



# Civil Resolution Tribunal

Date Issued: July 14, 2021

File: SC-2021-001323

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Fleischeuer v. T.F.Z. The Foam Zone Ltd.*, 2021 BCCRT 772

BETWEEN:

MAXIM FLEISCHEUER

**APPLICANT**

AND:

T.F.Z. THE FOAM ZONE LTD.

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kristin Gardner

## INTRODUCTION

1. This dispute is about a mattress purchase.

2. The applicant, Maxim Fleischeuer, purchased a mattress from the respondent, T.F.Z. The Foam Zone Ltd. (TFZ). Mr. Fleischeuer says the mattress he received was not the one he tried in the store. Mr. Fleishcheuer says that TFZ exchanged the mattress twice, but he still did not receive the mattress he says he initially ordered. Mr. Fleischeuer says that he ultimately returned the mattress, but that TFZ has refused to provide him with a refund. Mr. Fleischeuer claims a \$1,231.99 refund for the mattress.
3. TFZ says that Mr. Fleischeuer received the mattress that he initially ordered, but then complained that the mattress was too hard. TFZ says it exchanged the mattress for a softer one, but Mr. Fleishcheuer also unhappy with the new one, so TFZ exchanged it for the originally ordered firmness. TFZ does not dispute that Mr. Fleischeuer returned the mattress, and says it is still storing the mattress for Mr. Fleischeuer. TFZ says it is not obligated to provide Mr. Fleischeuer with a refund, and says it owes Mr. Fleischeuer nothing.
4. Mr. Fleischeuer is self-represented. TFZ is represented by its owner, Tiger Phan.

## **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.

## **ISSUES**

9. The issues in this dispute are:
  - a. Whether TFZ provided Mr. Fleischeuer with the mattress he tried in the store and ordered, and
  - b. Whether TFZ must provide Mr. Fleischeuer with a \$1,231.99 refund for the returned mattress.

## **EVIDENCE AND ANALYSIS**

10. In a civil proceeding like this one, the applicant Mr. Fleischeuer must prove his claims on a balance of probabilities. I have read all the parties' evidence and submissions, but I refer only to the evidence and arguments that I find relevant to provide context for my decision.
11. It is undisputed that Mr. Fleischeuer and his wife went to the TFZ store several times to try out different mattresses. On May 6, 2017, they selected a medium firmness mattress, which cost \$1,231.99. Mr. Fleischeuer ordered the mattress through TFZ and paid a \$500 deposit. He paid the \$731.99 balance when he picked up the mattress on June 5, 2017.

12. The parties' emails in evidence show that Mr. Fleischeuer contacted TFZ on June 12, 2017 to report that the mattress he received was too hard for him. Mr. Fleischeuer says the TFZ showroom contained 3 mattresses: one soft, one medium, and one hard. He says he and his wife were very careful to select the correct mattress, and that TFZ must have provided him with the hard mattress, rather than the medium mattress that they ordered.
13. The June 5, 2017 invoice in evidence shows that the mattress Mr. Fleischeuer ordered was a "Vanilla Breeze" build (2" latex soft, 2" serene memory foam, 4" deluxe firm foam). TFZ says there are 2 versions of the "Vanilla Breeze" mattress. The top 2 layers are always the same, but the bottom layer is either a firm or medium base. TFZ says the mattress in its showroom has the firm base, and this is the medium firmness mattress that Mr. Fleischeuer tried and ordered. TFZ denies that it provided Mr. Fleischeuer with the incorrect mattress.
14. On balance, I accept TFZ's submission that Mr. Fleischeuer received the medium firmness mattress that he ordered. The only evidence Mr. Fleischeuer provided to prove that he received the wrong mattress is his own submission that it seemed harder than the one he tried in the store. I find that is insufficient to prove that TFZ made any errors in ordering the mattress.
15. In any event, it is undisputed that TFZ later agreed to replace the bottom foam layer of the mattress Mr. Fleischeuer received with the softer option. Mr. Fleischeuer received this softer mattress on about June 30, 2017. In a July 13, 2017 email, Mr. Fleischeuer told TFZ that the new mattress was "way more comfortable than the first one".
16. The email evidence shows that Mr. Fleischeuer next contacted TFZ on September 11, 2018 to report that his wife was "very happy" with the mattress, but that it was a bit soft for him. Mr. Fleischeuer stated he thought he needed the "next step up" in the "high resilience factor". Mr. Fleischeuer also stated the first mattress had been good for him and asked if it was possible to make one half the mattress with a higher

resilience factor. TFZ responded that Mr. Fleischeuer should come by the store to discuss his options, but there is no evidence before me that he did so.

17. Mr. Fleischeuer says he and his wife were out of town for an extended period, but when they returned and started using the mattress again, they noticed the mattress layers were starting to separate.
18. The next email in evidence is dated October 2, 2019 from Mr. Fleischeuer to TFZ. In this email, Mr. Fleischeuer stated that the mattress foam appeared to be deteriorating and they could no longer sleep comfortably on it. TFZ responded that it sounded like a warranty issue and it should be returned for inspection.
19. There is some dispute between the parties about whether the mattress was defective. Mr. Fleischeuer says the mattress was faulty and that TFZ replaced it under warranty. TFZ denies that the mattress was defective and alleges that Mr. Fleischeuer incorrectly folded it and stored it for too long, which damaged it. Mr. Fleischeuer did not respond to this allegation. In any event, I find nothing turns on whether the mattress was defective, or whether Mr. Fleischeuer damaged it, because it is undisputed that TFZ's supplier agreed to exchange it under warranty.
20. Mr. Fleischeuer says he requested that TFZ provide him with the medium firmness mattress that he originally ordered. It is undisputed that TFZ ordered for Mr. Fleischeuer the same firmer "Vanilla Breeze" mattress that he had first received in June 2017, which TFZ says was the same mattress he originally ordered.
21. I note that Mr. Fleischeuer says he was surprised when TFZ advised him on October 21, 2019 that the new mattress was ready to be picked up because he thought TFZ was going to consult with him before placing an order. However, there is no evidence before me that Mr. Fleischeuer questioned the mattress model, and it is undisputed that Mr. Fleischeuer accepted delivery of the mattress shortly after it arrived.

22. Mr. Fleischeuer sent TFZ a December 31, 2019 email that said after sleeping on the mattress for 8 weeks, he and his wife agreed the mattress was too hard. They sent TFZ several follow up emails in which they asserted they had never received the medium firmness mattress they originally ordered.
23. In a February 10, 2020 email to TFZ, Mr. Fleischeuer confirmed he had returned the mattress to the store 2 days earlier. He also stated he and his wife had re-tried the 3 mattresses in the showroom, and his wife confirmed the “Vanilla Breeze” mattress was too firm for her. Mr. Fleischeuer indicated he was interested in having further discussions about ordering a satisfactory mattress.
24. The evidence shows that TFZ offered to again replace the base layer of the mattress with the softer foam option, at a cost of \$199.00 plus tax. Mr. Fleischeuer declined that offer and requested a full refund of the amount he paid for the mattress.
25. So, was Mr. Fleischeuer entitled to return the mattress for a refund? For the following reasons, I find he was not.
26. Mr. Fleischeuer submits that he received only the firm mattress and the soft mattress displayed in TFZ’s showroom, but not the medium mattress he wanted. However, as noted above, I find that Mr. Fleischeuer initially received the medium firmness mattress from the showroom that he ordered in June 2017. While TFZ agreed to exchange it for a softer version, I find that a good faith gesture and not because TFZ had provided the incorrect mattress. When TFZ’s supplier later agreed to exchange the softer mattress under warranty, I find Mr. Fleischeuer again received the medium firmness mattress he initially ordered, at his request.
27. I find there is no evidence before me that TFZ ever provided Mr. Fleischeuer with a mattress that he did not order. Rather, I find it is likely that Mr. Fleischeuer simply discovered that after sleeping on the medium firmness mattress, it was firmer than he had anticipated and mistakenly concluded he had been provided with the firm mattress from TFZ’s showroom. However, I find Mr. Fleischeuer likely realized his mistake when he revisited the showroom in February 2020 and confirmed the “Vanilla

Breeze” was the medium firmness model, which was too firm for his wife. I find TFZ is not responsible for Mr. Fleischeuer’s mistake.

28. Mr. Fleischeuer and his wife slept on the mattress for at least 3 months before they returned it. As I find Mr. Fleischeuer received the mattress he ordered, absent any defects in the mattress, I find TFZ was not obligated to accept the return of a used mattress for a refund. So, I dismiss Mr. Fleischeuer’s claim for a refund.
29. I note that Mr. Fleischeuer returned the mattress to TFZ without any agreement between the parties about receiving a refund or an exchange, and TFZ has been storing the mattress for more than 17 months. Even after TFZ advised Mr. Fleischeuer that it would not provide a refund and Mr. Fleischeuer declined TFZ’s offer to exchange it for a cost, Mr. Fleischeuer did not retrieve the mattress. I find the evidence shows that Mr. Fleischeuer does not want the mattress back, which is supported by his statement in the Dispute Notice that he is unwilling to accept another mattress from TFZ.
30. On balance, I find Mr. Fleischeuer abandoned the mattress, which means he has given up his ownership in it, and he is no longer entitled to it. Therefore, I make no order about the mattress itself.
31. 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 find Mr. Fleischeuer was unsuccessful, so I dismiss his claim for reimbursement of CRT fees. Neither party claimed any dispute-related expenses.

## **ORDER**

32. I dismiss Mr. Fleischeuer's claims, and this dispute.

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Kristin Gardner, Tribunal Member