Civil Resolution Tribunal

Date Issued: June 17, 2019

File: SC-2018-004938

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Russell v. Macdonald Realty Ltd. et al*, 2019 BCCRT 738

B E T W E E N :

Todd Russell

APPLICANT

A N D :

Macdonald Realty Ltd., Andrea Thon, and David Thon

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Karen Mok

INTRODUCTION

1. The applicant, Todd Russell, purchased a condominium unit (the Property) in a building located in Vancouver (the Building). He says that the respondents, Macdonald Realty Ltd. (Macdonald), Andrea Thon, and David Thon, who acted solely as agents for the seller, misrepresented to him that the exterior of the

Building had been fully rain screened when it was not. He seeks compensation of $4,700.00, which is the approximate amount of the special levy assessed against him to repair a portion of the Building's exterior cladding.

2. The respondents deny any responsibility for the amount claimed by the applicant. Andrea Thon and David Thon are agents with Macdonald. The seller is not a party to this dispute.

3. Macdonald is represented by Patricia Place, who I infer is a principal or employee. The remaining parties are 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 3.1 of the *Civil Resolution Tribunal Act* (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. While some of the evidence is in dispute, I find that I am properly able to assess and weigh the documentary evidence and submissions before me such that an oral hearing is not required. I note the recent 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.

6. 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.

7. 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

8. The issue in this dispute is whether the respondents must pay the applicant $4,700.00 for the special levy assessed against him, on the basis that the respondents misrepresented the condition of the Property at the time of sale.

EVIDENCE AND ANALYSIS

9. In a civil dispute such as this, the applicant bears the burden of proof on a balance of probabilities. I have commented on the evidence and submissions only to the extent necessary to give context to these reasons.

Background Facts

10. Under a Contract of Purchase and Sale executed on or about September 22, 2017, the applicant purchased the Property from the seller, who as noted is not a party to this dispute. The respondents acted solely for the seller and the applicant was represented by his own agent in this transaction.

11. On their feature sheet and Multiple Listing Service (MLS) listing, the respondents represented the Property as having a “full rainscreened exterior”. These marketing materials also included a disclaimer that the enclosed “information is deemed to be correct but is not guaranteed”. The applicant says that he relied on this representation, along with a verbal confirmation from Ms. Thon at the time of viewing, when deciding to purchase the Property.

12. The applicant says that it was not until the spring of 2018 when he became aware that there were issues with the exterior of the Building. At an Annual General Meeting that took place on April 4, 2018, a resolution was passed to approve an expenditure to repair the southeast exterior wall cladding, the majority of which was collected by way of a special levy. The applicant was assessed a special levy in the amount of $4,701.09. It is this levy at issue in this dispute.

13. The respondents say that their client, the seller, told them the Property had been upgraded to include a full rainscreening of the exterior of the Building.

14. Ms. Thon says that she does not recall any discussion with the applicant about the rainscreening during the applicant's viewing of the Property.

15. Mr. Thon received the strata documents sometime between September 18 and 24, 2017, several weeks after the feature sheet and MLS listing had been put out. The documents included minutes of an April 26, 2016 Council Meeting and March 1, 2017 Annual General Meeting, in which reference is made to the potential repair of blisters observed at the southeast corner retaining walls where the exterior wall cladding had not been replaced, but only re-coated, during the building envelope remediation that took place in 2011 and 2012.

16. The applicant's agent did not request these strata documents from Mr. Thon until September 23, 2017, after the Contract of Purchase and Sale had been executed.

The Applicable Law

17. The applicant does not dispute that the respondents relied on the seller's information that the Building was fully rainscreened. I accept the respondents' evidence that this is what the seller told them and that they relied on it when marketing the Property.

18. The case law is clear that sellers and listing agents are not required to verify the seller's own knowledge about their property (see *Gordon v. Kreig*, 2013 BCSC 842 and *Nixon v. MacIver*, 2014 BCSC 533). Rather, as set out in *Nixon*, the principle of

caveat emptor, or buyer beware, applies in which a purchaser is expected to make reasonable inquiries about and conduct a reasonable inspection of a property. The purchaser assumes the risk for any defects in the condition or quality of the property unless there is a breach of contract, active concealment, i.e. fraud, or non-innocent misrepresentation. As there was no contract between the parties, the applicant in this case must prove fraud or non-innocent misrepresentation.

19. For the reasons set out below, I find that the applicant has not met that burden. It should also be noted that the applicant has not made such claims against the respondents in this dispute.

20. I find that the evidence does not establish that the respondents were aware that the Building had not been fully rainscreened and actively concealed that fact from the applicant.

21. Mr. Thon would not have known that the Building was not fully rainscreened until after he reviewed the strata documents. I find it more probable than not that Mr. Thon did not fully review the strata documents at the time of sale, or review them at all. I say this because his client had already provided him with the pertinent information required in order for him to market the Property, which was at least three weeks prior to him receiving the strata documents.

22. I accept the applicant's evidence that Ms. Thon represented to him at the time of viewing that the Building was fully rainscreened. While Ms. Thon may not recall having a discussion with the applicant about the rainscreening, I find that the applicant, as a potential buyer, would have a better recollection of such discussions than Ms. Thon who, as a real estate agent, would likely have had many similar discussions with potential buyers and sellers during the course of her work.

23. Using the same analysis as above, Ms. Thon would not have been aware that the Building had not had full rainscreening at the time she made the representation to the applicant. The viewing took place on September 21, 2017, which was in or around the time Mr. Thon would have received the strata documents. I find that,

given the timing, it is more probable than not that Ms. Thon would not have reviewed the strata documents to know that her representation was incorrect.

24. There is also no evidence to prove that the respondents intentionally advertised a “full rainscreened exterior” knowing it was not true. Further, the feature sheet and MLS listing had a disclaimer indicating that the enclosed information, while deemed correct, is not guaranteed. The applicant was aware of the disclaimer.

25. The applicant did not make any further inquiries about the rainscreening which he ought to have done if his decision to purchase the Property turned on it. His agent did not request the strata documents from the respondents until after the Contract of Purchase and Sale was executed.

26. In summary, I find that the applicant simply has not met the burden of proving that the respondents knew that the Building of the Property was not fully rain screened and actively concealed it or intentionally advertised it as such knowing it was not true.

27. The applicant was unsuccessful in his claims. In accordance with the Act and the tribunal’s rules, I dismiss his claim for reimbursement of tribunal fees. The successful respondents did not pay any fees or claim expenses.

ORDER

28. I dismiss the applicant’s claims and this dispute.

Karen Mok, Tribunal Member