



Civil Resolution Tribunal

Date Issued: March 8, 2019

File: SC-2018-004365

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Holmes v. Berry et al*, 2019 BCCRT 289

BETWEEN:

Mary Holmes

APPLICANT

AND:

Crystal Berry, Joyce Berry and Kyle Krekoski

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. The applicant Mary Holmes sold her house in Courtenay, BC to the respondent Joyce Berry and her husband Ernest. The respondent Crystal Berry, their granddaughter, and her fiancé the respondent Kyle Krekoski, planned to live there.

2. The applicant says the respondents agreed to give her one extra day to remove her belongings, after they took possession of the house. When the applicant's movers went back to get her remaining belongings, she says the respondent Kyle Krekoski, denied them access.
3. The applicant seeks \$5,000 in compensation for her unreturned belongings or an order requiring the respondents to return her belongings.
4. The respondents Crystal Berry and Kyle Krekowsi say they tried to accommodate the applicant moving items on May 17, 2018 for a few hours, even though this was inconvenient because the driveway was supposed to be clear for them to move in. They say any items of value were given back to the applicant's ex-husband on May 20, 2018. They say they either donated or disposed of the remaining items, on the advice of their realtor. They say the cost of clean-up and disposal exceeded the value of the remaining items.
5. The respondents ask that the dispute be dismissed.
6. The parties are each self-represented.

JURISDICTION AND PROCEDURE

7. 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.
8. 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 a "she said, he said" scenario. The 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. 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 the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

9. 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.
10. 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

11. The issue in this dispute is whether the respondents must return items the applicant left at the home they purchased after the date of vacant possession or pay compensation for those items.

EVIDENCE AND ANALYSIS

12. The applicant sold her house to the respondent Joyce Berry and her husband Ernest.

13. In the March 22, 2018 Contract of Purchase and Sale, the applicant agreed to provide the respondent Joyce Berry and her husband vacant possession as of 9:00 a.m. on May 17, 2018.
14. On the evening of May 16, 2018, the applicant realized she would not be able to move her belongings out in time.
15. The applicant phoned the respondent Joyce Berry, who agreed to give her more time.
16. The applicant says that she was given until the end of May 17, 2018. The respondent Joyce Berry says she agreed to give the applicant "a few hours" on May 17, 2018.
17. On the morning of May 17, 2018, the respondents Crystal Berry and Kyle Krekoski drove to the house to start moving in. When they arrived, they found the driveway was not clear, and the applicant had to yet to move her belongings out of the basement or carport.
18. The respondents Crystal Berry and Kyle Kresoski say, and I accept, that they offered to help the applicant move some of her belongings to the roadside. She declined.
19. Based on a statement from the respondent Joyce Berry's real estate agent RK and the text messages filed in evidence, I find that Joyce Berry gave the applicant a few hours' extension to move her belongings out of the house. This extension was not to go past 12 noon on May 17, 2018.
20. By evening, the applicant still had not removed all of her belongings. At that point I find, based on text messages filed in evidence, the applicant's real estate agent told her that nothing could be left overnight on May 17, 2018.
21. Just before 6 pm on May 17, 2018, the Joyce Berry's realtor, RK, told the applicant's realtor T, that the applicant was not to be allowed on the property

anymore, and that the buyers would dispose of the remaining chattels as they saw fit.

22. Although there is some evidence that Mr. Krekoski reluctantly agreed that the applicant's movers could try to pick up more items that evening, I find that in the intervening hours RK and the applicant's realtor made it clear to the applicant that she could no longer access the property that evening.
23. Since the owners are the ones with the authority to grant this extension, I find that the extension was granted to 12 noon on May 17, 2018 only. Thereafter, the respondents were to have vacant possession.
24. Given the obligation to provide vacant possession no later than May 17, 2018, which the applicant agrees she failed to do, I find that it was appropriate for the respondents to stop granting access to the applicant.
25. Mr. Krekoski says any items of value were returned to the applicant's ex-husband on May 20. This is consistent with the statement from the ex-husband. Otherwise, Mr. Krekowski hauled truck load of items to the dump, and gave donatable items to Value Village.
26. The respondents provided photographic evidence establishing that so many items were left disorganized in the backyard, that it would not have been possible to use the space. They provided receipts from trips to the dump to dispose of these items. I accept their evidence they invested their time and energy in clean-up work and multiple truck trips, at their own cost, to clean out items the applicant should have removed earlier.
27. The applicant was obliged to move her belongings out of the house by May 17, 2018 at noon. She agrees that she failed to do so. She says she breached the Contract of Purchase and Sale by failing to move her belongings out of the house in time. The applicant says she paid the respondents \$500 in compensation for her breach.

28. The respondents dispute this and say the \$500 was paid to the new owners for accommodation and cleaning the house, not for the breach of contract.
29. The statement of RK confirms that the applicant's realtor "gave the renters \$500 for cleaning and a hotel for the night." It is not clear whether those funds were paid personally by the realtor or by the applicant. Either way, I find the \$500 was paid for cleaning and accommodation, and not to compensate the respondents for the expense of having to clear out the applicant's remaining belongings.
30. The applicant says she is still entitled to belongings she left at the house after the May 17, 2018 deadline. I disagree.
31. The courts have held that the right of vacant possession is a right to actual, unimpeded, physical enjoyment of the premises (*Zygocki v. Hillwood* (1975), 12 O.R. (2d) 103). If there is a physical impediment that substantially interferes with the enjoyment of the right of possession of a substantial part of the premises to which the purchaser has not consented, the right of vacant possession is breached.
32. Here, I find that the volume of disorganized material left in the yard, even considered alone, establishes that the applicant breached the right of vacant possession.
33. The law of bailment is about the obligations on one party to safeguard another party's possessions. A gratuitous bailment occurs where the bailor (here, the applicant) provides care for items for nothing. The evidence shows that the respondents received no net benefit from the belongings left behind. In fact, they had to use their own resources to remove most of the items. A gratuitous bailee is liable only for gross negligence if belongings are lost. Here, I find there is no proof of gross negligence on the part of the respondents.
34. I find that the respondents provided adequate access for the applicant to pick-up her belongings. They even returned valuable belongings to her ex-husband several days after the vacant possession date. In the circumstances I find it was reasonable for them to dispose of the remaining items as they saw fit.

35. 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. As the applicant was unsuccessful I find she is not entitled to reimbursement of tribunal fees.

ORDER

36. The applicant's claims and the dispute are dismissed.

Julie K. Gibson, Tribunal Member