Civil Resolution Tribunal

Date Issued: April 18, 2019

File: SC-2018-007861

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Shore v. Hewko*, 2019 BCCRT 480

B E T W E E N :

Wallace Shore

APPLICANT

A N D :

Susan Hewko

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. The applicant Wallace Shore says the respondent Susan Hewko sold him a house after disclosing that it had no issues in the foundation. After the applicant bought the house, the crawlspace had several leaks requiring repair. The applicant claims $2,667.00 as reimbursement for the repair bill.

2. The respondent says she owned the home from May 21, 2016 to October 23, 2017. She says there were no issues with leaks in the crawlspace during the year she resided in the home. The respondent denies making a false or misleading disclosure about the house. The respondent asks that the dispute be dismissed.

3. The parties are each self-represented.

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. In some respects, this dispute amounts to a "he said, she said" scenario with both sides calling into question the credibility of the other. Credibility of 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.

6. 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.

7. 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.

8. 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

9. The issue in this dispute is whether the respondent misrepresented the status of the house's crawlspace to the applicant and, if so, whether the respondent must reimburse the applicant the $2,667.00 spent to repair cracked areas in the crawlspace's interior foundation walls.

EVIDENCE AND ANALYSIS

10. In this civil claim, 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 only to the extent necessary to explain my decision.

11. The respondent bought the house in May 2016. At the time the house was about 18 years old. The house's crawlspace was used as a working area for art framing. Photographs taken in May 2016 show the crawlspace to be dry and well-organized.

12. While the applicant lived in the house, her daughter, K.F., stored furniture and boxes in the crawlspace for months at a time. K.F. provided a statement that none

of these personal items were water damaged, nor did she observe any water or leaks in the crawlspace during her frequent visits to the house.

13. The respondent's dog sitter, L.P., had also never noticed water damage or signs of water in the crawlspace, despite spending extended periods at the house.

14. In summer 2017, the applicant bought the house from the respondent with a closing date of late October 2017.

15. The Contract of Purchase and Sale Addendum shows that the respondent waived the subjects dealing with the property inspection and approval of the Property Disclosure Statement (PDS). That is, he agreed to proceed with the sale without having to approve a property inspection report or a PDS for the house.

16. The PDS, signed by the respondent, was provided to the applicant on August 11, 2017. The PDS says that the applicant is not aware of any damage due to water, nor of any moisture or water problems in the walls, basement or crawlspaces.

17. In fall 2017, the respondent's family friend, B.R., helped move boxes out of the house. He noticed no signs of dampness or water damages in the crawlspace while moving the boxes.

18. Over the winter of 2017, the applicant says the crawlspace leaked in several different areas

19. On May 8, 2018, the applicant and his spouse paid $2,667.00 to Island Basement Systems to repair the cracked and honeycombed areas on the interior foundation walls of the 6 ft unfinished crawlspace.

20. Erin Bradley of Island Basement Systems provided evidence, via email, that the house had some substantial pre-existing issues such as stress and/or settling fractures and honeycombing, which would allow moisture ingress and require ongoing monitoring. I find that Erin Bradley's email describes a pre-existing issue with the home's crawlspace, revealed after water leaked into the crawlspace and Island Basement completed a targeted inspection.

21. The applicant says the respondent had removed all air diffusers from the basement furnace, which he says is a practice consistent with “trying to keep the basement dry”. This issue was not mentioned by Island Basement Systems nor otherwise proven. I find that the applicant has not established that the removal of air diffusers, if it occurred, meant the respondent had knowledge of the crawlspace defects.

22. The law does not require all pre-existing issues with a house to be disclosed at the time of sale. Though another tribunal decision is not binding on me, I found the legal principles in the tribunal’s decision in *Bourke* v*. Taho Ventures Inc.* 2018 BCCRT 424 useful and refer to them below.

23. In a real estate transaction, a purchaser is expected to make reasonable enquiries and conduct a reasonable inspection of the property. Unless the seller breaches the contract, commits fraud or fails to disclose a known latent defect, the purchaser assumes the risk for any defects in the condition or quality of the property. This principle is referred to as the doctrine of *caveat emptor* or “buyer beware” and is alive and applicable to BC real estate transactions: See *Nixon* v*. MacIver*, 2016 BCCA 8 (Nixon); *Paniccia* v*. Eckert*, 2012 BCSC 1428.

24. A material latent defect is one which cannot be readily discovered through a reasonable inspection of the property, including a defect that renders the property dangerous or unfit for habitation.

25. By contrast, a “patent defect” is one that can be discovered by conducting a reasonable inspection and making reasonable enquiries about the property: *Cardwell v. Perthen*, 2006 BCSC 333, aff'd 2007 BCCA 313 (*Cardwell*).

26. Unlike patent defects, a seller has a duty to disclose a latent defect of which it has knowledge that: a) is not discoverable through a reasonable inspection or through reasonable inquiries; and b) makes the property dangerous or unfit for habitation.

27. A seller will be considered to have knowledge of a latent defect where it is actually aware of the defect, or where it is reckless as to whether the defect exists. The

applicant bears the burden of proving this degree of knowledge or recklessness: *McCluskie v. Reynolds et al* (1998), 65 B.C.L.R. (3d) 191 (S.C.).

28. A PDS asks only for the seller's awareness, which is inherently subjective: *Hamilton v. Callaway*, 2016 BCCA 189. A PDS requires a seller to honestly disclose its actual knowledge of the property to the extent set out in the disclosure statement, but that knowledge does not have to be correct: *Nixon*. In other words, the statements in the disclosure statements are not warranties: *Hanslo v. Barry*, 2011 BCSC 1624*, Kiraly* v*. Fuchs*, 2009 BCSC 654.

29. Based on her evidence and the witness statements, I find that the applicant has not proved the respondent was aware of any water damage to the house, or of any issues with the foundation that might give rise to water leaks. I find that the respondent honestly disclosed her actual knowledge of the property in the PDS.

30. It follows that the respondent did not have knowledge of a latent defect, nor was she reckless as to whether that defect existed.

31. It is not clear whether a reasonable inspection at the time of the sale, as opposed to a targeted inspection after the leaks were known, would have revealed the defect. If it would have, then the respondent had no duty to disclose the patent defect. For these reasons, and because the applicant waived the conditions on the purchase relating to inspection and the PDS, I find that the respondent did not breach any disclosure obligation to the applicant.

32. 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. I dismiss the unsuccessful applicant's claims for tribunal fee reimbursement.

ORDER

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

Julie K. Gibson, Tribunal Member