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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kvinlaug v. Schuchort*, 2020 BCCRT 578

B E T W E E N :

ANGELA KVINLAUG

APPLICANT

A N D :

GEORGE GROMER, MARTHA GROMER, and Joachim Schuchort

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. This dispute is about an alleged cat attack.

2. The applicant, Angela Kvinlaug, says that she and her dog were attacked by the respondent Joachim Schuchort's cat on June 13, 2019. She claims $5,000 for physical and mental injury from the attack.

3. Mr. Schuchort denies any responsibility for the cat attack and asks that the dispute be dismissed.

4. The respondents George Gromer and Martha Gromer own the property where the alleged attack occurred, but do not live there. As discussed below, Mrs. Gromer failed to file a Dispute Response and is in default. Mr. Gromer denies that he, or his wife, are responsible for the cat attack and asks that the dispute be dismissed

5. Ms. Kvinlaug and Mr. Schuchort each represent themselves. As discussed below I find that Mr. Gromer represents himself and Mrs. Gromer.

JURISDICTION AND PROCEDURE

6. 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.

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. 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.

ISSUE

10. The issue in this dispute is whether the respondents are responsible for the alleged attack and, if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

11. In a civil claim, such as this one, the applicant must prove her claims on a balance of probabilities. Although I have reviewed all of the parties' evidence and submissions, I will only reference what is needed to explain my decision.

12. I find that Mr. and Mrs. Gromer own half of a duplex (the property) which is divided into two suites. The Gromers do not live at the property. They rent the attic suite to Mr. Schuchort. All of this is undisputed.

13. Mr. Schuchort says that the former tenant from the main floor suite had a cat called Brummer. The main floor tenant died around 2 years ago. Mr. Schuchort says that he has taken care of Brummer ever since.

14. Mr. Gromer says that he and his wife do not own or care for Brummer, do not live at the property, and did not witness the attack. Mr. Gromer says that Brummer has lived at the property for over 12 years and the Gromers have never had any complaints from tenants, neighbours, visitors, tradespeople or anyone else about the cat. Mr. Gromer says that his daughter used to live at the property with her dog, and that she nor her dog ever had any issues with Brummer.

15. NS is the main floor tenant. At the time of the alleged attack, Ms. Kvinlaug and NS were friends.

16. Ms. Kvinlaug says that at around 9:30 p.m. on June 13, 2019, Brummer ran out of the house and attacked her and her small dog. She does not specify where the alleged attack occurred, but text messages between Ms. Kvinlaug and NS later that same evening indicate that Ms. Kvinlaug went up a set of stairs before the incident. Mr. Schuchort says that the incident happened on the front porch, although he did

not witness it. For the purpose of this dispute, I find that Ms. Kvinlaug was on the property owned by the Gromers at the time of the alleged attack, as she had gone up some stairs and was likely on the front porch.

17. There were no witnesses to the alleged attack.

18. In her texts to Ms. Kvinlaug, NSsaid that her “neighbours cat was the worst” but that she had “no idea that would happen” (quotes reproduced as written). NS said that she had spoken to her neighbor, that he was very sorry, that he wanted to work it out, and that he did not want anything to happen to the cat.

19. In her June 13, 2019 text messages, Ms. Kvinlaug asked NSif the neighbor (Mr. Schuchort) knew about the MT “dog incident”. The daughter did not answer the question but repeated that she felt bad about the cat incident.

20. I turn to the applicable law. The onus is on Ms. Kvinlaug to show that the respondents are responsible for her injuries. In British Columbia there are three ways for an owner to be responsible for a pet’s actions: a) the legal concept known as “scienter”, b) negligence, and c) occupier’s liability under the *Occupier’s Liability Act*. I will address how the law applies to each respondent separately.

21. Scienter means knowledge of the animal’s poor behavior or propensity to be aggressive. Although scienter is most commonly raised about dog incidents, I find that the law of scienter applies to all domestic animals, including cats (see *Kirk v. Trerise* 1981 CanLii 430 (BCCA)). For scienter to apply, Ms. Kvinlaug must prove that, at the time of the attack:

    a. The respondents were the owners, or keepers, of the cat,

    b. The cat had manifested a propensity or tendency to cause the type of harm that happened, and

    c. The cat’s owner knew of that propensity (see *Janota-Bzowska v. Lewis* [1997] B.C.J. No. 2053 (BCCA)).

22. I find that Mr. Schuchort is Brummer's owner. While I acknowledge that Mr. Schuchort inherited the cat from a prior tenant, he admits to taking care of it and keeping it at the property over the past 2 years. In this way, for the purpose of this decision, I find he has become Brummer's owner and is responsible for the cat.

23. Ms. Kvinlaug says that Brummer had a propensity to attack other animals. She is essentially arguing scienter.

24. Ms. Kvinlaug submitted an undated email from MT. MT said that, on April 29, 2019, he was taking care of a dog that was attacked in the backyard of the property. MT said that the cat, which lived in the upstairs unit of the property, jumped from the side of the stairs and got into a fight with the dog, scratching it on the nose and face.

25. There is no evidence contradicting MT's account. MT specifically refers to the cat from the upstairs suite, which is Mr. Schuchort's suite. I find it likely that it was Brummer who injured the dog under MT's care on April 29, 2019. This indicates that Brummer has a propensity to cause injury to other dogs. It does not indicate that Brummer has a propensity to cause injury to people, which is the primary type of injury at issue in this dispute. However, Ms. Kvinlaug argues that she sustained emotional injury resulting from her dog being attacked. As the dog's injuries are also at issue in this dispute, as a potential cause of Ms. Kvinlaug's emotional injuries, I will continue to address whether Ms. Kvinlaug has established scienter.

26. Ms. Kvinlaug says that Mr. Schuchort was aware that his cat was aggressive, territorial and had a history of attacking other animals. Mr. Schuchort denies that Brummer is aggressive or territorial. He says that he was not aware of the incident with MT's dog, or any other allegations of attacks by Brummer. Mr. Schuchort says that the cat is evasive, wants to be left alone, and runs away when people are near.

27. MT's email is silent about whether Mr. Schuchort saw, or was told about, the April 29, 2019 dog incident. Although Ms. Kvinlaug was aware of Brummer's interaction with MT's dog, she does not explain how she found out about it. From Ms.

Kvinlaug's text to Mr. Schuchort's daughter, I find that Ms. Kvinlaug was not then aware whether Mr. Schuchort knew of the MT dog incident or not.

28. On balance, I find that Ms. Kvinlaug has failed to prove that Mr. Schuchort knew of Brummer's propensity to cause injury to other animals. Therefore, I find that Ms. Kvinlaug has failed to prove that Mr. Schuchort is liable for Brummer's actions in scienter.

29. I now turn to negligence. To succeed in negligence Ms. Kvinlaug must prove that the respondents knew, or ought to have known, that Brummer was likely to create a risk of injury and that the respondents failed to take reasonable care to prevent such an injury (see *Xu v. Chen & Yates,* 2008 BCPC 0234). As discussed above, there is no evidence that Mr. Schuchort knew, or should have known, that Brummer had a propensity to attack a dog and/or was likely to create a risk of injury. As Mr. Schuchort was unaware of the risk of injury from Brummer, I cannot find that there are actions he should have, or could have, taken to prevent the attack and Ms. Kvinlaug's injuries.

30. Even if Mr. Schuchort knew, or should have known, that Brummer had a propensity to attack other animals, I cannot find that there are any further actions he could have, or should have, taken to prevent the incident with Ms. Kvinlaug. Unlike dogs, cats are generally not leashed or otherwise controlled. Brummer was in the house when Ms. Kvinlaug arrived on the property. On balance, I find that Ms. Kvinlaug has failed to prove that Mr. Schuchort was negligent in preventing the incident with Brummer.

31. I now turn to occupier's liability. Section 1 of the *Occupier's Liability Act* (OLA) defines an occupier as a person who is in physical possession of, or has responsibility and control over, the place where the incident occurred. I find that, as a tenant, Mr. Schuchort likely had at least some responsibility and control over the front porch, where the incident occurred. He is therefore an occupier.

32. Under section 3 of the OLA*,* an occupier must take reasonable care to ensure that others on the property are reasonably safe from harm. As noted above, I do not find that Mr. Schuchort knew, or reasonably ought to have known, that Brummer would attack Ms. Kvinlaug, or anyone else who might have access to the front porch. Mr. Schuchort cannot keep Ms. Kvinlaug safe from a threat that he is not aware of, nor should have been aware of. I find that Mr. Schuchort did not fail to take reasonable care about Brummer, given that he could not have reasonably anticipated Brummer's attack on the front porch. I find that Ms. Kvinlaug has failed to prove that Mr. Schuchort is liable for Brummer's actions in scienter, negligence, or occupier's liability.

33. I turn now to consider the Gromers' liability.

34. Mrs. Gromer is technically in default. She was served with the Dispute Notice by registered mail but did not file a Dispute Response as required. Normally when a party is in default, liability is assumed, meaning the applicant's position is assumed to be correct. However, in the circumstances and with the evidence before me, I find that assumption is rebutted.

35. It is quite clear that Mr. Gromer was acting both on his own behalf and on his wife's behalf, in submitting his Dispute Response and arguments to the tribunal. He signed off on each document with both his and his wife's names. Mr. Gromer put forth arguments that neither he, nor his wife, lived on the property and that neither he, nor his wife, owned Brummer. In the circumstances, I find that Mr. Gromer has put forth arguments that rebut the assumption of Mrs. Gromer's liability.

36. I find that neither Mr. Gromer nor Mrs. Gromer ar Brummer's owner, or keeper. As such, they are not liable in either scienter or negligence for Brummer's actions. As the property owners, Mr. Gromer and/or Mrs. Gromer could be found to be occupiers under the OLA. Even if this were the case, I would find that neither Mr. Gromer or Mrs. Gromer is responsible for Brummer's actions under occupier's liability. There is no evidence that either of the Gromers knew, or ought to have known, of any risk from Brummer. The Gromers are not required to keep Ms.

Kvinlaug safe from a risk of harm that they are not, and could not be, aware of. Overall, I find that neither Mr. Gromer or Mrs. Gromer are responsible for Brummer's actions in scienter, negligence, or occupier's liability.

37. As I have found that none of the respondents are liable for Brummer's actions, and any resulting injuries to Ms. Kvinlaug, there is no need to consider Ms. Kvinlaug's damages. I find Ms. Kvinlaug's claims must be dismissed.

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. As Ms. Kvinlaug was unsuccessful in her claims, she is not entitled to reimbursement of her tribunal fees or any dispute-related expenses. Although successful, the respondents did not pay any fees or claim reimbursement of any expenses.

ORDER

39. I dismiss Ms. Kvinlaug's claims and this dispute.

Sherelle Goodwin, Tribunal Member