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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Schroeder et al v. van Zyl*, 2018 BCCRT 525

B E T W E E N :

Ronald Schroeder and Rita Schroeder

APPLICANTS

A N D :

Leon van Zyl

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell

INTRODUCTION

1. This is a dispute about a real estate purchase. The applicants, Ronald Schroeder and Rita Schroeder, bought a townhouse from the respondent, Leon van Zyl and his spouse.

2. The evidence indicates that Mr. van Zyl's spouse, Liesel Schroeder, is the applicants' daughter. The documents also say Mr. van Zyl and Liesel Schroeder separated in February 2017, before the townhouse sale. Liesel Schroeder is not named as a party to this dispute.

3. The applicants say the respondent breached the contract of purchase and sale by failing to give vacant possession, and by removing a wine fridge, a bar fridge, and a water cooler (the appliances) from the home. The applicants seek $532.35 to pay for removal of garbage and "rubble" from the property. They also seek an order for return of the appliances in good condition, or alternatively $610 in compensation.

4. The respondent says he provided vacant possession as required under the contract. He also says the appliances were not included in the sale.

5. The parties are self-represented.

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 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.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to "he said, she said" and "he said, he said" scenarios. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. 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.

Parties

10. The respondent says the applicants should have named Liesel Schroeder as a party to this dispute, or should file a new dispute against both sellers named in the contract. I disagree. It was open to the applicants to file a dispute naming Mr. van Zyl as respondent. It was open to Mr. van Zyl, under tribunal rule 74, to name Liesel Schroeder as an additional or "third" party to the dispute. He did not do so, and I find that this is not determinative of the outcome of the dispute against Mr. van Zyl.

Jurisdiction

11. The respondent says the tribunal does not have jurisdiction over the appliance-related claims because the appliances are family assets that are being addressed in an ongoing divorce proceeding. I disagree. While the BC Supreme Court has exclusive jurisdiction to make orders about the division of family property under section 94(1) of the *Family Law Act*, this dispute does not involve an order dividing family property. Mr. van Zyl and Liesel Schroeder agreed to sell the townhouse. The appliance dispute involves interpreting section 7 of the contract of purchase and sale, so the substance of this dispute is breach of contract, rather than a dispute about division of family property. I also note that the respondent did not provide specific evidence that the appliances in question are being addressed in a family law proceeding.

ISSUES

12. The issue in this dispute is whether the respondent breached the terms of the contract of purchase and sale, and if so, what remedy is appropriate.

EVIDENCE AND ANALYSIS

13. In a civil claim such as this, the applicants bear the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

14. The contract of purchase and sale (contract) is dated August 15, 2017. It says the sale would be completed on September 15, 2017, and the applicants would have vacant possession on September 18, 2017.

Vacant Possession

15. The applicants say the respondent failed to give vacant possession as required in the contract because he left a wall structure installed in the garage, and because he left garbage on the property.

16. The photos provided by the applicants show a partial wall built in the garage. It is wood-framed and covered with sheetrock. The applicants say they had to remove the wall as it was illegal and unsafe, and did not comply with strata corporation bylaws.

17. Section 8 of the contract says the property and all included items will be in substantially the same condition on the possession date as on the date the contract was executed (August 15, 2017). The evidence before me does not establish that the garage wall was built after August 15, 2017. Rather, a lawyer acting for the applicants wrote in an October 20, 2017 letter said the respondent had undertaken to remove the wall before the possession date. This indicates that the applicants were aware of the wall, and knew that it was in place when they signed the contract on August 15, 2017. I also find the applicants have not provided any evidence that the respondent promised to remove the wall.

18. For these reasons, I find that leaving the garage wall in place was not a breach of contract. The applicants are therefore not entitled to a remedy for its removal.

Garbage

19. The photos show that some full garbage bags and boxes of items were left on the property, as well as various other items such as a full box, wood scraps, a paint can, car jacks, and metal siding from a dismantled shed.

20. The applicants say these items constitute a breach of their contractual right of vacant possession.

21. In *Zygocki v. Hillwood* (1975), 12 O.R. (2d) 103, the Ontario Superior Court of Justice court considered the meaning of vacant possession, and said that a purchaser has a right to actual, unimpeded physical enjoyment of the premises. The court said the vendor has not complied with the duty to provide vacant possession if there exists a physical impediment which substantially interferes with the enjoyment of the right of possession of a substantial part of the premises to which the purchaser has not expressly or impliedly consented.

22. Following the reasoning in *Zygocki,* I find that the respondent in this dispute provided vacant possession to the applicants. While he left some garbage behind, this did not constitute a physical impediment which substantially interfered with a substantial part of the premises. While I accept that the garbage was an annoying nuisance for the applicants, it did not take up an entire room. It was a small enough amount that it was hauled away in one load, along with the debris from the garage wall.

23. I also note that while some real estate contracts include a provision requiring a property to be left in “broom swept” condition, the contract in this dispute had no such clause.

24. For these reasons, I conclude that the respondent did not breach the applicants’ contractual right to vacant possession. The applicants are therefore not entitled to compensation for garbage removal.

Appliances

25. The respondent admits he removed the wine fridge, the bar fridge, and the water cooler from the home. He says these appliances were not included in the sale contract because they were his personal possessions. I do not agree.

26. Section 7 of the contract says the purchase price includes “all appliances”. The wine fridge, bar fridge, and water cooler are clearly appliances, which is not particularly disputed by the respondent. There is no evidence before me to support

the conclusion that “all appliances”, as written in the contract means some appliances and not others, or that the disputed appliances were excluded from the contract. There is also no suggestion that the disputed appliances were not in the home when the contract was signed on August 15, 2017. If the respondent wanted to exclude some appliances from the sale, he was obligated to specify that in the contract. By signing the contract, he agreed that all appliances, including the bar fridge, wine fridge, and water cooler, were part of the sale.

27. The applicants request an order for the return of the appliances. Ordering a party to do something in this manner is called specific performance. Specific performance is generally only ordered if monetary compensation will not suffice or is not appropriate. I find that monetary compensation is most appropriate in this case. The respondent has not disputed the applicants’ valuations of the appliances. Accordingly, I order the respondent to pay the applicants $610 for the appliances.

28. The applicants are also entitled to prejudgment interest under the *Court Order Interest Act* (COIA), as set out below in my order.

29. The tribunal’s rules provide that the successful party is generally entitled to recovery of their fees and expenses. The applicants were partially successful, so I order that the respondent reimburse 50% of their tribunal fees, which equals $62.50. Neither party claimed dispute-related expenses.

ORDERS

30. I order that within 30 days of this decision, the respondent pay the applicants a total of $679.23, broken down as follows:

    a. $610 as reimbursement for the appliances,

    b. $6.73 as prejudgment interest under the COIA, and

    c. $62.50 for tribunal fees.

31. The applicants are also entitled to post-judgment interest under the COIA.

32. 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.

33. 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.

Kate Campbell, Tribunal Member