



Civil Resolution Tribunal

Date Issued: June 30, 2020

File: SC-2020-001813

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Diligenti v. Robidoux*, 2020 BCCRT 727

BETWEEN:

PEPE DILIGENTI

APPLICANT

AND:

NORMAN ROBIDOUX

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. This dispute is about the sale of a used guitar. The applicant, Pepe Diligenti, says that the respondent, Norman Robidoux, sold him a guitar and misrepresented its

brand parts and also says that the guitar was damaged. Mr. Diligenti asks for a full refund of the \$750 he paid. Mr. Diligenti represents himself.

2. Mr. Robidoux says that he did not intend to misrepresent the guitar. He also says that it was not damaged when he sold it. Mr. Robidoux represents himself.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT 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 CRT 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the 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. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.
5. The CRT 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 CRT 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 CRT 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

7. The issues in this dispute are whether Mr. Robidoux misrepresented the guitar, whether the guitar was damaged, and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, the applicant, Mr. Diligenti, must prove his claim on a balance of probabilities.
9. I will not refer to all of the evidence or deal with each point raised in the parties' submissions. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.

Did Mr. Robidoux misrepresent the guitar?

10. It is undisputed that the parties entered into an agreement for the sale of a used guitar. Mr. Robidoux advertised the guitar on Kijiji in early December 2019. There is some dispute about what was exactly said in the advertisement and neither party provided the original advertisement. Mr. Diligenti says that Mr. Robidoux described the guitar as an ultimate hand built "Telecaster" that was made from "Warmoth parts." Mr. Diligenti says that Warmoth parts are premium parts. Mr. Robidoux does not dispute this.
11. Mr. Robidoux placed a second advertisement on Kijiji on December 8, 2019 stating "Warmoth Premium partscaster last chance til Sunday." Mr. Diligenti provided this advertisement. Based on the evidence, I accept that Mr. Robidoux represented the guitar as having Warmoth parts. Mr. Diligenti says that the guitar turned out not to be made of Warmoth parts and that Mr. Robidoux either fraudulently or negligently misrepresented the guitar's quality.

12. In *Ban v. Keleher*, 2017 BCSC 1132, a BC Supreme Court judge reviewed the law of fraudulent misrepresentation and set out what a claimant must prove to succeed in a claim for fraudulent misrepresentation:
 - a. The defendant made a representation of fact to the claimant,
 - b. The representation was false in fact,
 - c. The defendant knew that the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false,
 - d. The defendant intended for the claimant to act on the representation, and
 - e. The claimant was induced to enter into the contract in reliance upon the false representation and thereby suffered a detriment.
13. The text messages show that Mr. Diligenti paid \$750 for the guitar on December 9, 2019 and then arranged for a friend, Mr. K, to pick it up at a later date because Mr. Diligenti lived in a different city. Mr. Diligenti never personally inspected the guitar although he did ask Mr. Robidoux to provide more pictures before purchase. Mr. Robidoux says that Mr. K was a musician and inspected the guitar when he picked it up on December 16, 2019 and saw nothing wrong with it before accepting it. Mr. Diligenti did not dispute that Mr. K inspected the guitar before he took it to deliver to Mr. Diligenti. Mr. K had possession of the guitar but did not deliver it to Mr. Diligenti until January 24, 2020.
14. Mr. Diligenti says that when he received the guitar, he immediately thought that there was something wrong with it. He says that he suspected that it was not made of Warmoth parts. Mr. Diligenti took the guitar apart and sent pictures of the neck to a Warmoth representative. The representative said that certain features were missing and therefore the guitar did not have Warmoth parts.
15. Mr. Diligenti says that he also took the guitar to Mr. I who is a luthier or guitar service specialist. Mr. Diligenti provided Mr. I's biography from the website where he works. The website says that Mr. I is a guitar technician and indicates that he was a

musician and that he has helped numerous people and bands with their guitars and stringed instruments. I do not accept that a website promotion is proof that Mr. I is an expert and therefore do not accept his opinion provided in emails amount to expert evidence. However, I will still address the comments he made about the guitar because he was a witness to the state it was in once it was in Mr. Diligenti's possession.

16. Mr. I said that there was an issue with the "backbow" and that the neck was poorly made. Mr. Diligenti then contacted Mr. Robidoux. Mr. Diligenti says that the parties spoke on the phone and that Mr. Robidoux said that he custom ordered the guitar from Warmoth and had the original receipt. I do not accept Mr. Diligenti's statement on this point. There is no evidence from before this date that Mr. Diligenti made any such representation. None of the emails or texts between the parties show that Mr. Diligenti said this. I find it does not ring true that Mr. Diligenti would say at this point that he had an original receipt when obviously Mr. Robidoux was questioning whether the guitar had Warmoth parts and would ask Mr. Diligenti to produce this proof.
17. Further, the evidence shows that the parties communicated by text or email. I find that it does not ring true that the source of the final statement confirming the guitar was made of Warmoth's parts happens to be the one communication that was verbal. I find that Mr. Robidoux advertised the guitar as having Warmoth's parts and the emails show he was surprised to find out it did not. There is insufficient evidence that Mr. Robidoux made further representations that the guitar was made of Warmoth parts after Mr. Robidoux found out he was mistaken. Further, in his submissions, Mr. Robidoux admits that he was mistaken.
18. In *Shaughnessy v Sidhu*, 2016 BCPC 308 (CanLII), the judge said that a fraudulent misrepresentation is a representation of fact made without any belief in its truth, with the intent that the person to whom it is made will act on it, and actually causing the person to act on it. I find that Mr. Diligenti has not established fraudulent misrepresentation by Mr. Robidoux in this dispute. In *Anderson v. British Columbia*

(*Securities Commission*), 2004 BCCA 7 (CanLII), the judge said that because fraud is a very serious allegation, which carries a stigma, it requires evidence that is clear and convincing proof of the elements of fraud, including the mental element. There is no such evidence before me establishing Mr. Robidoux's intention to commit fraud in this case. I find that Mr. Diligenti has not proven on a balance of probabilities that Mr. Robidoux fraudulently misrepresented the guitar.

19. Mr. Diligenti also suggested that this might be a case of negligent misrepresentation. In *Queen v. Cognos Inc.*, [1993] 1 SCR 87, the Court wrote that negligent misrepresentation occurs when

- a. There is a duty of care based on a "special relationship" between the seller and buyer,
- b. The representation was untrue, inaccurate, or misleading,
- c. The seller acted negligently in making the representation,
- d. The buyer, acting reasonably, relied on the negligent misrepresentation, and
- e. The reliance was detrimental to the buyer and resulted in damages.

20. Like my finding that that the respondent did not make a false representation, or make a representation recklessly without knowing whether it was true or false, I find the evidence does not support a conclusion that the respondent acted negligently in representing the guitar. The law requires that a seller making a representation must exercise such reasonable care as the circumstances require to ensure that the representation is accurate and not misleading. There is nothing in evidence to suggest that Mr. Robidoux should have suspected that the guitar was not made from Warmoth parts such that it would have been reasonable for him to investigate. The guitar has a Warmoth sticker on the outside and appears to be Warmoth guitar.

21. Mr. Diligenti says that he knew right away it was not a Warmoth guitar. However, he did have to take the guitar apart to be sure and send the pictures to a Warmoth representative. I also note that Mr. K had the guitar in his possession for weeks and

did not notice anything. I find that the evidence does not show that Mr. Robidoux acted negligently as the evidence does not show he did not take reasonable care in making the representation.

22. Therefore, I find that the evidence shows that Mr. Robidoux innocently misrepresented the guitar but did not fraudulently or negligently misrepresent it.

Was the guitar damaged when Mr. Robidoux sold it?

23. Mr. Diligenti says that the guitar's neck was damaged because it was bowed. Mr. Diligenti states that Mr. Robidoux deals in the business of selling guitars and therefore aspects of the *Sales of Goods Act* dealing with warranties and guarantees apply. I find that Mr. Diligenti has not proved that Mr. Robidoux is in the business of selling guitars. Mr. Robidoux submits that he is a musician and throughout his career has sold his used instruments. Mr. Diligenti provided a copy of Mr. Robidoux's website. The website shows that Mr. Robidoux represents himself as a sound engineer. It does not say that he is a guitar dealer. I find that this was a private sale and that Mr. Robidoux is not in the business of selling guitars. This means that section 18(a) and (b) of the SGA do not apply to the sale. However, the durability warranty in section 18(c) does apply.
24. Mr. Robidoux submits that even if the guitar was not made of Warmoth parts this does not mean the guitar was worthless or that he sold it damaged. He says that, when he sold it, it was still useable as a quality guitar. In a January 26, 2020 email, Mr. Robidoux questioned how the guitar had been treated since Mr. K took possession and whether Mr. Diligenti damaged the guitar when he took it apart.
25. Mr. Diligenti again emailed Mr. I who said on April 27, 2020 that taking the neck off the guitar would not cause the back bow and that this is the sign of wood not seasoned properly and climatized properly, or both. Mr. I did not explain what he meant by climatizing and did not address if the guitar was kept in varying temperatures for six weeks if this could affect what he referred to as climatizing.

26. I find that the evidence does not show that Mr. Robidoux sold a damaged guitar. Mr. K accepted the guitar and had it in his possession for weeks and did not say it was damaged. Mr. I's evidence does not establish that the guitar was damaged 6 weeks earlier when Mr. Robidoux sold the guitar. Further, Mr. Diligenti viewed pictures of the guitar, front and back, and did not say there was damage
27. The evidence shows that Mr. Robidoux made an innocent mistake in saying the guitar was made of Warmoth parts, there was no fraudulent or negligent misrepresentation, and the guitar was still durable for its purpose.
28. I find that the principle of buyer beware applies to this dispute. Buyer beware means that a buyer must assess the condition of the item before buying it, which in the guitar's sale would mean an inspection, and there is no implied or legislated warranty. Here, Mr. Diligneti expressly decided not to do that inspection, but rather arranged for someone else to pick up the guitar. Buyer beware does not apply when there is: (i) a breach of contract, (ii) fraud, (iii) non-innocent misrepresentation, (iv) there is a warranty, or (v) a latent defect that cannot be discovered by reasonable inspection (see: *Nixon v. MacIver*, 2016 BCCA 8 (CanLII)). In other words, Mr. Diligenti must show that buyer beware should not apply because one of the conditions listed above existed. However, he has not done so.
29. I note that under the "buyer beware" principle an innocent misrepresentation does not entitle a buyer to a refund. "Buyer beware" is only set aside where there is non-innocent misrepresentation: see *Nevmerjitski v Ratinov*, 2018 BCCRT 293. This is not the situation in this case. The onus of "buyer beware" is on Mr. Diligenti and he chose not to inspect the guitar before purchasing it and he did not establish fraudulent or negligent misrepresentation. Accordingly, Mr. Diligenti is not entitled to any refund.
30. Under section 49 of the CRTA and CRT rules, the CRT 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 Mr. Diligenti was not successful he is not entitled to reimbursement of his tribunal fees or the expenses he claims for shipping the guitar.

ORDER

31. I dismiss Mr. Diligenti's claims and this dispute.

Kathleen Mell, Tribunal Member