Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Nanayakkara v. MacIntyre*, 2020 BCCRT 791

B E T W E E N :

SETH NANAYAKKARA, JULIA WELLS and LINDA ADAMS

APPLICANTS

A N D :

LINDA MACINTYRE and JOHN MACINTYRE

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This dispute is about drainage issues on a residential property. The applicants, Seth Nanayakkara, Julia Wells, and Linda Adams, purchased a residential property from the respondents, Linda MacIntyre and John MacIntyre. The applicants say that the respondents knew about, and failed to disclose, drainage issues on the property. The applicants say they have had to spend money on repairs, and ask for an order

that the respondents pay them $5,000 in damages. The respondents deny that they were aware of any drainage issues and say that they are not responsible for the damages claimed by the applicants.

2. Mr. Nanayakkara represents the applicants. The respondents are self-represented.

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. 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 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 CRT considers appropriate.

ISSUES

7. The issues in this dispute are:

a. Whether the respondents misrepresented the condition of the property,

b. Whether the respondents failed to disclose any drainage issues,

c. Whether the respondents breached the parties' purchase and sale agreement, and

d. Whether the respondents must pay the $5,000 in damages claimed by the applicants.

EVIDENCE AND ANALYSIS

8. In a civil dispute like this one, an applicant bears the burden of proof on a balance of probabilities. The parties provided evidence and submissions in support of their positions. While I have considered all of this information, I will refer to only what is relevant to the issues before me and necessary to provide context to my decision.

9. The parties entered into a purchase and sale agreement for the property in May of 2019. This agreement incorporated a Property Disclosure Statement (PDS) completed by the respondents on November 9, 2018 (and re-dated with the same contents on February 14 and May 16, 2019). In response to the question "Are you aware of any damage due to wind, fire or water?", the respondents disclosed a 2017 basement flood that was related to a blocked pipe. The respondents described the damage and repair efforts associated with this incident. The respondents answered "no" when asked if they were aware of any material latent defects, which were described as "a material defect that cannot be discerned through a reasonable inspection of the property", including defects that render the property dangerous, potentially dangerous, or unfit for habitation.

10. The applicants took possession of the property in July of 2019. In early 2020, the applicants experienced what they describe as widespread and repeated flooding on the property. They say the floods are the result of serious exterior drainage issues and that the water evacuation system is not adequate for the size of the property. The applicants say that, by speaking to contractors, neighbours and others who are

familiar with the property, they learned that there are long-standing water issues on the property. According to the applicants, the respondents knew about these drainage issues but did not disclose these problems prior to the sale. The applicants ask for an order that the respondents pay them $5,000 as a contribution to the costs of fixing the problem. I infer that the applicants have paid more for the repairs, but are abandoning the portion of their claim that is over the CRT's small claims monetary limit of $5,000.

11. The respondents deny that there were any drainage issues on the property. They say that they never experienced any such issues during their 3 years of ownership despite periods of heavy rainfall, and that the previous owner did not disclose any problems on his PDS. The respondents admit that there was a problem flowing from a blocked pipe in 2017 that was repaired and disclosed on the PDS. The respondents deny that they are responsible for any damages claimed by the applicants.

12. The principle of "buyer beware" applies to real estate transactions in British Columbia, and a buyer is expected to make reasonable inquiries about, and conduct a reasonable inspection of, a property. Unless a seller breaches the contract, commits fraud, or fails to disclose a latent defect that cannot be discovered by reasonable inspection, a buyer assumes the risks for any defects in the condition or quality of the property (see, for example, *Nixon v. MacIver*, 2016 BCCA 8).

Negligent Misrepresentation

13. As noted by the applicants, the British Columbia Supreme Court has determined that a special relationship exists between buyers and sellers in real estate transactions such that the seller owes the buyer a duty of care: see *Hanslo v. Barry*, 2011 BCSC 1624 at paragraphs 117 to 118. The applicants say this means that the respondents had a responsibility to be aware of and disclose any drainage issues. Although not explicitly stated, I find that this amounts to a claim of negligent misrepresentation.

14. As set out in *Hanslo*, a misrepresentation in a PDS may give rise to a claim for damages for negligent misrepresentation. In order to prove negligent misrepresentation, an applicant must establish the following elements:

    a. There must be a duty of care,

    b. The representation in question must be untrue, inaccurate, or misleading,

    c. The respondent must have acted negligently in making the misrepresentation,

    d. The applicant must have relied, in a reasonable manner, on the negligent misrepresentation, and

    e. The reliance must have resulted in damages.

15. The decision in *Hanslo* confirms the duty of care for a seller. The applicable standard of care is that of the reasonable person: *McCluskie v. Reynolds* (1998), 1998 CanLII 5384 (BCSC) at paragraph 67. The next consideration is whether the respondents' representation that there was no water damage (except for that related to the 2017 blocked pipe incident) was untrue, inaccurate or misleading.

16. The respondents provided photos of the property before it was sold and there is no indication of standing water in the yard area. The respondents also say that, as they were living in the home, they would have been aware of any water ingress, but that this did not occur.

17. The applicants say that their information about longstanding drainage issues on the property came from contractors, neighbours and others. The evidence does not contain statements from these individuals, and the respondents deny that they used the contractors in question. The respondents also say they spoke to their former neighbours, and these people were not aware of any water problems. The applicants say that a district official advised their contractor that there had been complaints about water run-off from the property. However, the respondents say that the district told them there was no record of complaints about the property. There is no statement from the district in this regard.

18. The applicants say the drainage problem is due to insufficient drain pipes for the size of the property. They provided a portion of a letter from their insurance company that attributed the water problems on the property a high-water table that caused a build-up of hydrostatic pressure which forced water into the basement through the foundation walls and concrete floor. This statement apparently was based on information from the applicants' plumbing contractor, but there is no report from that contractor or any other plumbing professional to comment on the cause of the water problems, the adequacy of the property's drainage system, or the possible impact of the 2017 repairs on the property. I find that the available evidence does not prove the cause of the water issues reported by the applicants.

19. Based on the detailed disclosure in the PDS, I find that the respondents were aware of the 2017 water issues. However, I find that the evidence does not show that they were aware of any other water or drainage problems on the property. Further, as the evidence before me does not establish the cause of the water-related problems, I find that the applicants have not proven that the respondents ought to have been aware of any water issues or that they failed to act reasonably to detect any possible issues.

20. I find that the evidence before me does not support the conclusion that the respondents made statements about water damage or drainage that were untrue, inaccurate or misleading. I conclude that the respondents did not negligently misrepresent the property.

Latent Defect

21. As discussed above, the respondents indicated on the PDS that they were unaware of any latent material defects. A latent material defect is a material defect that cannot be discerned though 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.

22. 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 on the applicant (see *McCluskie*, above). The PDS asks whether a seller is currently aware of a defect, and this awareness is subjective (see *Hamilton v. Callaway*, 2016 BCCA 189). In the PDS, a seller must disclose honestly its actual knowledge of the property, but that knowledge does not have to be correct (see *Nixon*, above). Further, a statement in a PDS does not rise to the level of a warranty (see *Hanslo*, above and *Kiraly v. Fuchs*, 2009 BCSC 654).

23. The applicants had the benefit of the results of an inspection before purchasing the property. Given the circumstances, I find that nothing turns on the fact that the applicants purchased that inspection report from another prospective buyer. The report detailed the results of an inspection performed on April 18, 2019. The report stated that, at the time of the inspection, the ground was wet and it had rained in the last 3 days. According to the report the "Vegetation, Grading, and Surface Drainage on the Property" were inspected, but there were no comments attributed to these areas. Due to this lack of detail, I find that I am unable to conclude whether the inspection was reasonable. However, this is not determinative.

24. I am satisfied that serious drainage issues have the potential to be dangerous, and therefore could be construed as a latent defect that should be disclosed. However, as discussed above, I have found that the available evidence does not establish the cause of the drainage issues. It is therefore not possible to determine whether the issues could not have been discerned through a reasonable inspection of the property such that they would amount to a latent defect.

25. Even if the drainage issues were a latent defect, the applicants bear the burden of establishing that the respondents aware of the defect, or where they were reckless as to whether the defect existed. I find that it is not sufficient for the applicants to say that the respondents must or should have been aware of problems on their property. I have already determined that the respondents were not aware of

drainage issues (other than the 2107 issue), and that the evidence does not prove that they ought to have been aware of any water-related problems. Based on the evidence before me, I find that the respondents did not fail to disclose a latent defect.

Breach of Contract and Damages

26. Given my findings that the respondents did not negligently misrepresent the property or fail to disclose a latent defect, I am satisfied that they did not breach the parties' purchase and sale agreement. As such, the applicants are not entitled to damages.

27. Even if I had come to a different conclusion about the breach, I would not have awarded the applicants the damages they claim. Although the applicants say that they spent far more than $5,000 on water remediation, damage and renovations, they did not provide any invoices or other proof of these expenditures. Without this information, I would have dismissed the applicants' claim for damages in any event.

28. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As the applicants were unsuccessful, I dismiss their claim for reimbursement of CRT fees.

ORDER

29. I dismiss the applicants' claims and this dispute.

Lynn Scrivener, Tribunal Member