



Civil Resolution Tribunal

Date Issued: February 21, 2019

File: SC-2018-005493

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mazzeo v. Twiss et al*, 2019 BCCRT 209

B E T W E E N :

Tilar Mazzeo

APPLICANT

A N D :

Peter Twiss, Stephanie Twiss, Michelle Martin and Shelly Mann

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This dispute is about a failed real estate transaction. The applicant, Tilar Mazzeo, seeks reimbursement for expenses she says she incurred as a result of inaccurate information provided to her and an inability to conduct a full assessment of the property she wished to buy. The respondents Peter Twiss and Stephanie Twiss are

the owners of the property, while Michelle Martin and Shelly Mann acted as the real estate agents for Mr. and Ms. Twiss. The respondents deny responsibility for the damages claimed by the applicant.

2. The applicant is self-represented. The respondents are represented by Peter Twiss.

JURISDICTION AND PROCEDURE

3. 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.
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, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
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 make one or more of the following orders:
 - a. order a party to do or stop doing something;
 - b. order a party to pay money;
 - c. order any other terms or conditions the tribunal considers appropriate.

ISSUES

7. The issues in this dispute are:
 - a. whether the respondents must pay the applicant \$2,586.94 for inspection fees and
 - b. whether the respondents must pay the applicant \$156.45 for an expert statement.

EVIDENCE AND ANALYSIS

8. Peter Twiss and Stephanie Twiss (owners) purchased a property in Central Saanich, British Columbia in November of 2013. They decided to list the property for sale in May of 2018, with the respondents Michelle Martin and Shelley Mann acting as their real estate agents.
9. The listing identified the property as having been operated as a bed and breakfast (B&B) business, and that it was currently operating as an Air BnB style accommodation, with no breakfast provided. The listing stated that all wiring had been upgraded.
10. The applicant viewed the property and made an offer of \$1.3 million. She says that she offered this price based on the information provided to her in the listing and in the Property Disclosure Statement (PDS). The April 30, 2018 PDS stated that the owners were not aware of any problems with the sanitary sewer system, the owners were not aware of any additions or alterations made without a required permit and final inspection, and that they were not aware of any material latent defects.
11. The applicant then discovered that there was no business licence in place, as was required by the municipality. Inspections revealed that there had been some electrical work and the enclosure of a carport on the property without necessary permits, there was some residual knob and tube wiring, and there were concerns

with the septic system. The applicant also says the owners refused to allow her to complete her inspection of the drainage system.

12. The applicant offered to complete the transaction in spite of the issues with the property, but for a lesser amount of money. The owners did not agree to a reduced selling price, and the deal collapsed.
13. The applicant seeks reimbursement for the amounts she spent on inspections and a report about the extent of the drainage inspection that was required. She says that she made an offer on the property based on the information provided to her in the listing, and would not have entered into a contract if she had accurate information. The applicant says the owners knowingly provided false statements on the PDS, and that they engaged in fraudulent misrepresentation. The applicant's position is that the real estate agents failed to do their due diligence and discover the false claims made by the owners such that they are jointly liable with their clients. She also says that the owners breached the contract by failing to allow her to inspect the perimeter drains fully.
14. The respondents say that the expenses incurred in anticipation of completing the sale are not recoverable. Although they admit that some of the information they provided was not accurate, the owners deny that they did so intentionally. The owners say that they were not aware that they needed permits for the alterations, some of which were done by a friend who was a licenced electrician. They provided documentation from a safety authority that led them to believe that all of the wiring had been upgraded, and all of the knob and tube wiring removed, and documentation indicating that the local authorities approved the septic system. The owners state that some items on the property may not be up to the present-day building codes, but point out that the home is almost 90 years old. They say that they had inquired with the municipality about a business licence, and were told that they did not need one. The owners say that they permitted the drain inspection, but declined to allow the lawns, gardens and concrete areas to be torn up as they would have been responsible for restoring the damage.

15. The real estate agents deny that they made any misrepresentations or acted in bad faith, and point out that the applicant was represented by her own agent. They say they owed no duty to verify the sellers' knowledge of their own property and were not aware that any work had been done without a permit. The real estate agents say there is no term in the contract that allows prospective buyers to do whatever they like in terms of their inspection, and that they have no control over a seller's decision to permit an invasive investigation or not.

PDS

16. The applicant believes that the sellers provided inaccurate responses on the PDS when they said they were not aware of problems with the septic system, unpermitted alterations (in the form of electrical work and enclosing a carport), and the presence of latent material defects.

17. A patent defect can be discovered by conducting a reasonable inspection and making reasonable enquires about a property (see *Cardwell v. Perthen*, 2006 BCSC 333, affirmed 2007 BCCS 313). A latent material defect is a material defect that cannot be discerned through a reasonable inspection of the property, including a defect that renders the property dangerous or potentially dangerous to the occupants, unfit for habitation. A seller must disclose a latent defect if they have knowledge of it.

18. A seller will be considered to have knowledge of a latent defect where they are actually aware of the defect, or where they are reckless as to whether the defect exists. The burden of proving the requisite degree of knowledge or recklessness rests on the applicant (see *McCluskie v. Reynolds et al* (1998), 65 B.C.L.R. (3d) 191 (S.C)). The PDS asks whether a seller is aware of a defect, and this awareness is inherently subjective (see *Hamilton v. Callaway*, 2016 BCCA 189). In the PDS, a seller must disclose honestly its actual knowledge of the property, but that knowledge does not have to be correct (see *Nixon v. MacIver*, 2016 BCCA 8). A statement in a PDS does not rise to the level of a warranty (*Hanslo v. Barry*, 2011 BCSC 1624, *Kiraly v. Fuchs*, 2009 BCSC 654).

19. In the circumstances of this case, I find that there were no latent material defects as all of the issues identified by the applicant were discerned through a reasonable inspection. In addition, I am not satisfied that the evidence establishes that any of the issues were dangerous, potentially dangerous, or rendered the property unfit for habitation.
20. Turning to the accuracy of the statements, I find that the applicant has not established that the owners were dishonest and did not disclose their actual knowledge of the property. As noted above, there is no requirement that a disclosure on a PDS be correct. Further, I am not satisfied that a real estate agent's due diligence extends to assessing an owner's belief or knowledge of the status of their property. I find that this aspect of the applicant's claim is not established.

Fraudulent Misrepresentation

21. The applicant says that, in addition to the items discussed in the PDS, the owners fraudulently misrepresented the state of the wiring, the lack of a business licence, the presence of a commercial kitchen, and the legality of kitchenettes in the guest quarters.
22. Except for items listed on the PDS, the principle of "buyer beware" applies to real estate purchases and a buyer must determine the state and quality of a property. This principle does not apply if a seller makes a fraudulent misrepresentation about the property: *Cardwell v. Perthen*, 2006 BCSC 333.
23. As set out in *Ban v. Keleher*, 2017 BCSC 1132, in order to succeed with a claim for fraudulent misrepresentation, a claimant must prove:
 - a. the defendant made a representation of fact to the claimant;
 - b. the representation was false in fact;
 - c. the defendant knew the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;

- d. the defendant intended for the claimant to act on the representation; and
 - e. the claimant was induced to enter into a contract in reliance upon the false representation and thereby suffered a detriment.
24. The owners have provided explanations for their statements. Although the applicant's investigations and inspections revealed some unexpected issues, I find that the evidence does not establish that the owners knowingly made false statements or were reckless in making their statements. I am not satisfied that fraudulent misrepresentation has been established on the part of the owners. Further, I do not find that the real estate agents knew of, or were responsible for, any misrepresentation. I also note that the listing document state that "[i]nformation given is from sources believed reliable but should not be relied upon without verification."
25. Based on the evidence before me, I find that the applicant has not met her burden to establish fraudulent misrepresentation.

Breach of Contract

26. The purchase and sale agreement permits the buyer to have access to the property to conduct inspections. It did not specify which inspections would be permitted. The applicant says that the owners breached the contract when they did not permit a full inspection of the perimeter drains. She agrees that the real estate agents were not responsible for the owners' decision in this regard.
27. The July 18, 2018 report from the inspector retained by the applicant states that they were unable to locate a perimeter drain around the house. According to the report, the owners "did not grant us permission to dig around the house to locate a perimeter drain". The extent of the digging that would be required was not discussed in this report.
28. The owners said that they did not want the lawn and garden to be dug up and concrete removed as they would have been responsible to restore these areas.

The real estate agents said that it is not common practice to dig up gardens in order to conduct an inspection. Although the applicant denied that such activity would have been required for a “reasonable and customary” inspection, this was the reasonable impression that the owners had when they declined to permit a further inspection of the drainage system. I am not persuaded that the contractual term permitting inspection was intended to be broad enough to encompass what could be perceived as damage to the property, as I find was clearly the case here.

29. In these circumstances, I find that the owners’ decision not to allow digging for a perimeter drain was not a breach of the contractual term permitting inspections.

Summary

30. I acknowledge the applicant’s dissatisfaction with the failed real estate transaction. However, the evidence does not support her allegations of dishonest disclosure on the PDS, fraudulent misrepresentation or breach of contract, or that she incurred expenses as a result of same. I dismiss the applicant’s claim for reimbursement of her claimed expenses.
31. 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. As the applicant was unsuccessful, I dismiss her claim for reimbursement of tribunal fees.

ORDER

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

Lynn Scrivener, Tribunal Member