



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Whelan v. Labrecque*, 2020 BCCRT 455

BETWEEN:

PATRICK WHELAN and JESSICA WHELAN

APPLICANTS

AND:

TIM LABRECQUE

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION

1. This dispute is about the purchase of a used motorboat through a private sale. The applicants, Patrick Whelan and Jessica Whelan, say they purchased a motorboat and trailer from the respondent, Tim Labrecque, who represented it had just been serviced and that it was in good working condition. However, the motor stalled the first time the applicants tried to use it in water. The applicants seek \$1,700 as a full

refund for the motorboat and trailer and to return the motorboat and trailer to the respondent. The respondent denies there were any problems with the motor and says it was sold in an “as is” condition.

2. The parties are each 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* (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.
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. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

Injunctive Relief

7. The applicants seek an order that the respondent take the motorboat and trailer back. An order requiring someone to do something is known as “injunctive relief”.

Injunctive relief is outside the tribunal's small claims jurisdiction, except where expressly permitted by section 118 of the CRTA. There is no relevant CRTA provision here that would permit me to grant the injunctive relief sought by the applicants. So, I refuse to grant this remedy.

ISSUES

8. The issues in this dispute are:
 - a. Did the respondent misrepresent the condition of the motorboat he sold to the applicants?
 - b. Did the respondent breach an implied warranty under *the Sale of Goods Act*?
 - c. If so, what remedy is appropriate?

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicants have the burden of proof on a balance of probabilities. This means that I must find it is more likely than not that the applicant's position is correct. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.
10. The applicants purchased a motorboat and trailer from the respondent on October 19, 2019. The respondent made the following statements in the motorboat's online advertisement:
 - a. The boat had a 70 hp mercury outboard that was just serviced and "purrs like a kitten".
 - b. The motor was "very strong."
 - c. The boat could be used for fishing, crabbing, and water sports.

11. The parties agree that the applicants inspected the motorboat on October 19, 2019 before they purchased it. The respondent ran the motor in neutral for several minutes and it appeared to run without difficulty. The parties did not test the motor in water. The applicants paid the respondent \$1,700 in cash for the motorboat and trailer. The applicants did not have a mechanic inspect the motorboat before they purchased it. The applicants say they relied on the respondent's advertisement that the motor was just serviced and ran perfectly.
12. After purchasing the motorboat the applicants registered it and obtained insurance. On October 22, 2019 the applicants tried to use the motorboat for the first time in a nearby lake but the motor stalled when they tried to shift it out of neutral. They say when they removed the motorboat from the water they saw a lot of oil leaking out of the motor and "leg". The applicants say they removed the motor's cover and discovered the motor was full of oil, debris, and a mouse nest. I accept the applicants' description of the motor's appearance since the respondent did not dispute it.
13. The applicants also say their friend, a boat mechanic, inspected the motor and told them this was a common problem with older motors and the cost of rebuilding the motor was more than the amount the applicants paid for the motorboat and the trailer. While the applicants did not describe what the common problem was, I infer that the friend was referring to the motor stalling. The applicants did not provide a written statement from their friend.
14. I find the mechanic's alleged statement to the applicants is hearsay. While the tribunal is permitted to accept hearsay evidence, in this case I place no weight on the applicants' hearsay evidence about what the mechanic said, given the mechanic was not identified and there is no explanation before me about why the applicants did not obtain a statement from him. As a result, I find the applicants have not proved the respondent should have known the motor would stall in water, or the cost of repairing it.

15. The respondent says that the applicants are not credible because of inconsistencies in their statements. Specifically, he says the applicants initially claimed they tested the motor “right way” and then admitted they tested it 3 days after they purchased it. I find this inconsistency is irrelevant since there was no evidence that the motor worked in water when the applicants purchased the motorboat. I see no reason to doubt the applicants’ credibility.
16. The respondent also says he does not know what happened to the motorboat during the 3 days it was in the applicants’ possession. By this I infer that the respondent is implying the applicants may have damaged the motorboat after they purchased it. Since the respondent is making the allegation, the burden of proof is on him. I find the respondent has not provided any evidence that the problems the applicant described with the motorboat were caused by the applicants after they took possession of it.

Did the respondent misrepresent the motorboat’s condition?

17. The applicants say the respondent fraudulently misrepresented the motorboat’s condition.
18. The parties agree the respondent wrote “as is” on the receipt. I understand this to mean the motorboat and trailer were sold in an as is condition. Based on this, the respondent relies on the principle of “buyer beware”. This means that the buyer is required to make reasonable enquiries about the property they wish to purchase. This principle is subject to several exceptions, including fraudulent or negligent misrepresentation (see *Nixon v. MacIver*, 2016 BCCA 8 at paragraphs 32 to 33).
19. According to *O’Shaughnessy v Sidhu*, 2016 BCPC 308, a misrepresentation is a false statement of fact made in the course of negotiations or in an advertisement, that has the effect of inducing a reasonable person to enter into a contract. The judge pointed out that there are several types of misrepresentation including negligent and fraudulent.

20. Although I am not bound by it, I agree with the decision of this tribunal in *Caviglia v. Jonathan*, 2020 BCCRT 426 that negligent misrepresentation occurs when a seller fails to exercise reasonable care to ensure representations are accurate and not misleading. I also agree that fraudulent misrepresentation occurs when a seller makes a false representation of fact and the seller knew it was false or recklessly made it without knowing it was true or false. In either case, the misrepresentation must reasonably induce the purchaser to buy the item.
21. The respondent made several statements about the motorboat in his advertisement, particularly that the outboard motor was just serviced, the motorboat had a very strong motor, and the motorboat could be used for crabbing, fishing, and water sports. I will address each statement in turn.

Was the outboard motor recently serviced?

22. As mentioned above, the respondent stated the motor had just been serviced in the advertisement. The applicants say the respondent also told them the motor had been serviced by his boat mechanic. An email from the respondent confirms that he told the applicants a mechanic had serviced the motor. However, when the applicants asked him to produce service records, the respondent admitted that he actually cleaned and serviced the motor himself.
23. I find whether the respondent serviced the motor himself or hired a third party is irrelevant so long as the motor had been serviced. Since the respondent did not refute there was debris under the motor's cover, I find the motor was never cleaned or serviced, even in a rudimentary manner. As a result, I find the respondent knowingly and falsely represented in his advertisement that the motor was serviced.
24. Did the statement induce the applicants to buy the motorboat? I find the applicants relied on the motorboat being serviced as an indication that the motor was working properly. However, the applicants did not provide any evidence that the motor would not have stalled if it had been serviced and cleaned. I find that the cause of the motor stalling is not ordinary knowledge and the applicants did not provide expert

evidence of why it did not work properly. As a result, I find they failed to prove the motor stalled because it was not serviced. I find the applicants have not proved that the misrepresentation induced them to purchase the motorboat.

Was the motor “very strong”?

25. The respondent stated in the advertisement that the motor was very strong. The applicants say the respondent told them the motor had never let him down and was always running great while he was using it. The respondent stated in his Dispute Response that he had not used the motorboat for “quite a while” before he sold it to the applicants and that “the motor seemed to be running strong and idled nicely”. From this I infer that he did not test the motorboat in the water before he listed it for sale.
26. There is no evidence of what the term “very strong” meant. However, even using the most conservative definition of the term, I find a motor that stalls when shifted out of neutral could not be described as strong. I also find that since the motor was intended to be used in water, the respondent should have tested it in water in addition to on land before making this statement. Since he did not do so, I find the respondent did not exercise reasonable care to ensure the statement was accurate. I also find the applicants were induced to purchase the motorboat based on the respondent’s description.
27. Was this statement fraudulent? Since the respondent tested the motor on land and was satisfied it ran well, I find there is no evidence that the respondent knew the motor stalled in water. As a result, I find that the respondent made a negligent misrepresentation, not a fraudulent misrepresentation.

Could the motorboat be used for crabbing, fishing, and water sports?

28. The respondent also stated the motorboat could be used for crabbing, fishing, and water sports. I infer a boat has to be able to move around a body of water, such as a lake, for these activities. Based on the size of the motorboat in the photo provided by the parties, I find that it would need a functioning motor to do so. I infer that since

the motor stalled when shifted out of neutral, the motorboat could not move in water.

29. As discussed above, the respondent says he had not used the motorboat in “quite a while” and the only way he tested the motor was by idling it on land. Again, I find the respondent did not exercise reasonable care because he did not test the motorboat in water before making this statement.
30. However, were the applicants induced to purchase the motorboat based on this statement? Since the applicants did not state they intended to use the motorboat for crabbing, fishing, or water sports, I find that they did not prove the statement induced them to purchase the motorboat.

Sale of Goods Act

31. Even if the respondent had not misrepresented the condition of the outboard motor, I find the parties entered a contract of purchase and sale which is subject to section 18(c) of the *Sale of Goods Act* (SGA). Section 18 of the SGA contains implied warranty conditions that each item is in the condition described and is of saleable quality and reasonably fit for its purpose. Section 18(c) of the SGA states that there is an implied condition that the goods will be durable for a reasonable period of time, taking into account how the goods would normally be used and all the surrounding circumstances of the sale.
32. In *Sugiyama v. Pilsen*, 2006 BCPC 265 the court noted that a number of factors are considered when determining whether a vehicle is durable for a reasonable period of time, including age, mileage, price, the use of the vehicle, the reason for the breakdown, and expectations of the parties as shown by any express warranties. In *Sugiyama* the claimant purchased a car that broke down after driving it for only 616 kilometers. The court determined that the car was still durable for a reasonable time because one had to consider its age (8 years old), mileage (over 140,000 kilometers), and price.

33. In this case, neither party provided any details about the age of the motorboat, original purchase price, whether the motor had been regularly maintained, or how often the respondent used the motorboat. Without this information, I cannot assess whether the motorboat was durable for a reasonable period of time and whether the respondent breached the implied warranty under section 18(c) of the SGA. Since the burden of proving a claim is on the applicants, I find there is no proof that the implied warranty under the SGA was breached.
34. Given my reasons above regarding the SGA, I find nothing turns on whether the motorboat was sold in an “as is” condition.

Remedies

35. Having found the respondent negligently misrepresented the condition of the motor, I must now determine the appropriate remedy. The court in *O’Shaughnessy* stated that a party seeking damages for negligent misrepresentation is entitled to be put in the position they would have been in had the misrepresentation not been made. The party must establish on a balance of probabilities what that position would have been. Once the party has established the loss caused by the transaction, his or her burden of proof with respect to damages is discharged (see *O’Shaughnessy* paragraph 104).
36. The applicants seek a full refund and that the respondent take back the motorboat and trailer. As discussed above, I do not have jurisdiction to order the respondent to take back the motorboat and trailer. Regarding the full refund, I find there is still some value in the motorboat and trailer. I also find the applicants would be unjustly enriched if they were awarded a full refund and also kept the motorboat and trailer. As a result, I find the amount awarded to the applicants should reflect the residual value of the motorboat and trailer. Since the parties did not provide any information about the value of the motorboat or trailer, I find the residual value is \$250. I find the applicants are entitled to receive \$1,450 for damages.

37. The *Court Order Interest Act* applies to the tribunal. The applicants are entitled to pre-judgment interest on the amount of \$1,450 from October 19, 2019, the date of purchase to the date of this decision. This equals \$14.87.
38. 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. I find the applicant is entitled to reimbursement of \$125 in tribunal fees.

ORDERS

39. Within 14 days of the date of this order, I order the respondent to pay the applicant a total of \$1,589.87 broken down as follows:
- a. \$1,450 as a refund for the motorboat and trailer,
 - b. \$14.87 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$125.00 in tribunal fees.
40. The applicant is entitled to post-judgment interest, as applicable.
41. 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.
42. The Minister of Public Safety and Solicitor General has issued Ministerial Order No. M086 under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The tribunal can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the tribunal will not have this ability. A party should contact the tribunal as soon as possible if they want to ask the tribunal to

consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

43. 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.

Rama Sood, Tribunal Member