Civil Resolution Tribunal

Date Issued: January 22, 2021

File: SC-2020-003952

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kwieton v. Lindberg*, 2021 BCCRT 78

B E T W E E N :

OSKAR KWIETON

APPLICANT

A N D :

CLAYTON LINDBERG, CATHY MAI, CHRISTOPHER GAUNDAN, and DOREEN BENNETT aka DOREEN ELIZABETH BENNETT

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about the sale of a house. The applicant, Oskar Kwieton, purchased the house from the respondent, Doreen Bennett aka Doreen Elizabeth Bennett. The respondent Christopher Gaundan acted as Mr. Kwieton's realtor. The respondents Cathy Mai and Clayton Lindberg were Ms. Bennett's realtors.

2. Mr. Kwieton alleges Ms. Bennett breached the contract of purchase and sale (contract) for the house. He also alleges the respondent realtors were negligent. He seeks $2,000 as compensation for replacing a fridge, $231 for furnace repairs, $999 for bathroom insulation repairs, and $1,170 as reimbursement for contractor rescheduling costs. He also seeks $600 for time spent on rescheduling the contractors, supervising garbage pickup, reconfiguring an alarm, and configuring a garage door opener. Mr. Kwieton also claims $90 for rekeying a garage door lock.

3. Ms. Bennett denies Mr. Kwieton's claims and says she fulfilled the contract's terms. The respondent realtors also deny being negligent or otherwise liable.

4. The parties are self-represented.

5. As discussed below, I find Mr. Kwieton has proven his claims against Ms. Bennett for the fridge, furnace repairs, rescheduling costs, and rekeying fees to the extent of $1,705. I dismiss all other claims, including Mr. Kwieton's claims against the respondent realtors. My reasons follow.

JURISDICTION AND PROCEDURE

6. 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). Section 2 of the CRTA states that 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 the dispute's parties that will likely continue after the CRT process has ended.

7. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary 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 in the interests of justice.

8. Section 42 of the CRTA says 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.

9. 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.

Admissibility of Witness Statements and Late Evidence Provided by Ms. Bennett

10. Mr. Kwieton objected to witness statements provided by 2 of Ms. Bennett's family members and another from a tenant or guest. He points out that the statements are not signed or dated. He also questions their relevance.

11. The witness statements comment on the issues in this dispute. Bearing in mind the CRT's mandate which includes flexibility, I find that under CRTA section 42 the witness statements are relevant, and I allow them. I find it appropriate to consider Mr. Kwieton's objections when deciding how much weight to give each statement. Ultimately, I relied more heavily on other evidence discussed below.

12. Ms. Bennett also provided as late evidence a picture of a handrail that works using suction. Mr. Kwieton had the opportunity to review it and provide submissions and evidence in response. Again, being mindful of the CRT's mandate, I find the late evidence does not result in any prejudice to Mr. Kwieton and I allow it.

Preliminary Issue – Mr. Kwieton's Claim for Rekeying the Garage Door

13. Mr. Kwieton did not include his claim for rekeying the garage door in his application for dispute resolution. Previous CRT decisions have held that it is generally unfair to

decide claims that are not identified in a Dispute Notice or amended Dispute Notice. See, for example, *Rodgers v. The Owners, Strata Plan VR 1322*, 2020 BCCRT 368.

14. The parties did not object to this new claim and Ms. Bennett also provided submissions about it. I find there is no prejudice to the parties in considering this claim, which is only for $90. Bearing in mind that the CRT's mandate includes proportionality, I find it appropriate to resolve this claim.

ISSUES

15. The issues in this dispute are as follows:

    a. Did Ms. Bennett breach any terms of the contract, and if so, what is the appropriate remedy?

    b. Were any respondent realtors professionally negligent, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

16. In a civil claim such as this, as the applicant Mr. Kwieton bears the burden of proof on a balance of probabilities. Though I have reviewed all the evidence and submissions, I only refer to what is necessary to explain my decision. I note that Mr. Lindberg did not provide evidence and relied only on submissions.

17. Mr. Kwieton purchased a house from Ms. Bennett under the terms of the signed August 11, 2019 contract. The contract provided for a completion date of November 14 and possession date of November 15, 2019. The parties completed the sale and Mr. Kwieton took possession of the house. I will discuss the contract terms below.

Labour Arising from Missed Viewing of October 11, 2019

18. The contract says that Ms. Bennett agreed to give Mr. Kwieton access to the house before the possession date so that Mr. Kwieton's contractors could take

measurements and provide renovation quotes. Ms. Bennett was obligated to provide access 2 times on at least 24 hours' notice.

19. Mr. Kwieton says he requested access for the date of October 11, 2019, but Ms. Kwieton unreasonably cancelled on October 10, 2019. He also places blame on all the realtors for miscommunication. Ms. Bennett submits that she denied the access request as soon as she learned about it on October 8, 2019.

20. I will first consider the claim against Ms. Bennett. From the evidence, I find that Ms. Bennett refused access by texting her realtor Mr. Lindberg on October 8, 2019. Given this date, I find that under the contract, Mr. Kwieton provided more than 24 hours' notice to Ms. Bennett for the October 11, 2019 date. I find that Ms. Bennett breached the contract by refusing to provide access.

21. I acknowledge Ms. Bennett's submission that the access date was not reasonable because it was Thanksgiving, she had family over, and she had recently experienced a personal tragedy. However, I do not find this permitted her to avoid performance of the contract. Text messages show Mr. Kwieton requested access lasting 2 hours for the morning of October 11, 2019 and not the whole day. There is no indication that Ms. Bennett or her guests needed to vacate the property to accommodate access. I do not find Mr. Kwieton's request was unreasonable in the circumstances. Ms. Bennett also had the benefit of being represented by a realtor. I find she had the opportunity to exclude October 11, 2019 as an access date in the contract but did not do so.

22. I find Mr. Kwieton has proven damages. The contractor provided an August 19, 2020 statement from its project manager, DB. DB wrote that they charged Mr. Kwieton for lost time because of the cancelled appointment. An invoice shows the contractor charged $1,134 inclusive of GST, which is slightly less than then $1,170 claimed. I find that $1,134 is reasonable and order Ms. Bennett to pay it.

Claims against the Respondent Realtors

23. I turn to Mr. Kwieton's claim that the other respondent realtors were professionally negligent. To prove negligence, Mr. Kwieton must show that 1) the respondent realtors owed him a duty of care, 2) the realtors breached the standard of care, 3) Mr. Kwieton sustained a loss, and 4) and the loss was reasonably foreseeable. See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 33.

24. Generally, in claims of professional negligence, an applicant must prove a breach of the standard of care through expert opinion evidence. See, for example, *Bergen v. Guliker*, 2015 BCCA 283, in which the Court of Appeal decided that expert evidence was required to determine whether a police officer acted reasonably in a vehicle pursuit.

25. The evidence shows that Mr. Kwieton texted his realtor, Mr. Gaundan, on September 26, 2019. He asked Mr. Gaundan to request access for October 11, 2019, for 2 hours. The next day Mr. Gaundan texted Ms. Bennett's realtor, Mr. Lindberg, asking for access on October 4 or 11, 2019. Mr. Lindberg said, "No problem". Mr. Gaundan followed up on September 28, 2019 and Mr. Lindberg replied, "We will make it happen". He added that he had not asked Ms. Bennett yet. Mr. Gaundan texted Mr. Kwieton on September 28, 2019 that October 11, 2019 would work.

26. Ms. Bennett texted Mr. Lindberg on October 8 that October 11, 2019 would not work. Mr. Lindberg followed up with Ms. Bennett again on October 10, 2019. She reiterated that she would not allow access. Emails indicate that Mr. Gaundan told Mr. Kwieton that Ms. Bennett refused access on October 10, 2019.

27. I do not find it obvious from the text messages that any realtors were negligent. Mr. Lindberg provided assurances about access to Mr. Gaundan, but his wording was also equivocal. I do not find it clear that Mr. Gaundan or Mr. Lindberg should have made further efforts to clarify their statements or Ms. Bennett's intentions. There are no text messages from the other respondent realtor, Ms. Mai.

28. As I do not find this to be a clear case of negligence, I find that expert opinion evidence is necessary, because a realtor's professional responsibilities are outside ordinary knowledge. As there is no such expert evidence before me, I dismiss the claim against the respondent realtors.

29. For much the same reasons, I also dismiss all other claims against the respondent realtors. There is no indication the realtors were negligent or provided any guarantees or representations about any of the following claimed items.

Fridge Replacement

30. Section 3 of the contract says that Ms. Bennett warranted that the appliances included in the purchase of the house would be "in proper working order" as of November 15, 2019. Section 7 says the sale included the fridge, which I find to be an appliance.

31. Mr. Kwieton says his inspector previously found the fridge was working. However, DB says in his witness statement that the contractors used the fridge on November 15, 2019. At the time they noticed the fridge did not cool their food, though it was on.

32. Ms. Bennett says the fridge worked the day she left and that it was unlikely it stopped working. Ms. Bennett also provided a witness statement from her daughter DT. DT says that the fridge still worked when they moved out.

33. On balance, I am satisfied the fridge was broken. I accept that the fridge previously worked but DB provided direct evidence about the fridge as of the possession date. I prefer DB's evidence overall because I find him to be the most impartial observer.

34. Mr. Kwieton provided a quote of $2,000 for a new stainless-steel fridge. I do not find this to be the used fridge's value. DB says it would cost $500 to repair the fridge but did not explain why. DB did not say he had any knowledge or expertise about refrigerator repair. I also do not find the repair cost is an appropriate measure of damages in this dispute, as the evidence indicates Mr. Kwieton intended to buy a new fridge. Ms. Bennett did not address the value of the fridge.

35. On a judgment basis, I find that Mr. Kwieton is entitled to payment of $250 for the used fridge from Ms. Bennett.

Furnace Repairs

36. Mr. Kwieton says the furnace worked intermittently and required repairs. Ms. Bennett says the furnace worked and she had it serviced shortly before she moved out.

37. The parties' contract contains no specific terms about the furnace. However, I find the furnace is an appliance and under section 3 of the contract, discussed above, Ms. Bennett warranted it to be "in proper working order".

38. Mr. Kwieton provided a December 16, 2019 repair invoice which shows a contractor replaced a furnace thermocouple. Ms. Bennett did not provide any evidence from anyone that serviced the furnace. Based on the repair invoice, I am satisfied that the furnace was not in proper working order, and Mr. Kwieton is entitled to reimbursement of $231.

Bathroom Insulation Repairs

39. DB's witness statement shows that he visited the house on January 6, 2020, and found the pipes leading to the sink in the en suite bathroom had frozen. DB concluded this was because there was no insulation in the bathroom wall.

40. The contract incorporates a property disclosure statement (PDS) dated June 6, 2019 and signed by both Ms. Bennett and Mr. Kwieton. Ms. Bennett indicated on the PDS that, to the best of her knowledge, the exterior walls were insulated. She also indicated that she was unaware of any problems with the plumbing system. I find these representations apply to the en suite bathroom.

41. DB wrote in his statement that the lack of insulation was preexisting, and the pipes must have frozen over annually, as the temperature at the time was not any colder than previous years. From this, Mr. Kwieton says Ms. Bennett must have known about the lack of insulation and was obligated to disclose it on the PDS.

42. Ms. Bennet says that in the 4 years she lived there she never had any problems with the pipes. In their witness statements, the 3 prior occupants of the house also say they encountered no issues with the pipes.

43. I find that Mr. Kwieton's submission that the pipes likely froze over annually requires expert evidence to prove. Under CRT rule 8.3, an expert must state their qualification in any written expert opinion evidence. Although DB provided a statement on the matter, I do not find it to be expert opinion evidence because DB's qualifications are not stated.

44. Given the above, I am not satisfied that the bathroom pipes froze over during the time Ms. Bennett lived at the house. I am also not satisfied that she knew about the lack of insulation in the bathroom walls. I dismiss this claim.

Compensation for Time Spent to Coordinate Tasks

45. As noted above, Mr. Kwieton claims $600 as compensation for time spent on coordinating the following tasks: rescheduling the contractor's October 11, 2019 visit, supervising garbage pickup at the house, reconfiguring the alarm system, and reconfiguring a garage door opener. Mr. Kwieton uses a rate of $60 per hour for his time.

46. In *Edwards v. Mercedes Benz Canada Inc.*, 2019 BCCRT 1408, a CRT member dismissed a claim for time spent on a dispute. He noted the applicant did not document the time spent or explain why they chose an hourly rate of $75 as compensation. There was also no suggestion that the applicant missed work or lost wages to deal with the dispute. Although *Edwards* is not binding, I find it persuasive. Mr. Kwieton did not provide any evidence of lost wages or missed work. Mr. Kwieton also did not explain why $60 per hour would be appropriate. I find Mr. Kwieton has not proven his claim.

Rekeying the Garage Door Lock

47. Under section 3 of the contract Ms. Bennett agreed to give Mr. Kwieton all keys to the property. Mr. Kwieton says Ms. Bennett failed to provide keys for the garage door. The contractor's invoice of April 2, 2020 shows it charged Mr. Kwieton $90 to do so.

48. In submissions Ms. Bennett says she could only leave the garage through the car entrance and used a remote to close the overhead door.

49. From the evidence and submissions, I conclude Ms. Bennett breached section 3 of the contract. Ms. Bennett was vague on what happened to the keys for the garage door. I find $90 is the appropriate measure of damages.

CRT FEES, EXPENSES AND INTEREST

50. The *Court Order Interest Act* applies to the CRT. Mr. Kwieton is entitled to pre-judgment interest on damages of ($1,134 + $250 + $231 +$90 =) $1,705. I calculate interest from the date of the underlying invoices to the date of this decision. I find it likely the fridge was replaced by December 20, 2019 (one month after the appliance quote date) and calculate interest on the $250 award from that date. The total interest equals $15.69.

51. 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. I find Mr. Kwieton has been partially successful and is entitled to reimbursement of half of the claimed $225 in CRT fees. This equals $112.50. The parties claimed no dispute-related expenses, so I order none.

ORDERS

52. Within 14 days of the date of this order, I order Ms. Bennett to pay Mr. Kwieton a total of $1,833.19, broken down as follows:

a. $1,705.00 as damages,

b. $15.69 in pre-judgment interest under the *Court Order Interest Act*, and

c. $112.50 in CRT fees.

53. Mr. Kwieton is entitled to post-judgment interest, as applicable.

54. Mr. Kwieton's remaining claims, including all claims against respondent realtors, are dismissed.

55. 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.

56. 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.

David Jiang, Tribunal Member