



Civil Resolution Tribunal

Date Issued: April 1, 2019

File: SC-2018-007442

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Read et al v. Imhof*, 2019 BCCRT 406

BETWEEN:

Lawrence Scott Read and Lenora Gail Read

APPLICANTS

AND:

Seighard Imhof

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This dispute is about a property disclosure statement (PDS).
2. The applicants Lawrence Scott Read and Lenora Gail Read bought a strata townhouse unit (unit) , from the respondent Seighard Imhof. They say the respondent was aware of water damage to the unit's deck but failed to disclose it on

the PDS. The applicants ask that the respondent pay \$3,000 toward the cost of replacing the deck.

3. The respondent says he was not aware of any problem with the deck and completed the PDS to the best of his knowledge. The respondent points out that the sale was subject to the buyer being satisfied with an independent home inspection, which was conducted prior to the closing. The respondent asks that the dispute be dismissed.
4. The parties are each self-represented.

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*. 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. 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 that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.
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.

ISSUE

10. The issue in this dispute is whether the respondent misrepresented the state of the deck in the PDS, such that he should pay the applicants \$3,000 toward the replacement of the deck.

EVIDENCE AND ANALYSIS

11. This is a civil claim in which the applicant bears the burden of proof on a balance of probabilities. I have reviewed all of the evidence and submissions but refer to them here only as necessary to explain my decision.
12. Except for matters that must be disclosed on a PDS, which are discussed further below, the principle of “buyer beware” generally applies to real estate purchases, and the onus is on the purchaser to determine the state and quality of the property. However, buyer beware does not apply when a vendor makes a fraudulent misrepresentation about the property: *Cardwell v. Perthen* 2006 BCSC 333 (CanLII).
13. In *Ban v. Keleher*, 2017 BCSC 1132 (CanLII), a BC Supreme Court judge reviewed the law of fraudulent misrepresentation in the context of the purchase and sale of a residential property. The judge set out what a claimant must prove to succeed in a claim for fraudulent misrepresentation:
- a. the defendant made a representation of fact to the claimant;
 - b. the representation was false in fact;
 - c. the defendant knew that 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 the contract in reliance upon the false representation and thereby suffered a detriment.
14. This case is about whether the defect in the deck had to be disclosed by the respondent.

15. A patent defect is one that 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). By contrast, a latent material defect is a material defect that cannot be discerned though 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.
16. 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 applicants (see *McCluskie v. Reynolds et al* (1998), 65 B.C.L.R. (3d) 191 (S.C)).
17. 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).
18. I now turn to the facts.
19. The respondent lived in the unit for 28 years, and says he maintained the unit to the standard of a diligent homeowner.
20. On June 8, 2018, the applicants entered a Contract of Purchase and Sale (Contract) with the respondent for the unit.
21. The Contract includes a condition permitting the buyers to have a home inspection, that they find satisfactory, prior to completion.
22. The Contract attaches a PDS dated May 3, 2018. The respondent answered “no” to two questions on the property disclosure statement, as follows:
 - a. Are you aware of any damage due to wind, fire or water?
 - b. Are you aware of any leakage or unrepaired damage?
23. The applicants admit that they noticed “rotten posts” on the deck prior to purchasing the unit.

24. The applicants retained a home inspector who inspected the unit prior to the sale closing. Their home inspector identified an issue with "VISIBLE ROT – DECK RAILING REAR" which he advised needed repair.
25. The home inspector also inspected the deck and identified that it was made of wood. He recorded limited access to the balcony, but not the deck. Based on this record, I find that he had appropriate access to examine the deck. His report notes that "inadequate and poorly maintained exterior components may contribute to Water/Moisture Damage."
26. The applicants say they did not walk out onto the deck because the respondent had his BBQ and patio furniture on it. They say that their home inspector "missed" the damage to the deck base.
27. After receiving the home inspection report, on June 19, 2018 the applicants lifted the inspection subject and closed on the purchase of the unit.
28. Upon moving in, the applicants say they found a soft spot on the deck, and cracks, under a large mat that had been left by the respondent. On my review of the photograph of these cracks, filed in evidence, I find that they appear minor. Upon further inspection the applicants discovered rotting and water damaged plywood beneath the deck.
29. The applicants raised the issue of the deck railings and base with the strata. After discussion at an August 7, 2018 strata council meeting applicants were told the strata would cover the cost of the railings but not the deck "base".
30. The respondent denies any knowledge of the deck defect. He says the mat was on the deck to protect his feet from the heat when he used the deck in the summer.
31. The applicants filed a letter from contractor BY in which he provides his opinion that the deck's posts are "rotten due to improper maintenance" including examples such as a lack of snow removal and caulking not being maintained. BY says the "current joists" are "still in decent condition." While I accept the deck may not have been ideally maintained, this evidence does not establish that the respondent knew of this defect.
32. Based on the evidence, I find that the respondent was not aware of the water damage in the deck base. I say this because even the home inspector did not identify the issue. As well, the damage is not plain on visual inspection of the deck surface, based on the photographs filed in evidence.

33. I find that the defect here was a latent defect. I have found that the respondent did not have knowledge of it.
34. Turning to the accuracy of the statements in the PDS, I find that the applicants have not established that the respondent was dishonest and did not disclose his actual knowledge of the property. I find that no fraudulent misrepresentation has been proven. As noted above, there is no requirement that a disclosure on a PDS be correct. The applicants have also not established that the defect makes the unit uninhabitable.
35. I dismiss the applicants' claims and this dispute.
36. 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 successful respondent paid no tribunal fees and so I make no order in this regard.

ORDER

37. I dismiss the applicants' claims and this dispute.

Julie K. Gibson, Tribunal Member