



Civil Resolution Tribunal

Date Issued: March 9, 2021

File: SC-2020-007526

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mair v. Nicon Developments Limited*, 2021 BCCRT 259

BETWEEN:

LESLIE LEIGH MAIR also known as LEIGH MAIR

APPLICANT

AND:

NICON DEVELOPMENTS LIMITED

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Leah Volkers

INTRODUCTION

1. This dispute is about reimbursement of expenses to repair a bathroom.

2. In 2012 and 2013, the respondent Nikon Developments Limited (Nicon) built a home that the applicant Leslie Leigh Mair, also known as Leigh Mair, bought in 2013.
3. Mr. Mair says Nicon did not build the bathroom in accordance with the applicable *BC Building Code* (Code). He says in June 2019 he discovered the substrate installed behind the shower tiles had deteriorated and the shower and tub had to be rebuilt. Mr. Mair claims the \$3,088.25 repair cost.
4. Nicon says it is not responsible for the bathroom repair costs. Nicon says that the substrate installed was aqua board with moisture resistant backing that met the Code requirements. Nicon says the substrate deteriorated because Mr. Mair did not properly maintain the shower tiles and grout.
5. Mr. Mair is self-represented. Nicon is represented by NW, who I infer is a principal or employee.

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.

ISSUES

10. The issue in this dispute are:
 - a. Whether Nikon built the bathroom to a reasonable standard and in accordance with the applicable Code, and, if not,
 - b. Whether Mr. Mair is entitled to \$3,088.25 from Nikon for the bathroom repair costs.

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, as the applicant Mr. Mair must prove his claim on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.
12. In June 2019, Mr. Mair says that he found water damage in the bathroom after he saw a baseboard was bubbling. He then found a hole in the bathroom wall next to the shower. He says he called a plumber, who assessed the bathroom and indicated the plumbing was all in working order. Nikon does not dispute this.
13. Mr. Mair says he hired Dovetail Construction Ltd. (Dovetail) to further assess and repair the bathroom damage. He says Dovetail advised that the substrate behind the shower tiles was "plain non-waterproof drywall" and the tub and shower had to be

replaced. There is no evidence directly from Dovetail on this issue, which I address further below.

14. As referenced above, the issue in this dispute is whether Nikon built the bathroom to a reasonable standard and in accordance with the Code, and if not, whether Mr. Mair is entitled to \$3,088.25 from Nikon for the bathroom repair costs.
15. In essence, the applicant's claim is a negligence claim. To succeed in a claim of negligence against the respondent, the applicant must establish each of the following elements on a balance of probabilities:
 - a. The respondent owed the applicant a duty of care,
 - b. The respondent breached the standard of care,
 - c. The applicant sustained damages, and
 - d. The respondent's breach of the standard of care caused the applicant's damages, in fact and in law.

Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 at para 3

16. It is undisputed that Nikon built and sold the home to Mr. Mair. In Nikon's capacity as the home builder, I find Nikon owed Mr. Mair a duty of care and that duty of care included building the bathroom to a reasonable standard and in accordance with the applicable Code.
17. The next question is whether Nikon breached the standard of care by allegedly failing to install moisture resistant backing in Mr. Mair's bathroom.
18. It is undisputed that the applicable Code required the use of moisture resistant backing around showers and tubs. Nikon says the substrate they installed was moisture resistant. Mr. Mair says it was not.

19. I find that whether the substrate Nikon installed was moisture resistant, as required by the Code, is technical and beyond ordinary knowledge. In such cases, expert evidence is generally required: see *Bergen v. Guliker*, 2015 BCCA 283.
20. Mr. Mair relies on a signed statement from Lou Ferreira, a former renovation contractor (contractor). The contractor inspected a piece of substrate provided by Mr. Mair. The contractor's opinion was that the substrate was standard drywall that did not comply with the Code requirements for use around showers and tubs. The contractor did not observe the location where the inspected piece of substrate was used.
21. I find that the contractor's statement meets the standard required for expert evidence under the CRT's rules. I find they are qualified to give opinion evidence on the type of drywall they inspected and whether it was compliant with the Code for use around showers and tubs.
22. I accept the contractor's opinion that the substrate they inspected did not comply with the Code for use around showers and tubs. I do not have any contrary expert evidence before me. However, the contractor did not observe the substrate in Mr. Mair's bathroom. There is no evidence that the substrate inspected by the contractor was, in fact, the same substrate that Nikon installed under the shower tiles in Mr. Mair's bathroom. As a result, I find that the contractor's opinion is not helpful in determining whether the substrate Nikon installed complied with the applicable Code.
23. Mr. Mair says that the City of Duncan building inspector confirmed that the substrate Nikon installed did not comply with the Code. I disagree. Mr. Mair provided copies of the emails from the building inspector, which set out the relevant sections of the Code and a discussion of its requirements. However, the building inspector did not provide an opinion on whether the substrate used in Mr. Mair's bathroom complied with the Code.
24. As noted above, Mr. Mair did not provide any evidence from Dovetail, the contractor who Mr. Mair said inspected the bathroom, advised him of the concerns with the

substrate and completed the repairs. Mr. Mair says that he planned to get a report from Dovetail but they cancelled at the last minute. Nonetheless, I am not prepared to accept hearsay evidence from Dovetail in the absence of a written expert opinion on the central issue in this dispute.

25. Mr. Mair also says he showed the substrate to a red seal drywaller who confirmed it did not comply with the Code. However, there is also no evidence from the red seal drywaller.
26. Mr. Mair says he was unable to get a report from Dovetail or signed declarations from the red seal drywaller or anyone other than the contractor because of the power that Nikon has over sub-contractors and building supply companies in the area. However, Mr. Mair has not provided any evidence to support his submissions on this issue and I do not accept them.
27. Mr. Mair bears the burden of proof. I find that Mr. Mair has not proven that the substrate Nikon installed failed to comply with the Code or was otherwise substandard. Therefore, I find that Nikon did not breach the standard of care and Mr. Mair has not proven his claim.
28. Given my findings above, it is unnecessary to address the alleged bathroom damage or Mr. Mair's bathroom repair expenses in any details. However, I note that even if Nikon had breached the standard of care, the evidence does not establish that the alleged damage resulted from the use of a non-moisture resistant backing behind the shower tiles, rather than Mr. Mair failing to properly maintain the shower tiles and grout over the 6-year period Mr. Mair used the shower.
29. 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 Nikon is entitled to reimbursement of \$25 in paid CRT fees. Nikon has not claimed any dispute related expenses, and I award none. I dismiss Mr. Mair's claim for reimbursement of CRT fees as he was unsuccessful.

ORDRS

30. I dismiss Mr. Mair's claims.
31. Within 14 days of the date of this order, I order Mr. Mair to pay Nikon \$25 in CRT fees.
32. Nikon is entitled to post-judgment interest on its CRT fees, as applicable.
33. 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.
34. 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.

Leah Volkens, Tribunal Member