



Civil Resolution Tribunal

Date Issued: June 11, 2021

File: SC-2020-009040

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Gavinchuk v. Mosig*, 2021 BCCRT 649

BETWEEN:

LORNE GAVINCHUK

APPLICANT

AND:

THOMAS MOSIG

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Roy Ho

INTRODUCTION

1. This dispute is about a used toy train set (train set) the applicant Lorne Gavinchuk bought from the respondent Thomas Mosig for \$25.

2. The applicant says the respondent misrepresented how wide the train set rails were. The applicant seeks from the respondent a \$25 refund and \$320 in damages for 4 hours of time spent seeking a resolution with the respondent prior to starting this dispute.
3. The respondent denies misrepresenting the train set rails' width and seeks to have this dispute dismissed.
4. The parties are each self-represented.
5. For the reasons that follow, I find that the respondent did not misrepresent the train set rails and I dismiss the applicant's claim.

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.

ISSUE

10. The issue in this dispute is whether the respondent misrepresented the train set rails' width, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the applicant must prove their 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.
12. The parties do not dispute that:
 - a. The respondent posted the train set for sale on Used.ca,
 - b. On November 17, 2020, the applicant emailed the respondent and asked what "the width of the rails out to out" were,
 - c. On November 18, 2020, the respondent replied by email that they were "2 inches",
 - d. On November 21, 2020, the applicant met with the respondent and bought the train set for \$25,
 - e. The applicant did not measure the rails before buying the train set, and
 - f. About 2 hours after, the applicant sought a refund from the respondent because the rails were allegedly wider than 2 inches.

13. The applicant says that the respondent misrepresented the train set rails' width. The applicant says the rails were 2 and 3/8 inches wide rather than 2 inches wide. So, the applicant says the respondent must refund the \$25 and compensate them for the time spent trying to resolve this dispute with the respondent. I note that the applicant also makes a compensation claim in their submissions for pain and suffering, undue stress, and for mental anguish allegedly caused by the respondent. However, these claims were not part of the Dispute Notice. I find the purpose of a Dispute Notice is to define the issues and provide notice to the respondent of the claims made against them. Therefore, I find the applicant's added claims are not before me and I decline to address them.
14. The respondent disagrees that he misrepresented the rails' width and says that the measurements were correct. I agree for the reasons that follow.

Did the respondent misrepresent the train set rails' width?

15. The parties provided extensive submissions about what "out to out" measurement meant to each of them. However, the parties did not provide any objective or independent evidence about what "out to out" means.
16. The applicant submitted in evidence a photo of a measuring tape measuring a train set rail. Based on the photo, the applicant submits that "out to out" means the distance between the left rail outside edge to the right rail inside edge. I note that the applicant's "out to out" measurement in the photo shows the rail's width to be 2 and 3/16 inches wide rather than 2 and 3/8 inches wide. However, I find nothing turns on this difference because I am satisfied that by using the applicant's "out to out" measurement method, the rail's width is greater than 2 inches.
17. Conversely, the respondent says that "out to out" means the distance between the left and right rails' inside edges. I accept this because based on the applicant's photo, it shows the distance between the inside edges of the 2 rails to be 2 inches wide.
18. So, depending on the "out to out" measurement method used, both parties are correct about the rails' width. The question then is whether the respondent misrepresented

the train set rails. As discussed below, I find the respondent did not misrepresent the train set rails.

19. A “misrepresentation” is a false statement of fact, made during negotiations that has the effect of inducing a reasonable person to enter the contract. If a seller misrepresents the product, the buyer may be entitled to compensation for losses arising from that misrepresentation. There are 2 types of compensable misrepresentation: fraudulent and negligent misrepresentation.
20. A fraudulent misrepresentation occurs when a seller makes an inaccurate or untrue statement and makes that statement knowingly or recklessly without knowing whether it was true or false (see *Ban v Keleher*, 2017 BCSC 1132 at paragraph 16). Based on the respondent’s understanding of “out to out”, I am satisfied that the respondent made a factually true representation of the rails’ width. Even if the respondent made an inaccurate or untrue statement, I find that the respondent did not do so knowingly or recklessly. This is because I accept the respondent believed that “out to out” meant the inside distance between the rails. As mentioned, there is no evidence before me establishing a known “out to out” standard that the respondent knew or ought to have known. There is also no evidence before me establishing that the respondent knew or ought to have known the applicant’s “out to out” version. For these reasons, I do not find that the respondent made a fraudulent misrepresentation to the applicant.
21. A negligent misrepresentation occurs when a seller fails to exercise reasonable care to ensure their representations are accurate and not misleading to the buyer (see *Ban* at paragraph 31). For the same reason as above, I find that the respondent’s representation was not negligent because the rails’ width are accurate based on the respondent’s “out to out” understanding.
22. I find that the applicant has not proven that the respondent made an untrue, inaccurate, or misleading statement to the applicant about the train set rails’ width. So, I dismiss the applicant’s misrepresentation claim against the respondent.

23. Given that I have dismissed the applicant's misrepresentation claim, it follows that the applicant's compensation claim against the respondent for time spent in seeking a resolution with the respondent is also dismissed.
24. In summary, I find that the applicant has not proven their claims and so I dismiss the applicant's claim and this dispute.
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. As the applicant was not successful, I do not order reimbursement of their paid tribunal fees. The parties did not claim dispute-related expenses, so I make no order for expense reimbursement.

ORDER

26. I dismiss the applicant's claim and this dispute.

Roy Ho, Tribunal Member