Civil Resolution Tribunal

Date Issued: March 23, 2021

File: SC-2020-006507

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Somel v. Gourley*, 2021 BCCRT 324

B E T W E E N :

SANDY SOMEL and PARMINDER SOMEL

APPLICANTS

A N D :

BRIAN LAWRENCE GOURLEY and TOYOKO GOURLEY

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. This contract dispute is about a compliance deposit.

2. The applicants, Sandy Somel and Parminder Somel, purchased a vacant residential lot from the respondents, Brian Lawrence Gourley and Toyoko Gourley, in 2015. The

Somels say that they paid the Gourleys a $5,000 compliance deposit. The Somels say their house has been built and complies with the registered building scheme, but the Gourleys refuse to return the deposit. The Somels claim $5,000.

3. The Gourleys deny that the contract requires them to return the compliance deposit to the Somels. The Gourleys also say the Somels' claim is out of time under the *Limitation Act*. They ask that the claim be dismissed.

4. Mr. Somel (Sandy) represents the applicants. The respondents are represented by Tyler Dennis, a lawyer.

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.

9. As a preliminary issue, the Somels submitted a November 25, 2019 compliance report as late evidence. Mr. Somel said that he did not realize that the report did not properly upload until after the deadline for submitting evidence had passed. The Gourleys were given the compliance report and an opportunity to respond to it. Under the CRTA and the CRT rules, I have discretion to accept evidence I consider relevant. As I find the compliance report relevant to this dispute, and as I find the Gourleys were not prejudiced by the late evidence, I allow it and consider it in my reasons below.

ISSUES

10. The issues in this dispute are:

    a. Is the Somels' claim out of time under the *Limitation Act?*

    b. If not, must the Gourleys pay the Somels $5,000 as a compliance deposit return?

EVIDENCE AND ANALYSIS

11. In a civil claim such as this the Somels, as the applicants, bear the burden of proving their claims on a balance of probabilities. I have reviewed all evidence and submissions provided, but only refer to that needed to explain and give context to my decision.

12. The parties entered into a contract of purchase and sale on April 23, 2015. The agreed completion date was May 14, 2015. The contract includes the following term:

    > Buyer is aware that there is a $5000 compliance deposit to be paid at the time of completion.

13. There is nothing further about the compliance deposit in the contract.

14. The sale completed as agreed. The Somels built a house on the lot. They received their final occupancy permit from the City of Surrey on November 15, 2018. On November 25, 2019 an inspector found that the Somels' house complied with the "Final Plans and/or the registered Building Scheme". None of this is disputed.

15. The Somels provided the parties' emails from November 2019. The emails show that the Somels' real estate agent forwarded the compliance report to the Gourleys and asked the Gourleys to refund the compliance deposit to the Somels. The Gourleys declined. They said the Somels' compliance deposit was intended to reimburse the Gourleys the amount they had already paid to the city as a compliance deposit. The Gourleys told the Somels to contact the city to recover the deposit.

16. The Gourleys say the Somels filed their claim beyond the 2-year time limit set out in the *Limitation Act.* The Somels say they are not out of time because they did not discover their claim until the Gourleys refused to return the deposit in 2019. So, the Somels say, the 2-year time limit did not start to run until 2019. I find I need not determine whether the Somels filed their claim within the 2-year time limit because I find their claim fails for other reasons, as set out below.

17. I turn now to consider the contract's terms.

18. The Gourleys say the contract is silent about who is to receive, or hold, the compliance deposit, whether it is to be returned, and when. Where a contract term is ambiguous, such as in this case, I may consider other evidence and the circumstances surrounding the making of the contract to determine the parties' intentions (see *Sattva Capital Corp v. Creston Moly Corp.,* 2014 SCC 53).

19. The buyer's Statement of Adjustments shows the Somels paid the Gourleys a $5,000 "compliance deposit" on top of the purchase price. So, I find the parties agreed that the Somels would pay a $5,000 compliance deposit to the Gourleys.

20. The Somels say the $5,000 must be returned to them because a "deposit", by its very nature, is something which should be returned or refunded. While a deposit may be returned or refunded, it is usually dependent on certain conditions being met. I find this to be the case here, as the deposit is specifically named a "compliance deposit". The words in a contract should be given their plain and ordinary meaning and must be interpreted in light of the whole contract (see *Group Eight Investments Ltd. v. Taddei,* 2005 BCCA 489 at paragraph 20).

21. The Somels say they were to be reimbursed the deposit once the house construction was completed in compliance with the registered building scheme. The Somels say it is an "industry norm" to structure a contract this way but provided no supporting evidence about the industry standard.

22. In contrast, the Gourleys deny agreeing to refund the $5,000 deposit to the Somels upon completion of the house in compliance with the building scheme.

23. Neither party provided a copy of the registered building scheme. However, the Somels provided a June 25, 2003 restrictive covenant filed in the Land Title Office, which has an unsigned copy of the building scheme attached. The Gourleys were named as 1 of 3 sets of owners in the restrictive covenant agreement.

24. The covenant required an owner to pay a $5,000 security deposit to ensure compliance with the building scheme's landscaping restrictions. The covenant required the owner to pay the deposit to the developer upon completion of the property purchase or upon applying to the city for a building permit. If the developer no longer owned any of the lots the owner must pay the deposit to an architect consultant appointed by the developer.

25. It is undisputed that the Gourleys were not developers, so I find they had no obligation to hold a compliance deposit for the Somels under the registered building scheme. The Somels are not parties to the restrictive covenant agreement. I find the covenant agreement does not show that the $5,000 compliance deposit term in the parties' contract of purchase and sale requires that the Gourleys return the deposit to the

Somels. I further find the covenant agreement does not assist in interpreting the real estate contract's compliance deposit term. In other words, the covenant does not show that the parties intended the Gourleys to hold the Somels' $5,000 compliance deposit until the Somels completed their house in compliance with the registered building scheme.

26. I find the real estate contract's compliance deposit term is ambiguous, as there is more than one reasonable interpretation. The legal principle of "*contra proferentem*" says that an ambiguous contract should be interpreted against the party that drafted it. Here, I find the Somels drafted the real estate contract through their real estate agent. I find the Somels specifically included the compliance deposit clause as an addendum to the contract. Given the ambiguity, I find I must interpret the compliance deposit clause against the Somels. I find the real estate contract does not contemplate a refund of the $5,000 deposit to the Somels.

27. On balance, I find the Somels have failed to prove that the Gourleys are required to pay $5,000 to the Somels under the terms of the April 23, 2015 contract. I dismiss their claim.

28. As I find the contract does not require the return of the deposit, I find I need not consider whether the Somels' claim is out of time under the *Limitation Act.*

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. As the Somels were unsuccessful in this dispute I find they are not entitled to reimbursement of their CRT fees. Although they were successful in this dispute, the Gourleys did not claim any dispute-related expenses or pay any CRT fees. So I make no order for fees or expenses.

ORDER

30. I dismiss the Somels' claims and this dispute.

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<div align="right">Sherelle Goodwin, Tribunal Member</div>