



Civil Resolution Tribunal

Date Issued: April 16, 2020

File: SC-2019-010444

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Armstrong v. Rocha*, 2020 BCCRT 408

BETWEEN:

GOWAN ARMSTRONG and KARLA ARMSTRONG

APPLICANTS

AND:

ELIZABETE ROCHA and WILLIAM OWEN

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Andrea Ritchie, Vice Chair

INTRODUCTION

1. The applicants, Gowan Armstrong and Karla Armstrong, purchased a home from the respondents, Elizabete Rocha and William Owen.

2. The applicants say the respondents failed to disclose a latent defect in the home's window seals, contrary to the respondents' completed property disclosure statement (PDS). The applicants say the respondents must have known about the failed window seals because the issue was present in all 68 windows. The applicants seek \$5,000 towards the labour cost to replace the windows.
3. The respondents disagree and say there were no issues with the window seals while they owned the property. Further, they say the applicants had an independent home inspection done, which noted no issues with the windows.
4. The applicants are self-represented. The respondents are represented by Ms. Rocha.

JURISDICTION AND PROCEDURE

5. 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.
6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. 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.
7. 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.

8. In resolving this dispute the tribunal may make one or more of the following orders, where permitted by 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.

ISSUE

9. The issue in this dispute is whether the respondents failed to disclose a latent defect in the home's window seals, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicants bear the burden of proof on a balance of probabilities. While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
11. It is undisputed the respondents had the home built in approximately 2006. Sometime in the fall of 2018, they listed it for sale. After the applicants viewed the property in person, on November 2, 2018 the parties signed a purchase and sale agreement for the home, subject to, among other things, an acceptable home inspection. The PDS, signed by all parties, noted the respondents were not aware of any material latent defect.
12. On November 6, 2018, the applicants had the home inspected. The inspector's report does not note issues with any of the windows. In fact, any time "windows" are

mentioned, the inspector wrote “acceptable”. It is undisputed the parties completed the sale and the applicants took possession of the home on December 29, 2018.

13. The applicants say a few weeks later they noticed fogging and frost in several of the windows. They contacted the window manufacturer, AWW, and an AWW inspector determined all 68 windows’ seals had failed and recommended total replacement. Given the extent of the failure, AWW agreed to honour part of the warranty, and only charged the applicants labour to replace all 68 windows. On April 11, 2019, the applicants paid AWW \$5,024.25 for this labour. In this dispute, the applicants seek reimbursement of \$5,000, the tribunal’s small claims monetary limit.
14. As noted above, the applicants say the respondents failed to disclose in the PDS that the windows had a latent defect. A patent defect is one that can be discovered by conducting a reasonable inspection and making reasonable enquiries about a property (see: *Cardwell v. Perthen*, 2006 BCSC 333, affirmed 2007 BCCA 313). In contrast, a latent material defect is a material defect that cannot be discerned through 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.
15. 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 with the applicants (see: *McCluskie v. Reynolds et al* (1998), 65 BCLR (3d) 191 (SC)).
16. A PDS asks whether a seller is aware of a defect, and this awareness is inherently subjective (see: *Hamilton v. Callaway*, 2016 BCCA 189). In a PDS, a seller must disclose honestly its actual knowledge of the property, but that knowledge does not have to be correct (see: *Nixon v. MacIver*, 2016 BCCA 8). A statement in a PDS does not rise to the level of a warranty (see: *Hanslo v. Barry*, 2011 BCSC 1624, *Kiraly v. Fuchs*, 2009 BCSC 654).

17. It is undisputed that in the PDS, the respondents indicated that they were unaware of any material latent defect respecting the property. The respondents say they never experienced any issues with the windows fogging or frosting, and provided realtor photographs and witness statements from their realtor and two others, all of whom stated they never saw any issues with the home's windows, despite frequent visits to the property.
18. Additionally, neither the applicants nor the applicants' home inspector identified any visible issues with the windows, even though the inspection was done in November, during inclement weather.
19. It is undisputed the window seals failed and that the applicants did not experience any window issues until the end of January 2019, nearly one month after taking possession of the home. However, there is no evidence as to whether this failure occurred before or after the applicants purchased the home.
20. I find the evidence does not establish the respondents knew the windows seals had failed. I find the defect here was a latent defect, unknown to the respondents. On balance, I find the applicants have not proven the respondents improperly filled out the PDS or otherwise failed to disclose their actual knowledge about the property's windows. For these reasons, I dismiss the applicants' claims.
21. Under section 49 of the CRTA, and the tribunal rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses. I see no reason to deviate from that general rule. As the applicants were not successful, I find that they are not entitled to reimbursement of their paid tribunal fees or dispute-related expenses.

ORDER

22. I order the applicants' claims, and this dispute, dismissed.

Andrea Ritchie, Vice Chair