



Civil Resolution Tribunal

Date Issued: July 22, 2021

File: SC-2021-005689

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Skelly v. Fayad*, 2021 BCCRT 803

BETWEEN:

JULIA SKELLY

APPLICANT

AND:

NABIL GABRIEL FAYAD

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sarah Orr

INTRODUCTION

1. This small claims dispute is between 2 owners in a strata building with only 2 strata lots, also known as a duplex. The applicant, Julia Skelly, owns strata lot 1 (SL1) and the respondent, Nabil Gabriel Fayad, owns strata lot 2 (SL2).

2. The strata, The Owners, Strata Plan 1318, is not a party to this dispute, but it is a party to a related dispute, ST-2020-009583 (strata dispute) for which I have issued a separate decision. In the strata dispute, Ms. Skelly claimed Mr. Fayad breached various bylaws.
3. In this dispute, Ms. Skelly says Mr. Fayad's construction and use of a squash court wall in his yard has caused her loss of enjoyment of her strata lot and mental distress. She claims \$2,000 in damages.
4. Mr. Fayad denies Ms. Skelly's claims.
5. Both parties are self-represented in this dispute.

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. Ms. Skelly originally claimed \$2,000 in damages from Mr. Fayad as part of the strata dispute. However, I find this damages claim does not fall within the CRT's strata property jurisdiction. CRTA section 121(1) says that strata property claims must be claims "in respect of the *Strata Property Act*." As explained in the non-binding but persuasive decision in *Alameer v. Zhang*, 2021 BCCRT 435, damages claims between individual strata lot owners are not claims in respect of the *Strata Property Act* (SPA), since the duties in the SPA are owed by the strata corporation. Rather, such claims generally arise under the common law of torts, or legal wrongs.
11. With her consent, Ms. Skelly's damages claim in the strata dispute was re-classified as this separate small claims dispute.
12. In her submissions, Ms. Skelly complains about the allegedly unreasonable noise Mr. Fayad has created by using his squash court, playing piano, building a bed, operating his business, and entertaining guests in his front and back yards. However, in the Dispute Notice Ms. Skelly only claimed damages against Mr. Fayad in relation to his construction and use of the squash court structure. I find it would be procedurally unfair to address any noise or nuisance claims relating to anything except the squash court structure, since Mr. Fayad did not have an opportunity to provide evidence about these other claims. So, I decline to address any of these other claims in this decision.

ISSUE

13. The issue in this dispute is whether Mr. Fayad's construction and use of his squash court wall caused Ms. Skelly loss of enjoyment of her strata lot and mental distress.

EVIDENCE AND ANALYSIS

14. In a civil claim like this one, as the applicant, Ms. Skelly must prove her claim on a balance of probabilities. I have read all the parties' evidence and submissions but refer only to what I find relevant to explain my decision. For a complete discussion of the facts in this case, see my related decision in the strata dispute ST-2020-009583.
15. For the following reasons, I dismiss Ms. Skelly's claim.
16. It is undisputed that on July 25, 2020, Mr. Fayad built a 9-foot high and 8-foot wide squash court wall on top of a deck in his backyard. The wall leans against the fence separating Mr. Fayad's yard from Ms. Skelly's yard. On July 26, 2020, Ms. Skelly notified Mr. Fayad about her objection to the new structure because she said it cut off sunlight to her yard and flower bed. She says she gave Mr. Fayad 2 weeks to "make things right." It is undisputed that on July 27, 2020 Mr. Fayad reduced the height of the squash court wall by 1 foot so that it was 8 feet high. It is also undisputed that by August 8, 2020 he had added netting to the wall which was attached to red tags that Ms. Skelly could see from her yard. Ms. Skelly says Mr. Fayad ignored any further communication from her about the squash structure.
17. Mr. Fayad says that after removing 1 foot off the top of the squash court wall, at 8 feet high and 8 feet wide, it is only 2 feet higher than the fence. He says this 2-foot by 8-foot structure above the fence could not possibly block sunlight into Ms. Skelly's yard. He also says the structure benefits Ms. Skelly by providing her with additional privacy.
18. In the context of a strata, a nuisance is a substantial, non-trivial, and unreasonable interference with an owner's use and enjoyment of their property (see *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502). The test for determining whether there is a nuisance is objective. This means that for a disturbance to be a nuisance, it must meet the criteria stated above based on a reasonable person's experience who is occupying the premises. The BC Supreme Court has stated that in the strata context there must be some give and take between

neighbours using their strata lots and common property (see *Sauve v. McKeage et al*, 2006 BCSC 781).

19. Ms. Skelly says Mr. Fayad's use of the squash court wall has created excessive noise. However, she says the only times she heard Mr. Fayad playing squash were on the late afternoon of July 25, 2020 and on March 4, 2021 at 5:00 p.m. She also says that on July 27, 2020, Mr. Fayad played loud music while reducing the height of the squash court wall. Mr. Fayad says he tries to only use his squash court when Ms. Skelly is not at home. Ms. Skelly says this proves that he knows the sound of him playing squash is "offensive".
20. On the evidence before me, I am not satisfied that Mr. Fayad's construction or use of the squash court wall created unreasonable noise. Ms. Skelly failed to provide any objective evidence of the noise levels occurring during the 3 alleged incidents. I also find the time of day of the alleged incidents makes it unlikely any noise Mr. Fayad created by playing squash or music in his yard would have been unreasonable.
21. Ms. Skelly also says the squash court wall has caused her loss of enjoyment of her strata lot because it restricts her view and access to sunlight. She says she is claustrophobic and chose to buy her strata lot because of its "unrestricted" view of nature. She says the squash court ruined her "summer of enjoyment" of her back patio by spoiling her view. Ms. Skelly submitted many photos of her backyard taken from various angles both before and after Mr. Fayad built the squash court wall.
22. While the squash court wall is visible above the fence from Ms. Skelly's yard, on the evidence before me I cannot find the structure is a substantial or non-trivial interference with Ms. Skelly's enjoyment of her property. It is not clear from the evidence to what extent, if any, the squash court wall blocks sunlight into Ms. Skelly's yard beyond any sunlight the fence already blocks. The BC Supreme Court has found that the construction of unsightly structures or the blocking of views do not on their own support an action in nuisance (see *Drager v. Lojstrup*, 2016 BCSC 1447 at paragraph 28 and *Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258 at paragraph

89). While I appreciate that Ms. Skelly does not like the appearance of the squash court wall, I find that is not enough to amount to a compensable nuisance.

23. Ms. Skelly also says Mr. Fayad's construction and use of the squash court wall has caused her mental distress. She says Mr. Fayad built and uses the squash court to bully, intimidate, and antagonize her and to demonstrate that he can do whatever he wants on his property. She says this makes her feel trapped and uncomfortable. She says that during their meeting on July 25, 2020 Mr. Fayad showed his "scary side" and she felt he was unapproachable. Ms. Skelly describes Mr. Fayad's behaviour in relation to his construction and use of the squash court as "cruel and demeaning" and "like a cruel game of psychological torture." She says she has been "traumatized by his anger" and that Mr. Fayad has threatened her safety. She says the structures are also an intrusion into her peace of mind. She says all of this has caused her despair, health issues, personal expense, and the loss of future possibilities.
24. The BC Court of Appeal has found that there must be some evidentiary basis for awarding damages for mental distress (see *Lau v. Royal Bank of Canada*, 2017 BCCA 253 at paragraphs 48 to 49). Ms. Skelly submitted a February 22, 2021 note from her doctor stating that she was being managed for stress related symptoms. She also submitted a February 24, 2021 letter from her chiropractor stating that she had been treated for stress-related symptoms 8 times in 2021. However, neither letter states the source of Ms. Skelly's stress, or mentions anything about Mr. Fayad or this dispute. I find these documents are insufficient proof that Ms. Skelly suffered compensable mental distress from any of Mr. Fayad's behaviour or actions.
25. While I appreciate that Ms. Skelly has been upset by Mr. Fayad's construction and use of the squash court wall, I find she has not provided sufficient evidence to establish that Mr. Fayad has ever threatened her safety. I find she submitted no other relevant evidence to support her claim for mental distress.
26. I note Ms. Skelly also claims that Mr. Fayad caused her to incur personal expense because she had to hire a lawyer, but she has not claimed any legal fees as dispute-related expenses.

27. I dismiss Ms. Skelly's damages claim.

28. 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. Ms. Skelly's damages claim was not re-classified as a small claims dispute until after the parties provided evidence and submissions, so she did not pay any additional CRT fees for this small claims dispute. I address Ms. Skelly's entitlement to CRT fees in the strata dispute. She did not claim any dispute-related expenses.

ORDER

29. I dismiss Ms. Skelly's claims and this dispute.

Sarah Orr, Tribunal Member