Civil Resolution Tribunal

Date Issued: July 29, 2020

File: SC-2019-009846

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Rosen v. Dead Level Construction Ltd.*, 2020 BCCRT 841

B E T W E E N :

BARBARA ROSEN

APPLICANT

A N D :

DEAD LEVEL CONSTRUCTION LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kathleen Mell

INTRODUCTION

1. This dispute is about items allegedly damaged or lost during a construction project. The applicant, Barbara Rosen, says the respondent, Dead Level Construction (DLC), had access to her strata lot when it was repairing the strata property after

water damage. Ms. Rosen says that she was out of the country so DLC employees took advantage of her personal space. Ms. Rosen originally requested $3,701.46 for replacing, cleaning and repairing several items. She later withdrew some items from her claim, which I will discuss below. Ms. Rosen represents herself.

2. DLC says that it is not responsible for any missing property. It also says that when it was ordered to stop working on the project it could not clean up any mess and that it is not responsible for any damage. DLC also says that the parties have a BC Supreme Court Consent Order that dealt with these issues and therefore the claim is *res judicata* (already decided). DLC is represented by an organizational contact.

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 "she said, it 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 CRT'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 CRT considers appropriate.

ISSUES

7. The issues in this dispute are:

    a. Whether Ms. Rosen's claims are *res judicata.*

    b. Whether DLC is responsible for missing or damaged property and, if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, the applicant Ms. Rosen must prove her claim on a balance of probabilities. 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.

Are Ms. Rosen's claims res judicata?

9. In early September 2018 DLC was hired by Ms. Rosen's strata corporation to perform construction work on a patio deck. While doing this work DLC discovered the building had a serious water leak issue and a rot issue. DLC told Ms. Rosen about these issues because she is the president of the strata council. The estimate for fixing the damage was over a million dollars. The evidence shows that DLC was hired by the strata to fix the building's exterior. The insurance company hired

another company, C, to repair the inside of the damaged units, including Ms. Rosen's. C then subcontracted this work to DLC. This effectively meant that DLC was doing both the exterior repair and the interior repair.

10. Money issues arose as the strata struggled to obtain a loan to fix the building's exterior. DLC kept working but the evidence shows that it was constantly asking the strata about payment with the strata updating DLC on the progress of finding a loan. During this time Ms. Rosen, in her role as strata council president, indicated that she was happy about DLC's work and that DLC continued to work despite the payment issues. DLC says this shows that the issue between the parties was about money and not DLC's work.

11. Things changed on February 14, 2019 when Ms. Rosen wrote DLC that it should stop work on the building exterior because the strata had hired another company. The strata told DLC to continue working on the interior of the building as this work was under a separate contract with the insurance company.

12. On February 15, 2019, DLC placed liens on all the strata's units, including Ms. Rosen's. DLC says that it then started a Supreme Court claim which was settled by Consent Order. DLC argues that this settlement was not just between DLC and the strata but also between DLC and the individual strata owners and therefore Ms. Rosen cannot begin this claim against it because the matter has already been decided.

13. *Res judicata* is a legal principle that prevents parties from bringing multiple legal proceedings about the same issue. It can arise in two ways. The first is called cause of action estoppel, which prevents someone from pursuing a matter that was or should have been the subject of a previous process. The second is called issue estoppel, which stops someone from raising an issue that has already been decided in another process (*Erschbamer v. Wallster*, 2013 BCCA 76). The test for cause of action estoppel has 4 parts. Each part must be met.

a. There must be a final decision of a tribunal or court of competent jurisdiction in the prior action (the requirement of 'finality').

b. The parties to the subsequent litigation must have been parties to the prior action (the requirement of 'mutuality').

c. The cause of action and the prior action must not be separate and distinct.

d. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action had the parties exercised reasonable diligence.

14. Based on the evidence, I find that this claim is not *res judicata* because it does not involve the same parties in their same capacity. Although Ms. Rosen named DLC in this dispute, DLC was acting as a subcontractor when working on Ms. Rosen's strata lot. As noted, it was the insurance company who hired C who subcontracted to DLC to work on the interior of the strata lots. This is corroborated by the strata asking DLC to continue its work on the interior of the strata lots even though the strata had ended the contract with DLC to work on the building's exterior. Therefore, the Consent Order dealt with DLC in its capacity as contractor, here it is named as a party in its capacity of subcontractor.

15. I also note that when Ms. Rosen informed DLC in April 2019 that she was unhappy with the way her strata lot looked when she returned from holiday, DLC responded that it was forced out of working on the interior and specifically stated that this issue had nothing to do with the strata's debt to DLC and the upcoming litigation.

16. Therefore, I find that the claim between Ms. Rosen and DLC about the interior repairs of her strata lot has not already been decided and therefore it is within my jurisdiction to consider.

Is DLC responsible for missing or damaged property and, if so, what is the appropriate remedy?

17. In the Dispute Notice, Ms. Rosen requested compensation for missing objects, cleaning of sofas, windows, blinds, and area rugs. She also asked for compensation to cover damage to flooring and a screen sliding door and to replace baseboard heaters. This totals $2,241.46. She also asked for $1,200.00 to repair her office ceiling, $60 to clean her bathroom, and $200 for missing silverware.

18. Ms. Rosen sent the CRT an email on April 26, 2020 saying she withdrew her claim for missing silverware and the screen door. She also indicated that she was claiming less for cleaning the bathroom. She further stated that the ceiling repair was included in the total costs when all 3 units were repaired so she was requesting less for this. It is unclear if the insurance company paid for this.

19. Ms. Rosen also changed the amount requested for the baseboard heaters. She indicated that she did not replace them but that they are damaged. She said she did not know how much to request for these items. Because I have decided below that Ms. Rosen is not entitled to any of the amounts requested, I need not consider the specific amount claimed for each item.

20. The texts show that Ms. Rosen communicated directly with DLC about her condo's repairs. At times there is an overlap between Ms. Rosen acting in her capacity as owner of the condo under repair and as president of the strata council overseeing the strata repair. Regardless, Ms. Rosen has not established that at any point she personally had a contract with DLC. Ms. Rosen stresses that the focus of her claim is the interior of her strata lot, which does not involve the strata's contract with DLC and the building's exterior. However, the contract relating to the building's interior was between the strata and the insurance company who contracted C, who subcontracted DLC, according to Ms. Rosen's own submissions.

21. Therefore, if Ms. Rosen argues that she has a valid claim about the way the interior repairs were conducted, her claim is not against DLC in contract as she does not

have a contract with DLC. Having said that I will also consider whether Ms. Rosen has a claim against DLC in negligence.

22. To establish negligence, Ms. Rosen must prove the following elements on a balance of probabilities: DLC owed a duty of care, DLC failed to meet the applicable standard of care, it was reasonably foreseeable that DLC's failure to meet the standard could cause the claimed damages, and the failure did cause the claimed damages.

23. In November 2018 Ms. Rosen indicated that she had a rental contract and she wanted to know whether the strata lot would be in shape to rent out by December 4, 2018. DLC responded that the repairs would not be completed by then. I note that at one point in her submissions Ms. Rosen suggests that DLC was accessing her strata lot to gain access to the building's exterior and that this was when the items either were damaged or went missing. I find the evidence shows that Ms. Rosen knew DLC was repairing the interior of her strata lot and that Ms. Rosen gave them the right to do so. I also find that this means DLC owed Ms. Rosen a duty of care.

24. At this same time Ms. Rosen mentioned a hole in her ceiling and said that it would wait until she returned home in May 2019. In her submissions, Ms. Rosen says she did not find out about this hole until December 2018 when she was out of town. I do not accept this submission. Ms. Rosen does not establish how the hole occurred or whether it was DLC who caused the hole when it was working in its capacity as contractor, which would already be covered by the Consent Order or whether it was when DLC was subcontracting. DLC says that regardless the ceiling was going to be taken down when all three strata lots were repaired. Ms. Rosen indicated in her submissions that this is what occurred. Therefore, I find that Ms. Rosen did not prove that DLC caused the hole when it was acting as subcontractor and even if it did, I would not have awarded damages as the evidence shows the ceiling had to be taken down anyway.

25. On January 24, 2019, Ms. Rosen texted DLC and asked about the "re-do" of her strata lot. She also emailed and asked when she should come back. As noted

above, things then changed dramatically when the strata decided that it no longer wanted DLC to continue to work on the exterior of the property and told DLC this on February 14, 2019. In that same letter Ms. Rosen also indicated that the work DLC was contracted separately to complete for the insurance company would need to be completed as soon as possible. This work included the interior of Ms. Rosen's strata lot. This is relevant as it goes to whether DLC owed Ms. Rosen a duty of care after February 14, 2019.

26. The emails show that DLC was concerned about the outstanding amount owed under the strata contract and that somebody else was hired to finish the exterior work. DLC sent a letter the same day stating that the interior project was insurance work which the strata contracted with C to do and DLC was a subcontractor. DLC indicated that it did not know what was approved to do in relation to the interior of the units.

27. On February 18, 2019, Ms. Rosen emailed DLC and stated that if DLC had a contract with the insurance company and C to reconstruct the interior of the damaged condos, including Ms. Rosen's, that it should go ahead with that as soon as possible. DLC responded that it understood that DLC was being fired from the project because the strata decided to contract with P. DLC noted that the insurance company was only covering a small portion of the interior work required and none in one of the other units.

28. Ms. Rosen responded that the interior work could only go ahead if DLC had a contract with the insurance company. DLC questioned how this would work if it was only authorized to do a portion of the repair at the same time someone else was doing repairs in the same condo. It questioned how the companies would coordinate their efforts and who would be liable if something went wrong. DLC stated that it did not know how to proceed.

29. DLC emailed Ms. Rosen on February 20, 2019 and asked again how the interior repairs would progress if DLC was only doing work authorized by the insurance company. Later that day Ms. Rosen sent an email to P stating that since P was

addressing the matter with the insurance company that P should respond to DLC. P replied that it would not respond to DLC because DLC had started the civil claim. P indicated that it would continue working toward getting the project moving forward. The next emails between DLC and Ms. Rosen indicate that DLC had returned their keys as of February 25, 2019. Based on the information, I find that DLC was formally let go from the exterior project and it was made effectively impossible for DLC to continue to work on the interior. I also find that Ms. Rosen knew this at that time. Therefore, at that point DLC no longer owed Ms. Rosen a duty of care.

30. The evidence indicates that P did not continue to do the work on Ms. Rosen's strata lot. Ms. Rosen returned in April 2019 and sent an email to DLC that she was upset about the state of her strata lot. DLC responded that it was removed from the project and therefore had no opportunity to complete the work or to clean up. DLC stated that P took over the project months ago and that the condo's state was not DLC's responsibility.

31. As noted, DLC never had a contract with the insurance company to do the interior work but was sub-contracted by C. Based on this, I find that when Ms. Rosen told DLC to stop working on the interior of the condos as well as the exterior unless they had a contract with the insurance company they were entitled to stop work. Further, the evidence shows that DLC tried to work out a way they could continue to finish the work, but P was hired and refused to discuss with DLC how DLC could continue to work on the interior.

32. Ms. Rosen says that DLC abandoned the project and did not properly clean up before leaving including the bathroom area. I find that DLC was fired from the project and therefore was not under an obligation to finish the repairs, protect Ms. Rosen's property, or clean up the unfinished strata lot. DLC says that if it had been kept on it would have finished the work and made sure Ms. Rosen's strata lot was completed to her satisfaction. I accept that DLC was not given this opportunity.

33. DLC also submits that many people had access to Ms. Rosen's strata lot after they left the project. Ms. Rosen argues that P did not do any work on the strata lot before

she returned in April 2019. She has provided no supporting evidence of this. Further, the evidence shows that several people had keys to Ms. Rosen's strata lot, including people she had checking on the property. Therefore, Ms. Rosen has not proved that DLC was responsible for any missing items or damage caused after they stopped work on the strata lot interior in February 2019. I will now consider whether DLC was responsible for missing items or damage prior to when it stopped work on the project.

34. Ms. Rosen argues that the damage did not happen after February 2019 but occurred when DLC was repairing the strata lot. I first note that Ms. Rosen says that DLC told her that C as the main contractor would ensure her personal possessions were safeguarded and protected. Ms. Rosen says that this was not done. Again, her claim then would be against C. However, I will still continue to consider whether DLC was negligent as I have found it owed Ms. Rosen a duty of care during this time period.

35. DLC says that it did have measures in place to protect Ms. Rosen's property but when it was let go from the project in February 2019 it took its materials with it, including dividers to protect Ms. Rosen's furniture from dust and damage.

36. Ms. Rosen disagrees and says DLC did not properly care for her property before February 2019. Ms. Rosen has provided a witness statement from N who states that as of December 2018, which would have been right after Ms. Rosen left, N noticed that the furniture and blinds were not properly covered and that they were exposed to construction dust. N says that she also saw dirt accumulating and urine spots near the toilet in the bathroom. She says that she updated Ms. Rosen about this in December.

37. Another witness, C, says that in late January 2019 he checked on Ms. Rosen's strata lot and noticed that the bathroom was dirty and that Ms. Rosen's personal items were unprotected. C says that the couch and blinds were especially not cared for and caused concern. He says he took a video of this and sent it to Ms. Rosen.

38. I do not accept this evidence. The emails between Ms. Rosen and DLC are friendly and complimentary of the work DLC was doing around this time and there is no indication that Ms. Rosen was unhappy, which I find she would have been if C and N informed her of her strata lot's unsatisfactory state. I also find it does not ring true that if Ms. Rosen was aware of these concerns, and she had people continuously checking on her home, that she would let things continue on this way and not ask the people checking on the unit to cover her belongings. I find that it does not make sense that Ms. Rosen knew that this was the state of her condo and left it like that, especially after she knew DLC was no longer working on the project as of February 2019.

39. It also does not make sense that the witnesses told Ms. Rosen about these concerns in December 2018 and January 2019 but then Ms. Rosen says she was shocked to find things this way in April 2019. I find that Ms. Rosen did not prove that items went missing and the damage occurred when DLC was working on the strata lot between December 2018 and February 2019. The evidence does not show that Ms. Rosen expressed concern over missing items or damage to her personal possessions during this time period.

40. For all these reasons I dismiss Ms. Rosen's claims. I find that Ms. Rosen has not proved that DLC failed to meet the applicable standard of care or that DLC was responsible for the items going missing or the strata lot's damage.

41. 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. Because Ms. Rosen was unsuccessful in her claims, she is not entitled to have her CRT fees reimbursed. There were no dispute-related expenses claimed.

ORDER

42. I dismiss Ms. Rosen's claim and this dispute.

Kathleen Mell, Tribunal Member