Civil Resolution Tribunal

Date Issued: March 8, 2019

File: SC-2018-005768

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Ricketson v. The Corporation of the District of Saanich*, 2019 BCCRT 285

B E T W E E N :

Charles Ricketson

APPLICANT

A N D :

The Corporation of the District of Saanich

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sarah Orr

INTRODUCTION

1. This is a dispute about a damaged driveway. The applicant, Charles Ricketson, says the roots of a tree on the boulevard in front of his home which was owned by the respondent, The Corporation of the District of Saanich, grew under his driveway causing damage. The applicant wants the respondent to pay him $3,500 for the cost of repairing his damaged driveway.

2. The respondent says it is not responsible for the cost of repairing the applicant's driveway, and that once it became aware of the issue it removed the tree within a reasonable period of time.

3. The applicant is self-represented. The respondent is represented by an employee or principal.

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 118 of the *Civil Resolution Tribunal 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. 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.

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.

ISSUES

8. The issue in this dispute is whether the respondent is required to pay the applicant $3,500 for the cost of repairing his driveway.

EVIDENCE AND ANALYSIS

9. In a civil claim like this one, the applicant must prove their claim on a balance of probabilities. This means I must find it is more likely than not that the applicant's position is correct.

10. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision. For the following reasons, I dismiss the applicant's claims.

11. It is undisputed that a Liquidambar tree (the Tree) was planted on the respondent's property on the boulevard in front of the applicant's home in Saanich in 1993. The applicant says the respondent planted the Tree too close to his neighbour's spruce tree, his driveway, and the utility cover. He submitted an undated letter from his neighbor which states that the Saanich Parks Department planted the Tree in 1993 within 3 feet of her blue spruce without consulting any homeowners. The respondent says there is no evidence it planted the Tree, and suggests it was likely planted by a previous homeowner or the property developer. I find the applicant has not established that the respondent planted the Tree, and there is insufficient evidence before me to determine where exactly it was planted in relation to his neighbour's spruce tree, his driveway, or the utility cover.

12. The letter from the applicant's neighbour states that in the spring or summer of 1993 she complained to the respondent about the placement of the Tree. The letter states that an employee of the respondent investigated and decided not to remove the Tree. The applicant says his neighbour asked the respondent to remove the Tree at this time, however the letter does not specifically state this.

13. In July 2005 the applicant's neighbour complained to the respondent that the Tree was killing her spruce tree. In August 2005 the respondent inspected the Tree and pruned back some of its lower limbs. The service request document in evidence for this issue states, "Problem REMOVAL," but does not specifically state that the applicant's neighbour asked the respondent to remove the Tree. Regardless of whether such a request was made, I am satisfied that the respondent determined it was unnecessary to remove the Tree at that time. In the absence of evidence that the Tree was in fact killing the neighbor's spruce tree, I find the respondent's determination was reasonable.

14. The applicant submitted photographs of his driveway which he says were taken in December 2009 and December 2010, although the photographs themselves are undated. The photographs show some cracking and lifting of the driveway near the boulevard, though I cannot determine from these photographs the extent or cause of the damage.

15. In July 2011 the applicant's neighbour asked the respondent for permission to remove her spruce tree. After inspecting the area, the respondent granted the neighbour's request and she removed her spruce tree. The service detail in evidence from that service visit does not indicate that the applicant complained to the respondent at that time about the Tree or about damage to his driveway. That document states that both neighbours want the tree down, and that it was in "a poor location, is surface rooting and taking up lawn." The applicant suggests that this refers to the Tree, however on reading the entire document I find it refers to his neighbour's spruce tree, which is the subject of the service request.

16. The applicant says that during the respondent's visit to his neighbour's property in July 2011, a representative of the respondent "noted some minor driveway lifting" on the applicant's driveway, however this claim is unsubstantiated by the evidence before me. The applicant says the representatives of the respondent who attended the property at that time should have noticed early damage to his driveway, should have known that further damage to his driveway was inevitable with the Tree's

continued growth, and should have had the Tree removed before it caused damage. The applicant says the removal of his neighbour's spruce tree caused the Tree to grow at a faster rate, and in support of this he submitted a photograph of the Tree's rings. However, the photograph is of poor quality and there is no evidence that the spacing of the Tree rings is connected to the removal of the spruce tree, aside from the applicant's assertion.

17. It is undisputed that in August 2014 the applicant's neighbour called the respondent to complain about caterpillar nests in the "boulevard trees," and that the respondent attended the applicant's property a few days later to investigate. The applicant says this was another opportunity for the respondent to notice his damaged driveway and take required action, but that it failed to do so.

18. The applicant also submitted photographs of his driveway taken by Google Maps in September 2011 and May 2014, however they are of poor quality. I am unable to determine from these photographs whether there was damage to the applicant's driveway on the dates indicated, or whether such damage was caused by the Tree.

19. It is undisputed that on January 22, 2018 the applicant complained to the respondent that the Tree had damaged his driveway. It is undisputed that this was the first time the applicant complained to the respondent about the Tree. On February 14, 2018 the respondent removed the Tree, and on March 19, 2018 it removed the Tree stump.

20. The applicant wants the respondent to pay him $3,500, which he says is the replacement cost of the exposed aggregate for only the damaged part of his driveway. He submitted 2 quotes for repairing his driveway ranging between $4,700 and $15,700.

21. I find the law of nuisance applies to this dispute. A nuisance is the substantial and unreasonable interference with the use and enjoyment of property (see *St.* Lawrence *Cement Inc. v. Barrette*, 2008 SCC 64). It is undisputed that in January 2018 the applicant's driveway was damaged by the Tree's roots, and the Tree had

become a nuisance. Since the respondent did not actively create the nuisance, the respondent can only be found liable in nuisance if it knew or ought to have known about the potential nuisance through the exercise of reasonable care and failed to take reasonable steps to remedy the situation (see *Lee v. Shalom Branch #178*, 2001 BCSC 1760).

22. While the applicant claims the respondent knew about the damage to his driveway in July 2011, this is unsubstantiated by any evidence. On the evidence before me, I find the respondent was not aware of the damage to the applicant's driveway until he complained to them on January 22, 2018. The respondent removed the Tree several weeks later, on February 14, 2018. The respondent says its response time was reasonable in the circumstances, and its employees acted reasonably in inspecting and removing the Tree. There is no evidence that the damage to the driveway was a significant safety concern or that it prevented the applicant and his family from using the driveway. In the circumstances I am satisfied the respondent acted reasonably to remove the Tree once it learned of the nuisance.

23. The next question is whether the respondent ought to have learned of the nuisance before January 22, 2018 through the exercise of reasonable care. The applicant says the respondent ought to have learned of the nuisance in July 2011 when its crews were present to inspect his neighbour's spruce tree. The respondent says there is no evidence the applicant's driveway was damaged in July 2011, and in the alternative, that there is no evidence the respondent breached the standard of care of a reasonable municipality by not noticing damage to the applicant's driveway at that time. I agree. While the photographs the applicant submitted from December 2009 and December 2010 do show some cracking and lifting of the driveway, I am unable to determine from the photographs the extent of the damage or what caused it, or whether such damage amounted to a nuisance. It is uncontested that the respondent's crew was on site in July 2011 to remove the applicant's neighbour's spruce tree, and presumably they were focused on that task. The applicant has not established that the respondent had any reason to inspect his driveway that day, or that they in fact did so.

24. The respondent says there is no evidence the Tree's roots caused substantial or unreasonable interference with the applicant's driveway before the applicant notified them in January 2018. I agree. The Google Maps photographs the applicant submitted from September 2011 and May 2014 do not provide enough detail to determine whether the damage to the applicant's driveway was significant enough to amount to a nuisance on those dates.

25. Even if the applicant could establish the existence of a nuisance before January 22, 2018, I find the respondent's inspection policy protects it from liability. It is undisputed that the respondent adopted a Public Works Inspection Policy in 2001 (the policy) which states that it will not carry out formal periodic inspections of municipal infrastructure, including boulevards. The policy says the respondent will repair defects or hazards in response to complaints or reports from the public or municipal staff.

26. In *Barratt v. Corporation of North Vancouver*, 1980 CanLII 219 (SCC), the Supreme Court of Canada said a municipality cannot be held liable for its policy decisions, however it may be found liable for its operational implementation of its policies. In that case the court said the municipality's determination of the frequency at which it made pothole inspections was a policy decision (see *Just v. British Columbia*, 1989 CanLII 16 (SCC)). I am satisfied that the respondent's decision to maintain its municipal infrastructure through a complaints-based system was a policy decision. Therefore, the respondent can only be liable for the negligent implementation of this policy. However, I have already found the respondent acted reasonably once it learned of the nuisance in January 2018.

27. The respondent's Streets and Traffic Bylaw 8.15(a) says that property owners are responsible for maintaining their driveways, which include the portions built on the street. I also note that section 736 of the *Local Government Act* says that a municipality is not liable for damages unless notice in writing is delivered to the municipality within 2 months from the date the damage was sustained. If, as the

applicant claims, his driveway was damaged in 2011, his claim for damages from that time is statute-barred.

28. In all the circumstances, I find there is no legal basis for the respondent to pay the applicant for the cost of repairing his driveway and I dismiss the applicant's claim.

29. 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 unsuccessful, so he is not entitled to reimbursement of his tribunal fees. The respondent has claimed $25 in tribunal fees, and as the successful party I find the applicant must reimburse the respondent for these fees.

ORDER

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

31. Within 14 days of the date of this order, I order the applicant to pay the respondent $25 in tribunal fees.

32. The respondent is entitled to post-judgment interest, as applicable.

33. 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.

34. 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.

Sarah Orr, Tribunal Member