Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Davison v. Wikjord*, 2020 BCCRT 1097

B E T W E E N :

ZACHARY DAVISON

APPLICANT

A N D :

KARLA WIKJORD and DEBORAH MELENCHUK

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. This dispute is about a damage deposit for vacation accommodation.

2. The applicant Zachary Davison says his father Rowan Davison paid a $750 damage deposit to the respondent Karla Wikjord, as property manager with Cona Vacation

Getaways (CVG), for a stay at Unit 1 in the respondent Deborah Melenchuk's property.

3. Rowan Davison has assigned all rights to the damage deposit claim to Zachary. Because Rowan and Zachary share the same last name, without intending any disrespect, I refer to them by their first names below for convenience and brevity.

4. Zachary says his group left the unit in "immaculate condition" and was respectful about noise. Zachary says that, afterward, Ms. Melenchuk wrongly refused to refund the $750 damage deposit.

5. Ms. Melenchuk says that Zachary and his friends breached their accommodation contract by making excessive noise, using the shared hot tub during quiet hours, and creating a mess. Ms. Melenchuk instructed Ms. Wikjord to refund Rowan's damage deposit to other guests, who complained about the noise. Ms. Melenchuk disputes the assignment of the claim from Rowan to Zachary. Ms. Melenchuk says Zachary is not entitled to a damage deposit refund.

6. Ms. Wikjord says she was only acting as Ms. Melenchuk's agent in the accommodation contract. Ms. Wikjord agrees that she received a $750 deposit from Rowan, and then refunded those monies to the other guests, on Ms. Melenchuk's instructions. Ms. Wikjord asks me to dismiss the dispute against her.

7. The parties are each self-represented.

JURISDICTION AND PROCEDURE

8. 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.

9. 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, she 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 this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.

10. 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. 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.

11. 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.

12. 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.

13. The CRT does not have jurisdiction to grant statutory entitlements available under the Residential Tenancy Act (RTA), as that is within the exclusive jurisdiction of the Residential Tenancy Branch (RTB). However, section 4(e) of the RTA says that the RTA does not apply to vacation accommodation. I therefore find that I have jurisdiction to determine this claim for the damage deposit.

ISSUE

14. The issue in this dispute is whether either Ms. Wikjord or Ms. Melenchuk must refund Zachary the $750 damage deposit his father paid for a vacation rental stay.

EVIDENCE AND ANALYSIS

15. In this civil claim, as the applicant Zachary bears the burden of proof on a balance of probabilities. I have reviewed the evidence and submissions but refer to them only as I find necessary to explain my decision.

Background

16. On February 4, 2020, Rowan paid Ms. Wikjord $750 as a refundable deposit for stay at Unit 1 for his son Zachary.

17. The damage deposit would be kept for up to 30 days to remedy certain issues that I discuss below. The email included a link to CVG's Vacation Rental policies (Policies).

18. The Policies contain the following relevant conditions (Conditions) that I find form part of the parties' agreement to the vacation rental (Agreement):

    a. A refundable damage deposit of between $500 and $1500 will be required before access instructions are provided,

    b. A $200 charge will be deducted from the deposit if guests are asked to limit noise before 7 am or after 11 pm,

    c. Guests may be billed for remediating any smells or damage,

    d. Guests must follow posted rules for the hot tub or be subject to forfeiture of their rental or a deduction from the deposit.

19. Based on the emails Ms. Wikjord sent to Rowan, I find that the Agreement's Conditions also include deductions from the damage deposit for incidents of

excessive noise, cleaning or damages, based on the emails sent by Ms. Wikjord to Rowan.

20. By paying the damage deposit on these terms, I find that Rowan agreed to communicate the Conditions to Zachary, and that he would be responsible for deductions from the deposit if Zachary and his friends breached the Conditions including if there was excessive noise or cleaning required beyond the usual turnaround cleaning.

21. On February 5, 2002, CVG emailed Rowan instructions to access Unit 1.

22. From February 7 to 9, 2020, Zachary and friends stayed at Unit 1.

23. The parties agree that the damage deposit was not refunded to Rowan.

24. On February 9, 2020, CVG issued refunds of $200 for unit B, $300 for unit 3 and $250 for unit 2, for the other guests at the property from February 7 to 9, 2020. These refunds were allegedly provided using Rowan's damage deposit.

Assignment of Claim

25. On March 5, 2020, Rowan signed an Assignment of Interest in the damage deposit dispute to Zachary. I find that the Assignment of Interest is a valid transfer between Rowan and Zachary regarding the damage deposit claim. That is, Zachary may bring the claim in place of Rowan: see *Fredrickson* v*. ICBC*, 1986 Canlii 1066 (BCCA); *Margetts* v*. Timmer Estate*, 1999 ABCA 268 (Canlii) at paragraph 12.

Claim Against Ms. Wikjord

26. Turning next to Ms. Wikjord, I find that her role was as agent for Ms. Melenchuk only, and not in her personal capacity. There are no allegations directed at her personally. I therefore dismiss the dispute against her.

Noise Complaints

27. I find that the Agreement permits Ms. Melenchuk to deduct from the damage deposit for noise either when the guests are asked to be quiet either before 7 am or after 11 pm during the stay, because unit owners may be fined this amount by their strata, or where noise is "excessive".

28. It is undisputed that no one approached Zachary to ask that he be quiet during the stay. There is also no evidence that the strata fined Ms. Melenchuk. Therefore, I will consider whether Zachary and his guests breached the Agreement by causing "excessive" noise during their stay.

Unit B Noise Complaint

29. On February 10, 2020, the guests who stayed in the basement unit (Unit B) emailed CVG complaining that noise levels that weekend had been "horrendous" because the occupants of Unit 1 directly above them partied until 2 or 3 am, causing a noise "like thunder coming through the ceiling."

30. I find that because the Unit B occupants reported significant noise outside the 7 am-11 pm quiet hours, coming from Unit 1, Zachary and his friends breached the Condition that they would not cause excessive noise.

Unit 3 Noise Complaint

31. On February 8, 2020, Ms. Wikjord received text messages from the Unit 3 guests. The guests reported that a unit below Unit 3, though they could not say which one, was using the hot tub until 1 am, drinking and being noisy outside. The Unit 3 occupants also reported "unbearable" noise on Friday night both inside and out, and wrote that things were quiet only after 1:30 a.m.

32. I find that the Unit 3 occupants were unable to identify whether the noise was coming from Unit 2 immediately below them, Unit 1, or both. For example, the Unit 3 occupants wrote that there were many people leaving Unit 2 below them, suggesting that at least some of the noise was coming from Unit 2 occupants.

33. However, given my findings about the Unit B complaint and below about hot tub rule violations, I find it likely that the Unit 1 occupants were causing excessive noise and using the hot tub after hours.

Unit 2 Noise Complaint

34. On February 10, 2020, Ms. Wikjord received an email from the Unit 2 guests. The Unit 2 guests reported excessive noise from Unit 1 occupants past 1 am one night and to 12 midnight the second night. The Unit 2 guests also reported cleaning up the hot tub area after someone else left a mess, because they did not want to be blamed for it.

Noise Complaint Deductions

35. I find there is sufficient evidence that Zachary and his group caused excessive noise on Friday and Saturday evening, during quiet hours, in breach of the Conditions. I find that a $200 is a suitable deduction for each excessive noise incident because the Agreement referred to $200 deductions for noise incidents.

36. I find it would be improper to apply multiple $200 deductions for each unit's complaint about the same noise on the same evening. However, I find that one-$200 deduction per evening is appropriate. I therefore order a $400 deduction from the damage deposit for excessive noise.

Hot Tub Rule Issues

37. Zachary admits that he and his friends used the hot tub after hours upon seeing that some of their neighbors were already in the tub. I therefore find that Zachary breached the Agreement by using the hot tub outside permitted hours. The Agreement did not specify a deduction amount for this violation. On a judgement basis, I find that a $100 deduction applies.

38. Turning to the alleged mess at the hot tub, Zachary says his group left Unit 1 and the common areas clean when they departed. The Unit 2 guests say they cleaned up a

mess at the hot tub, voluntarily. However, as the Unit 2 guests did not say who had left the mess, I dismiss the claim for a deduction for a mess at the hot tub.

Conclusions

39. I order Ms. Melenchuk to refund Zachary Davison $250, being the damage deposit less $100 for breaching the hot tub rules and $400 in excessive noise deductions.

40. The *Court Order Interest Act* applies to the CRT. Zachary Davison is entitled to pre-judgement interest on the $250 from March 9, 2020, the date by which the remaining deposit should have been refunded, to the date of this decision. This equals $2.74.

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 Mr. Davison was only partly successful, I order Ms. Melenchuk to pay 50% of his CRT fees, which $62.50. Mr. Davison did not claim dispute-related expenses.

ORDERS

42. Within 30 days of the date of this order, I order Ms. Melenchuk to pay Zachary Davison a total of $315.24, broken down as follows:

    a. $250 as a refund for the remaining damage deposit after deductions,

    b. $2.74 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $62.50 in CRT fees.

43. Mr. Davison is entitled to post-judgment interest, as applicable.

44. Under section 48 of the CRTA, the CRT 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 CRT's final

decision. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

45. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT 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 CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Julie K. Gibson, Tribunal Member