Civil Resolution Tribunal

Date Issued: March 18, 2021

File: SC-2020-008785

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Denicola v. Gierl*, 2021 BCCRT 299

B E T W E E N :

AMY DENICOLA and JAKEOB LEBRUN

APPLICANTS

A N D :

ZADA GIERL and MICHAEL GIERL

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This dispute is about a leaky roof.

2. The applicants, Amy Denicola and Jakeob Lebrun, purchased a house from the respondents, Zada Gierl and Michael Gierl. The applicants say that 2 days after they took possession of the house, they discovered a roof leak, with moisture damage and

mould growth in the walls and floor of the principal bedroom. The applicants claim $2,999.83, for the cost of repairs and a roof inspection.

3. The respondents say they were unaware of any roof leak, and the applicants' home inspector did not even identify the leak. The respondents deny that they are responsible for any repairs.

4. Ms. Denicola represents both herself and Mr. Lebrun. The respondents are represented by Mr. Gierl.

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, and I find that there are no significant issues of credibility or other reasons that might require an oral hearing. 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 the respondents misrepresented the home's condition, and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities. While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.

11. The following background facts are undisputed:

    a. The applicants purchased the respondents' house with an August 28, 2020 possession date.

    b. The applicants' July 31, 2020 offer to purchase the house was subject to a home inspection.

    c. The applicants arranged a home inspection and removed all the subjects on their offer on August 14, 2020.

    d. The respondents completed a Property Disclosure Statement (PDS) on May 27, 2020, which was incorporated into the purchase agreement. On the PDS, the respondents indicated they were not aware of any roof leakage or unrepaired roof damage and that they were not aware of any latent defects.

    e. The house sale completed on August 27, 2020, and the applicants took possession of the house on August 28, 2020.

12. The applicants say that they noticed a carpet stain in the principal bedroom when they moved in, but they did not become concerned until 2 days later when they discovered water pooling on the floor. The applicants say they pulled back the carpet and saw moisture damage and mould, so they called their insurance company. The insurance company's investigation revealed a roof leak causing water damage down the exterior bedroom wall to the floor, but the applicant's insurer denied the claim because it concluded the leak was pre-existing.

13. The applicants filed photographs of the bedroom showing the drywall on the exterior wall removed, and the wall underneath the drywall was wet and with what appears to be mould growth down the wall's length. Similarly, photographs in evidence show the bedroom carpet pulled off, with wet wood and what appears to be mould underneath the carpet underlay along the same wall. I find from the photographs that it is more likely than not the leak was present before the respondents sold the house.

14. However, just because the leak may have started when the respondents still owned the house, does not in itself make the respondents responsible for the damage. The principle of "buyer beware" applies to real estate transactions in British Columbia. This means that buyers are required to make reasonable inquiries about, and conduct a reasonable inspection of, the property they wish to purchase. Sellers are not obligated to actively inform themselves about the state of the property they are selling, including whether any defects exist. However, there are some exceptions to the buyer beware principle. These exceptions largely depend on the distinction between patent defects and latent defects and whether the seller has either negligently or fraudulently misrepresented the existence of such defects to a buyer.

15. Patent defects are those that can be discovered by conducting a reasonable inspection or inquiry about the property. A seller does not have to disclose patent defects to a buyer, but they must not actively conceal them: *Cardwell v. Perthen*, 2007 BCCA 313.

16. In contrast, a latent defect is one that cannot be discovered by observation or a reasonable inspection. A seller is obligated to disclose any material latent defect if

they know about it. A latent defect is material if it renders the house dangerous or uninhabitable. Sellers will be considered to have knowledge of a material latent defect if they are actually aware of the defect, or where they are reckless as to whether the defect exists. The burden of proving the requisite degree of knowledge or recklessness rests with the applicants: *McCluskie v. Reynolds et al* (1998), 65 BCLR (3d) 191 (SC).

17. I find the roof leak was not a patent defect. The photographs in evidence do not appear to show any outward signs of water damage to the bedroom ceiling or exterior wall. While there may have been some carpet staining present, it is not clear that it would have been visible on reasonable inspection, depending on the furniture placement in the room. The applicants' home inspection report in evidence shows the inspector did not identify any signs of leaks in the principal bedroom or any issues with the roof itself. In any event, if the roof leak was a patent defect, the respondents would have had no obligation to disclose it, so long as they were not actively concealing it. I find there is no evidence before me that the respondents tried to conceal an otherwise obvious roof leak or the presence of water damage in the principal bedroom.

18. So, I find the roof leak was a latent defect, and the applicants must prove the respondents knew about it or were reckless about whether the leak existed. The applicants say it is "impossible" that the respondents were completely unaware of the leak issue, given the carpet staining and the amount of water present within only 2 days of them moving in. As noted, the respondents submit they were not aware the roof leaked, and they indicated on the PDS that they were unaware of any roof leakage or latent defects respecting the property.

19. I note that the PDS only asks if the respondents are *aware* of a roof leak or latent defect, and the PDS is not a warranty that there are no roof leaks or latent defects: see *Hanslo v. Barry*, 2011 BCSC 1624 at paragraph 96. Awareness of a leak or defect is subjective, and a seller's honest, actual knowledge of the property does not have

to be correct: see *Hamilton v. Callaway*, 2016 BCCA 189 and *Nixon v. MacIver*, 2016 BCCA 8.

20. I also note that the applicants' insurance company adjusters' report conceded that due to where the respondents had their bedroom furniture placed (having reviewed the respondents' realtor photographs), the respondents may not have been aware of the carpet staining or the leak until they removed their furniture. While the realtor photographs are not before me, the applicants do not dispute that the respondents' furniture placement may have hidden the carpet stains. On balance, I find the respondents were unaware of the roof leak or water damage in the bedroom and there is no evidence before me suggesting the respondents were reckless about whether there was a leak when they completed the PDS and accepted the applicants' offer to purchase the house.

21. There is some suggestion in the applicants' insurance company adjusters' report that the respondents had the carpets cleaned after they moved their furniture out, and the adjuster believed the carpet staining would have been evident to them then. I note that the PDS provides that the sellers have an ongoing obligation to disclose any important changes to the PDS to the buyers before the purchase agreement completion date (here, August 27, 2020).

22. The only photograph of the carpet staining in evidence was taken after the applicants discovered water pooling, so I infer the carpets (and stains) were wet when the photograph was taken. I have no evidence before me about what the carpet looked like when it was dry or whether the dry carpet's appearance would have alerted the respondents to the possibility of a leak. Further, there is no evidence before me that the respondents were present when their furniture was removed or that they returned to the principal bedroom after the carpets had been cleaned. Therefore, I find there is insufficient evidence to prove the respondents saw or had knowledge of any apparent carpet stains.

23. I find the evidence does not establish the respondents knew or ought to have known there was a roof leak that had caused damage in the principal bedroom. I find the

applicants have not proven the respondents improperly filled out the PDS or otherwise failed to disclose their actual knowledge about this latent defect, or that they were reckless as to whether there was a leak. For these reasons, I dismiss the applicants' claims.

24. 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. As the applicants were not successful, I find they are not entitled to reimbursement of their paid CRT fee or dispute-related expenses. The respondents did not pay any fees or claim any expenses, so I make no order.

ORDER

25. I order the applicants' claims, and this dispute, dismissed.

Kristin Gardner, Tribunal Member