



Civil Resolution Tribunal

Date Issued: March 27, 2019

File: SC-2018-006169

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Vytasek v. CRESSEY (VIDAL) DEVELOPMENT LLP et al*,
2019 BCCRT 382

B E T W E E N :

Jindrich Vytasek

APPLICANT

A N D :

CRESSEY (VIDAL) DEVELOPMENT LLP, Travelers Insurance
Company of Canada, and CRESSEY VIDAL HOLDINGS LTD.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. The applicant Jindrich Vytasek bought strata lot 65 (unit 805) in the respondent Cressey Vidal Holdings Ltd. (Cressey)'s condominium development. Mr. Vytasek says the marble countertop in unit 805's master ensuite bathroom is discolored. He

informed Cressey that he found the countertop unacceptable. Mr. Vytasek then filed a home warranty claim with the respondent Travelers Insurance Company of Canada (Travelers), which was denied.

2. Mr. Vytasek claims \$5,000, the maximum monetary limit before the tribunal. He says his damages likely exceed this amount but abandons the excess. Mr. Vytasek also asks that the countertop be replaced, in lieu of monetary damages.
3. Travelers says it inspected the countertops, which were made of polished Calacatta White/Gold marble. Travelers says the countertops were undamaged. They are mostly white and grey with some gold veins consistent with the natural characteristics of the stone. Travelers says these color variations are not a warrantable defect. Travelers asks that the dispute be dismissed.
4. Mr. Vytasek is self-represented. The respondent Cressey is represented by principal or employee Julian Kendall. Travelers is represented by claims counsel Keoni Norgren.
5. The respondent Cressey (Vidal) Development LLP did not file response. Given my conclusions below, I make no findings against it.

JURISDICTION AND PROCEDURE

6. 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.
7. 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.

8. 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.
9. 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

10. The issues in this dispute are whether Mr. Vytasek is entitled to have his master bathroom marble countertop replaced, or to be paid damages, either under the home warranty issued by Travelers or through Cressey.

EVIDENCE AND ANALYSIS

11. This is a civil claim in which Mr. Vytasek bears the burden of proof on a balance of probabilities. I have reviewed all of the evidence and submissions but refer to them only as necessary to explain my decision.
12. In 2015, Mr. Vytasek signed a contract with Cressey to purchase unit 805 in a development in White Rock, B.C.
13. At around that time, it is undisputed and I find, Mr. Vytasek was shown, by Cressey, a colour palette choice of either light or dark colours, and chose the lighter colour scheme to finish countertops in his unit. The colour scheme choices were mounted

on a wall beside the words “COME IN AND IMAGINE YOUR FUTURE HOME”. The lighter colour scheme, called DAY, shows white and grey colours only in the small marble sample. Mr. Vytasek selected the DAY scheme.

14. In August 2017, when Mr. Vytasek examined his completed suite, he discovered yellow discolorations in the marble of the master bathroom countertop.
15. On September 16, 2017, Mr. Vytasek wrote to Cressey explaining that the marble countertop in the ensuite was unacceptable.
16. On September 21, 2017, Cressey responded and organized the countertop installer to make a site visit to Mr. Vytasek’s unit.
17. On September 22, 2017, the installer visited the unit. He confirmed that the yellow veining occurs naturally in Calacatta White/Gold marble, so named in part for the gold veining. The installer found the marble to be satisfactory.
18. Cressey also requested a report from the Terrazzo Tile & Marble Association of Canada (TTMAC), an organization specializing in marble stone, who provided a report, with photographs concluding that the “veining found in the Calacatta Gold appeared consistent with that expected of this type of stone.”
19. When Cressey did not provide a satisfactory response to Mr. Vytasek, he made a warranty claim to Travelers. Travelers denied the claim.
20. Mr. Vytasek requested mediation of the insurance claim.
21. On June 26, 2018, Travelers sent an inspector to look at the countertop. The inspection report shows that he found the marble to be undamaged and with colouring consistent with the characteristics of the marble installed, Calacatta White/Gold Marble. The inspector referred to section 11.14 of the Residential Construction Performance Guide (Guide) which says “surface fits, shading fissures or veins in stone countertops are naturally occurring characterizes of stone” and are not warrantable defects.

22. Cressey and Travelers provided considerable evidence, from the inspector who examined the suite's master bathroom countertop and TTMAC, that the yellow discolorations are naturally occurring characteristics of the stone used. I accept this evidence and find that the gold/yellow colour is a natural characteristic of the marble.

Claim Against Cressey

23. Mr. Vytasek says Cressey misrepresented the colour of the marble countertop that would be installed in his suite's master bathroom. Specifically, he says that the colour of the installed countertop was inconsistent with:

- a. the colours shown in Cressey's promotional display suite, and
- b. the colour pallet samples Cressey offered and which Mr. Vytasek agreed to, prior to the suite being completed.

24. Having reviewed photographs of the promotional display suite and the colour palette samples, which Cressey did not dispute, I find that both the display suite and the samples were white and grey in colour. There is no yellow or gold in them.

25. The only person who provided evidence of the representations made by Cressey prior to the suite being completed was Mr. Vytasek. Mr. Vytasek says, and I accept, that he was given a choice between two colour schemes. The DAY scheme showed white and grey coloured finishes. While I agree with Traveler's and Cressey's evidence that the name Calacatta Gold suggests yellow colouring may be present, there was no evidence that Cressey told Mr. Vytasek the marble would be Calacatta Gold. There was also no evidence that Cressey informed Mr. Vytasek that the actual marble installed would vary markedly in colour from the sample.

26. The master bathroom countertop in Mr. Vytasek's unit has yellow or rust coloured areas in it. While I accept the evidence that these are natural features of the stone, I find that Mr. Vytasek was misled as to the colour scheme that would be used for his master bathroom. While some variation in characteristics of natural stone might be expected, the marble installed in the applicant's master bathroom shows dissonant

yellow streaks, not in keeping with the samples or Cressey's own display suite finishes.

27. That is, Cressey represented the colour palette for finishing the suite to be in white and grey tones. There was no evidence that there would be a color substitution for something with yellow in it. The yellow is now prominently placed in the master bathroom countertop. It differs markedly from both the marble slab that used to finish the display suite, and the sample square in pre-construction colour palette.
28. While this is not a warrantable defect, I find there was a negligent misrepresentation as to the colour palette.
29. I find that Cressey represented that it would use marble slabs with white and grey colouration to finish Mr. Vytasek's suite, both through the colour palette sample and the display suite.
30. Mr. Vytasek relied on Cressey's representation to his detriment. He chose the colour scheme with an understanding that it would be followed.
31. Cressey then failed to ensure that slabs with only white and grey coloration were used. Mr. Vytasek has suffered some damage, in that, in his view, his bathroom does not present as well as it would with only white and grey coloured marble.
32. Mr. Vytasek provided his own view, as a retired construction engineer, that replacing the countertop may cost over \$5,000. Given the minimal evidence, I am not prepared to award Mr. Vytasek monetary damages.
33. Mr. Vytasek established that Cressey is liable for the master bathroom countertop being the wrong colour. Mr. Vytasek asked to have the countertop replaced, including plumbing, painting and clean up related to the replacement. I find that this is an appropriate remedy that would put Mr. Vytasek in the position he would have been in, but for the misrepresentation. I order that Cressey replace the marble bathroom countertop in Mr. Vytasek's unit with an equivalent marble countertop that

has only white and grey colouration in the slab, up to a total value of \$5,000, given the tribunal's monetary jurisdiction.

34. I dismiss the claim against the respondent CRESSEY (VIDAL) DEVELOPMENT LLP, as there was no evidence that it was responsible for the misrepresentation. I note that the respondent Cressy participated here and acknowledged it was responsible for the suite sold to Mr. Vytasek.

Claim Against Travelers

35. I turn now to Mr. Vytasek's claim against Travelers for warranty coverage.

36. Travelers says Mr. Vytasek's insurance claim was that

a. he was unhappy with the aesthetic of the marble countertop, and felt the countertop installed was materially different to what he saw in the display promotional material.

37. Travelers says this claim was outside coverage, and that the terms of the warranty specify that any representation made by Cressey is not binding on Travelers nor relevant to coverage. I agree.

38. Travelers issued a new home warranty for the unit commencing August 31, 2007, pursuant to the *Homeowner Protection Act* and the *Homeowner Protection Act Regulation*.

39. Home warranty insurance is defined under section 141 (1) of the *Insurance Act* to mean a "contract of insurance covering defects in the construction of a new home or renovation, and consequential losses or costs incurred by the owner."

40. I accept the evidence from Travelers, as laid out in the Guide, that the warranty is not a performance bond, nor is it a guarantee to be called upon if a homeowner is unhappy with the aesthetic of a countertop installed in their new home, or because they believe that there has been a substitution of materials from what was shown to them in the promotional materials.

41. The Guide goes on to say that home warranty insurance is specifically defect insurance and does not deal with contract related issues, such as cost overruns or other financial disputes, incomplete work, substitution of materials or colours.
42. The Travelers warranty provides coverage for “Defects”, defined as “any design or construction that is contrary to the Building Code or that requires repair or replacement due to the negligence of a builder or person for whom the Builder is responsible at law.”
43. I have found that this is a dispute about the colour of the marble, though naturally occurring, being different than what Cressey represented to Mr. Vytasek before the suite was finished. As such, I find the Travelers home warranty does not apply, since there is no evidence that the marble required repair or replacement due to builder’s negligence. The installation was performed properly. The colour is the source of the dispute and is outside the scope of the warranty.
44. I dismiss Mr. Vytasek’s claim against Travelers.
45. 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. I find Mr. Vytasek is entitled to reimbursement of \$175 in tribunal fees and \$40 in dispute-related expenses, incurred serving the Dispute Notice, which I find to be reasonable.

ORDERS

46. Within 90 days of the date of this order, I order the respondent Cressey Vidal Holdings Ltd.
 - a. to replace Mr. Vytasek’s master bathroom countertop with an equivalent marble countertop containing only white and grey colouration, up to a value of \$5,000, and

b. to pay Mr. Vytasek \$175 in tribunal fees and \$40 for dispute-related expenses.

47. I dismiss the applicant's dispute against Travelers and Cressey (Vidal) Development LLP.

48. 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.

49. 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.

Julie K. Gibson, Tribunal Member