



Civil Resolution Tribunal

Date Issued: July 9, 2019

File: SC-2018-009453

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Baugh et al v. Westcoast Endeavours ULC*, 2019 BCCRT 825

B E T W E E N :

KRISTEN BAUGH and JASON STANLEY

APPLICANTS

A N D :

WESTCOAST ENDEAVOURS ULC

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about a new Samsung washer and dryer that the applicants, Kristen Baugh and Jason Stanley, found were not in the fourplex property they bought but say should have been included in their purchase. Instead, around 2 months after

purchase, the applicants found the property had only a leaking Moffatt washer and an old Whirlpool dryer. It is undisputed the new machines were removed by the respondent seller, Westcoast Endeavours ULC (Westcoast) before the February 28, 2018 closing date. The applicants claim \$1,770 as the cost of a new Samsung washer and dryer.

2. Westcoast says a “new Samsung washer and dryer” was not included in the contract. It also says the ‘swap’ of the washer and dryer was disclosed to the applicants before they took possession.
3. The applicants are represented by Ms. Baugh. Westcoast is represented by Jennifer Salisbury, who I infer is an employee or principal. For the reasons that follow, I dismiss the applicants’ claims.

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* (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 the circumstances here, I find that I am properly able to assess and weigh the documentary 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 that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal’s process and found 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: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUE

8. The issue in this dispute is whether the parties' contract of purchase and sale required the respondent seller to leave a new Samsung washer and dryer in the revenue property it sold the applicants, and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the burden of proof is on the applicants to prove their claims on a balance of probabilities. Although I have reviewed all of the parties' evidence and submissions, I have only referenced what I find necessary to give context to my decision.
10. It is undisputed that the January 30, 2018 contract of purchase and sale itself included a washer and dryer with the sale. However, it does not specify any make or model or age for laundry machines. Instead, it just says "washer and dryer". I note the applicants acknowledge an error in the contract, because it said 4 sets of washers and dryers, and that there was only ever expected to be 1 set. The applicants only claim for the cost of 1 new Samsung set. Thus, nothing turns on the number of appliances referenced in the contract. The issue is whether the applicants should have been left with new Samsung machines. The applicants say they were relatively inexperienced buyers and did not realize they should have included make and model and year in the contract of sale, if that was important to them.

11. The contract's completion or closing date was February 28, 2018, with March 1, 2018 as the vacant possession date. The contract does not specify the date the applicants viewed the property. In other words, that standard term in the contract was left blank. So, contrary to the applicants' reply submission, nothing in the contract required the respondent seller to leave the property in the condition it was in at the time of viewing.
12. The applicants say the new laundry machines should have been included because the respondent seller led them to believe they were included. First, the applicants say the MLS listing had photos of a new Samsung washer and dryer. Second, the applicants say the contract of purchase and sale had "included" a brochure that described the property's updates. The applicants submitted a live link to the listing, which when I reviewed it the property listing was no longer available. However, it is not particularly disputed that it had the photos as alleged, and I accept it did. But, there is no evidence before me that the MLS listing formed part of the parties' contract. The 'executive summary' in that brochure says the respondent seller had "completely remodeled the entire building including all four units, laundry, ...". I infer this is what the applicants refer to when they say they were led to believe there were new machines.
13. So, the first issue in this dispute is whether the MLS listing and the brochure formed part of the parties' contract. The second issue is whether the respondent seller misrepresented the property given the MLS listing and the brochure it provided. The applicants argue the respondent engaged in a deceptive 'bait and switch'.
14. The contract includes a standard term that there are no representations, warranties, guarantees, or agreements other than those set out in the contract. On the last page of a Property Disclosure Statement signed by the applicants, it identifies 1 unit in the fourplex as being the unit the "laundry facilities tie into", and that the revenue property was sold 'as is where is'. The applicants added their initials by this term.
15. I find the 'no additional representations' and "as is, where is" terms described above mean the MLS listing and the brochure were not part of the contract, which was

signed later. At the same time, I find there was no misrepresentation, because of the “no additional representations’ term. My further reasons follow.

16. Except for matters that must be disclosed on a Property Disclosure Statement, which do not apply here with respect to the laundry machines, 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.
17. In *Veroni v. Carlsen*, 2018 BCCRT 103, a non-binding decision that I find persuasive, the tribunal member noted that the MLS listing sheet states that representations made in it are not guaranteed. There is no evidence that the MLS listing sheet in this dispute, which I was not able to see, did not include a similar disclaimer which appears to be standard.
18. In *Ban v. Keleher*, 2017 BCSC 1132, 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.
19. In *Shaughnessy v. Sidhu*, 2016 BCPC 308 (CanLII), the judge said a fraudulent misrepresentation is a representation of fact made without any belief in its truth, with

the intent that the person to whom it is made will act on it, and actually causing that person to act on it.

20. I find that the applicants have not established fraudulent misrepresentation by the respondent in this case. In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 (CanLII), the judge said that because fraud is a very serious allegation which carries a stigma, it requires evidence that is clear and convincing proof of the elements of fraud, including the mental element.
21. At the time the brochure and MLS listing were created, the new laundry machines were on the property. The contract did not specify “new” machines and it contained the clause that the contract was the parties’ entire agreement. Further, while the email thread is not before me, the respondent seller said that it told the parties’ dual real estate agent before closing that it was swapping out the laundry machines. I find there is no evidence before me establishing the respondent’s intention to commit fraud in this case.
22. There is also no right of recovery for an innocent misrepresentation made in the context of a real estate transaction. For a remedy to apply, the misrepresentation must be fraudulent or negligent: *McCluskie v. Reynolds*, 1998 CanLII 5384 (BCSC).
23. A claim in negligent misrepresentation in a real estate transaction cannot succeed without evidence that the respondent paid more for the property than its value at the time of the purchase: *Ban v. Keleher*, at para. 69; *Matthias v. Garibaldi Springs Development et al*, 2007 BCPC 138 (CanLII), at para. 28. The applicant has not provided such evidence. As a result, I find the respondent seller was not responsible for providing the applicants with new Samsung laundry machines.
24. Finally, even if I had found the respondent seller liable for failing to provide new laundry machines, the applicants provided no evidence in support of the \$1,770 amount claimed, such as an invoice or a quote. For that reason, I would not have allowed the entire \$1,770 in any event.

25. In accordance with the Act and the tribunal's rules, as the applicants were unsuccessful I find they are not entitled to reimbursement of tribunal fees. There were no dispute-related expenses claimed.

ORDER

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

Shelley Lopez, Vice Chair