Civil Resolution Tribunal

Date Issued: August 27, 2019

Files: SC-2018-007081 and SC-2018-007082

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *De Beyer v. Yang*, 2019 BCCRT 1021

B E T W E E N :

Donald Peter De Beyer

APPLICANT

A N D :

Qian Yang

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sarah Orr

INTRODUCTION

1. The applicant Donald Peter De Beyer used to own a strata lot (unit 213) directly below the respondent Qian Yang's strata lot (unit 313). The applicant says water from unit 313 entered his unit on multiple occasions causing damage.

2. In dispute SC-2018-007082 the applicant says water leaked from unit 313 into his unit on March 11, 2017, April 12, 2017, and November 6, 2017, causing damage to his unit. He says half of his unit was under repair throughout 2017 and 2018. The applicant claims $5,000 for loss of use of his unit and for stress and associated health problems.

3. In dispute SC-2018-007081 the applicant says water leaked from unit 313 into his unit on April 25, 2018 causing damage to his unit. As of that date the applicant had sold his unit with a closing date of April 30, 2018. The applicant claims $5,000 for lost profit on the sale of his strata lot to reimburse the buyer for their damages and living expenses while the unit was repaired.

4. On March 12, 2019, the Civil Resolution Tribunal (tribunal) issued a preliminary decision finding that the applicant was permitted to pursue the claims in disputes SC-2018-007081 and SC-2018-007082 as separate disputes even though together they add up to $10,000, which exceeds the tribunal's small claims $5,000 monetary limit. This is because the tribunal found the 2 disputes arose from separate and distinct incidents. In other words, the applicant has separate claims with a $5,000 limit each. I agree with that conclusion. However, the tribunal ordered that the 2 disputes should be linked during the tribunal process to conserve the tribunal's resources and avoid inconsistent findings of fact (see *De Bayer v. Yang*, 2019 BCCRT 298). For this reason, I address both disputes in this decision.

5. Both parties are self-represented.

JURISDICTION AND PROCEDURE

6. These are the tribunal's formal written reasons. The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). 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.

7. 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 "he said, she said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanor in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. 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 recent decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

8. 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.

9. The respondent has asked for special accommodation from the tribunal because she is residing in the United States for a period of time. The respondent has not explained how she is at any disadvantage by living in the United States or specified what type of accommodation she seeks. The respondent's evidence and submissions do not suggest that she had any difficulty participating in the online tribunal process from the United States. Therefore, I find I can fairly decide these disputes by written submissions while the respondent resides in the United States.

10. Under tribunal rule 9.3 (2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA:

    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.

ISSUES

11. The issues in this dispute are:

    a. Is the applicant entitled to $5,000 for loss of use of unit 213 and for stress and related health problems caused by the 2017 water leaks from unit 313?

    b. Is the applicant entitled to $5,000 for lost profit on the sale of unit 213 as a result of the April 2018 water leak from unit 313?

EVIDENCE AND ANALYSIS

12. In a civil claim like this one, the applicant must prove his claims on a balance of probabilities. This means I must find it is more likely than not that the applicant's position is correct.

13. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.

Is the applicant entitled to $5,000 for loss of use of unit 213 and for stress and related health problems as a result of the 2017 water leaks from unit 313?

14. This claim is for loss of use and enjoyment and for alleged stress and health problems.

15. The applicant says water leaked from unit 313 into his unit on March 11, 2017, April 12, 2017, and November 6, 2017, causing damage to his unit on each occasion. As discussed below, the applicant has already been paid for the repairs to his unit and some hotel expenses. The applicant claims $5,000 for loss of use and enjoyment of his unit, and for stress and related health problems.

16. I find the laws of nuisance and negligence apply to this dispute. A nuisance occurs when a person substantially and unreasonably interferes with a property owner's use or enjoyment of their property. When the interference causes physical damage, there is a strong likelihood that the interference is not reasonable and that a claim for damages should succeed (*Royal Ann Hotel Co. v. Ashcroft*, 1979 CanLII 2776 (BCCA)). The applicant cites *Kulessa et al. v. The Owners, Strata Plan KAS2598*, 2017 BCPC 238, where the Provincial Court said that water escaping from an adjoining property causing physical damage constitutes an unreasonable interference.

17. To establish negligence, the applicant must prove that the respondent owed him a duty of care, breached the standard of care, and that he sustained damage as a result (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27). As the upstairs neighbour of the applicant, I find the respondent owed the applicant a duty of care to the applicant to use and maintain her unit in a reasonable manner so as to not cause damage to other units. These basic duties and standards are reflected in the bylaws of the strata in which the parties used to reside, which make owners responsible to repair and maintain their units (bylaw 2) and prohibit owners from using their unit in such a way that causes a nuisance or hazard, or unreasonably interferes with the rights of another person to use and enjoy their strata lot (bylaw 3).

18. In the circumstances of this case, I find the standard for nuisance in *Kulessa* is also the standard of care for determining negligence.

March 11, 2017

19. The applicant submitted photos he took in his unit on March 11, 2017 which show water pooling on the stove and kitchen floor. However, the source of the water is unclear in the photos. The applicant provided no other evidence, such as dated photographs of the ceiling or work orders, to indicate that the water came from unit 313 or that his unit sustained damage on that date requiring repairs. The respondent says there was no water leak from her unit on this date. I find the

applicant has submitted insufficient evidence to establish that the respondent was negligent or created a nuisance on March 11, 2017, or that he incurred damages. I dismiss the applicant's claim for damages for the March 11, 2017 incident.

April 12, 2017

20. The respondent says that on April 12, 2017 she accidentally left her kitchen faucet dripping on the dividing edge between 2 sinks while she was at work all day. She says when she returned home from work she found water had pooled on the counter and overflowed onto the floor. She says repairs were not required in her unit.

21. The applicant submitted photos he took in his unit on April 12, 2017 which show water pooling on the exhaust fan and stove, and brown stains on the ceiling. He submitted a work authorization for a restoration company to repair the damage and a completion certificate indicating the repair work was completed on June 15, 2017. The evidence does not show the start date of the repair work.

22. On June 16, 2017 the respondent hired a plumber to inspect the kitchen plumbing in her unit. She submitted the plumber's report which states that everything was in working order with no visible signs of water leaks. However, by the respondent's own admission she left her faucet dripping for many hours which caused the water overflow. Therefore, I find the plumber's report is irrelevant to the issue of damage since the respondent admits that human error caused the water.

23. It is undisputed that the respondent paid for the repairs to the applicant's unit through her insurance company for a cost of $5,350. She says the repairs took less than a full week, and that the applicant was in a better position after the repairs because some of the damage to his floor existed before the water damage on April 12, 2017. However, I find there is no evidence to indicate the applicant's floor was damaged prior to the April 12, 2017 water leak, and there is no evidence of the exact dates or duration of the repairs.

24. On balance, I find the respondent's failure to turn off her kitchen faucet on April 12, 2017 was a breach her duty of care to the applicant, which caused the applicant to sustain damages, and therefore amounts to negligence. I also find the respondent's actions caused a nuisance to the applicant. I address the applicant's entitlement to damages for the April 12, 2017 water leak further below.

November 6, 2017

25. On November 6, 2017, the respondent says she was mopping her floor after hosting a party and accidentally spilled a bucket of water. She says that despite her effort to immediately mop up the water, it penetrated into unit 213 in less than 30 seconds.

26. The applicant submitted photos he took in his unit on November 6, 2017 showing water pooling on the stove and on the floor in and next to the kitchen. Other photos show several large holes that appear to have been cut into the ceiling, the floor in the living space next to the kitchen ripped out, and floor coverings in the kitchen.

27. The applicant submitted a work authorization for a restoration company to repair the damage and a completion certificate indicating the repair work was completed on March 29, 2018.

28. The respondent says the cost of the repairs after the November 6, 2017 water leak was $9,389.33, which she paid for through her insurance company. She says that $1,242.61 of this amount was for the applicant's hotel and living expenses during the repairs. The applicant does not dispute this. Neither of the parties submitted details about the dates of the actual repairs or the dates the applicant was required to stay at a hotel.

29. The respondent suggests that the water leaks could have been caused by the applicant's modification of the original exhaust fan over the microwave but provided no evidence to support this contention. The respondent also says the pipes in the building are the original pipes from 1974 and have never been replaced, and that the dividing structure between unit 313 and unit 213 has been in place for 45 years. She says the material is not as supportive as it was when it was originally installed,

but she failed to specify the type of material to which she refers, or to provide evidence to support her contention.

30. On balance, I am satisfied that the respondent's water spill on November 6, 2017 caused a nuisance to the applicant entitling him to damages. The respondent alleges that the applicant used the damage in his unit as an opportunity to renovate it before selling it. She says the listing photos and video of unit 213 in evidence show that the floors in the kitchen, dining room and living room were completely redone. However, it is undisputed that the respondent has already paid for the cost of repairing unit 213 through her insurance company, and she has not brought a counterclaim to recover any of that amount in these disputes. As noted, the applicant's claim is for loss of use and enjoyment of his strata lot, and I address his entitlement to these damages further below.

Damages

31. The damages that flow from a finding of negligence and nuisance are the same, and the applicant is entitled to compensation for all of the reasonable costs resulting from the respondent's wrongful acts. The evidence before me indicates that the respondent, through her insurer, paid for all repairs to the applicant's unit as well as his hotel costs while his unit was repaired after the April 12, 2017 and November 6, 2017 water leaks. However, in *Medomist Farms Ltd. v. Surrey (District of)*, 1991 CanLII 325 (BC CA), the Court of Appeal said that in addition to damages for physical damage caused to property by a nuisance, an occupier of property may also recover damages for loss of enjoyment of the property as a result of the nuisance.

32. The applicant claims $5,000 for loss of use and enjoyment of his unit, stress, and associated health problems. He claims $25 per day for the March and April 2017 water leaks for a total of 65 days, which equals $1,625. He claims $50 per day for the November 2017 water leak for a total of 67.5 days which equals $3,375. However, it is unclear how the applicant calculated these amounts. While he provided completion certificates showing the dates the repairs concluded in his unit,

he did not provide the dates of the actual repairs or explain why some of the repairs were not completed until months after the damage occurred. The respondent suggests that the applicant caused the delay in the repairs but provided insufficient evidence to support this assertion. I have also found that the applicant has not established entitlement to damages for any water leak that may have occurred on March 11, 2017.

33. The applicant says that after the April 12, 2017 and November 6, 2017 water leaks it took approximately 1 week to dry his unit, and that in total his unit was a construction zone for months. However, he provided no details about how his daily life was affected by the damage or repairs. Evidently, he was required to live at a hotel during some of the repairs, but the evidence indicates the respondent already compensated the applicant for the associated costs. While the applicant's enjoyment of his strata lot was undoubtedly negatively affected by the April 12, 2017 and November 6, 2017 water leaks and resulting damage, he has provided very little evidence of the extent of that loss of enjoyment.

34. For these reasons, on a judgment basis I find the applicant is entitled to $1,000 for loss of use and enjoyment of his strata lot. He is entitled to pre-judgment interest on this amount under the *Court Order Interest Act* (COIA), calculated from November 6, 2017, which is the date of the latest water leak, to the date of this decision. This equals $27.10.

35. The applicant also claims damages for stress and associated health problems arising from the damage to his unit. While I acknowledge that repairing damage to one's home can be stressful, a trivial or minor convenience is insufficient to establish a legal claim. The applicant has not submitted any medical or other evidence to support a claim for emotional distress or pain and suffering, and I therefore I dismiss this aspect of his claim.

Is the applicant entitled to $5,000 for lost profit on the sale of unit 213 as a result of the April 2018 water leak from unit 313?

36. On April 25, 2018, the applicant discovered extensive water damage to his unit. It is undisputed that the respondent's unit was the source of the water leak. The applicant had already sold his unit with a closing date of April 30, 2018. The applicant says he was required to pay for the repairs and the buyer's living expenses for the duration the buyer was unable to live in the unit after taking possession.

37. The applicant submitted photos that he and a strata council member took of his unit on April 25, 2018 which show water dripping from the ceiling above the stove and pooling on the stove and kitchen floor. The applicant submitted an April 25, 2018 email from the same strata council member stating that the water was coming from the respondent's unit. The applicant submitted photos from his unit's sale listing showing it was not damaged before the April 25, 2018 water leak.

38. On April 29, 2018 the applicant notified the respondent by letter that a remediation contractor had performed remediation work in his unit after the April 25, 2018 water leak. On June 20, 2018 the applicant signed a completion certificate indicating that the restoration work in unit 213 was complete.

39. The applicant submitted a revised seller's statement of adjustments for the sale of his unit dated May 2, 2018 showing that the buyer of his unit held back $20,000 from the purchase price for expenses associated with the water damage. The applicant submitted evidence showing that on July 4, 2018 he received $14,590.65 from the holdback, meaning his sale price was reduced by a total of $5,409.35 because of the April 25, 2018 water damage. The applicant is abandoning the amount of his claim above $5,000 to fall within the tribunal's small claims monetary limit.

40. The respondent says she is willing to compensate the applicant for his true losses from the sale caused by the April 25, 2018 water damage. However, she asked the

applicant for proof that the July 4, 2018 payment was the final payment from the holdback and that no further payments were forthcoming from the buyer.

41. The July 4, 2018 letter from the buyer's agent which accompanied the $14,590.65 payment indicated that that amount was the release of the holdback. The content of the letter suggests that the transaction is complete and that no further payments are forthcoming. I am satisfied that the applicant will receive no further payments from the holdback. Therefore, I find the respondent must pay the applicant the full amount of his claim, which is $5,000. The applicant is entitled to pre-judgment interest on this amount under the COIA calculated from May 1, 2018, which is the revised completion date on the sale of his strata lot, to the date of this decision. This equals $110.42.

42. Under section 49 of the CRTA 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. Since the applicant was generally successful I find he is entitled to reimbursement of $300 in tribunal fees. He claims $299.60 in dispute-related expenses for a process server, courier, and registered mail, for which he submitted receipts. I find these to be reasonable dispute-related expenses, and I find he is entitled to reimbursement of $299.60 which is the full amount of his claimed dispute-related expenses.

ORDERS

43. Within 14 days of the date of this order, I order the respondent to pay the applicant a total of $6,737.12, broken down as follows:

    a. $1,000 for loss of use and enjoyment of his strata lot in dispute SC-2018-007082,

    b. $5,000 for loss of profit on the sale of his strata lot in dispute SC-2018-007081,

c. $137.52 in pre-judgment interest under the *Court Order Interest Act*, and

d. $599.60, for $300 in tribunal fees and $299.60 for dispute-related expenses.

44. The applicant is entitled to post-judgment interest, as applicable.

45. Under section 48 of the CRTA, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

46. Under section 58.1 of the CRTA, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Sarah Orr, Tribunal Member