Civil Resolution Tribunal

Date Issued: May 31, 2021

File: SC-2021-000556

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kong v. McLean,* 2021 BCCRT 588

B E T W E E N :

XIANGFEI KONG

APPLICANT

A N D :

ROBIN MCLEAN

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Leah Volkers

INTRODUCTION

1. This small claims dispute is about damages resulting from an overflowing toilet in an upstairs strata lot (condo). The applicant, Xiangfei Kong, lives in the condo directly below the condo owned by the respondent Robin McLean. The parties agree that Mr. McLean's toilet overflowed on July 20, 2020 and caused water damage to Mr. Kong's ceiling. Mr. Kong claims $1,300 for the ceiling repair costs.

2. Mr. Kong says that Mr. McLean was negligent and caused the toilet to overflow. Mr. McLean says he was unaware the toilet drain was partially blocked when he purchased the condo and says he did not do anything to cause the toilet to overflow. So, Mr. McLean says he is not responsible for the ceiling repair costs. Mr. McLean also says that Mr. Kong should have had homeowner insurance to cover the cost of any repairs.

3. Mr. Kong and Mr. McLean are each self-represented.

JURISDICTION AND PROCEDURE

4. 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.

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. The issue in this dispute is whether Mr. McLean is liable for the water damage, and if so, does he owe Mr. Kong $1,300 for the claimed repair costs?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, as the applicant Mr. Kong must prove his claims 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.

10. As noted above, the parties agree that Mr. McLean's toilet overflowed and caused water damage to Mr. Kong's ceiling. Mr. Kong says that the water damage occurred because Mr. McLean "blocked" his toilet. I find Mr. Kong alleges that Mr. McLean was negligent.

11. In order to be found negligent, it must be shown that Mr. McLean owed Mr. Kong a duty of care, that he breached the standard of care, and Mr. Kong sustained damage that was caused by his breach (see *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27).

12. I find that as a neighbour and fellow condo owner in a multi-unit building, Mr. McLean owed Mr. Kong a duty of care. The applicable standard of care is reasonableness (see *Burris v. Stone* et al, 2019 BCCRT 886 at paragraph 28).

13. The parties agree that, after the toilet overflow, a plumber, T, cleared Mr. McLean's toilet blockage. T's invoice includes a statement of T's investigation of the toilet. T says they were initially unable to clear the toilet with a toilet auger. T then removed the toilet and used a drain machine with cutting blade in the toilet drain. They "hit" a

blockage 8 feet into the toilet drain and “cleared the drain pulling back dental floss and toilet paper”.

14. As noted above, Mr. McLean does not dispute that the toilet drain was blocked. However, he says the toilet drain must have been partly clogged prior to him purchasing the condo a year and a half before the toilet overflowed. He says he had no way of knowing that the “dental floss trap” was there because his son, who he says lives in the condo, only has six teeth and has never used dental floss. Mr. McLean did not provide a statement from his son, or any details of the living arrangement, including whether Mr. McLean also lived in the condo. On the evidence before me, it is unclear who was living in Mr. McLean’s condo at the time the toilet overflowed. However, based on Mr. McLean’s submissions I find that Mr. McLean had control of the condo at the time the toilet overflowed. Mr. McLean’s son is not a party to this dispute.

15. Mr. Kong also says that the parties’ strata confirmed that Mr. McLean was responsible for the water damage. In evidence is an email from BS, who I infer is the property manager for the parties’ strata, to Mr. Kong. In the email, BS confirmed he advised Mr. McLean that he was responsible for the water damage because the water had originated from Mr. McLean’s strata lot, as confirmed by the plumber, T. While it is undisputed that the water originated from Mr. McLean’s condo, the strata’s opinion on who is responsible for the water damage is not determinative of whether Mr. McLean was negligent.

16. Here, it is undisputed that water escaped from Mr. McLean’s condo because dental floss and toilet paper blocked the toilet drain, causing the toilet to overflow. The blockage described by the plumber was significant, and first required the removal of the toilet in order to clear the toilet drain. There is no expert evidence about whether dental floss should be flushed down the toilet or whether a person should monitor the proper functioning of the toilet after each flush to ensure the water drains from the bowl without obstruction. However, I find these issues are within ordinary knowledge. I find that the standard of care for a user of a toilet in a multi-unit building includes (a)

not flushing dental floss down a toilet and (b) monitoring the proper functioning of a toilet after each flush (see *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519).

17. On balance, and considering the available evidence, I find the most likely scenario is that the blockage occurred as a result of dental floss being flushed down the toilet by either Mr. McLean or his son during Mr. McLean's undisputed ownership of the condo. As noted, I find that flushing dental floss down the toilet falls below the standard of care of a reasonable toilet user.

18. I do not accept Mr. McLean's submission that dental floss partially blocked the toilet drain before he purchased the condo. There is no expert or other evidence to support a finding that the dental floss partially blocked the toilet drain for one and a half years before the toilet overflowed. So, I find Mr. McLean has not proven that the toilet drain was partially blocked before the toilet overflowed, and before he purchased the condo.

19. However, even if the toilet drain was partially blocked, as Mr. McLean claims, I find Mr. McLean has not shown how the complete blockage and toilet overflow could have occurred one and a half years later without any negligence on his part. Mr. McLean did not provide any details of how the toilet functioned before it overflowed. He did not provide any expert evidence that a single flush could cause the complete blockage of a partially blocked toilet drain without any prior indication of a partial blockage. In the absence of this evidence, I find it more likely than not that if there was a partial blockage, it would have become apparent by monitoring the toilet's function after each flush. As noted, I find that failing to monitor a toilet's function after each flush falls below the standard of care. Mr. McLean did not indicate whether he monitored the toilet's function at all. However, as I have already found that the blockage was caused during Mr. McLean's ownership of the condo, and not beforehand, I do not need to determine whether Mr. McLean failed to monitor the toilet's function after each flush.

20. Mr. McLean refers to *Uribe v. Cheung*, 2020 BCCRT 306, a previous CRT decision involving water damage to an apartment where the apartment owner was not found

liable for the damage. First, I note that previous CRT decisions are not binding on me. Second, I note that in *Uribe*, there was no evidence that the owner, who had rented the property to tenants, should have foreseen that the apartment's bathroom sink would leak. In this dispute, I find that Mr. McLean should have foreseen that his toilet would overflow because dental floss was being flushed down the toilet by either himself or his son.

21. Based on the evidence and submissions before me, I find Mr. McLean is liable in negligence for the water that overflowed from his toilet and damaged Mr. Kong's ceiling.

22. Contrary to Mr. McLean's position, I find that Mr. Kong's failure to have home insurance to cover the repairs costs does not relieve Mr. McLean of his responsibility to pay for damage caused by his negligence.

23. It is undisputed that Mr. Kong paid for the ceiling repairs. Mr. Kong claims $1,300 for the ceiling repair costs. However, the invoice in evidence is for $1,270.50, which I find is the amount Mr. Kong paid for ceiling repairs. I find Mr. McLean must pay Mr. Kong that amount.

24. The *Court Order Interest Act* applies to the CRT. Mr. Kong is entitled to pre-judgment interest on the $1,270.50 from July 27, 2020, the date of the repair invoice to the date of this decision. This equals $4.83.

25. 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 Mr. Kong is entitled to reimbursement of $125 in CRT fees. Mr. Kong did not claim any dispute-related expenses, and so I award none.

ORDERS

26. Within 30 days of the date of this order, I order Mr. McLean to pay Mr. Kong a total of $1,400.33, broken down as follows:

a. $1,270.50 in damages for the ceiling repair costs,

b. $4.83 in pre-judgment interest under the *Court Order Interest Act*, and

c. $125 in CRT fees.

27. Mr. Kong is entitled to post-judgment interest, as applicable.

28. 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.

29. 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 Volkers, Tribunal Member