Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Allnutt et al v. Dack*, 2019 BCCRT 833

B E T W E E N :

Alan Allnutt and Rosemarie Linda Scharf

APPLICANTS

A N D :

Kathryn Dack

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This is a dispute about a real estate transaction. The applicants, Alan Allnutt and Rosemarie Linda Scharf, purchased a townhouse from the respondent, Kathryn Dack, in 2018. They say that the respondent failed to disclose an upcoming roof replacement and other expenditures and that, had they known of this issue, they

would have reduced the amount of their offer to the respondent. The applicants seek an order that the applicant pay them $5,000. The respondent denies that she withheld any information and disagrees with the applicants' claims.

2. The applicants are represented by Alan Allnutt. The respondent is self-represented.

JURISDICTION AND PROCEDURE

3. 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.

4. 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.

5. 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.

6. 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

7. The issue in this dispute is whether the respondent is responsible for the $5,000 in damages claimed by the applicants.

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, an applicant bears the burden of proof on a balance of probabilities. The parties have provided evidence and submissions in support of their respective positions. While I have considered all of this information, I will refer to only that which is necessary to provide context to my decision.

9. This dispute concerns a strata development known as Green Gables. A portion of the strata has a heritage designation. The respondent was the owner of strata lot 2.

10. In 2017, a roofing replacement project was approved by the strata's ownership and each owner paid a special assessment to cover its cost. The project did not proceed as a result of contractor availability and the possibility of obtaining a grant for the heritage portion of the development. The special assessments were returned to the owners around December of 2017.

11. In January of 2018, an engineering consultant provided an opinion that the "existing roof components on the building have a minimum life expectancy of 20 months". At a February 19, 2018 meeting, based on the engineer's opinion and the heritage grant process, the strata decided to defer the roof project until 2019. At some point in the spring of 2018, the strata received approval for a heritage grant.

12. The respondent advertised her strata lot for sale in March of 2018. In a March 6, 2018 Property Disclosure Statement, the respondent answered "no" to the question "Are you aware of any special assessment(s) voted on or proposed?" The respondent noted on the PDS that she had paid a special assessment in 2016. She also indicated that there was no depreciation report, although this was identified as "forthcoming". The PDS also contains the respondent's statement that she was not aware of any material latent defect in respect of the property or unit.

13. The applicants made an offer to purchase the strata lot. They did not arrange their own inspection, but were provided with a 2015 inspection report by the respondent. Their offer also waived the condition about review of various documents, including documents received from the strata. The applicants' offer also contained a term that indicated the applicants' awareness of other offers on the property and allowed the respondent to counter their offer at a price $2,500 higher than any other offer. The respondent accepted the applicants' offer and the sale closed in April of 2018.

14. Shortly after they took possession of the townhouse, a leak occurred that accelerated the timeline for the roofing project. At that point, the applicants became aware of this and other upcoming projects. They say they have paid more than $6,800 in special assessments to date, and anticipate a further $9,114.48 in assessments for the roofing project, the depreciation report, and other maintenance projects at the strata. The applicants say they would have reduced the amount they offered to pay for the townhouse had they known of these expenditures, and seek an award of $5,000, which is the maximum available under the tribunal's small claims jurisdiction.

15. The applicants say the respondent failed to disclose the special assessment for the roofing project on the PDS. They also say that the respondent did not disclose all the minutes of strata council meetings. In particular, they say they were not provided with the minutes of a July 5, 2017 special general meeting which documented the previously approved special assessment, as well as other proposed maintenance projects. The applicants also say they did not receive minutes from the February 19, 2018 annual general meeting, which contained information about the roofing project to be completed in 2019, as well as a number of upcoming items including carpentry work, a sump pump and an expenditure for a depreciation report. In the applicants' view, the roof amounted to a material latent defect that the respondent was obliged to disclose.

16. The respondent denies that she withheld any information and says she answered the questions on the PDS honestly and correctly. She says that, at the time she

completed the PDS, there were no special assessment amounts proposed or voted on by the strata's owners. The respondent also noted the engineer's opinion that the roof had 20 months of wear and tear left, and says it was her understanding that this was why the roofing project was "no longer active". Any new project would need to be voted on by the owners (and take into account the funding from the heritage grant). A fresh special assessment would have to be paid. The respondent says she was not aware that there had been a problem with the disclosure of complete meeting minutes. She states that the information that was disclosed contained information about the strata's intention to replace the roof, the returned special assessment, and other proposed projects. According to the respondent, this information was made available to the applicants and they had an opportunity to consider it before making their offer.

17. Apart from matters that must be disclosed in a PDS, the principle of "buyer beware" applies to real estate transactions in British Columbia, and a buyer is expected to make reasonable inquiries about, and conduct a reasonable inspection of, a property. Unless a seller breaches the contract, commits fraud, or fails to disclose a latent defect that cannot be discovered by reasonable inspection, a buyer assumes the risks for any defects in the condition or quality of the property (see, for example, *Nixon v. MacIver*, 2016 BCCA 8).

18. There is a distinction between patent and latent defects in this context. A patent defect 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). 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.

19. 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 applicant (see *McCluskie v. Reynolds et al* (1998), 65 B.C.L.R. (3d) 191 (S.C)). The PDS asks whether a seller is currently 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*). 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. The PDS does not contain specific questions about a strata lot's roof or possible upcoming projects or expenses. It asks whether the seller is "aware of any special assessment(s) voted on or proposed". The respondent has provided an explanation for her negative answer in that there was no approved or proposed assessment at the time she signed the PDS, and that any new proposal for the roofing project would require a new vote and a fresh special assessment. While another person may have interpreted the question differently in the circumstances, I find that the respondent's answer amounted to an honest disclosure of her knowledge about the special assessments.

21. In any event of the respondent's answers on the PDS, I am satisfied that the information about the returned special assessment was available to the applicants in documentation they acknowledge they received prior to making their offer. The strata's financial statements from October and November of 2017 show the special levy refunds as accrued liabilities. The "Tenant Ledger" for the respondent's strata lot showed the refund of the $4,140.09 special assessment on December 15, 2017.

22. In addition, although some minutes were not included in the disclosure package, the available documentation contained information about the roof project, the depreciation report, and other strata-related projects. The October 11, 2017 meeting minutes discuss the roofing project and the fact that the special assessments would be returned to owners if the project was not completed by November 30, 2017. The council also discussed obtaining quotes for a depreciation report. The November 29, 2017 minutes discussed the roofing project, the return of the special

assessment, and new business in the form of the depreciation report and the proposed other projects in the strata.

23. I am not satisfied that the roofing project or other strata projects amounted to material latent defects that required disclosure on the PDS or otherwise. The applicants had information about these matters, and could have obtained additional information by making reasonable inquiries. The applicants chose not to make further inquiries, conduct their own inspection, or make their offer conditional upon approval of strata-related documentation. In doing so, I find that the applicants assumed the risk of their purchase.

24. I acknowledge that the applicants were faced with unexpected strata-related expenses after their purchase. However, the evidence does not establish that the respondent failed in her disclosure obligations such that the principle of "buyer beware" would not apply. Accordingly, I dismiss the applicants' claim for damages of $5,000.

25. 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 applicants were unsuccessful, I dismiss their claim reimbursement of tribunal fees and dispute-related expenses.

ORDER

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

Lynn Scrivener, Tribunal Member