



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *West Coast Nissan Ltd. v. Kim*, 2021 BCCRT 253

B E T W E E N :

WEST COAST NISSAN LTD.

APPLICANT

A N D :

HEESOOK KIM

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about a test-drive that resulted in a collision. The applicant, West Coast Nissan Ltd. (Nissan), loaned its car to the respondent, Heesook Kim. Mrs. Kim drove the vehicle and damaged it. Nissan says it paid \$5,000 as an insurance

deductible to have the vehicle repaired. Nissan seeks reimbursement for this amount under the terms of a temporary vehicle rental agreement.

2. Mrs. Kim denies the applicant's claim. She says she did not understand the key terms of the agreement because her English language abilities are limited, and Nissan misrepresented its terms to her.
3. Nissan is represented by its employee JS. Mrs. Kim represents herself, though I find it apparent that someone assisted her as she does not speak English.
4. For the reasons that follow, I find that Mrs. Kim has not shown that Nissan misrepresented the contract, or that the contract terms should otherwise not apply. I find Nissan has proven its claims.

JURISDICTION AND PROCEDURE

5. 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.
6. 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.
7. 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.

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 Mrs. Kim should be held liable under the parties' contract for the insurance deductible levied for vehicle damage, and if so, what remedy is appropriate.

EVIDENCE AND ANALYSIS

10. In a civil claim like this one, the applicant Nissan must prove its claims on a balance of probabilities. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.
11. The background facts are largely undisputed. In early March 2020 Mrs. Kim went to Nissan's dealership. Mrs. Kim's husband accompanied her, and they dealt with Nissan's representative, JS. Mrs. Kim decided to test drive a Nissan Micra. As discussed below, Mrs. Kim signed 2 contracts with Nissan.
12. The contracts indicate Mrs. Kim visited the dealership on March 1, 2020. Nissan also submitted ICBC documents indicating the visit and accident occurred on March 2, 2020. I prefer the ICBC documents' date though ultimately nothing turns on which date is right.
13. The first contract said that Mrs. Kim was interested in acquiring a vehicle and wished to test drive it. Under its terms Mrs. Kim agreed that during the test drive, she would be "entirely responsible" for the vehicle. This included indemnifying Nissan for any loss or damage to the vehicle and paying on demand any expense arising out of any accident during the test drive, including an amount equal to any deductible caused

by the payment of claims arising out of the accident. The contract also has a “catch-all” provision that says, despite any other term, Nissan could require Mrs. Kim to immediately pay for any loss or damage to the vehicle or expenses arising out of its use, in its “sole and arbitrary discretion.”

14. The second contract was titled a temporary vehicle rental agreement. It said that Nissan was loaning Mrs. Kim a vehicle while hers was being repaired. Contrary to this stated term, I find that this was not the case. There is no evidence or submission to support this. The parties also entered “0” as the rental fee. The contract contains similar clauses about indemnification of Nissan for loss or damage during the vehicle rental period. JS says he had Mrs. Kim sign this contract because he was distrustful of Mrs. Kim. Ultimately, I find nothing turns on this, as I find the terms about Mrs. Kim’s responsibility for the vehicle are largely identical between the 2 contracts. My decision is the same if either contract applied.
15. Mrs. Kim signed the agreements and so did JS for Nissan. The contracts were written in English. Mrs. Kim says she does not know and cannot read English. She does not say if Mr. Kim could read English. She says she relied on JS’ representations, made verbally in Korean, about the contract to sign it. JS disagrees and says Mrs. Kim fully understood the agreement, though he does not directly comment on Mrs. Kim’s English capabilities.
16. I find it likely that Mrs. Kim’s English capabilities are limited. The evidence and submissions indicate that JS and the Kims spoke in Korean at the time. Based on the parties’ submissions and the weight of the evidence before me, I find it likely that, before signing the contract, Mrs. Kim asked what would happen if there was accident, and that JS replied that ICBC would “cover” it, without further detail. I find JS was unaware of any insurance deductible and so he did not discuss it.
17. I reach these conclusions in part because Mrs. Kim provided a recording of herself and JS taken a day after the accident. In these recordings JS acknowledges discussing what would happen if there was an accident, and his comments are consistent with my conclusions. Mrs. Kim also provided another recording between

JS and Mr. Kim in which JS provides largely the same information. Both recordings are entirely in Korean. I rely on the recordings because Nissan did not object to them or dispute Mrs. Kim's translation of them.

18. Mrs. Kim then took the vehicle for a test drive and collided with another vehicle. Nissan had insured the vehicle under a fleet policy with ICBC. ICBC determined in a March 23, 2020 letter to Nissan that Mrs. Kim was 100% responsible for the crash. Mrs. Kim does not dispute this determination.
19. In its letter, ICBC said it would pay for any claims under Nissan's policy, but said this did not include the cost of repairing the Nissan Micra. ICBC explained that Nissan did not carry collision coverage for the vehicle.
20. Nissan claims \$5,000 for the cost of an insurance deductible to fix the vehicle. A March 20, 2020 repair order and invoice shows that Nissan repaired the Micra at a cost of \$5,639.26. Mrs. Kim does not dispute that Nissan insured the vehicle with another insurer (presumably not ICBC) and that a \$5,000 deductible applies. I therefore accept that Nissan paid \$5,000 for the repairs due to the deductible.

Enforceability of the Contract

21. In general, when a party signs a contract, the signing party is bound even if the signing party may not have read or understood the contract. The exceptions to this include fraud, misrepresentation, where a party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms, and *non est factum*. In cases of *non est factum*, a party must show that the document signed is fundamentally different from what the person believed he or she was signing. See *Loychuk v. Cougar Mountain Adventures Ltd.*, 2011 BCSC 193 at paragraphs 27 to 28.
22. Mrs. Kim signed the contract, so she has the burden to show that an exception applies. Mrs. Kim says that JS misrepresented the contract by saying that ICBC would "cover" the accident and test-driven vehicle, so I will start my analysis there. Mrs. Kim

did not file a counterclaim, so I find she is asking for a setoff based on JS' alleged misrepresentation.

23. A misrepresentation is a false statement of fact made during negotiations or in an advertisement that has the effect of inducing a reasonable person to enter into the contract. Rescission is the only remedy for an innocent misrepresentation, which results in the contract being voidable by the innocent party. See *O'Shaughnessy v. Sidhu*, 2016 BCPC 308. However, I do not find rescission available here as the parties cannot be put back into their previous positions due to the accident happening.
24. For a remedy to apply, I find Mrs. Kim must show Nissan acted negligently or fraudulently in making the alleged misrepresentation, Mrs. Kim must have reasonably relied on the alleged misrepresentation to enter into the contract, and the reliance "must have been detrimental in the sense that damages resulted": see the nonbinding but persuasive decision of *Rosenbloom v. Alcos*, 2020 BCCRT 1323 at paragraph 26, citing *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC) at paragraph 110.
25. Mrs. Kim does not allege fraud, so I find her claim for a setoff is based on negligent misrepresentation. In this dispute I find JS did not make a false statement of fact, and so did not make a negligent misrepresentation. In the recorded conversation taken a day after the accident, Mrs. Kim said that JS should have told her about the \$5,000 deductible. From the translation I find that Mrs. Kim took issue with the size of the deductible, rather than the fact that any deductible was payable. Mrs. Kim did not say that she ever would have expected Nissan to fully pay for the accident.
26. Based on the recording, I find it likely that JS did not represent that Nissan would cover the cost of all damage to the vehicle. Mrs. Kim's recorded comments are inconsistent with a different conclusion. As noted above, I find that JS merely said that Nissan had insurance with ICBC to cover the test drive, without further elaboration.
27. I acknowledge that Mrs. Kim says Nissan should have advised her about the size of the deductible, but on balance I find that if Mrs. Kim was concerned about coverage,

she should have made further inquiries. As such, she did not rely on any representations by JS or Nissan about the deductible.

28. Mrs. Kim also says that JS should have advised her that her own insurance policy would not provide coverage for the test drive. I do not find Nissan provided any misrepresentation about this. Mrs. Kim submits she asked JS before signing the contract if her insurance policy would provide coverage. There is no submission or indication that JS responded falsely when he said he “didn’t know”. As Mrs. Kim had a question about her own insurance coverage, I also find that she was in a better position to find answers on this issue than JS.
29. I have found that Nissan did not actively misrepresent the contract. I also considered whether Mrs. Kim should not be bound because JS knew she was not consenting to the terms in the contract, and so JS or Nissan would have an obligation to warn her. For such an exception to apply, Mrs. Kim would need to show 1) that in the circumstances a reasonable person would have known that she did not intend to agree to the terms of the contract she signed; and 2) that in these circumstances Nissan failed to take reasonable steps to bring the content of the contract to her attention: *Loychuk* at paragraph 29.
30. I am not satisfied that this exception should apply. The contract specified that Mrs. Kim would be liable for damage caused to the vehicle, including the amount of any deductible. Mrs. Kim did not show why a reasonable person would not expect this to be the case. There is no indication that this term is, for example, different from industry standards. I note that the vehicle was still insured for any claims made by the motorist she hit.
31. I also do not find this to be a case of *non est factum*. Mrs. Kim knew, in general terms, that that the contract would determine who should pay for damage to the vehicle. I have already found that she knew that it was likely that she would need to pay some amount if she caused damage.

32. As Mrs. Kim has not shown that she should not be bound by the contract, I find the contract terms apply and Mrs. Kim is liable for the damage caused. Based on the repair invoice, I find Nissan has proven its claim for \$5,000.
33. The *Court Order Interest Act* applies to the CRT. Nissan is entitled to pre-judgment interest on \$5,000 for damages from April 3, 2020, the date of the repair invoice, to the date of this decision. This equals \$38.95.
34. 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 Nissan is entitled to reimbursement of \$200 in CRT fees. The parties did not claim reimbursement for dispute-related expenses, so I order none.
35. I note that interest under the *Court Order Interest Act* and CRT fees are excluded from the CRT's small claims \$5,000 monetary limit.

ORDERS

36. Within 14 days of the date of this order, I order Mrs. Kim to pay Nissan a total of \$5,238.95, broken down as follows:
 - a. \$5,000 in damages,
 - b. \$38.95 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$200 in CRT fees.
37. Nissan is entitled to post-judgment interest, as applicable.
38. 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.

39. 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