Civil Resolution Tribunal

Date Issued: August 23, 2018

File: SC-2017-007177

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Birsa* v. *BLU Auto Group Inc.,* 2018 BCCRT 471

B E T W E E N :

Stefan Birsa

APPLICANT

A N D :

BLU Auto Group Inc.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION AND JURISDICTION

1. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the respondent's participation, due to the respondent's non-compliance with the tribunal's directions as required, as discussed below. The applicant Stefan Birsa's claim is that the respondent BLU Auto Group Inc. should refund him the $1,980.00 paid for a 2003 Pontiac Vibe (car), because the car's quality was misrepresented.

2. The parties are each self-represented.

3. Section 36 of the *Civil Resolution Tribunal Act* (Act) applies if a party to a dispute fails to comply with the Act or its regulations. It also applies if a party fails to comply with tribunal rules in relation to the case management phase of the dispute, including specified time limits, or an order of the tribunal made during the case management phase. After giving notice to the non-compliant party, the case manager (facilitator) may refer the dispute to the tribunal for resolution and the tribunal may:

    a. hear the dispute in accordance with any applicable rules.

    b. make an order dismissing a claim in the dispute made by the non-compliant party, or

    c. refuse to resolve a claim made by the non-compliant party or refuse to resolve the dispute.

4. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 3.1 of the 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.

5. 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.

6. For the reasons that follow, I have allowed the applicant's claim.

ISSUES

7. The first issue in this dispute is whether I should proceed to hear the applicant's dispute, without the respondent's further participation given its non-compliance.

8. The second issue is to what extent, if any, I should order the respondent pay the claimed refund of $1,980.00 for the vehicle, plus tribunal fees of $125.00.

EVIDENCE & ANALYSIS

Non-compliance

9. My June 13, 2018 summary decision to hear the dispute without the respondent's participation, given the respondent's non-compliance, was previously communicated to the parties by email, through the tribunal facilitator. The details supporting that decision are set out below.

10. The respondent is the non-compliant party in this dispute and has failed to participate in the case management phase, as required by sections 25 and 32 of the Act and tribunal rules 94 to 96, despite multiple attempts by the facilitator to contact it with a request for a reply.

11. In particular, the applicant's Dispute Notice was issued on December 5, 2017. He says the respondent sold him the car and promised that it was a good quality and reliable vehicle. He says the car had drive train failure and critically low oil within one day, and that he drove only 45 kilometers initially, after he bought it. The applicant also says he took all proper measures to maintain the car and used fluids that "meet and exceed OEM standards." OEM stands for original equipment manufacturer.

12. The respondent submitted its Dispute Response on January 19, 2018, saying the car was sold to the applicant but that its subsequent deterioration was due to the applicant's actions in driving 8,000 km and then in having the transmission flushed

with non OEM parts and fluid. The respondent also says the bill of sale showed the applicant declining any warranty on the car.

13. After emailing a list of evidence and three documents corresponding to that list, the respondent stopped participating in the facilitation process. The details of the non-compliance are as follows:

    a. *May 7, 2018* – The case manager sent an email to the respondent asking for a response to the applicant submissions by May 17, 2018. There was no response.

    b. *May 21, 2018* – The case manager sent a reminder email allowing until May 23, 2018 for the response. There was no response.

    c. *May 24, 2018* – The case manager telephoned and spoke to the respondent who indicated he would send the response that evening. No response was received.

    d. May 26, 2018 – The case manager emailed the respondent a final warning allowing them until May 28th to provide evidence and submissions. The email included a warning that this matter could be referred to a tribunal member for a decision without the respondent's further participation, if it did not respond. The respondent did not reply.

14. The facilitator referred the respondent's non-compliance with the tribunal's rules to me for a decision as to whether I should hear the dispute in the absence of the respondent.

15. As noted, the respondent filed a response and submitted evidence, but has provided no explanation about why it then suddenly stopped communicating with the tribunal as required. I find the facilitator made a reasonable number of attempts to contact the respondent. Parties are told at the beginning of a tribunal proceeding that they must actively participate in the dispute resolution process. I

find it is more likely than not that the respondent was aware of the facilitator's contact attempts but chose not to respond.

16. The tribunal's rules are silent on how it should address non-compliance issues. I find that in exercising its discretion, the tribunal must consider the following factors:

    a. whether an issue raised by the claim or dispute is of importance to persons other than the parties to the dispute;

    b. the stage in the facilitation process at which the non-compliance occurs;

    c. the nature and extent of the non-compliance;

    d. the relative prejudice to the parties of the tribunal's order addressing the non-compliance; and

    e. the effect of the non-compliance on the tribunal's resources and mandate.

17. First, this claim does not affect anyone other than the parties involved in this dispute.

18. Second, the non-compliance here occurred after the respondent filed evidence. The respondent has effectively abandoned the process. It failed to provide submissions when requested. Third, given the facilitator's repeated attempts at contact and the respondent's failure to respond despite warnings of the consequences, I find the nature and extent of the non-compliance is significant.

19. I see no prejudice to the applicant in hearing the dispute without the respondent's participation. The prejudice to the respondent of proceeding to hear the dispute is outweighed by the circumstances of its non-compliance. If I refused to proceed to hear the dispute, the applicant would be left without a remedy. That would be unfair.

20. Finally, the tribunal's resources are valuable and its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is

severely impaired if one party does not want to participate. I find that it would be wasteful for the tribunal to continue applying its resources on this dispute, such as by making further attempts to seek the respondent's participation.

21. In weighing all of the factors, I find the applicant's claims should be heard. In deciding to hear the applicant's dispute I have put significant weight on the following factors:

    a. the extent of the non-compliance is significant;

    b. the applicant is not prejudiced if such an order is made; and

    c. the need to conserve the tribunal's resources.

Merits of the Claim and Damages

22. Having decided to hear the dispute without the respondent's participation, I turn to the merits of the dispute. Where a respondent filed a response but has since failed to comply with the tribunal's directions as required, an adverse inference may be drawn against that respondent. This means that if the respondent refuses to participate, then it is generally reasonable to assume that the applicant's position is correct on the issue at hand. This concept is similar to where liability is assumed when a respondent has failed to provide any response to the dispute and is in default.

23. Here, the situation is somewhat different because the non-compliance occurred after the respondent submitted three documents as evidence. I have therefore considered all evidence filed by the applicant and respondent in making the decision on the merits of this dispute.

24. This claim is for a refund of $1,980.00 for a car.

25. On October 23, 2017, the respondent bought the car from another dealer. The disclosure statement that accompanied the car at that time said that the car was

"suitable for transportation" and that the subframe, suspension and electrical systems did not require repair.

26. It is undisputed, and I find, that on November 13, 2017, the applicant bought the car from the respondent for $1,980 plus tax. The purchase agreement represents the car as being suitable for transportation.

27. The purchase agreement filed by the respondent contains a clause that says "THE DEALER WARRANTS THE MOTOR VEHICLE: … If NEW or USED, under the *Sale of Goods Act*, except the sale of a vehicle to (i) a purchaser who intends for buy for resale (ii) a Purchaser who intends to use a vehicle primarily in business (ii) a corporation or industrial or commercial enterprise. Other Warranty (describe): (and then, in printing, Decline Warranty)."

28. The respondent argues, in its Dispute Response, that the words "Decline Warranty" mean that no warranty applies to the car. It is not clear who wrote those words.

29. The purchase agreement filed by the applicant is undated, and does not have the "Decline Warranty" notation on it. However, it is signed by the applicant and the dealer and otherwise similar to the purchase agreement filed by the respondent.

30. Due to the respondent's non-compliance, the discrepancy between its version of the purchase agreement and that filed by the applicant cannot be fully explored. I therefore draw an adverse inference against the respondent on this point, and find that there was no agreement between the parties to decline any *Sale of Goods Act* (SGA) warranty.

31. The CARPROOF report that accompanied the car and was referred to in the purchase agreement lists only one minor accident (left side damage with repairs less than $300), and no other damage records.

32. The day he bought the car, the applicant says it broke down. He took the car in for service at Mobil 1 Lube Express. An inspection was completed which included a

recommendation to replace the transmission fluid. The applicant says, and I accept, that the mechanic at Mobil 1 told him the transmission fluid looked so used that he suspected no transmission maintenance had ever been done on the car. A photo of the original transmission fluid shows it to be very dirty. I accept the applicant's uncontested evidence that all replacement fluids were OEM or exceeded OEM standards. The applicant had the transmission and some other vehicle fluids replaced, and the car ran well.

33. The next day, the applicant says he contacted the respondent to complain about the car breaking down. He says they denied responsibility, suggesting that the problems were caused by the Mobil 1 Lube Express service, even though the service was done after the break down.

34. In these proceedings, the respondent asserted that the applicant drove the car 8,000 kilometers without problems. There was no evidence before me that the car drove 8,000 kilometers after the applicant purchased it.

35. The text messages filed in evidence establish that by early December 2017, the car was not running well and the transmission failed. The applicant says, his odometer readings support and I find, that he drove the car for 21 days, and 1,866 kilometers between buying it and when it broke down. The applicant has not driven the car since.

36. The sale of a car by a car dealer is not 'buyer beware'. The respondent is in the business of selling cars and so the SGA applies and implies a term that the item is in the condition described and of saleable quality. Under the SGA, if the buyer has examined the goods, there is no implied condition about defects that the examination ought to have revealed.

37. Here, the applicant took the car for a test drive. I find that he would have been able to examine the car further, but opted to buy it before it was inspected. I also find that the defect here, namely the lack of service to the transmission for over 200,000 kilometers, would not necessarily have been revealed on examination.

38. The mechanic who ultimately examined the car suspected that maintenance had never been done, but could not say so with certainty. The dealer should have had that information and disclosed it to the buyer. Instead, the applicant says, and I find, that the dealer represented the car as of good quality and suitable for transportation.

39. Section 18 of the SGA says that it is an implied condition of a sale that the goods, here the car, would be "durable for a reasonable period of time having regard to the use to which they would normally be put…"

40. I find that, in circumstances where the dealer knew or ought to have known that the transmission had not been serviced recently, it should have disclosed that knowledge to the applicant.

41. As well, the car was said to be good quality and suitable for transportation. I find that the car, which operated for only 21 days after purchase, was not durable for a reasonable period of time. For a used car of good quality, the applicant could reasonably have expected at least several months of problem free driving.

42. I find for the applicant and award the claimed $1,980.00. As well, the applicant is entitled to $125 in tribunal fees.

43. I order the respondent to pay the applicant $1,980.00 plus applicable pre-judgment interest under the *Court Order Interest Act* (COIA).

ORDERS

44. Within 30 days of this decision, I order the respondent to pay the applicant a total of $2,117.82, comprised of:

    a. $1,980.00 for the car,

    b. $12.82 in pre-judgment interest at COIA rate from December 4, 2017 (the date the car broke down) to the date of this decision, and

c. $125.00 in tribunal fees.

45. The applicant is also entitled to post-judgment interest.

46. I also order that, once the respondent makes the payments ordered above, the applicant must make the car available for the respondent to pick up, at a mutually agreeable time and date not later than October 10, 2018, with ownership transferred back to the respondent at that time. I further order that the respondent is responsible for any filing costs or taxes associated with the transfer of ownership.

47. If the respondent fails to pick up the car by October 10, 2018, the applicant can dispose of it as he sees fit and retain any proceeds from it.

48. 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.

49. 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.

Julie K. Gibson, Tribunal Member