



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Milroy v. Smith*, 2019 BCCRT 1022

B E T W E E N :

CHERYL MILROY

APPLICANT

A N D :

SHANTAL SMITH

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This dispute is about a sale of a 3-year-old mare horse named Guys Cute Lena, also known as “London”.
2. On May 12, 2018, the respondent, Shantal Smith, sold the horse to the applicant, Cheryl Milroy. The applicant says the respondent misrepresented the horse as

having no behavioural or health issues. The applicant says that after the sale, she found the horse had both. The applicant claims a total of \$4,610.18 for medication and training to “fix” London. The respondent denies the claim.

3. The parties are each 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 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.
5. 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. 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 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.
6. 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.

7. 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.
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. 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

10. The issues in this dispute are whether the respondent misrepresented the horse to the applicant, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicant bears the burden of proving her claims on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
12. The respondent's Facebook ad for the horse stated in part,

London is one sweet ride...jump and go type horse, no 'colt' messing around... was started slow and correct and is ready to go in any direction. Soft in the face with a very solid top....easy to trim, handle, and load....She

has been very lightly started on the barrels and I have no doubt that she has what it takes to be a top barrel horse!... This mare is solid.

13. The parties exchanged Facebook messages about the horse's temperament, training and potential, and some discussion of their own experience with horses. The respondent told the applicant she put herself through school by "starting" colts. The respondent also sent a video of someone riding the horse. The applicant said she was prepared to buy the horse unseen. Instead, the parties agreed to meet to complete the sale.
14. The respondent met the applicant in a horse-riding ring. Despite having met in a riding ring, the applicant decided to purchase the horse without riding her or having someone else ride her. The applicant also chose not to have a vet check the horse's health. The respondent provided a copy of the May 12, 2018 bill of sale. The bill includes details of the seller, buyer, price and type of horse but no warranties or exclusions.
15. On May 23, 2018, 11 days after the sale, the applicant had a veterinary technician check over the horse. The technician found the horse presented with symptoms of an ulcer, including being underweight, low energy, poor hair coat, nervous, touchy, and sensitive in certain areas. The applicant says a vet later confirmed the horse had an ulcer. The applicant provided no vet report to establish the cause or how long the horse had the ulcer.
16. The applicant wrote the respondent on May 25, 2019. The applicant told her about the ulcer and that she was having "major issues" with the horse. The applicant said the horse had reared up and bucked quite a bit when the applicant was harnessing her up. The applicant said that in her opinion, the horse was riding like a 30-day colt and she expected more skill. The respondent replied in surprise at the applicant's description of the horse. She suggested there might be a "disconnect" in what they each expect out of their horses. She said the horse had never reared, and had only bucked two times while being saddled, and never again.

17. The parties exchanged further emails. The applicant asked to return the horse for a full refund based on misrepresentation. The respondent refused. The respondent said there were no “ill health identifiers”, “bad mannerisms” or other reasons to believe that the horse “was anything but healthy and ready to go to a new home”.
18. The applicant claims she is entitled to a refund of the purchase price under the *Consumer Right Act*, 2015, which only applies in the United Kingdom. In British Columbia, the *Business Practices and Consumer Protection Act*, (BPCPA) applies to consumer transactions for the supply of goods, which includes horses. Under the BPCPA, a “consumer transaction” is defined to include the supply of goods or services by a supplier to a consumer for purposes that are primarily personal, family or household. A “supplier” is a person in the course of business, who offers to supply, goods or services to a customer.
19. The applicant argues that by training horses to pay for school the respondent is a horse “dealer”, or a person in the business of selling horses. I disagree. I find horse training is not the same as horse dealing. While the respondent trained and sold her horse to the applicant, the applicant has not established that the respondent was in the business of selling horses. Specifically, the applicant provided no evidence that the respondent had sold another horse, that she was regularly selling horses, or that she was running a business. Therefore, I find the applicant has not established that the BPCPA applied to this sale.
20. In a private sale, the “buyer beware” principle applies. This means the applicant bears the risk that the horse’s quality might be somehow defective. Once the horse was bought, unless there was some non-innocent misrepresentation or other legal basis to set aside the contract, the buyer may be stuck with the purchase without legal remedy.

Negligent Misrepresentation

21. For a remedy to apply on misrepresentation, the seller’s misrepresentation must be negligent or fraudulent. There is no right of recovery for an innocent

misrepresentation (see: *Nixon v. MacIver*, 2016 BCCA 8 and *McCluckie v. Reynolds*, 1998 CanLII 5384 (BCSC)). I find the applicant's claim is in negligent misrepresentation.

22. The applicant made quite extensive submissions on the alleged negligent misrepresentation, which I have read and considered, but not summarized in full. I have grouped the applicant's submission into 4 categories: the horse's health, bucking and rearing, lack of skill development, and temperament.

The Horse's Health

23. The applicant claims the respondent misrepresented the horse as healthy, when she was not. However, the applicant did not provide evidence from an accredited veterinarian to establish the extent of the alleged health issues. I also find the applicant has not established that the respondent knew about any health issues prior to sale.
24. The law says the seller is not under any duty to disclose known or patent defects, but must not actively conceal them. The law only requires a seller to disclose latent or hidden defects if they are known to the seller. (see *Rusak v. Henneken* [1986] B.C.J. No. 3072 (S.C.)).
25. I find the applicant had an opportunity to check over the horse prior to purchase. She had the opportunity to view and palpate the horse's body and check the horse's teeth and hooves. This allowed her to check for any patent, or apparent, defects with the horse's health. In terms of latent health defects, I find the respondent did not know of any. I say this because the respondent provided a copy of the horse's export animal health certificate from the United States Department of Agriculture. It says an accredited veterinarian inspected the horse on April 30, 2018 and found her to be healthy and free from evidence of communicable disease.

Bucking and Rearing

26. The horse had bucked two times prior to sale. It is undisputed that the respondent did not disclose this fact until after the sale. The applicant says that if a horse has ever bucked, it will buck again. The respondent says any horse has the potential to buck. The applicant argues that the respondent had a positive obligation to disclose the prior bucking, did not disclose it, and instead, represented the horse as having no bucking behaviour.
27. The applicant says the respondent's statement in the Facebook ad, "no 'colt' messing around", means "no bucking/rearing/and/or dangerous behavior". However, I find the statement ambiguous and does not necessarily say the horse never bucked. There is otherwise no suggestion that the respondent attempted to conceal the bucking. In any event, I find the applicant has also not established that the horse's occasional bucking was actually a "defect" rather than a behavior expected of any horse given the situation.
28. The respondent wrote in her Facebook message, "anyone can jump on this horse and go". The applicant claims this misrepresented a horse that bucks and rears, and thus, dangerous to her and her pregnant daughter. I find the statement was made in the context of the parties' messaging as experienced horse riders. I find both parties likely knew the statement was an exaggeration. Irrespective of the horse, not everyone can "jump on" or ride. I find the statement was a misrepresentation, but I find it was an innocent one. The applicant has also not established that she relied on the statement to purchase the horse.

Lack of Skill Development

29. The applicant claims the respondent represented the horse as having more skill and development than she had. Apart from her own subjective opinion, the applicant provided a partial Facebook message from the horse's current trainer. The trainer described the horse's skill after about 7 months of training. I find this statement does not establish the horse's skill level prior to or after sale to compare it with anything the respondent might have said about the horse. I find the respondent had

clearly represented that the 3 years old horse was still developing. I find the respondent had only speculated on the horse's potential when asked. I find the applicant has not established that the respondent misrepresented the horse's skills or development.

Temperament

30. The applicant described the horse as "mare-ish" soon after purchase. By "mare-ish" I infer she means temperamental and aggressive when in heat. The applicant says she had asked the respondent if the horse was "mare-ish" and the respondent said no, it was more like a gelding. Similar to the horse's skill level, I have no evidence apart from the applicant's subjective opinion, that the horse's temperament was "mare-ish". I note that soon after the sale, the horse was experiencing symptoms of an ulcer. As mentioned, the applicant's vet technician described these symptoms as being nervous and touchy. The applicant has not explained how the "mare-ish" temperament was different from the ulcer symptoms.
31. Even if I accept the horse was "mare-ish" after sale, the applicant has not established that this was the respondent's experience with the horse. The respondent's witness statements described the horse as "quiet", "easy to handle", "soft" and "easy to get along with", and do not describe her as foul tempered, aggressive or otherwise as "mare-ish". There is no contrary evidence of the horse's temperament prior to sale, except that the horse attempted to kick the applicant's husband when he tried to pick-up her back hoof right before purchase. More below.

Buyer Beware

32. The applicant has the burden of proof. I find she has not established on a balance of probabilities that the respondent negligently misrepresented the horse. Therefore, I find the "buyer beware" principle applied to this sale and the applicant had the onus to assess the horse before purchasing it. She chose not to do so.
33. Prior to sale, the respondent gave the applicant information about the horse's prior trainer and breeder. I find it was open to the applicant to contact them to learn more

about the horse from these third parties. I find, without explanation, the applicant failed to assess the horse by riding her or having her examined by a vet. The applicant also bought the horse despite it attempting to kick her husband. For these reasons, I find the applicant is not entitled to any reimbursement from the respondent to “fix” the horse.

34. 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. As the applicant was unsuccessful, I dismiss her claims for reimbursement of tribunal fees and dispute-related expenses.

ORDER

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

Trisha Apland, Tribunal Member