Civil Resolution Tribunal

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File: SC-2017-005723

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Elliott v. Roesch et al*, 2019 BCCRT 54

B E T W E E N :

Phillip Elliott

APPLICANT

A N D :

John Roesch, Eileen Roesch, and SEIDLER CONSTRUCTION LTD.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Sarah Orr

INTRODUCTION

1. The applicant, Phillip Elliott, says the respondent SEIDLER CONSTRUCTION LTD.[1] (Seidler), trespassed on and damaged his former property in Oliver, British

[1] The parties' names are exactly as set out in the Dispute Notice, including capitalization.

Columbia when it was excavating the neighboring property belonging to the respondents John Roesch (Mr. Roesch) and Eileen Roesch (Ms. Roesch). The applicant wants the respondents to reimburse him $1,705.12 for an engineering report he says he was required to obtain as a result of the damage.

2. The respondents Mr. and Ms. Roesch say they were living in Prince George, British Columbia at the time Seidler performed the work on their property and they have no knowledge of any damage caused to the applicant's former property.

3. Seidler says it did not trespass on the applicant's former property and that any damage to the applicant's former property was a result of the applicant's leaking irrigation line.

4. The applicant and the Roesches are self-represented. Seidler is represented by David Seidler, its principal.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 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.

6. 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, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

7. 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.

8. 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

9. The issue in this dispute is whether any of the respondents are required to reimburse the applicant $1,705.12 for an engineering report.

EVIDENCE AND ANALYSIS

10. In civil claims like this one, the applicant has the burden of proving their claim on a balance of probabilities. This means the tribunal must find it is more likely than not that the applicant's position is correct.

11. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision. For the reasons that follow, I dismiss the applicant's claim.

12. It is undisputed that both properties in this dispute are in the Arbor Crest Development project in Oliver, BC. Seidler has had exclusive builder rights to this development since 2005 and has completed 41 of the 44 homes. Seidler says it is intimately aware of the foundations and property lines of all homes in the development, and that each home is only 3 feet, 11 and ¾ inches from the property line.

13. Seidler started working at the Roesches' property on September 28, 2016 and started excavation on October 5, 2016. Seidler says that while excavating near the applicant's property line, an area of dirt 2 feet deep and 4 feet wide sloughed off the applicant's property and into the excavation on the Roesches' property. Seidler says this exposed the applicant's irrigation control box, which showed there was a water

leak that had saturated the surrounding ground, causing the sloughing. Seidler says it immediately worked to shore up the applicant's irrigation box and lines and stabilize the applicant's air conditioning unit and concrete pad which had started to lean towards the excavation. Seidler says it informed a woman at the applicant's home of the situation, and she gave them permission to remove the applicant's air conditioning unit and store it until it could be properly reinstalled, which Seidler did. Once the air conditioning unit was removed, Seidler says it allowed the concrete pad to fall into the excavation, removed it and all the water-saturated soil that had sloughed away, and hauled it all away in a dump truck. Seidler says the next day it repaired the applicant's leaking garden hose and built a platform to support the applicant's irrigation lines.

14. The applicant says Seidler trespassed on his property before excavating to install stakes and boards, and again to excavate soil on his property. Seidler denies installing stakes on the applicant's property, and I am unable to determine the applicant's property line from the photographs in evidence. Seidler denies excavating any soil from the applicant's property and provided three affidavits from people who were on site on the day of the excavation supporting this position. There is no indication the applicant witnessed Seidler's excavation work on October 5, 2016. I find the applicant has not established that Seidler trespassed on his property either to install stakes or to excavate soil.

15. On October 18, 2016 the applicant informed Seidler of his intention to obtain an engineering report and his demand for Seidler to cover the cost. At no point did Seidler agree to pay for the engineering report.

16. On October 26, 2016 the applicant received a conditional offer to purchase his home. One of the conditions was that the applicant would provide the prospective buyer an engineering report by April 30, 2017 determining the impact Seidler's work on the Roesches' property had had on the applicant's property.

17. The applicant obtained an engineering report from Riding Engineering dated December 19, 2016. It is based on inspections of the site on October 25, 2016 and

December 9, 2016. The report says the applicant was concerned that Seidler's excavation of the Roesches' property may have caused cracking in the concrete skimcoat covering the floor of his crawlspace. The report found Seidler's excavation of the Roesches' property did not cause any structural damage to the applicant's home, and it did not appear to cause any of the cracking in the applicant's foundation and crawlspace floor.

18. If the Roesches and Seidler did nothing wrong with respect to the applicant's property, there is no legal basis to order them to pay for the engineering report. Therefore, I will consider the respondent's actions with respect to the applicant's property and whether any of those actions were wrongful. The legal considerations are negligence and nuisance.

The Roesches

19. In order to establish a claim in negligence against the Roesches, the applicant must prove that they owed him a duty of care, they failed to meet a reasonable standard of care, it was reasonably foreseeable that their failure to meet that standard would cause damage to the applicant, and their failure did in fact cause damage.

20. Generally speaking, neighbours owe each other a duty of care with respect to the other's property. However, here I find Mr. and Ms. Roesch did not owe the applicant a duty of care in the circumstances, namely with respect to Seidler's excavation work. There is no evidence they employed Seidler, and they were not present during any of the events the applicant claims led to the damage of his former property. Even if they did owe the applicant a duty of care here, there is no evidence they breached such a duty or in any way acted negligently.

21. While the applicant did not specifically allege nuisance, I find it reasonable to consider whether the Roesches are responsible in nuisance. To establish a private nuisance the applicant must prove he suffered a substantial interference affecting the use or enjoyment of his property, and that the interference was unreasonable in all of the circumstances (see *Burke v. Linder*, 2014 BCSC 1798). While there is no

question the applicant experienced some interference with his land from the excavation of the Roesches' property, he did not provide sufficient evidence about the extent or nature of any loss of use or enjoyment. Even if he had, there is nothing in the evidence to indicate that such an interference was unreasonable in the circumstances. I find the applicant has not established a claim in nuisance against the Roesches. I therefore dismiss the applicant's claims against the Roesches.

Seidler

22. I find Seidler owed the applicant a duty of care when it excavated the Roesches' property, and the standard of care is that of a reasonably prudent builder in the circumstances. However, I find the applicant has not demonstrated that Seidler breached the standard of care. The evidence is clear that when the earth sloughed away from the applicant's home, Seidler immediately ceased excavation and worked quickly to prevent damage to the applicant's property. The applicant has not established that the sloughing away of earth from his property into the excavation on the Roesches' property was a result of Seidler's negligence.

23. Given the proximity of the excavation work to the applicant's property, the sloughing of earth from the applicant's property, and the need for the applicant's air conditioning unit and supporting concrete slab to be removed, it is understandable the applicant was concerned there may be damage to his property. However, the engineering report states that Seidler's excavation work did not cause any damage to the applicant's home. There is no evidence the applicant incurred any damages caused by Seidler's actions.

24. The applicant suggests that he could have sold his home for $4,000 to $5,000 more than he did if not for Seidler's negligence, but he failed to provide any evidence to support this claim aside from stating the price at which he sold his home. As I have already found the applicant failed to prove Seidler was negligent, I dismiss this claim.

25. I have already dismissed the applicant's claim that Seidler trespassed on his property. I find the applicant has not established a claim in nuisance against Seidler for the same reasons he has not established a claim in nuisance against the Roesches.

26. In summary, I find the applicant has failed to establish any legal basis for the respondents to pay for his engineering report. While the applicant may have been required to obtain the engineering report as a condition for selling his home, that requirement was a result of being party to a contract to which none of the respondents were a party. I find the respondents are not required to reimburse the applicant for the cost of the engineering report.

27. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. The applicant was the unsuccessful party, so he is not entitled to reimbursement of his tribunal fees or dispute-related expenses. None of the respondents paid tribunal fees.

ORDER

28. I dismiss the applicant's claims and this dispute.

Sarah Orr, Tribunal Member