Civil Resolution Tribunal

Date Issued: August 23, 2018

File: SC-2017-006214

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Dyal v. Township of Langley*, 2018 BCCRT 469

B E T W E E N :

Sanjiv Dyal

APPLICANT

A N D :

Township of Langley

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. The applicant, Sanjiv Dyal, says that on March 10, 2017 a pothole damaged his car on a stretch of road the respondent, the Township of Langley, is responsible for maintaining. The applicant claims $300 for his insurance deductible paid to the Insurance Corporation of British Columbia (ICBC). The applicant also seeks $150,

as reimbursement for what he paid to obtain records from the respondent through the *Freedom of Information and Protection of Privacy Act* (FOIPPA). The applicant is self-represented and the respondent is represented by an employee.

JURISDICTION AND PROCEDURE

2. 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.

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

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 this dispute through written submissions, as I find I can fairly resolve the dispute based on the documentary evidence and submissions before me, which is consistent with the tribunal's mandate, as set out above.

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.

ISSUE

7. The issues in this dispute are a) whether the respondent negligently failed to repair a pothole, and b) whether the applicant has proved that the alleged unrepaired pothole caused the damage to his car.

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 referenced the evidence and submissions as necessary to give context to my decision.

9. The applicant submits that he was heading west in his car on 84 Ave in the respondent Township of Langley. Along a poorly lit section of the road "somewhere between 204 and 200 streets", he hit a pothole. The applicant says this resulted in damage, and as noted above in this dispute the applicant claims the $300 he paid to ICBC as an insurance deductible. For the purpose of this decision, I accept that a pothole in the respondent's road led to the applicant's vehicle damage and the insurance deductible being paid.

10. In its May 17, 2017 email to the applicant, the respondent stated that it did not have an official road inspection program, and instead it relies upon the public to advise of any potential road hazards and "we respond accordingly". In other words, the respondent has an unwritten "complaints-driven" policy of responding to pothole repairs.

11. The respondent is a municipality or a local government, as described in the *Local Government Act* (LGA). The respondent relies on section 744 of the LGA that it is not strictly liable for any road malfunction. The respondent denies negligence in respect of the applicant's pothole collision, and therefore the respondent refused to make any payment to the applicant.

12. The respondent says it did not breach any duty of care, because the respondent reasonably carried out its pothole repairs on a complaints-driven basis. Further, the respondent says the applicant has not identified the pothole's location in the 800 meter stretch of road nor has he proved that the respondent reasonably ought to have known about the alleged pothole.

13. The respondent relies on the important decision in *Barratt v. Corporation of North Vancouver*, 1980 2 SCR 418, in which the Supreme Court of Canada held that the municipality was not negligent for failing to maintain a pothole which the plaintiff cyclist had biked into, suffering injuries. As noted in *Barratt*, the respondent says it is not an insurer against damage resulting from the existence of a pothole. Something more is required. In *Barratt*, the court held that the municipality, a public authority, exercised its power to maintain the road but it was under no statutory duty to do so. Rather, the municipality's method of exercising its power was a policy matter to be determined by the municipality itself. The court held that if in the implementation of its policy a municipality's employees acted negligently, then liability could arise. However, the court concluded the municipality cannot be held negligent just because it formulated one policy of operation over another.

14. The above amounts to the distinction between operational decisions versus policy decisions (see also *Just v. British Columbia*, [1989] 2 S.C.R. 1228). A municipality cannot be held liable in negligence for its policy decisions, but it can be for its operational decisions. In *Just*, the court held that when a government is supplying services, it is subject to ordinary negligence principles. It is not disputed that if in carrying out its own policy, the respondent could be held negligent if its operational duty is not performed with reasonable care (*City of Kamloops v. Nielsen*, 1984 CanLII 21 (SCC)).

15. The respondent further relies upon *Sandhu v. Delta*, 2012 BCPC 435, which summarized the applicable principles in 'pothole cases'. Briefly, what is "reasonable repair" depends on the surrounding circumstances, including the road and the municipality. Second, as noted, a municipality is not an insurer against

injury or damage. Third, the method a municipality chooses to maintain a road is a policy matter, not an operational decision. In *Sandhu*, the court accepted that Delta's unwritten policy was a complaint-driven approach to pothole repairs and found the potholes were repaired in a reasonable amount of time.

16. I turn then to the facts of the case before me. Here, as referenced above, the respondent's policy decision was to repair potholes on receipt of complaints. The applicant says the policy is in fact to do so "in a timely manner", and that the respondent did not repair potholes in a timely manner on the road in question. I agree, although I also agree with the respondent that the surrounding circumstances are relevant, such as weather and road conditions.

17. For reasons discussed below, I find I do not need to decide whether the respondent's response to pothole repairs between September 2016 and March 2017 were timely. I say this because I find the respondent had fixed all known potholes by January 10, 2017, with no further complaints before the applicant's vehicle damage.

18. The applicant relies upon the respondent's own documentation between December 1, 2016 and March 10, 2017, and during that time there were 5 visits for pothole repairs, with 2 "service requests" (SR48202 and SR48388) for pothole repairs, which the applicant says each took 4 months to complete. The applicant says that SR48388 was for 2 large potholes that were not repaired until 4 days after the applicant's vehicle sustained the damage in question, and I infer he blames one of those potholes for his vehicle damage. I disagree with the applicant's interpretation of the respondent's records, as discussed below.

19. The applicant says SR48388 shows a citizen called the respondent on November 7, 2016 to complain that a pothole damaged his vehicle the week prior. The face of SR48388 shows the work completed was "2 large potholes repaired mid street" with a "log date" of March 14, 2017. The applicant says the log date could only mean the date the repairs were completed, and thus the repair took 4 months, after his vehicle was damaged. I do not agree that the "log date" means the date of

the pothole repair, as I find it means only the date the repair was noted or logged on the associated service request form. The fact that there are 5 work orders related to 2 service requests supports the conclusion that the service request is not the source of truth for when a job is completed. It is also consistent with the July 18, 2018 statement from the respondent's Roads Operations Manager, as discussed below.

20. Among other things, the respondent's manager stated that the 2016/2017 winter season was severe and as such the respondent experienced much higher road damage and difficult road conditions to carry out repairs. Based on the various work orders in evidence, the respondent's manager also says that road crews fixed potholes on the road in question on multiple dates in the fall and winter of 2016, and lastly on January 10, 2017. The manager stated there were no further pothole complaints after January 10, 2017, before the applicant's March 10, 2017 incident. This is consistent with the service requests in evidence.

21. This is the crux of the matter. Even if I found taking about 2 months to repair the potholes was unreasonable, and I make no such finding, those potholes were in fact repaired by January 10, 2017, well before the applicant's vehicle damage occurred. This is reflected in the relevant Work Orders.

22. In particular, I agree with the respondent that Work Order 143360, which shows work was completed on December 2, 2016, is the document that reflects the work it did in response to SR48388. The applicant says this is not possible, because Work Order 143360 was initiated on September 21, 2016, before the November 2016 pothole incident that gave rise to the service request. I disagree with the applicant. The Work Order W143360 was initiated on September 21, 2016, as part of a "group repair project", with the listed maintenance type as "scheduled corrective". This is consistent with the respondent's manager's statement. In other words, there is nothing inconsistent about the work done under W143360 being the relevant repair to solve the complaint issue in SR48388.

23. The material point is that the respondent's records show that all pothole complaints were responded to and the repair work completed by January 10, 2017, with no new intervening complaints before the applicant's March 10, 2017 complaint.

24. The applicant says the test in negligence remains the "but for" test: but for the respondent's negligent act, the damage would not have occurred (*Plett v. Abbotsford (City)*, 2017 BCSC 1298). The respondent says the applicant has not proved which hazard caused the damage in question, nor has he provided that the hazard existed due to the respondent's breach of duty. The respondent says if the applicant cannot prove the former, he cannot prove the latter, citing *Hewson v. British Columbia*, 2016 BCSC 803 and *Newham v. Canwest Trade Shows Inc*. 2012 BCSC 238. The respondent says the tribunal should not resort to speculation to fill any evidentiary gaps. I agree with the respondent.

25. Again, the respondent emphasizes that the applicant has never identified the pothole he says damaged his car. As such, the respondent says the applicant has failed to prove his case, as there is no evidence the respondent was ever informed of that particular pothole such that it should have responded to it under its complaint-driven policy of repair. I agree. The difficulty for the applicant is that based on my findings about the respondent's records, the pothole that damaged his car was not known to the respondent. Therefore, the respondent cannot be found negligent.

26. In accordance with the Act and the tribunal's rules, as the applicant was not successful, I find he is not entitled to reimbursement of the $125 paid for tribunal fees. I say the same about the $150 the applicant spent to obtain the FOIPPA records from the respondent.

ORDER

27. I order that the applicant's claims, and therefore this dispute, are dismissed.

Shelley Lopez, Vice Chair