



Civil Resolution Tribunal

Date Issued: July 16, 2021

File: SC-2020-006252

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Dueck v. Dubo*, 2021 BCCRT 782

B E T W E E N :

HANS DUECK and DUECK'S POULTRY FARM LTD.

APPLICANTS

A N D :

SHERRYL DUBO and ERNEST MELVILLE HOUGH

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about an alleged mortgage overpayment. The respondent Ernest Melville Hough sold the applicant Dueck's Poultry Farm Ltd. (Dueck's) a property, and those parties agreed to a take-back mortgage in April 2019. The respondent Sherryl Dubo is a lawyer. Ms. Dubo handled Mr. Hough's and Dueck's mortgage payout transaction in 2020 for Mr. Hough. The applicant Hans Dueck is Dueck's owner and director.
2. The applicants say the parties agreed to an amortization payment schedule set out in a chart Mr. Dueck created and gave Mr. Hough (chart). The applicants say when Dueck's paid out the mortgage on July 29, 2020 the respondents ignored that chart and overcharged \$4,203.28 for principal and interest. In this dispute, the applicants claim that \$4,203.28, plus \$400 for Ms. Dubo's legal fees they were charged as part of the payout transaction, for a total of \$4,603.28.
3. Ms. Dubo says she is not responsible and is not appropriately named since she only acted for Mr. Hough in the mortgage payout transaction. Mr. Hough says he never agreed to the figures in the chart. Both Ms. Dubo and Mr. Hough admit there was a \$3,141.50 overpayment, but in August 2020 Mr. Dueck undisputedly declined to pick up a cheque from Ms. Dubo's trust account for that amount because the applicants say they are owed the \$4,603.28.
4. Mr. Dueck represents himself and Dueck's. Ms. Dubo and Mr. Hough are each self-represented.

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). 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 parties to a dispute that will likely continue after the dispute resolution 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. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find I can fairly hear this dispute based on the submitted evidence and through written submissions.
7. Under section 42 of the CRTA, 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, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.
9. Mr. Hough submitted 2 items of evidence on time, and then 79 items late. The other parties were given the opportunity to comment on the late evidence, and so bearing in mind the CRT's flexible mandate I have allowed the late evidence since no one is prejudiced by it. Most of the late evidence submitted is corporate records documentation for Dueck's and Land Title Office documents. I find most of this late evidence is of marginal relevance, if any. Ordinarily, I would not admit irrelevant late evidence. However, given the volume submitted and the CRT's mandate that includes speed and efficiency, I decline to parse it out here. I discuss below the weight I give relevant evidence, to the extent I find referring to it is necessary to give context to my decision.
10. I note Ms. Dubo submits that the applicants' claims should be dismissed under section 11 of the CRTA on the basis they disclose no reasonable claim and are an abuse of process. First, CRTA section 11 gives me discretion to refuse to resolve the applicants' claims, which is not the same thing as dismissing them after a

hearing on the merits. Second, I disagree with Ms. Dubo's submission and find on their face the applicants' claims are not unreasonable or an abuse of process. So, I have adjudicated them below and I decline to refuse to resolve them.

11. Finally, I note that Mr. Hough's spouse appears to have made some submissions on his behalf. Mr. Dueck therefore questions whether Mr. Hough has in fact participated. I find he has, since he filed a Dispute Response and also appears to have made some submissions. I find nothing turns on his spouse's involvement. In particular, I find there is no need for Mr. Hough and Mr. Dueck to submit correspondence between their respective spouses, as Mr. Dueck proposes, given my decision's narrow focus which is about the extent of the mortgage overpayment.

ISSUES

12. The issues in this dispute are:
 - a. Do both applicants have standing to make the claims?
 - b. Is Ms. Dubo personally liable?
 - c. Whether the applicants owed the \$400 paid for Ms. Dubo's legal fees,
 - d. Whether the applicants overpaid Mr. Hough principal and interest by \$4,203.30 as claimed, and
 - e. To what extent are either of the respondents responsible to repay the applicants?

EVIDENCE AND ANALYSIS

13. In a civil claim like this one, as the applicants Mr. Dueck and Dueck's have the burden of proving their claims, on a balance of probabilities. I have only referenced below what I find is necessary to give context to my decision. As referenced above, much of the parties' arguments and evidence are not relevant to the overpayment issue, such as evidence about their animals, particular farming practices, corporate

registry history, and community relationships. I will not address those other matters and confine my decision to the overpayment issue before me.

Mr. Dueck's claim

14. In September 2018, Mr. Hough and Dueck's entered into a contract of purchase and sale (contract) for a farm property. The buyer was listed as "Dueck's Poultry Farm Ltd. (Hans Dueck and [LD])". At the contract's end, both Hans Dueck and LD each signed as "buyer" for Dueck's Poultry Farm Ltd. There is no mention of their being guarantors or parties in their personal capacities. The mortgage was registered in the Land Title Office with Dueck's as the sole buyer. I find the corporate applicant Dueck's was the contracting party, not Mr. Dueck personally. So, I dismiss Mr. Dueck's claims. I will discuss below the corporate applicant Dueck's claims.

Claim against Ms. Dubo

15. I turn next to Ms. Dubo's role. In certain circumstances, such as misappropriation or misleading conduct, it is possible for a lawyer to be liable to an opposing party. However, I find there is no evidence of such circumstances here. Even if Ms. Dubo erred, it was at most an innocent error. In the circumstances here, she did not owe a duty of care to Dueck's as her client was Mr. Hough. There is no evidence she willfully misled Dueck's and I find her correspondence, while perhaps firm in tone, was reasonable given her duties to her own client. I find there is no legal basis to hold Ms. Dubo personally liable for the alleged mortgage overpayment. At the same time, I find Dueck's obligation to pay the claimed \$400 in legal fees arose out of the contract with Mr. Hough, rather than any agreement with Ms. Dubo directly. Given the above, subject to the fact Ms. Dubo's law firm holds in trust the \$3,141.50, I dismiss the claims against Ms. Dubo. I discuss that trust balance below.

Mortgage contract

16. Mr. Hough's and Mr. Dueck's relationship deteriorated early on, but I find nothing in this dispute turns on the reasons for the deterioration. I turn then to Dueck's claims against Mr. Hough and the relevant contractual terms.

17. The property's purchase price was \$1,400,000. As required by the contract Dueck's paid a \$250,000 non-refundable deposit. The completion date was March 29, 2019 and possession on April 1, 2019. The adjustment date was April 1, 2019. The contract stated the buyer (Dueck's) would bear, among other things, all conveyance costs and for arranging a mortgage.
18. As referenced above, the contract also provided that Mr. Hough would take back a first mortgage of \$500,000 at 3.75% annual interest "calculated semi-annually, not in advance, 5-year term (amortization period of 18 years) with payments of principal and interest". The contract also stated that the buyer could pay the full mortgage balance without notice or penalty.
19. I find the evidence shows that for each month between April 1, 2019 and the last payment on July 17, 2020, inclusive of principal and interest, Dueck's paid \$3,187 against the mortgage. Mr. Hough argues there was a \$10 short-payment in June 2019, and I find it is possible Mr. Dueck's chart erred by \$10 in an interest calculation. However, what matters is that there is no evidence Dueck's actually short-paid.
20. It is undisputed Dueck's post-dated cheque for the July 1, 2020 mortgage payment was misdated as July 1, 2019. I find there is no evidence to support Mr. Dueck's assertion that Ms. Dubo acted improperly in informing him that he needed to urgently correct the problem as the uncashable cheque meant Dueck's was in breach of contract. Mr. Dueck provided a replacement cheque for \$3,187 on July 17, 2020. While Mr. Hough appears to argue he is entitled to some compensation for the misdating of 4 cheques in total, I disagree. First, he did not file a counterclaim and second there is no evidence he sustained any loss as a result.
21. Shortly after Mr. Dueck made the final payment on July 17, he decided to find a different lender. So, at the end of July 2020 Dueck's paid out the mortgage owing to Mr. Hough, as permitted under the contract, by paying Ms. Dubo in trust. This dispute is over the amount Dueck's paid Ms. Dubo, and to what extent there was an overpayment.

22. Ms. Dubo had initially advised Mr. Dueck and his notary in mid-July that the payout required was \$478,396.78, inclusive of \$400 in Ms. Dubo's legal fees. Dueck's paid that amount. As referenced above, the applicants say this total figure was \$4,603.30 too much (in part because they object to the \$400 in legal fees), but they paid it because they felt they had no other choice.
23. On August 11, 2020, Ms. Dubo wrote Mr. Dueck's notary enclosing a \$3,141.50 cheque, noting that the July 17, 2020 payment had not been accounted for in the payout statement. Mr. Dueck did not cash the \$3,141.50 cheque and did not return it either. Instead, he started this CRT dispute on August 14, 2020.

Claim for reimbursement of \$400 in paid legal fees

24. Ms. Dubo requested \$400 in legal fees from Dueck's on July 22, 2020 as part of the payout. As noted above, the contract says the buyer (Dueck's) would bear all conveyancing costs and for arranging a mortgage. I find that Ms. Dubo's legal fees related to the mortgage payout and falls within the buyer's obligation to pay legal fees. Dueck's does not argue the amount is unreasonable and I find no evidence that it is. I dismiss the claim for the \$400 in legal fees.

Calculations and remedy – mortgage and principal

25. I turn then to the \$4,203.28 difference between what Dueck's paid to payout the principal and interest and what the applicants say Dueck's should have paid.
26. As noted, the applicants rely on Mr. Dueck's chart, which is a photocopy of a 1-page Excel spreadsheet. It sets out a schedule for 18 payments between April 1, 2019 and September 1, 2020. Mr. Dueck points to the \$473,393.50 figure beside the scheduled August 1, 2020 payment. He says the difference between that figure and the \$478,396.78 Dueck's paid to payout the mortgage equals the \$4,603.30 claimed in this dispute (\$4,203.30 plus the \$400 Dueck's was required to pay for Ms. Dubo's legal fees). The difference actually equals \$4,603.28, and I infer Mr. Dueck has simply rounded up.

27. First, there is no mention of the chart in the contract. Mr. Dueck submits that in “good faith” he accepted the chart had “been considered” when the contract was drawn up, but he also admits in his submissions he printed out and gave a copy of the chart to Mr. Hough “after the terms had been agreed to”. I find there is insufficient evidence Mr. Hough ever agreed to the chart as reflecting what would be owed as a final payout figure at any given point. Rather, I find Dueck’s payment history and the parties’ contract determines what was owed.
28. As noted, after Dueck’s payout funds of \$478,396.78 had been received, it was determined that the last \$3,187 payment received on July 17, 2020 (for the July 1, 2020 payment) had not been taken into account by Mr. Hough’s accountant in calculation of the payout amount. Also as noted, Mr. Dueck chose not to cash the \$3,141.50 cheque Ms. Dubo sent him on August 11, 2020. I note Ms. Dubo did not explain how she arrived at \$3,141.50 rather than the \$3,187 figure that Dueck’s paid on July 17, 2020. The respondents do not address this discrepancy in their submissions. I find the difference likely relates to interest accruing due to the fact the payment due July 1 was not made until July 17. This conclusion is supported by the fact that according to Mr. Hough’s accountant’s payment schedule, most of Dueck’s late July 17 payment was applied to interest, rather than principal.
29. Mr. Hough’s accountant’s amortization schedule in evidence shows the amount owing after the July 17, 2020 payment was \$474,855.28, which includes interest charges up to July 31, 2020. The difference between the \$478,396.78 Dueck’s paid and the \$474,855.28 is \$3,541.50. After deducting the \$400 in legal fees, that leaves \$3,141.50. As noted above, \$3,141.50 is the amount the respondents admit Dueck’s had overpaid.
30. I turn then to my interpretation of the contract and calculation of the overpayment.
31. Notably, the contract provided for 3.75% annual interest, “calculated semi-annually, not in advance”. Yet, none of the parties addressed what “calculated semi-annually, not in advance” means in terms of how the interest was to be calculated.

32. Significantly, Mr. Dueck did not explain what formula he used in the chart. It appears he intended to calculate compounded monthly interest on a declining principal balance. However, I cannot reconcile the chart's amounts. For instance, it says the interest payment on April 1, 2019 would be \$1,562.50 and the interest charge was over \$10 less on May 1, 2019, and yet the following months the interest would decrease by only around \$5. The chart also shows all but the first April 1, 2019 payment were around \$3,181 and some cents, and yet Dueck's undisputedly paid \$3,187 every month. Quite apart from my conclusion the chart is not part of the parties' contract, I find I cannot rely on the chart to determine the interest calculation. This means I cannot rely on the chart to calculate the overpayment.
33. It is clear Mr. Hough's accountant also used a formula where the interest was compounded monthly on a declining principal balance. Based on that formula, I find Mr. Hough's accountant's calculations are accurate. As the applicant, Dueck's bears the burden of proof and I find it has not established that Mr. Hough's accountant's formula was incorrect under the contract. In other words, while the contract says "calculated semi-annually, not in advance", the burden is on Dueck's to prove that Mr. Hough's interest and overpayment calculation are not correct under the contract. As discussed above, I find Dueck's has failed to do so.
34. So, exclusive of the \$400 in legal fees that I have addressed above, I find the amount owing on the mortgage as of July 31, 2020 was \$3,141.50. As noted above, this amount is sitting in Ms. Dubo's trust account, and the cheque in Mr. Dueck's possession is now stale-dated.
35. Given Ms. Dubo is a party, I find she must pay Dueck's the \$3,141.50 out of her trust account, to satisfy Mr. Hough's obligation under the parties' contract. As noted above, I find Ms. Dubo is not personally liable to Dueck's.

Conclusion, interest, and fees

36. The *Court Order Interest Act* (COIA) applies to the CRT. I find Dueck's is entitled to pre-judgment interest on the \$3,141.50, calculated from August 14, 2020 (the date

the CRT dispute was filed) to the date of this decision. This interest equals \$13.02. I have no evidence that the funds in Ms. Dubo's trust account are accruing interest, and I find it is Mr. Hough's obligation to pay the interest as I have found above Ms. Dubo is not personally liable.

37. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. Dueck's was not successful beyond the amount Mr. Hough offered through Ms. Dubo before the applicants started this dispute. In these circumstances, I decline to exercise my discretion to order reimbursement of CRT fees. Neither party claimed dispute-related expenses, so I order none.

ORDERS

38. Within 30 days of this decision, I order Ms. Dubo, not in her personal capacity but on behalf of her client Mr. Hough, to pay \$3,141.50 from her law firm's trust account to Dueck's.
39. Within 30 days of this decision, I order Mr. Hough to pay Dueck's \$13.02 in pre-judgment interest under the COIA.
40. Dueck's is entitled to post-judgment interest, as applicable. I dismiss Mr. Dueck's claims, Dueck's remaining claims, and all claims against Ms. Dubo in her personal capacity.
41. 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 in effect until 90 days after June 30, 2021, which is the date of the end

of the state of emergency declared on March 18, 2020, 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.

42. 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.

Shelley Lopez, Vice Chair