Civil Resolution Tribunal

Date Issued: October 7, 2020

File: SC-2020-004372

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Robertson v. Morrison*, 2020 BCCRT 1133

B E T W E E N :

ALAN ROBERTSON

APPLICANT

A N D :

MARTIN MORRISON and JENNIFER DOM

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Chad McCarthy

INTRODUCTION

1. This dispute is about defects in a home purchased by the applicant, Alan Robertson.

2. Mr. Robertson purchased a home from the respondents, Martin Morrison and Jennifer Dom. Mr. Robertson says there was a strong odour in the home, both before and after he purchased it, and that the respondents should have told him about the

odour's cause before he bought the home. Mr. Robertson claims $5,000: $1,000 for sub-floor repairs to address the odour, and $4,000 in temporary rental accommodations. In his submissions, he lists these amounts as $995 for sub-floor repairs and $4,200 for rent, which exceeds the $5,000 maximum Civil Resolution Tribunal (CRT) small claim amount. I find Mr. Robertson has abandoned his claim to any amounts totalling more than $5,000.

3. The respondents deny ever smelling anything in the home, or that they knew about the sub-floor stains that allegedly caused an odour, so they say they owe Mr. Robertson nothing.

4. The parties are each self-represented in this dispute.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the CRT, which 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.

6. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Although the parties' submissions each call into question the credibility of the other party in some respects, I find I can properly assess and weigh the written evidence and submissions before me without an oral hearing. In the decision *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always needed where credibility is in issue. Keeping in mind that the CRT's mandate includes proportional and speedy dispute resolution, I find I can fairly hear this dispute through written submissions.

7. 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.

8. 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.

ISSUE

9. The issue in this dispute is whether the respondents knowingly or recklessly failed to disclose to Mr. Robertson the cause of an alleged odour defect, and if so, do they owe $5,000 or another amount for repairs and temporary accommodation expenses?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, as the applicant, Mr. Robertson must prove his claims on a balance of probabilities. I have read and weighed all the submitted evidence, but I refer only to the evidence I find relevant to provide context for my decision.

11. The undisputed evidence is that Mr. Robertson viewed the respondents' home in July 2019 with his realtor and 2 friends, LG and EG. Mr. Robertson says there was an objectionable odour in the home that he assumed was from alleged dirt and grease in the kitchen. However, Mr. Robertson did not ask the respondents about the odour, either directly or through his realtor, PC. Mr. Robertson also says he did not ask the respondents' realtor about the smell because he expected the realtor to give him a "negative" response anyway. Despite the alleged odour, Mr. Robertson made an offer on the home, that was not subject to a home inspection, or any odour investigation or remediation. The respondents accepted the offer and sold the home to Mr. Robertson, who took possession at the end of July 2019. There is no dispute that Mr. Robertson did not mention an odour to the respondents or their realtor until September 2019.

12. Mr. Robertson provided a letter from LG and EG saying that they also noticed a "strange odour" when viewing the home in July 2019. LG and EG said that they discussed it with Mr. Robertson, and they thought that the odour would disappear with a thorough cleaning. Another person, SG, provided a July 14, 2020 statement saying that she viewed the home on August 2, 2019, after Mr. Robertson took possession of it. SG said there was a "really bad smell" that she could not identify. She described it as an organic, pungent smell, something similar to dried urine.

13. The respondents deny ever smelling anything unusual in their home. They say that no one else, including their realtor, and Mr. Robertson's realtor, PC, complained of any smell. In April 29, 2020 correspondence with PC, Mr. Robertson asked why PC said he did not smell anything at the home, and why he did not notice an odour when Mr. Robertson brought it to his attention. In earlier correspondence with the respondent's realtor, PC said that he thought the home smelled a bit because it had been empty and closed up for a long time, but he did not recognize a urine-like smell.

14. I note that odours are inherently subjective, and cannot be conveniently recorded like sound or images. I find it is possible for one person to smell something when another does not. In evaluating odour-related issues, as with others, I must simply weigh the evidence before me in order to reach a conclusion.

15. The evidence shows Mr. Robertson began an extensive home remodeling project shortly after he purchased the home. Mr. Robertson suggests the remodeling's purpose was to address the odour problem, but I find the evidence provides little support for that, especially since he had not identified the odour's source or a remedy before beginning the project. SG said she returned to the home on September 21, 2019, after Mr. Robertson had removed the home's carpet, because he wanted help identifying the strange smell. SG said the smell was stronger than before, and that she noticed stains on the concrete subfloor previously covered by carpet. She said that upon seeing the stains, she immediately knew the smell was urine on concrete. She does not explain how she arrived at that conclusion. Photos in evidence show dark patches on concrete floors, but I find the photos do not show the patches' cause.

16. I find that none of the witnesses who say they smelled an odour in the home could identify what the odour was by smell alone. I also find the odour was not identified as a urine odour until SG saw the concrete stains and suggested the smell was urine. The evidence does not show that SG, or any other witness, has any particular experience identifying dried urine stains by smell or sight, or has any experience with pets or pet urine. Further, on the evidence before me, I find that no one specifically identified the alleged urine stains as cat urine until the respondents said that a cat had been in the home for a few weeks. No tests were conducted to determine the stains' cause or content.

17. I find the stains' identification is a subject beyond ordinary knowledge, requiring expert evidence: see *Bergen v. Guliker*, 2015 BCCA 283. I find there is no expert evidence before me. Overall, I find Mr. Robertson and others assumed the stains were urine based on SG's poorly supported guess, and assumed they were from a cat because the respondents later said there had been a cat in the home. However, I accept that Mr. Robertson and SG determined that the concrete stains had a urine-like smell.

18. Mr. Robertson says he attempted to clean the concrete stains, but that his attempts made the odour much worse, to the point where the home was uninhabitable. At this point, in late September 2019, he ordered a stop to the remodelling project while he sought compensation from the home's strata corporation and its insurer, which he says was denied. The remodeling project recommenced approximately 3 months later, after Mr. Robertson had the concrete stains covered in epoxy, when his contractor became available to restart the work. Mr. Robertson claims $4,000 in additional accommodation fees during this 3 month delay, and $1,000 for covering the stains in epoxy.

19. Mr. Robertson says that the concrete stains are a latent defect that an ordinary home inspection would not have revealed. The respondents agree that there was no way to detect the stains other than pulling up the carpet. However, Mr. Robertson says the concrete stains are cat urine, and that the respondents must have known about

them, but they failed to disclose them on the Property Disclosure Statement (PDS) for the home sale. I find that the respondents agreed on the PDS that they were not aware of any material latent defect.

20. A material latent defect is a material defect that cannot be found through a reasonable property inspection, and includes something dangerous or potentially dangerous to the occupants, or that makes the property unfit for habitation. A seller must disclose a latent defect if they know about it, or if they are reckless about whether the defect exists. The applicant, Mr. Robertson, bears the burden of proving the respondents knew about or were reckless about a latent defect: see *McCluskie v. Reynolds et al* (1998), 65 BCLR (3d) 191 (SC). I note that the PDS only asks if the respondents are **aware** of a latent defect, and the PDS is not a warranty that there are no latent defects: see *Hanslo v. Barry*, 2011 BCSC 1624 at paragraph 96. Awareness of a latent defect is subjective, and a seller's honest, actual knowledge of the property does not have to be correct: see *Hamilton v. Callaway*, 2016 BCCA 189 and *Nixon v. MacIver*, 2016 BCCA 8.

21. I will address the concrete stains in a moment. But first, I find that the odour detected by Mr. Robertson was a patent defect, meaning one that can be discovered by a reasonable inspection. A seller is not responsible for patent defects so long as they do not actively conceal them, given the principle of *caveat emptor*, or "buyer beware": see *Cardwell v. Perthen*, 2006 BCSC 333, affirmed 2007 BCCA 313. Mr. Robertson says the odour was unmistakeable, and he detected it before offering to purchase the home. He bought the home knowing about the smell, and thinking it could be cured by an ordinary cleaning, although he says he later found he was mistaken. So, I find the respondents are not responsible for the alleged odour.

22. But are the latent concrete stains, that Mr. Robertson says were the odour's source, a material defect? The evidence before me does not show that the stains resulted in any risks or negative effects apart from their alleged odour, which Mr. Robertson was well aware of. I find that, except for the known odour, the evidence does not show that the stains were a danger or potential danger to anyone, or that they had any

other effect on the home's occupants. I find that other than the odour, the stains' mere existence did not render the home uninhabitable or potentially dangerous. On the evidence before me, I find the home was habitable at least until Mr. Robertson's failed cleaning attempts worsened the odour. This evidence all supports that the concrete stains, apart from the odour, were not material defects.

23. However, even if the stains themselves were material latent defects, Mr. Robertson must show that the respondents knew about them, or were reckless about their existence, when they did not mention them on the PDS. I find the respondents did not know about the sub-floor stains, and were not reckless about their existence, for the following reasons.

24. The parties agree that a previous owner, who sold the home to the respondents around 2015, had replaced the carpet. They also agree that the carpet was in good condition, and there were no stains or other signs of possible urine soils or other spills at the time Mr. Robertson purchased the home. The respondents say that they rarely stayed at the home during the approximately 4 years they owned it, and it mostly sat empty, except for approximately their last 10 months of ownership when their daughter lived there. Mr. Robertson suspects the home was used as a long-term rental, and speculates about possible pet soiling from renters. But I find this argument is almost entirely unsupported on the evidence, and even if accurate, does not prove that the respondents knew about an odour or sub-floor stains. The respondents say that their house-trained cat stayed at the home for 3 weeks in early 2019, but deny that the cat urinated on the floor. I find this is consistent with the lack of stains or defects on the carpet. The respondents say, and I accept, that they never pulled up the carpet.

25. The respondents say they never smelled an objectionable odour, and neither Mr. Robertson nor anyone else told them about an odour before Mr. Robertson purchased the home, so they had no reason to search for the source of an odour. Mr. Robertson maintains that the odour was so obvious that no one could reasonably deny smelling it. I find the evidence shows that some witnesses smelled an odour,

and others did not. I also find that any odour was not overly objectionable when Mr. Robertson purchased the home, because it did not dissuade him from the purchase, and he chose not to raise the issue with the respondents before the purchase. On the evidence before me, I find that the respondents did not smell anything unusual and were not aware of any alleged odours before selling the home, even if Mr. Robertson and others did smell something.

26. So, I find the respondents had no reason to suspect that sub-floor stains or other odour sources existed. As a result, I am satisfied that the respondents did not know about, or reasonably suspect, that sub-floor concrete stains existed, even if those stains were material latent defects. So, I find the respondents did not breach the PDS for the home's contract of purchase and sale, did not misrepresent their knowledge of the home's sub-floors, and are not responsible for the concrete stains or related odours. I dismiss Mr. Robertson's claims.

CRT FEES AND EXPENSES

27. 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. The respondents were successful, but paid no CRT fees and claimed no CRT dispute-related expenses, so I order no fee or expense reimbursement.

ORDER

28. I dismiss Mr. Robertson's claims and this dispute.

Chad McCarthy, Tribunal Member