Civil Resolution Tribunal

Date Issued: June 14, 2019

File: SC-2018-009254

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Rainville v. Badgerow*, 2019 BCCRT 734

B E T W E E N :

Marie Line Rainville

APPLICANT

A N D :

Tammy Lynn Badgerow

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kathleen Mell

INTRODUCTION

1. This dispute is about whether the respondent, Tammy Lynn Badgerow, had a duty to disclose that a vented dryer in the condo she sold to the applicant, Marie Line Rainville, was installed without strata approval.

2. The applicant says the respondent was obligated to ensure that any changes to her property received strata approval. She says at the time of the purchase of the condo in August 2016 she was told that all upgrades and renovations were approved by the strata. She argues that the unauthorized vented dryer was a latent defect and the respondent should have disclosed it. The applicant seeks payment of $3,000.00 ($2,000.00 as a result of the lower re-sale value of the condo, $600.00 for replacement of common property, and $400.00 for "time spent").

3. The respondent says she did not know that the vented dryer did not have strata approval and therefore she could not have disclosed this information. The respondent says she is not responsible for the applicant's claimed damages.

4. Both parties are 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. Some of the evidence in this dispute amounts to a "she said, she 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 most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances of this dispute, I find that I am properly able to assess and weigh the 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 that oral hearings are not necessarily required where credibility is in issue. I therefore 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 9.3(2), 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 failed to disclose that the vented dryer was not authorized by the strata and, if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

10. In a civil dispute such as this, the applicant must prove her claim. She bears the burden of proof on a balance of probabilities.

11. I will not refer to all of the evidence or deal with each point raised in the parties' submissions. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.

12. In August 2016, the parties entered into an agreement for the applicant's purchase of the respondent's condo. In preparation for selling the condo, the respondent completed a property disclosure statement (PDS) dated April 21, 2016. The

respondent indicated in the PDS that she was not aware of any additions or alterations made without a required permit.

13. When the applicant purchased the condo, it came equipped with a vented dryer.

14. The applicant became aware of the fact that the vented dryer was unauthorized when she was in the process of selling the condo to a third party in 2018 and the building's caretaker noticed it when the inspection was conducted. Upon its discovery, the caretaker informed the strata council who ordered the applicant to remove the dryer. The applicant paid $577.74 to repair the dryer's venting window. Although the applicant claims $600.00 for this expense, I find the evidence is that she paid $577.74. As a result of the removal of the dryer, the applicant reduced the selling price of the condo by $2,000.00. The applicant requests to be reimbursed for these amounts, as well as $400.00 to compensate her for her time, and reimbursement of her tribunal fees.

15. 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).

16. 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.

17. Further, different rules apply regarding disclosure depending on whether the defect is a patent defect or a latent defect. 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 or unfit for habitation. A seller must disclose a latent defect if they have knowledge of it.

18. In this case, I find that the vented dryer was a patent defect as the applicant could have become aware of it by performing proper inquiries about the property and getting an inspection performed. It is noteworthy that the fact that the vented dryer was unauthorized came to light simply by the caretaker of the building noticing it in the course of the third party's inspection in 2018 and reporting it to the strata council.

19. In addition to the above, the PDS asks whether a seller is aware of a defect. 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).

20. In her submissions, the respondent made a reference to the applicant admitting in mediation that she was aware that vented dryers were not allowed in the units. I place no weight on this as the applicant has not confirmed that she made this statement, and, in her evidence, the respondent consistently states that she believed the vented dryer received all necessary permits and authorizations.

21. The respondent says that in the PDS she stated that she was not aware of any renovations done without a permit and that was true to her knowledge. The respondent submits that her ex-boyfriend acted as her contractor and performed the renovation. She says that he handled all the permits and approvals. She notes that it was her understanding that he got a city permit for the renovation and that he also got the approval of the strata.

22. There is no evidence before me that the respondent tried to hide the vented dryer when selling the property or that she denied the applicant an opportunity to perform an inspection. The applicant's behaviour during the sale supports her claim that she did not know the dryer was unauthorized.

23. Based on the evidence, I find that the respondent was unaware that the vented dryer was not authorized by the strata. I say this because she was not the one who installed the dryer and her contractor led her to believe that all approvals had been obtained. The applicant has not established that the respondent was dishonest or failed to disclose her 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.

24. Even if I am incorrect in my finding that this was a patent defect, I find that the applicant has not established that the respondent was obligated to disclose the vented dryer as a latent defect. I first note that this is not a defect that renders the property dangerous or potentially dangerous to the occupants or unfit for habitation. Further, a seller must disclose a latent defect if 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 applicant (see *McCluskie* v*. Reynolds et al* (1998), 65 B.C.L.R. (3d) 191 (S.C)). The applicant has not established that the respondent knew of the defect or that her reliance on her contractor obtaining the necessary permits and authorizations rose to a level of recklessness. Given my findings above, I dismiss the applicant's claim.

25. The applicant requested to be reimbursed $400.00 for time spent. I note that even if the applicant had been successful, I would not have reimbursed this amount. The applicant's claim is unclear and does not state whether she is requesting reimbursement for time spent on remedying the situation with the dryer, which she did not itemize or explain, or the time spent on this dispute. The tribunal does not normally reimburse parties for time spent on the dispute. Further, without detail, the amount of time spent on the removal of the dryer and repair of the window was not established and therefore I would not have compensated the applicant for it.

26. 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. As the applicant was unsuccessful in her claim she is not entitled to have her tribunal fees reimbursed.

ORDER

27. I dismiss the applicant's claim and this dispute.

Kathleen Mell, Tribunal Member