Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Funk v. Andersen*, 2020 BCCRT 604

B E T W E E N :

MICHELLE FUNK

APPLICANT

A N D :

COLLEEN ANDERSEN and TORBEN ANDERSEN

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Rama Sood

INTRODUCTION

1. This dispute is about the private sale of a used truck. The applicant, Michelle Funk, purchased a 2004 Chevrolet Colorado (truck) from the respondents, Colleen Andersen and Torben Andersen.

2. The applicant says the respondents misrepresented the truck's accident history. She seeks $1,920 for diminished value. The applicant also says the set of summer tires that were included in the purchase were the wrong size. She seeks another $730.97 for the cost of 4 new summer tires.

3. The respondents say they told the applicant about the accident. They also deny that the tires they supplied were the wrong size.

4. The parties are self-represented.

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. In some respects, this dispute amounts to a "he said, he said" scenario with both sides calling into question the credibility of the other. Credibility of 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.

7. 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. In *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the court recognized that oral

hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.

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.

ISSUES

10. The issues in this dispute are:

    a. Whether the respondents misrepresented the truck's accident history to the applicant, and if so, what is the appropriate remedy.

    b. Whether the respondent gave the correct tires to the applicant.

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicant must prove her claims on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.

12. On November 30, 2019 the applicant, accompanied by her friend, JD, inspected the respondent's truck. The applicant says the respondents' son showed them the truck and pointed out wear and tear, which was not significant. The applicant says she asked the respondents' son for any receipts for any work or maintenance done on the truck but he did not provide any. After test driving it, the applicant purchased the truck along with a set of summer tires from the respondents and paid the

respondents $6,400 by e-transfer. The applicant says the respondents were only present after she decided to purchase the truck.

13. The respondents completed and signed a Transfer/Tax Form (form) while the parties waited for the funds to be e-transferred. The form contained a "Seller Information and Vehicle Declaration" section. The form stated that this section must be completed in full by the seller. The section required the seller to indicate whether there was cumulative vehicle damage over $2,000 by checking either a "yes" box or a "no" box. The respondents did not check either box. The respondents signed the form, indicating that they certified the information in the section was true.

14. The applicant says at some point after she purchased the truck, she was in a motor vehicle collision while driving it. She says she then discovered that the truck was a salvage vehicle. She says it had been in a previous motor vehicle collision and the front end was rebuilt. She says the respondents did not say anything about the truck's accident history when she purchased it. JD confirmed that neither the respondents or their son disclosed that the truck had previous extensive front end damage.

15. The applicant says the respondents intentionally misled her about the truck's repair history. She says the respondents did not mention the truck's accident history or properly complete the "Seller Information and Vehicle Declaration" section of the form.

16. The respondents say they knew the truck had been in a front end accident and professionally repaired when they purchased it in 2017. However, they denied that the truck had been rebuilt. The respondents agree they were not present when their son showed the truck to the applicant. They say the applicant was told everything they knew about the truck and denied they attempted to hide or misrepresent any information. However, the respondents did not state who informed the applicant about the truck's accident history, when she was informed, or what specifically they told her.

Did the respondents mislead the applicant?

17. 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 whether it was true or false, and the buyer is induced by the false representation to buy the item. The first element can be met if the seller fails to disclose a material fact (see *House of Barrs Ltd v Toronto Dominion Bank*, [1997] BCJ No 1670 at paragraph 27). I find the respondents did not disclose the truck's accident history to the applicant before she purchased it.

18. The respondents say they did not attempt to mislead the applicant. I find the respondents' statement that they told the applicant everything they knew about the truck is vague. As mentioned above, they did not provide details of what specific information they provided to the applicant. Also, they admitted they only met with the applicant while waiting for the e-transfer to be completed. This means even if they did discuss the truck's history with the applicant, it would have been after she purchased the truck.

19. The applicant and DJ both say the son did not mention anything about a previous collision when the applicant inspected the truck. I find that the respondents' son should have disclosed the truck's accident history when the applicant asked about whether there were receipts for work or maintenance on the truck. The respondents did not provide a statement from their son. I draw an adverse inference against the respondents for not providing a statement from their son. Based on the evidence before me, I find there is no evidence that the respondents' son informed the applicant about the truck's accident history.

20. I find the respondents' son acted as their agent in the sale. A misrepresentation made by a seller's agent is just as effective as a representation made by the seller personally (see *O'Shaughnessy v. Sidhu*, [2016] BCJ No 2136 at paragraph 110). Accordingly, the respondents are deemed to have made the same representations

as their son. Given that the respondents knew the accident history, I find that, through their son, they misled the applicant by not disclosing that the front end had been repaired.

21. I turn now to the form. The respondents say they initially intended to just sign the form and leave it for the insurance broker to fill in the details, as they have done in the past. They also say the only reason they filled in their names and address was because they were waiting for the e-transfer to finish.

22. I find the form is straight forward and unambiguous. I also find that since the form stated the section “Must be competed in full by the seller”, the respondents, as the sellers, were obligated to indicate whether there was damage over $2,000 by checking either the yes box or the no box. The respondents did not deny that the damage to the front end of the truck was less than $2,000. Since they admitted they spoke to the previous owner about the truck’s accident history, I find they likely knew the monetary damage to the truck. I find the respondents acted recklessly when they did not indicate whether the truck had damage over $2,000. Even if they did not complete this section of the form in prior transactions, I find it is no excuse for not completing it in this situation, especially since the respondents knew the truck’s history.

23. The respondents say the applicant should have investigated the truck’s history independently. While I am not bound by previous tribunal decisions, I agree with the tribunal’s reasoning in *Bonneteau v. Dhatt*, 2019 BCCRT 1423 at paragraph 37 that a buyer’s lack of due diligence does not benefit a seller who makes a false statement, particularly when the statement is made fraudulently or negligently (also see *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, [2002] SCJ No 20 at paragraph 67). Hence, I do not accept the respondents’ argument.

24. What remedy is available? If a seller misrepresents a vehicle’s condition, the buyer may be entitled to compensation for losses arising from that misrepresentation. The applicant says that according to ICBC's Total Loss Policy, a vehicle that has been deemed salvageable and is rebuilt loses between 20%-30% of its value. The

applicant seeks $1,920 in damages which is 30% of the purchase price. While the respondents admit the truck was previously damaged, they deny it was rebuilt. The applicant did not provide a copy of the policy or provide any proof that the truck was rebuilt. Without this information, I find the applicant has not proved the value of the truck was diminished by 30%. However, I acknowledge the truck would still have a diminished value due to its accident history and I find the applicant is entitled to damages equivalent to a 15% decrease in value, or $960.

Did the respondents give the wrong tires and, if so, what is the remedy?

25. When the applicant purchased the truck, it had winter tires on it with tire size 265/65R17. As mentioned above, the truck came with a set of summer tires. The respondents say the summer tires were wrapped in white plastic tire bags when the applicant took them. The respondents say they opened one of the bags to show the tread to the applicant and she was satisfied with the tire. The respondents say the summer tires could be used for at least one more season.

26. The applicant says when she tried to replace the winter tires with the summer tires in April 2019, she discovered that the summer tires were size 255/65R16 and did not fit. She says she had to purchase a new set of summer tires. The applicant provided photos of one of the summer tires she received from the respondents that showed the size stamped on the side. She says she did not notify the respondents about the tires because she gave them the benefit of the doubt that they accidentally gave her the wrong ones.

27. The respondents deny that they gave the applicant the wrong size tires. They provided a copy of a receipt from a tire store dated September 30, 2017 for 4 265/65R17 tires. I am satisfied that the respondents had size 265/65R17 summer tires for the truck. However, based on the photos provided by the applicant, I am satisfied that the applicant received size 255/65R16 summer tires from the respondent.

28. I find that regardless of how the applicant ended up with the wrong size tires, she still failed to bring the matter to the respondents' attention. When she discovered she had the wrong size, a reasonable course of action would have been to simply contact the respondents to sort things out. Instead, the applicant purchased a new set of tires. While I am not bound by it, I agree with the tribunal's decision in *Kirkham v. Ali*, 2019 BCCRT 1153 that the applicant has a duty to mitigate damages. This means that the applicant needed to act reasonably to prevent avoidable expenses or costs after the respondent breached the contract.

29. Although the respondents did not use the language of mitigation, they still raised this issue in their submissions when they pointed out that the applicant waited 9 months to bring the tire issue to their attention. I find the applicant acted unreasonably when she decided to purchase new tires instead of contacting the respondents and giving them the opportunity to respond. I dismiss the applicant's claim for the cost of the new tires.

TRIBUNAL FEES, COSTS AND INTEREST

30. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgement interest on the $960 from October 30, 2019, the date she purchased the truck, to the date of this decision. This equals $9.54.

31. 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 30% successful in her claims, I find the applicant is entitled to reimbursement of 30% of the $ tribunal fees which is $41.66. The applicant did not claim dispute-related expenses.

ORDERS

32. Within 14 days of the date of this order, I order the respondents to pay the applicant a total of $1,011.20, broken down as follows:

a. $960 in damages,

b. $9.54 in pre-judgment interest under the *Court Order Interest Act*, and

c. $41.66 for tribunal fees.

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

34. 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.

35. The Minister of Public Safety and Solicitor General has issued a Ministerial Order 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.

36. 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