Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Groff v. Bath Fitter Distributing Inc. Distribution Bath Fitter Inc. dba Bath Fitter*, 2021 BCCRT 738

B E T W E E N :

JANE GROFF and ELIZABETH TOUCETTE

APPLICANTS

A N D :

BATH FITTER DISTRIBUTING INC. DISTRIBUTION BATH FITTER INC. doing business as BATH FITTER and GAIL SUMMERS

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This small claims dispute is about water damage to a strata lot.

2. The applicants, Jane Groff and Elizabeth Toucette, live in unit 106 in a strata building. They say they experienced water leaks on 2 occasions in March and April 2019, from plumbing associated with a tub in unit 206, directly above unit 106.

3. The applicants are represented by an employee of their insurer, Economical Insurance (Economical). They seek to recover $5,000 for emergency mitigation and repair to unit 106, including their $500 insurance deductible.

4. The respondent, Gail Summers, lives in unit 206. Ms. Summers denies responsibility for the damage to unit 106. She says she hired the other respondent, Bath Fitter Distributing Inc. Distribution Bath Fitter Inc. doing business as Bath Fitter (Bath Fitter), to install a new tub and surround. Ms. Summers is self-represented.

5. Bath Fitter says the applicants have not shown that it caused the leak. Bath Fitter is represented by an employee or principal.

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.

10. The strata corporation is not a party to this dispute and the strata's bylaws were not provided in evidence. I find this dispute falls under the CRT's small claims jurisdiction over debt or damages up to $5,000. I find the applicants have abandoned any claim to amounts over $5,000.

Subrogation

11. As noted above, the applicants are represented by Economical. CRT rule 1.16 says an insurer may represent their insured if they are making a claim to recover from a third party an amount paid under an insurance policy. Although there is no copy of the insurance policy or contract in evidence, I am satisfied on a balance of probabilities that Economical paid $4,523.56 to Belfor Property Restoration under the applicants' insurance policy. Neither respondent disputes this. I find the applicants are making the claim for their $500 deductible on their own behalf and for the balance on a subrogated basis on Economical's behalf. I find that subrogation is permitted under section 36 of the *Insurance Act*, which states that an insurer, on making payment or assuming contractual liability, is subrogated to all rights of recovery of the insured against any person, and may bring an action in the insured's name to enforce those rights.

Late evidence

12. Bath Fitter submitted evidence after the evidence submission deadline. The late evidence consists of argument and photos of overflow pipes, covers and gaskets, which I find relevant. I find that the applicants and Ms. Summers were not prejudiced

by the late evidence because they had an opportunity to respond to it. So, I have allowed Bath Fitter's late evidence and have considered it in my decision.

ISSUES

13. The issues in this dispute are:

    a. Are Ms. Summers or Bath Fitter liable for the water leaks?

    b. To what extent, if any, are the applicants entitled to the claimed $5,000 in damages?

EVIDENCE AND ANALYSIS

14. In a civil dispute like this one, the applicants must prove their claim on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.

15. It is undisputed that in early 2019, Ms. Summers hired Bath Fitter to install a new tub and tub surround in unit 206. Bath Fitter completed the installation on March 15, 2019.

16. The applicants say they were away from an unspecified date until March 29, 2019. Upon their return, they discovered the leak and reported it to the strata, who relayed it to Ms. Summers. Ms. Summers says she stopped using the tub and shower immediately. She says she contacted her insurance company and Bath Fitter.

17. It is undisputed that Bath Fitter could not immediately respond and directed Ms. Summers to contact a plumber.

18. On April 8, 2019, Hilltop Plumbing & Heating LTD (Hilltop) responded to the leak at Ms. Summers' request. I address Hilltop's findings below, but in summary, Hilltop identified an issue with the overflow gasket, addressed it, and advised that the leak was repaired.

19. On April 16, 2019, the applicants discovered another leak. Bath Fitter again advised Ms. Summers to call a plumber. The next day, Hilltop identified and addressed an issue with the “drain 90”. There have been no observed leaks into unit 106 since.

20. The applicants say that Bath Fitter is responsible for the damage to unit 106 because Bath Fitter’s employee improperly installed the new tub in unit 206.

21. Although the applicants named Ms. Summers as a respondent, they do not say why Ms. Summers should be responsible for the damage. In order to succeed in negligence against either respondent, the applicants must prove that the respondent owed them a duty of care, that the respondent breached the standard of care, that the damage in unit 206 was caused by the respondent’s breach of the standard of care, and that the damage was foreseeable.

22. While I accept that Ms. Summers as a neighbouring owner in the strata building owed the applicants a duty of care, I find that she did not breach the standard of care, which is that of a reasonable person. Bath Fitter was an independent contractor so Ms. Summers cannot be held vicariously liable for Bath Fitter’s negligence. The applicants do not suggest Ms. Summers failed to exercise appropriate care in choosing Bath Fitter to install her tub. It is undisputed that Ms. Summers stopped using the tub as soon as she was made aware of each leak. I find she did what a reasonable person would do in the circumstances, so I find Ms. Summers was not negligent.

23. As for nuisance, in disputes like this one, where the respondent did not actively create the nuisance, they will not be found liable unless they knew or ought to have known of the facts creating the nuisance: *Sadowick v. British Columbia*, 2019 BCSC 1249. In other words, an owner is not responsible for escaping water that they did not know of and could not reasonably be expected to know of. There is no evidence that Ms. Summers knew or should have known about the water leak under her tub, so I find she is not liable in nuisance. I dismiss the claim against Ms. Summers.

24. Turning to the claim against Bath Fitter, whether under negligence or nuisance I find the key issue is causation. Causation is essential to a finding of nuisance or

negligence, and the applicable test is the "but for" test: *Sadowick* at paragraphs 93-95. The applicants must show that but for Bath Fitter's installation, water would not have leaked into unit 206. For the reasons that follow, I find the applicants have not met this burden.

25. The applicants rely on copies of 2 Hilltop invoices, which include notes presumably written by the attending Hilltop employees. According to the invoices, 1 employee attended on April 8, 2019, and 2 different employees attended on April 17, 2019. None of the employees' qualifications are provided. CRT rule 8.3 provides that an expert must state their qualifications in any written expert opinion evidence, and expert opinion evidence will only be accepted from a person the CRT decides is qualified by education, training, or experience to give that opinion. As there are no qualifications provided, I do not accept the plumbing invoices as expert evidence. However, I do accept them as evidence of the employee's observations and the repair steps they took.

26. The employee who prepared Hilltop's April 8 invoice said they found the overflow set ¼ inch too low, and as a result the overflow gasket was not making a proper seal. They said they lowered the gasket and removed a "rubber piece" with Bath Fitter's name on it that they had not seen before. They said they arranged the gasket so that it was "holding water" and checked for signs of leakage. They said there were no signs of leakage.

27. The employee noted they had seen "issues at the overflow" on other Bath Fitter installs, but did not provide any details, so I put little weight on this general statement.

28. Bath Fitter disputes that there was a leak from the overflow. It says the overflow and gasket are "screwed centered" with the cover plate, and when the cover plate is removed, the overflow drops. It implies this would have made the overflow and gasket appear low to the Hilltop employee. Nothing in Hilltop's invoices contradicts this explanation. Although the April 8 invoice implies that the overflow being set too low was the leak's source, the Hilltop employee's notes do not indicate that they identified the source of the leak before completing the repairs they thought necessary.

29. Ms. Summers says she was gone for 1 week, returned home April 16 and had a bath that evening, shortly after which the second leak was discovered.

30. Hilltop's April 17 invoice said the 2 employees looked in unit 106 and found a drip coming from the "drain 90", which is not explained but I infer is a drain pipe that turns at a 90-degree or right angle. It is not clear whether the drip originated inside the drain 90, at a connection point, or from above and travelled along the outside of the drain 90. The notes said the employees removed the brass pipe that screws into the 90 and Teflon taped it. The notes did not say whether this was a possible cause of the leak. From unit 206, the employees removed the chrome drain and found silicone was applied to the drain "but did not seal," so they removed the silicone and applied plumber's putty. The notes did not explain how the employees confirmed that the silicone did not seal. The notes also did not say that this was the cause of the drip observed at the drain 90. The notes said after these repairs the employees tested for leaks and, like the first Hilltop employee, could not find any leaks.

31. Overall, I find the plumbing invoices inconclusive about the leak's cause. The April 17 invoice casts doubt on the theory in the April 8 invoice that the overflow was the leak's source because another leak was discovered as soon as Ms. Summers used her tub. Crucially, the April 8 invoice said after addressing the overflow issue there were no signs of a leak. This supports the idea that the second leak arose independently of Bath Fitter's work, either due to a fault in the plumbing structures Bath Fitter tied into, or, as Bath Fitter suggests, something the first Hilltop Employee did.

32. Further, the April 17 invoice notes do not explain the leak's cause. There is no explanation of what part of the drain or the "drain 90" actually leaked, and whether that was as a result of something Bath Fitter did or failed to do, as opposed to a pre-existing plumbing problem. The connection, if any, between the observed drip and the silicone seal, was not explained. There is also no expert or other evidence before me about the appropriate use of silicone as opposed to plumber's putty, so I am unable to find that the use of silicone was the cause of the leak.

33. In summary, I find the applicants have not shown that if not for Bath Fitter's installation, water would not have leaked into unit 206.

34. Considering negligence specifically, I find there is insufficient evidence that Bath Fitter's tub installation breached the standard of care for tub installers. Generally, when an issue is outside the knowledge of an ordinary person, expert evidence is required: *Bergen v. Guliker*, 2015 BCCA 283. I find expert evidence is required here to establish the applicable standard for Bath Fitter's work, and the applicants have not provided any. Even if I accepted the plumbing invoices as exert evidence, they do not assist the applicants because they do not say that Bath Fitter did anything wrong.

35. I note that Ms. Summers provided an email in which Bath Fitter appeared to take responsibility for the leak and resulting damages. However, this email was sent after the initial leak and before the second leak and Hilltop invoice, which suggested the overflow was not the leak's cause, so I find it does not undermine Bath Fitter's position that it did not cause the leak. It is undisputed that Bath Fitter reimbursed Ms. Summers for the Hilltop invoices and attempted to repair unit 106 but the applicants did not allow entry. I find there was no agreement between Bath Fitter and the applicants that Bath Fitter would reimburse them for the repairs.

36. I conclude that the applicants are not entitled to any of the claimed $5,000 in damages. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to recover their CRT fees and reasonable dispute-related expenses. The respondents were successful but did not pay fees or claim expenses. I dismiss the applicants' claim for reimbursement of CRT fees.

ORDER

37. I dismiss the applicants' claims and this dispute.

Micah Carmody, Tribunal Member