Civil Resolution Tribunal

Date Issued: October 20, 2020

File: SC-2020-004162

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Levering v. Rath*, 2020 BCCRT 1187

B E T W E E N :

LEE LEVERING and JOHANNES LEVERING

APPLICANTS

A N D :

CAROL RATH

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Rama Sood

INTRODUCTION

1. This dispute is about the purchase of a property. The applicants, Lee Levering and Johannes Levering (the Leverings), purchased a property from the respondent, Carol Rath. The Leverings say Ms. Rath did not leave the property in clean and vacant condition and that she is responsible for repairs to the irrigation system and a new pool liner. The Leverings have limited their claims for the cost of repairs and debris

removal to $5,000 to bring it within the Civil Resolution Tribunal (CRT) small claims monetary limit.

2. Ms. Rath says she kept her property in immaculate condition and denies she left debris when she moved out. She also says she paid for pool repairs before the sale completed and is not responsible for the cost of repairs to the irrigation system

3. The parties are self-represented.

JURISDICTION AND PROCEDURE

4. These are the CRT's formal written reasons. 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.

5. 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.

6. 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.

7. 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

8. The issues in this dispute are:

    a. Whether Ms. Rath was required to remove the debris on the property by possession date and failed to do so. If so, must she pay for any removal costs,

    b. Whether Ms. Rath must pay for repairs to the irrigation system, and

    c. Whether Ms. Rath must pay for a new pool liner.

EVIDENCE AND ANALYSIS

9. In a civil dispute like this, the applicants, the Leverings, bear the burden of proof on a balance of probabilities. The parties provided evidence and submissions in support of their respective positions. While I have considered all of this information, I will refer to only what is necessary to provide context to my decision. In this decision, witnesses and others are identified by their initials which are known to the parties.

10. The Leverings viewed Ms. Rath's property several times and on October 7, 2017 made an offer to purchase it. The property included a house, cabin, shed, and a pool.

11. The purchase contract included the following terms:

    a. Ms. Rath would remove all possessions and leave the home and property clean and vacant on the possession date (paragraph 3.3(b)).

    b. Ms. Rath would have the irrigation and pool "winterized appropriately" and provide a receipt showing the pool was winterized properly and professionally.

    c. The purchase agreement was subject to the Leverings obtaining and approving all inspection reports (including pest and pool) against any defects which materially or adversely affect the property's use or value.

    d. The property and all included items will be in substantially the same condition on possession date as when viewed on August 30, 2019.

e. All buildings on the property and all other items included in the purchase and sale will be, and remain, at the risk of Ms. Rath until the completion date.

12. The parties agree the Leverings took possession of the property on January 16, 2020.

13. The Leverings say they discovered in the spring 2020 that the irrigation system needed repairs and the pool needed a new liner. They also say the cabin on the property was not clean and they had to remove debris from the yard, shed, and cabin. I will address each issue separately.

Condition of the property

14. The Leverings say Ms. Rath did not remove all possessions and leave the house and property clean and vacant on the possession date as required under paragraph 3.3(b) of the purchase agreement. They provided several photographs of the interior of the cabin and shed that showed wooden boxes, stacks of plywood and wooden planks, a roll of bubble wrap, a set of French doors, shelving brackets, and plastic containers and a bucket. They also provided photographs of the yard that showed a stack of broken windows behind a wire fence, 3 tires beside a broken fence, a red tractor, a broken lawn mower, and a grass catcher (debris). They say they had to pay a waste disposal company to remove the debris and provided a photograph of the full truck. The Leverings seek $618.45 for the cost of removing the debris.

15. Ms. Rath says she kept the property in immaculate condition. She provided witness statements from several friends and coworkers who stated that they had visited Ms. Rath's home and property over several years and it was well kept and clean. I give limited weight to these statements because the witnesses did not state whether they saw the inside of the shed or cabin.

16. Ms. Rath also provided a letter from MB, a groundskeeper, who stated that the cabin was cleaned and emptied of everything except for "a small amount of lumber and building materials" in August 2019. MB also stated that she did a "thorough fall cleanup" of the property in October 2019 and removed all debris and nothing was left lying around. Based on the photographs, I find there was a significant amount of

lumber and building materials left in and around the cabin, although it was neatly stacked. I also find that MB's description of the yard is not consistent with the photographs that showed a small tractor in the yard near the cabin and several storm windows and building materials stacked in front of the cabin.

17. Ms. Rath says the debris in the yard identified by the Leverings was on the property adjacent to hers. I find the debris in and around the cabin and shed alone more likely than not filled the majority of the truck. I find the items near the fences did not significantly contribute to the debris the Leverings removed from the property. For this reason, I find it is not necessary to address whether some portion of the debris was from the adjacent property.

18. I find the photographs are objective and more reliable than the witness statements. Based on the photographs, I find Ms. Rath did not remove all possessions and leave the house and property vacant on the possession date.

19. Ms. Rath says she could not empty the cabin or shed due to a heavy snowfall and she asked her cousin, KW, to make arrangements with the Leverings to remove the materials in his pickup truck when the weather improved but the Leverings refused. KW stated that he attended at the property to remove "saw horses" and related items" that Ms. Rath "left out front" but Ms. Levering told him not to bother. I infer he meant in front of the cabin. The Leverings say they were not notified KW was attending and that the pickup truck was inadequate to remove all of the debris. Ms. Rath did not state whether she intended to remove any of the other debris inside the cabin and in the yard. I find that even if KW had removed the building materials in front of the cabin, the Leverings would still have required a waste disposal truck to remove the rest of the debris.

20. So, I find Ms. Rath breached paragraph 3.3(b) of the purchase agreement. The remedy for the breach is damages that are intended to place an applicant in the position they would have been in if the contract had been carried out as agreed (see *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319 at

paragraph 39). In this case, had Ms. Rath met her obligations under the purchase agreement, the cabin, shed, and yard would have been cleared of all debris.

21. The Leverings submitted a receipt for $618.45 for the removal of a ¾ loaded truck. I find this expense was reasonable and I order Ms. Rath to reimburse the Leverings $618.45.

22. The Leverings also say the cabin's interior was damaged by animals before the possession date. While the cabin's interior appears to have had animals nesting in it, since the Leverings make no claims for cleaning it, I make no findings or order about it.

The irrigation system

23. The Leverings say Ms. Rath did not properly winterize the irrigation system resulting in severe cracking, broken pipes, and leaks due to "freeze damage". I infer freeze damage refers to damage caused by water freezing in the pipes and expanding.

24. Ms. Rath provided a statement from a plumber, Mike Sallenback. Mr. Sallenback submitted a copy of a certificate of qualification issued by the province of British Columbia and stated that he was experienced in installing and repairing irrigation systems. I find Mr. Sallenback's statement meets the criteria in CRT rule 8.3 to be considered an expert opinion. Mr. Sallenback stated he checked the irrigation system in September 2019 and the entire system was in "excellent working order" and functioning. He also says it was ready to be winterized. Mr. Sallenback did not explain the winterizing process but I infer it included draining the pipes to prevent water from freezing and rupturing. Although I accept Mr. Sallenback as an expert, I give little weight to his statement since it refers to the condition of the inground irrigation system before it was winterized and does not address whether it was winterized properly.

25. Ms. Rath also says her irrigation system was professionally winterized by Evergreen Irrigation Ltd, an irrigation company. She provided a receipt dated September 25, 2019 from Evergreen Irrigation Ltd which showed she paid $173.25 for a blow out of

the irrigation lines for 9 zones and to install a hose bib. I accept that the inground irrigation system was professionally winterized.

26. Ms. Rath says in addition to the inground system, she also had a separate above ground independent line that operated manually. Ms. Rath admits that on December 4, 2019 this above ground line froze and broke causing water to flow down her driveway. She says a plumber attended later the same day and repaired the broken line. She denies the above ground line compromised the inground irrigation system.

27. Based on a photograph of a note on a computer screen, the Leverings say that Evergreen Irrigation Ltd told Ms. Rath on December 4, 2019 that the "system" should be "blown out again" but Ms. Rath declined. I find this photograph is hearsay and give it no weight. The CRT has the discretion to admit evidence that would not normally be admissible in court proceedings, including hearsay. In this case, I find the note is unreliable because the Leverings did explain why it was made, how they obtained it, or identify who wrote it. It also did not state whether Ms. Rath was advised to blow out the inground line or the above ground line.

28. The Leverings provided 2 Evergreen Irrigation Ltd invoices. The first was dated April 16, 2020 for $555.19. The second was dated April 29, 2020 and was for $391.65. I accept the Leverings's submission that the repairs were to the inground irrigation system. However, although the invoices listed the repairs that were done, they did not state what caused the damage to the irrigation system. I find this is a subject outside ordinary knowledge that requires an opinion from an expert (see *Burbank v. R.T.B.*, 2007 BCCA 215). I find expert evidence is needed in this dispute as it is not readily apparent whether the alleged repairs to the irrigation system were due to improperly winterizing it.

29. The Leverings say that Evergreen Irrigation Ltd may not have properly winterized the inground irrigation system since it was the first time it had performed the service for Ms. Rath and may not have been familiar with the system. I find this allegation to be speculative and give it no weight.

30. The Leverings say regardless of whether the irrigation system was properly winterized, it was required to be in good working order when they took possession of the property, as required under the purchase agreement. There is no term in the purchase agreement that the irrigation system had to be in "good working order" when the Leverings took possession. However, paragraph 8 of the purchase agreement required the property to be in substantially the same condition as when viewed on August 30, 2019.

31. Ms. Rath says the problem with the irrigation system was a latent defect and the legal principle of *caveat emptor*, or the buyer beware, applies. 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 Leverings bear the burden of proving Ms. Rath knew about or were reckless about a latent defect (see *McCluskie v. Reynolds et al (1998)*, 65 BCLR (3d) 191 (SC)).

32. I find there is no evidence that Ms. Rath knew of any problems with the irrigation system. Since Mr. Sallenback inspected the irrigation system in September 2019, I accept his opinion that it was in excellent condition. I find it was reasonable for Ms. Rath to rely on Mr. Sallenback's opinion. I find the Leverings have failed to show Ms. Rath knew the irrigation system required repairs or was reckless about this issue.

33. Based on my reasons above, I dismiss the Leverings's claim for the cost of repairs to the irrigation system.

The pool

34. The parties agree that in November 2019 Ms. Rath discovered that a patch in the pool liner had to be replaced. Ms. Rath says the patch could not be applied due to the cold weather and the parties agreed that Ms. Rath would pay a pool maintenance company, Sundance Pool Inc, in advance for the cost of patching the pool liner in the

spring. Ms. Rath provided the Leverings with an invoice, receipt, and contract from Sundance Pool Inc stating that it agreed to patch the pool liner in the spring.

35. The Leverings say when Sundance Pool Inc patched the pool, its technician expressed doubt that the patch would be sufficient. They say the patch came off soon after it was applied and they were advised by Sundance Pool Inc that the pool liner had to be replaced.

36. The Leverings say that Ms. Rath must pay for a new pool liner because Ms. Rath was obligated to provide a pool in good working condition as per the property disclosure statement (PDS). The Leverings state the pool appeared operational when viewed during the home inspection and that Ms. Rath had not disclosed in the PDS the liner had multiple patches.

37. The Leverings say they considered asking for a holdback of funds on closing in case the pool required further repairs but based on their lawyer's advice that Ms. Rath would be ultimately responsible for the pool repairs regardless of whether the patch was successful, they decided to complete the purchase. They say they did not ask for Ms. Rath to pre-pay for the patch or provide a contract confirming the pool company would perform the repairs in the spring and that she did this of her own volition.

38. Ms. Rath denies the patch was unsuccessful. She provided an August 20, 2020 letter from Sundance Pool Inc that stated it successfully replaced the patch in the spring 2020. It also stated the pool was restored to the condition it was in at the time of the purchase. In its letter, Sundance Pool Inc denied that it was hired by either party to do a pool inspection or give advice, recommendations, or opinions about the pool or its liner and did not do so. This contradicts the Leverings's statement that Sundance Pool Inc expressed doubt the patch would hold and recommended replacing the liner. Although the Leverings provided a quote for a new pool liner from another pool company, I find they did not prove it needed to be replaced. I dismiss the Leverings's claim for the cost of a new pool liner.

CRT FEES AND INTEREST

39. The *Court Order Interest Act* applies to the CRT. The Leverings are entitled to pre-judgement interest on $618.45, the cost of waste removal, from May 27, 2020, the date of the invoice to the date of this decision. This equals $2.02.

40. 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. I see no reason in this case not to follow that general rule. Since the Leverings were partially successful, I find they are entitled to reimbursement of 50% of the $175 CRT fees, which is $87.50. Neither party claimed dispute-related expenses.

ORDERS

41. Within 14 days of the date of this order, I order Ms. Rath to pay Mr. Levering and Ms. Levering a total of $707.97, broken down as follows:

    a. $618.45 as damages,

    b. $2.02 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $87.50 in CRT fees.

42. Mr. Levering and Ms. Levering are entitled to post-judgment interest, as applicable.

43. 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.

44. 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.

Rama Sood, Tribunal Member