Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Nichvalodoff v. Bles dba MB Renovations and Contruction*, 2021 BCCRT 460

B E T W E E N :

EMILY GEEN NICHVALODOFF and YURI NICHVALODOFF

APPLICANTS

A N D :

MIKE BLES (Doing Business As MB RENOVATIONS AND CONTRUCTION)

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Chad McCarthy

INTRODUCTION

1. This dispute is about allegedly deficient renovations in a home purchased by the applicants, Emily Geen Nichvalodoff and Yuri Nichvalodoff. They say that the respondent, Mike Bles (doing business as MB Renovations and Contruction) (spelled

as in the Dispute Notice), negligently installed a bathroom toilet and bathroom floor for the home's previous owners. The Nichvalodoffs claim $5,000 in repairs to the toilet and floor, the maximum Civil Resolution Tribunal (CRT) small claims amount. The Nichvalodoffs say that the renovations cost more than $5,000, but they have abandoned their claim to any amounts over $5,000.

2. Mr. Bles says he was unable to determine whether his toilet installation work and materials were defective and needed replacement, because the Nichvalodoffs had another contractor remove and replace the toilet. He also says that his bathroom flooring installation was not deficient, and that he owes nothing.

3. Mrs. Nichvalodoff represents the applicants in this dispute. Mr. Bles is self-represented.

JURISDICTION AND PROCEDURE

4. These are the CRT's formal written reasons. 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.

5. 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.

6. 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.

7. 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

8. Was Mr. Bles' bathroom toilet and floor installation was negligent, and if so, does he owe the Nichvalodoffs $5,000 for repairs to those items?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, as the applicants the Nichvalodoffs must prove their claims on a balance of probabilities. I have read and weighed all the submitted evidence, but I refer only to the relevant evidence as needed to provide context for my decision.

10. The facts are mostly undisputed. The Nichvalodoffs moved into their purchased home in September 2019. In the fall of 2020, they discovered that some bathroom floor tiles near a toilet were lifting and tilting, which cracked the grout between them. The home's former owner told the Nichvalodoffs that Mr. Bles had installed the toilet and bathroom floors. In his submissions Mr. Bles says he installed the floor, but denies that he or any of his subcontractors installed the toilet. However, when the Nichvalodoffs contacted Mr. Bles by email on December 3, 2020, Mr. Bles admitted that he did the bathroom work, including the toilet. On balance, I find that Mr. Bles installed both the toilet and the bathroom floors for the home's former owner.

11. The evidence shows that Mr. Bles installed particleboard sheets on top of the bathroom subfloor, and then installed tile on top of the particleboard. After the tile began lifting in late 2020, the Nichvalodoffs hired other contractors to diagnose the problem's source, including by removing the tile around the toilet. Photos and contractor reports in evidence show that there was some moisture on the particleboard near the toilet's base. I find the contractor statements in evidence say that the floor was too high and caused the toilet not to seal perfectly to its wax ring base. These statements also say that particleboard is an inappropriate substrate to mount tile floors on, because it can absorb moisture from the tile mortar. Given my conclusions below, I find I do not need to address whether the contractor statements qualify as necessary expert evidence.

12. The Nichvalodoffs say that it was negligent of Mr. Bles to use particleboard as a tile floor substrate, and that he negligently installed the toilet so that moisture from it seeped under the surrounding tile. It is undisputed that the Nichvalodoffs have now repaired the toilet and replaced the bathroom tile. The parties do not deny that the alleged floor and toilet issues were "latent defects", meaning that they were not discoverable by an ordinary inspection at the time the Nichvalodoffs purchased the home, until over 1 year later.

13. I note that in his December 3, 2020 email, Mr. Bles said that he would not "warranty" the toilet's wax ring or its installation because other contractors had begun repairs, so he was unable to verify the alleged defect and repair the toilet himself. However, I find the evidence fails to show that the former homeowner transferred any warranty to the Nichvalodoffs. I also find the evidence does not show that the parties agreed to a warranty for the toilet or flooring work, or that they were even aware of each other's existence before the toilet and floor defects arose. I find Mr. Bles' comments about providing a warranty for the work at issue were his way of indicating whether he would repair the toilet or flooring, and did not reflect an agreement containing specific warranty terms.

14. Construction defect repairs are usually claimed as breaches of contracts between parties to the dispute. In this case, I find there was no contract, including any express warranty, between the Nichvalodoffs and Mr. Bles, so the Nichvalodoffs have no claim for breach of contract. I also find there was no implied warranty under the *Sale of Goods Act*, which only applies to goods supplied under a contract. In the absence of a contract between the parties, the Nichvalodoffs must prove that Mr. Bles was negligent in installing the toilet and flooring, which is what they claim.

15. To prove negligence, the Nichvalodoffs must show that (a) Mr. Bles owed them a duty of care, (b) Mr. Bles failed to meet a reasonable standard of care, (c) the Nichvalodoffs sustained damage, and (d) Mr. Bles' failure actually caused the claimed damage (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 3).

16. If a contractor performs defective work on a home, and there is no contract between the contractor and a subsequent home purchaser, the defective work is a "pure economic loss." This means an economic loss that is unconnected to a physical or mental injury to the purchaser, or to physical damage to other property (see *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at paragraph 17). In other words, the only loss related to the defective work is devaluing the home. However, if the defective work actually injures a person or causes damage to other, non-defective property, the contractor may be liable in negligence for those resulting damages (see *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, 1995 CanLII 146 (SCC), [1995] 1 SCR 85 at paragraph 36). However, in this case, I find the Nichvalodoffs' claim is for the cost of repairing Mr. Bles' allegedly defective work, and is not for damages to other property, or for personal injury, caused by that work. So, I find the Nichvalodoffs' claim is for pure economic loss.

17. The Supreme Court of Canada said at paragraph 19 of *Maple Leaf* that although there is no general right in tort law protecting against pure economic loss, it may be recoverable in certain circumstances. The court said there are 3 categories of pure economic loss between private parties:

    a. Negligent misrepresentation or performance of a service.

b. Negligent supply of shoddy goods or structures.

c. Relational economic loss.

18. The court said that for a duty of care to exist under the first category, negligent misrepresentation or negligent performance of a service, there must be a sufficiently close relationship between the parties. Specifically, one party must undertake a responsibility which invites another party to rely reasonably and detrimentally on that responsibility. Here, I find there was no such relationship of reliance because Mr. Bles was unknown to the Nichvalodoffs when they purchased their home, and the evidence does not show that his renovations invited the Nichvalodoffs to rely on the quality of his work. For the same reason, I find the claimed losses are not a relational economic loss, which the court also noted was only recoverable in "exceptional" circumstances. However, I find the allegedly defective toilet and flooring installation might be characterized as a negligent supply of shoddy goods or structures, and is properly analyzed under that category of pure economic loss.

19. The Supreme Court of Canada considered recovery for this category of pure economic loss in *Winnipeg*, which also involved a subsequent purchaser of a defective building, and in *Maple Leaf*, among other decisions. I note that in *Ahamed v The Great Canadian Landscaping Company Ltd.*, 2021 BCSC 197, Master Elwood of the BC Supreme Court provided a useful summary of the principles set out in those decisions and others. The court in *Maple Leaf*, citing *Winnipeg*, confirmed that a duty of care not to supply shoddy goods or structures was only present where the defect poses a real and substantial danger to a party or its property. In paragraph 59 of *Ahmed*, Master Elwood noted that there is a distinction "between the cost of repairing shoddy work that poses a substantial risk of [injury to persons or] damage to other property, which is recoverable under the established category, and the cost of repairing the shoddy work itself, **which is not recoverable in negligence**" (my emphasis added).

20. In other words, absent a contract, a subsequent home purchaser may only recover the cost of repairing defective renovations where those defects create a real and substantial danger of personal injury, or of damage to other, non-defective property.

21. Here, the Nichvalodoffs do not suggest that the alleged toilet and flooring defects presented any danger of personal injury, or that they created a danger to their other property. Having reviewed the evidence, I find that it does not support any damage beyond the toilet and flooring installed by Mr. Bles. I find the photos, contractor statements, and other evidence show that there was moisture in the particleboard surrounding the toilet, and do not show that there was any damage or repairs to the subfloor beneath the particleboard. I find the evidence before me does not suggest that the alleged toilet and flooring defects presented a real and substantial danger of personal injury or damage to other property.

22. As a result, following the Supreme Court of Canada decisions cited above, which are binding on me, I find that the alleged toilet and flooring defects were non-dangerous pure economic losses. So, I find that under the established category of "negligent supply of shoddy goods or structures," the cost of repairing those non-dangerous defects cannot be recovered from Mr. Bles. I find Mr. Bles owed the Nichvalodoffs no duty of care about those non-dangerous alleged defects in his work. Given this finding, I find it is not necessary to consider what an appropriate standard of care was, and whether Mr. Bles breached that standard by installing the toilet and flooring as he did. I dismiss the Nichvalodoffs' claim for $5,000.

CRT FEES AND EXPENSES

23. 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. The Nichvalodoffs were unsuccessful here, but Mr. Bles paid no CRT fees and claimed no CRT dispute-related expenses. So, I order no reimbursements.

ORDER

24. I dismiss the applicants' claim, and this dispute.

Chad McCarthy, Tribunal Member