760*).

15. I find the issue before me is whether the respondent ought to have known that the Tree's branches were overhanging, but did not because it took only a reactive approach to tree issues, as described above.

16. I accept that the Tree was generally stable and healthy. However, I find that is not the end of the matter.

17. The respondent relies on its arborist's report that the Tree branch "appeared to have fallen" due to snow load and wind from winter weather conditions. Another respondent employee, an "Urban Forestry Foreman" stated that in his experience **healthy trees can lose branches without warning as a result of snow load and wind from winter storms** (my bold emphasis added). I accept this evidence.

18. It is also essentially undisputed that the respondent did nothing to maintain the Tree and prevent its branches from overhanging onto the applicant's property. The last inspection of the area was February 2014 (3 years before the Tree's branch fell), although this was based on a service request due to a branch failure of a different tree, a "Big Leaf Maple". There is nothing in the *Local Government Act* (LGA) that precludes the respondent's liability for a claim of nuisance arising from a failure to maintain its trees. Although not an issue raised by the parties, I find the applicant gave the respondent the notice of the damage as required by section 736 of the LGA.

19. The mere fact that the respondent is a municipality does not change its maintenance obligations. The respondent did not directly argue that its inspection approach was a policy decision rather than an operational one. In any event, I find it was an operational decision and thus the respondent is not immune from the applicant's claims (see *Anns v. Merton London Borough Council*, [1978] A.C. 728 as cited in *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 SCR 705, 1989 CanLII 81 (SCC)). In *McCrea v. White Rock (City)*, 1974 CanLII 1147 (BCCA), the court held

that the Canadian cases justify the conclusion that, provided it is consistent with the legislative scheme, a city and its inspector may be liable for a loss where the respondent has a duty, injury is a foreseeable consequence of the breach, and the respondent's breach caused the injury at issue. That is the situation in the case before me.

20. The respondent is correct that nuisance from trees does not give rise to what is known in law as "strict liability", meaning the respondent is not legally responsible for the damage simply because it was their Tree and a branch fell. However, I also do not agree with the respondent that it is not liable for property damage if it occurs due to wind or natural occurrence. What is required is that the evidence must show that the respondent knew or ought to have known about the Tree branch's dangerous position. I find the respondent ought to have known the Tree's branch could fall during the winter, and that it was foreseeable that if it did, it would damage the applicant's property.

21. In particular, I find the fallen Tree branch was a nuisance and amounts to unreasonable interference with the applicant's property. I find the respondent ought to have known the Tree's significantly overhanging branches presented a potential hazard to the applicant's property, particularly given the known location of his pool very near the property line boundary. While the respondent may have reasonably taken the reactive approach to most of the green belt area, I find that it ought to have conducted more proactive and regular inspections for those trees that it knew were directly adjacent to and overhanging on private property like the applicant's. The fact that a winter storm caused the Tree's branch to fall is not a defence. I say this because based on the respondent's own expert's opinion, I find the respondent ought to have known that in winter the Tree's branches were more likely to fall without warning. There is nothing in the evidence before me that the alleged winter conditions in February 2017 were particularly unusual. My conclusion is consistent with the court's analysis in *Millar & Brown Ltd. v. Vancouver (City)*, 1966 CanLII 393 (BC CA), where the court held the nuisance from an overhanging branch arose through the city's omission to take steps to

remove the impediment (the overhanging branch) when the overhanging developed. I have found the respondent knew or ought to have known the Tree's branches were overhanging onto the applicant's property. On balance, I find the Tree branch caused a nuisance and damage, and the applicant is entitled to compensation.

22. Given my findings above, I conclude the applicant is entitled to an award for damages because the respondent failed to take reasonable steps to maintain the Tree and remedy the potential hazard of its overhanging branches (see *Lee v. Shalom Branch #178 Building Society*, CanLii 2001 BCSC 1760).

23. The applicant submits his pool liner replacement cost $4,567.50 and has provided a June 26, 2017 invoice for it. The applicant also claims $87 for a pump he bought but for which he does not have the receipt. I find that amount is reasonable and on a judgment basis I allow the applicant's claim for a total of $4,654.00, the amount he sought in this dispute. I order the respondent to pay the applicant that amount, with pre-judgment interest under the *Court Order Interest Act* (COIA) on that amount, from June 26, 2017.

24. Bearing in mind the tribunal's mandate that includes recognition of parties' ongoing relationships, and given the applicant's submissions about ongoing responsibility for the Tree, I find it is appropriate to note that the respondent is responsible to maintain the Tree and any other trees, including preventing branches from overhanging onto the applicant's property. I decline however to make a formal order in this respect, as I have insufficient evidence before me about other trees.

25. The applicant was successful in this dispute, and therefore in accordance with the Act and the tribunal's rules, he is entitled to reimbursement of $175 for tribunal fees paid. There were no dispute-related expenses claimed. The respondent's request for reimbursement of $25 in fees it paid to file the Dispute Response is dismissed.

ORDERS

26. I order that within 14 days of this decision, the respondent pay the applicant a total of $4,878.04, comprised of:

    a. $4,654.00 as the replacement cost of the applicant's pool liner and related expense,

    b. $48.54 in pre-judgment interest under the COIA, and

    c. $175 in tribunal fees.

27. The applicant is entitled to post-judgment interest, as applicable.

28. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

29. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Shelley Lopez, Vice Chair