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Civil Resolution Tribunal

Indexed as: *Krugel v. Thiessen et al,* 2018 BCCRT 913

B E T W E E N :

Michael Krugel

APPLICANT

A N D :

Kelsey Thiessen and Chelcie Thiessen

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about money allegedly owing under a May 31, 2017 contract of purchase and sale of a property on Vancouver Island (contract). The sellers, SA

and GA, are not parties to this dispute, but on October 26, 2017 they assigned their claim to their lawyer, the applicant Michael Krugel, in exchange for his payment of $2,607 to them. The respondents, Kelsey Thiessen and Chelcie Thiessen, were the buyers in the contract.

2. The contract completed on July 31, 2017, and at that time the sellers agreed to be responsible for a $2,607 waterworks conversion charge. Later, the sellers realized that this was an error, as the conversion cost was at that time only an estimate of a future charge. Thus, the applicant says the sellers should not be responsible to pay it under the contract. The respondent buyers rely on the sellers' agreement to the $2,607 adjustment in the buyers' favour. The final amount for the waterworks conversion cost was not assessed until January 2018, for $2,000. After that, the respondents paid the applicant the $607 difference. Thus, the applicant claims $2,000 in this dispute.

3. The applicant is self-represented. The respondents are represented by Kelsey Thiessen.

JURISDICTION AND PROCEDURE

4. 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.

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

6. 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.

7. 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

8. The issue in this dispute is whether the respondent buyers owe $2,000 to the applicant, on the basis that the sellers' agreement to pay a waterworks conversion cost was a mistake.

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. I have only addressed the evidence and submissions below as necessary to explain my decision.

10. The applicant alleges the respondent buyers breached the contract by failing to pay "the full and properly adjusted purchase price" due under the contract. The applicant says his claim is based on 2 grounds: "improper adjustment", and "unilateral amendment to the contract".

11. In a July 21, 2017 email from the Comox Valley Regional District, there is a discussion about an "estimated" waterworks conversion cost that had been reduced to $2,607 from $4,902.

12. The “Sellers Statement of Adjustments” shows a $2,607 debit, for “payment of one-time conversion and connection charge for all property owners” in the property district. Significantly, the sellers signed their agreement with this Statement. In other words, the Statement shows the sellers were responsible for the $2,607 debit, which is the amount claimed in this dispute.

13. Paragraph 6 of the contract deals with adjustments: “The Buyer will assume and pay all taxes, rates, local improvement assessments, fuel utilities and other charges from, and including, all adjustments both incoming and outgoing of whatsoever nature made **as of July 31, 2017** (Adjustment Date)” (my bold emphasis added).

14. The root of this dispute is the sellers say that they signed the Statement of Adjustments in error, on the “mistaken understanding” that a bill for $2,607 had been issued before the Statement of Adjustments had been signed. It is undisputed that the Comox Valley Regional District had not yet issued an invoice for the waterworks conversion by the contract’s July 31, 2017 adjustment date.

15. The applicant says the estimated conversion cost was not an item to be adjusted for under the contract’s paragraph 6, because it was not a tax, rate, local improvement assessment or other charge as of the July 31, 2017 adjustment date. In other words, because it was an “estimated” cost, the applicant says it was not adjustable as of July 31, 2017. However, the applicant also says the waterworks conversion cost was not a charge his clients, the sellers, should have to bear because it was not specified in the contract.

16. The applicant provided a copy of a February 2, 2018 letter from the Comox Valley Regional District, which set out there were 2 costs associated with the waterworks conversion: a $2,000 “Parcel Tax” for the 2018 property taxation year, and a $1,000 capital improvement cost charge, to be charged as part of the 2018 utility bill. This combined conversion cost totals $3,000, almost $400 more than the $2,607 debited to the sellers. The applicant says the conversion cost was to be billed with the 2018 municipal taxes, after the July 31, 2017 adjustment date. The respondents provided an August 2, 2018 email from their notary who said they were sending $2,000 from

their trust account for the one-time conversion charge. In reply, the applicant acknowledges that the respondents paid $607. I infer this means the applicant has reduced his claim to $2,000.

17. The applicant says the respondents unilaterally amended the contract by retaining the $2,607, given that the contract is silent about the conversion cost. The applicant says the respondents unilaterally implied a term for a holdback for the $2,607, yet that term did not exist in the contract. The contract states at paragraph 18 that there are no representations or agreements other than those expressed in the contract.

18. The applicant says that unless modified by the contract, the respondent buyers bought the property “as is, where is”, under the doctrine known as *caveat emptore*. While the respondent buyers may have believed the conversion cost was an outstanding bill for the sellers to pay, that understanding was not set out in the contract.

19. The respondents say that as of July 21, 2017, they understood the waterworks project was an “active local improvement assessment”, captured by paragraph 6 of the contract. The respondents say that they did their due diligence and used a notary to guide them, and they completed the purchase relying on the sellers’ obligation to pay the conversion cost. The respondents say they should not be found at fault because the sellers’ lawyer advised his clients to pay a cost they no longer want to pay.

20. I find the conversion cost was in fact $2,000. I find it was not effective as of July 31, 2017, which is clear from the fact that at that time there was no invoice for $2,607 or any other amount, and that the $2,607 was then only an estimate. The contract did not provide for a holdback and did not specifically address the conversion cost. Based on the terms of the contract, I find that the waterworks conversion cost was not an adjustable item, because it was only an estimate of a future cost at that point.

21. This dispute then turns on what flows from the sellers’ mistaken agreement to pay the $2,607 charge on the Statement of Adjustments. Paragraph 1 under the “Notes

to Statement of Adjustments" states that the statement is believed to be correct but its accuracy is not guaranteed. The "Sellers should carefully check the statement to verify its accuracy. Errors and omissions are excepted". The sellers' agreement to the Statement of Adjustments was an agreement between the sellers and the buyers.

22. In contract law, there is what is known as "the law of mistake". As discussed in *Hannigan v. Hannigan*, 2007 BCCA 365, citing R*on Ghitter Property Consultants Ltd. v. Beaver Lumber Co.* (2003), 2003 ABCA 221, there are 3 types of mistake: common, mutual, and unilateral. Common is where the parties make the same mistake. Mutual mistake occurs when both parties are mistaken, but their mistakes are different. In a mutual mistake, the parties misunderstand each other and are "not on the same page". Unilateral mistake is where only one of the parties is operating under a mistake. In other words, if the other party is not aware of the one party's erroneous belief, then the case is mutual mistake. If the other party knows of it, it is a unilateral mistake.

23. The presence or absence of an agreement is one of the foundational differences among the 3 types of mistake. In the case of a mutual or unilateral mistake, the existence of an agreement is denied, and so there is no real offer and acceptance and thus the transaction must necessarily be void. With common mistake, the agreement is acknowledged and what remains to be determined is whether the mistake was so fundamental as to render the agreement void or unenforceable on some basis. Whether or not the mistake goes to the root of the contract is often important. A "fundamental" mistake is one that involves a fact which, "constitutes the underlying assumption on which the entire contract was based" (see *Munro v. Munro Estate* (1995), 1995 CanLii 1393 (BCCA), as cited in *Berthin v. Berthin*, 2015 BCSC 78).

24. I find the $2,607 debit to the sellers in the Statement of Adjustment was a common mistake. Everyone at that time mistakenly believed the waterworks conversion cost was an existing charge, rather than an estimate of a future charge.

25. So, was the mistake so fundamental to render the sellers' agreement to pay the $2,607 conversion cost void or unenforceable? I find the answer is no. The contract completed, the house was sold and the respondent buyers took possession. The entire contract was not based on the conversion cost line item on the Statement of Adjustments. Given that the common mistake was not fundamental to the contract, I find the applicant cannot succeed in his claim for the actual $2,000 conversion cost. The enforcement of the Statement of Adjustments as agreed by the sellers would not unjustly enrich the respondent buyers. In *Munro*, the court cited Lord Denning, who said that the party seeking to set aside a contract must not themselves be at fault. I find the sellers were at fault for not ensuring the waterworks conversion cost was truly payable by them, before signing the Statement of Adjustments. In summary, I find the applicant is bound by the sellers' agreement to pay the waterworks conversion cost in the Statement of Adjustments.

26. Given my conclusions above, I find the applicant's claims must be dismissed. As the applicant was not successful, in accordance with the Act and the tribunal's rules, I find the applicant is not entitled to reimbursement of tribunal fees or dispute-related expenses. I note that the applicant did not provide any detail or receipts for the $110 claimed in expenses, and so I would not have ordered their reimbursement in any event.

ORDER

27. I order the applicant's claims and this dispute dismissed.

Shelley Lopez, Vice Chair