Civil Resolution Tribunal

Date Issued: October 26, 2020

File: SC-2020-001894

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cowie v. Larsen*, 2020 BCCRT 1203

B E T W E E N :

FRANCIS COWIE

APPLICANT

A N D :

WAYNE LARSEN, DOROTHY LARSEN, The Owners, Strata Plan BCS 4502, Sandhill Development Ltd., and Sandhill Development (Langley) Ltd.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Rama Sood

INTRODUCTION

1. This dispute is about repairs to an outdoor patio. The applicant, Francis Cowie, and his wife purchased a strata lot townhouse with an outdoor patio (townhouse) from the respondents, Wayne Larsen and Dorothy Larsen (the Larsens). The townhouse is

part of the respondent strata corporation, The Owners, Strata Plan BCS 4502 (strata). The respondent, Sandhill Development (Langley) Ltd. (Sandhill Langley), was the developer that sold the townhouse to the Larsens. The role of the respondent, Sandhill Development Ltd. (Sandhill), was not explained by the parties.

2. Mr. Cowie says when he purchased the townhouse, the patio needed repairs. He says the Larsens said that the strata agreed to repair the patio but the strata now refuses to do so.

3. Mr. Cowie says one or more of the respondents are responsible for repairing the patio and seeks $4,950.75 for the repair costs.

4. The Larsens deny that they made any misrepresentations. They say that the strata had agreed to pay for the repair costs in 2017.

5. The strata, Sandhill, and Sandhill Langley each say they are not responsible for the repairs. They say that since the patio was not on the filed strata plan, it remains the townhouse owner's responsibility.

6. Mr. Cowie and the Larsens are each self-represented. The strata is represented by a strata council member, DG. Sandhill and Sandhill Langley are both represented by an employee, ST.

JURISDICTION AND PROCEDURE

7. 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.

8. 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, he said" scenario with the parties disputing whether particular information was provided. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by observing personal demeanour in a courtroom or tribunal proceeding. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.

9. 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.

10. 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.

11. 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.

Jurisdiction

12. Mr. Cowie's claims against the Larsens, Sandhill, and Sandhill Langley fall under the CRT's small claims jurisdiction. However, he also raised the issue of the strata's repair and maintenance obligations under the *Strata Property Act* (SPA) and the strata's bylaws. I find Mr. Cowie's claim against the strata is within the CRT's strata property jurisdiction that is set out in sections 1(2) and 121(1) of the CRTA. Under section 1(2) of the CRTA, if a claim may be a small claim or a strata property claim, the CRT will adjudicate it under its strata property claims jurisdiction.

13. I requested further submissions from Mr. Cowie and the strata about whether Mr. Cowie wanted to proceed with his claim against the strata as a separate strata dispute since it could not proceed as a small claims dispute. Mr. Cowie responded that he did not wish to do so and the strata did not respond.

14. Therefore, I refuse to resolve Mr. Cowie's claims against the strata.

ISSUES

15. The issues in this dispute are:

    a. Whether the Larsens misrepresented that the strata would repair the patio, and if so, the appropriate remedy, and

    b. Whether either Sandhill or Sandhill Langley are responsible for the patio repair costs.

EVIDENCE AND ANALYSIS

16. In a civil dispute like this one, as the applicant, Mr. Cowie bears the burden of proof on a balance of probabilities. The parties provided evidence and submissions to support 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.

17. The parties agree that the Larsens were the townhouse's original owners and purchased it from Sandhill Langley 6 months before it was completed. The Larsens say that Sandhill Langley's marketing materials, such as its floor plan and model, showed the townhouse had a large outdoor patio. The Larsens say after the townhouse was completed, they found that it only had 2 small patios. They say they spoke with the developer who then expanded the patio to match the marketing materials. Sandhill Langley agrees that it is the developer. The parties did not provide the dimensions of either the current patio or the patios when the townhouse was completed.

18. The parties agree that the patio tiles started to sink at some point after it was expanded, although the date was not provided. The Larsens say they spoke with the strata in 2017 and it agreed at the time to pay for the patio repairs. They did not state whether there was any correspondence with the strata about the repairs. However, according to the strata council's June 8, 2017 meeting minutes, the strata agreed to obtain repair estimates and revisit the issue at the next annual general meeting.

19. In early 2018 Mr. Cowie and his wife were interested in purchasing the townhouse. They knew the patio needed repairs. In March 2018, Mr. Cowie and his wife signed an offer to purchase the townhouse. The offer included an addendum electronically signed by Mr. Cowie, his wife, and the Larsens. The addendum stated that the contract was "[s]ubject to the sellers providing written proof that the concrete patio tiles will be repaired/levelled by the strata corporation at the strata corporation's expense" (subject clause).

20. Mr. Cowie did not state whether the Larsens provided written proof but says he removed the subject clause because the Larsens's realtor, LP, reassured his realtor, PL, that the strata had agreed to repair the patio. According to PL, LP stated repeatedly that there was "no issue" with the patio and the strata had agreed to repair it. PL also stated that the subject clause was removed based on LP's reassurance that the patio repair had been pre-approved and there was simply a delay with obtaining written confirmation from the strata council members because they were on vacation. After Mr. Cowie purchased the townhouse, the strata refused his request to repair the patio. Neither realtor is a party to this dispute.

21. The strata says before Mr. Cowie purchased the townhouse, it repeatedly informed the Larsens in writing and verbally that it would not be responsible for the patio repairs, which the Larsens deny. I give no weight to the strata's statement because it did not provide a copy of any written notifications it allegedly provided to the Larsens, or details of who verbally notified the Larsens or when. The strata also did not explain why it failed to provide this alleged evidence, which on balance I find was available to it.

22. The strata also says that it is responsible for repairs to common property or limited common property. However, it says the patio was not on the filed strata plan and so was not built with the strata's approval. As a result, the strata says the patio is not common property or limited common property and so the owner is responsible for its repairs. The strata also says Mr. Cowie, as the current owner, must remove the patio since it was built without approval. I refuse to resolve the issue of whether Mr. Cowie must remove the patio since the strata did not file a counterclaim and so the issue is not properly before me. Even if it was properly before me, I would refuse to resolve it because the claim would be under the CRT's strata property jurisdiction.

Did the Larsens make a misrepresentation?

23. Mr. Cowie says he and his wife were induced to proceed with the purchase based on the Larsens's false representations to his realtor, LP, that the strata would repair the patio.

24. According to *O'Shaughnessy v. Sidhu*, 2016 BCPC 308, a misrepresentation is a false statement of fact made in the course of negotiations or in an advertisement, that has the effect of inducing a reasonable person to enter into a contract. The judge pointed out that there are several types of misrepresentation including negligent and fraudulent.

25. Although I am not bound by it, I agree with the CRT's decision in *Caviglia v. Jonathan*, 2020 BCCRT 426 that negligent misrepresentation occurs when a seller fails to exercise reasonable care to ensure representations are accurate and not misleading. I also agree that a fraudulent misrepresentation occurs when a seller makes a false representation of fact and the seller knew it was false or recklessly made it without knowing it was true or false. In either case, the misrepresentation must reasonably induce the purchaser to buy the item.

26. This leads to the question of whether the Larsens made a misrepresentation. The Larsens relied on the strata council's June 8, 2017 meeting minutes when they informed Mr. Cowie that the strata had agreed to repair the patio. According to the

minutes, an engineering report ordered by the strata had revealed a void under the patio's slab and the strata council agreed to obtain estimates for the cost of repairing the slab and present the project at the next annual general meeting (AGM) for the owners to approve. The parties did not provide a copy of any AGM or strata council meeting minutes before Mr. Cowie took possession of the townhouse that showed the strata no longer intended to repair the patio. I find that given the June 8, 2017 strata minutes it was reasonable for the Larsens to state that the strata agreed to repair the patio and their statement was not misleading at the time it was made.

Are either Sandhill or Sandhill Langley responsible for the patio repairs?

27. As mentioned above, the parties did not explain Sandhill's role in this dispute. Sandhill says Sandhill Langley was the developer. Sandhill Langley agrees and says in addition, it was also the vendor who sold the townhouse to the Larsens. It also says "the builder" expanded the patio as a favour to the Larsens, but did not identify the builder. As mentioned above, the burden is on Mr. Cowie to prove his claim. Mr. Cowie did not state why Sandhill would be responsible for the patio repairs. I find Mr. Cowie has not met his burden and so I dismiss his claim against Sandhill.

28. Sandhill Langley says that it was not required to increase the size of the patio because it was built as shown on the strata plan and that the patio was enlarged as a "favour" to the Larsens. It says even if the marketing materials showed a larger patio, its purchase and sale agreement with the Larsens stated that marketing materials did not form part of the contract. Also, it says the increased patio size is the owner's responsibility to repair since it was not in the strata plan.

29. The legal doctrine called "privity of contract" applies here. Privity of contract means that a contract cannot give rights or impose obligations on persons or entities who are not parties to a contract. I find that Sandhill and Sandhill Langley were not parties to the negotiations or contract between Mr. Cowie, Mr. Larsen, and Mrs. Larsen.

30. I have also considered whether Sandhill Langley was negligent, and I find it was not. Although it did not overtly state that it expanded the patio, I find that Sandhill Langley

was responsible for the expanded patio since it stated that it was enlarged as a favour for the Larsens. To succeed in a claim for negligence, Mr. Cowie must prove Sandhill Langley owed him a duty of care, that it breached the applicable standard of care, that the loss or damages was reasonably foreseeable, and that Sandhill Langley's failure to meet the standard of care caused his loss.

31. I find that Sandhill Langley owed a duty of care when building the patio. However, I find that Mr. Cowie has not proved that the standard of care was breached. The burden is on Mr. Cowie to prove the deficiencies he alleges (see *Lund v. Appleford Building Company Ltd. et al*., 2017 BCPC 91). As mentioned above, an engineering report stated there were voids present below the patio's cantilevered slab. It also stated that the voids were not deep but could create a space for rodents to nest and for bedding sand and perimeter drain rock to slough. The report further stated that the condition was worsened by the backfill used because it did not provide adequate drainage. However, the report did not state whether it was reasonably foreseeable that the manner in which the patio was constructed would cause the pavers to settle and drain rock to slough. Also, the engineer did not state that use of the backfill was unreasonable since one of the remedies the engineer proposed was to regularly add more bedding sand and more rock.

32. I note that the engineer report is dated May 19, 2017. While this raised a potential limitation period issue, I find I did not need to consider it since Mr. Cowie failed to prove Sandhill Langley was negligent.

33. 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. Since Mr. Cowie did not make a claim for CRT fees or dispute-related expenses, I do not need to address this issue. None of the remaining parties sought dispute-related expenses.

ORDERS

34. I refuse to resolve Mr. Cowie's claims against The Owners, Strata Plan BCS 4502.

35. I dismiss Mr. Cowie's claims against Wayne Larsen, Dorothy Larsen, Sandhill Development (Langley) Ltd. and Sandhill Development Ltd.

Rama Sood, Tribunal Member