



# Civil Resolution Tribunal

Date Issued: July 23, 2021

File: SC-2020-008102

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Nielsen v. Lamontagne*, 2021 BCCRT 804

**B E T W E E N :**

BRENDA NIELSEN and DOUGLAS NIELSEN

**APPLICANTS**

**A N D :**

ROBERT LAMONTAGNE, TRACY LAMONTAGNE, and  
DEBBIE GYLES

**RESPONDENTS**

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## **REASONS FOR DECISION**

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Tribunal Member:

David Jiang

## **INTRODUCTION**

1. This dispute is about the sale of a house. The applicant, Douglas Nielsen, purchased the house from the respondents, Robert Lamontagne and Tracy Lamontagne. The

other applicant, Brenda Nielsen, now lives at the house. The other respondent, Debbie Gyles, acted as the Lamontagnes' realtor.

2. The Niensens say the respondents failed to disclose water and plumbing issues that led to a shower pan leak. They claim \$2,285 as the estimated cost of replacing their shower enclosure and other plumbing repairs. They also claim \$1,500 as the estimated cost to repair water damage to the ceiling and drywall beneath the pan. The Neilsens also say the Lamontagnes breached the contract of purchase and sale by taking curtains and 2 mirrors, and not adequately replacing another mirror. They claim \$500 for the curtains and mirrors.
3. The Lamontagnes say they mistakenly took the curtains and submit that \$60 would be appropriate compensation. They have not paid this. They deny the other claims. Ms. Gyles denies liability for all claims.
4. Mrs. Nielsen represents the applicants. Ms. Lamontagne represents the Lamontagnes. Ms. Gyles represents herself.
5. For the reasons that follow, I find only Mr. Nielsen has proven some of his claims, and only against the Lamontagnes. I order them to pay the amounts set out below.

## **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.

## **ISSUES**

10. The issues in this dispute are as follows:
  - a. Are the respondents liable for the water and plumbing issues, and if so, what is the appropriate remedy?
  - b. Did any of the respondents breach the contract of purchase and sale by taking the mirrors, curtains, or by failing to provide a suitable replacement for the main bathroom mirror, and if so, what is the appropriate remedy?

## **EVIDENCE AND ANALYSIS**

11. In a civil proceeding like this one, the Niensens as the applicants must prove their claims on a balance of probabilities. I have read all the parties' submissions, including case law, but refer only to the evidence and arguments that I find relevant to provide context for my decision.
12. I begin with the undisputed background facts. Mr. Nielsen purchased a house from the Lamontagnes under the terms of a July 28, 2020 contract of purchase and sale. He had the home inspected prior to completing the sale. As noted above, Ms. Gyles

represented the Lamontagnes as their realtor. Mr. Nielson was represented by his own realtor, EH.

13. Mrs. Nielsen was not a purchaser under the contract, so I find she has no compensable claims in this dispute. I dismiss all her claims for this reason.
14. The sale completed and Mr. Nielson took possession on September 19, 2020. On September 22, 2020, EH emailed Ms. Gyles. EH advised that the shower plumbing had leaked, causing damage to a ceiling and drywall below. EH also said the Lamontagnes had failed to provide an appropriate replacement for one mirror and took other mirrors they should not have.

***Issue #1. Did any of the respondents misrepresent the water and plumbing issues?***

15. The principle of “buyer beware” generally applies to real estate transactions in BC. This means that a buyer is required to make reasonable enquiries about the property they wish to purchase. Exceptions to this principle include negligent or fraudulent misrepresentations and the seller’s duty to disclose latent effects: see *Nixon v. MacIver*, 2016 BCCA 8 at paragraphs 32 to 33. The Nielsens did not provide a legal basis for their claims so I will consider these exceptions below.
16. A latent defect is one which cannot be discovered by a buyer through reasonable inspection: *Nixon* at paragraph 33. Here, I find the water and plumbing issues were not latent defects. The home inspector noted in their July 2020 report that there were water stains in the damaged area. They said the stains might have originated from a past leak in the bathroom above. They noted there was no moisture at the time of inspection. However, they recommended a qualified contractor evaluate and estimate repairs. The Nielsens did not follow this recommendation. In any event, based on the inspector’s comments, I find it likely that all the water damage and plumbing issues could have been discovered through reasonable inspection.
17. As I have found the water and plumbing issues were not latent defects, I find the Nielsens rely on the law of negligent or fraudulent misrepresentation. I will consider

negligent misrepresentation first. To prove such a claim, Mr. Nielsen must establish the 5 following elements:

- a. There must be a duty of care,
- b. The representation in question must be untrue, inaccurate, or misleading,
- c. The respondents must have acted negligently in making the misrepresentation,
- d. Mr. Nielsen must have reasonably relied on the negligent misrepresentation, and
- e. The reliance must have resulted in damages.

18. In real estate transactions the seller owes the buyer a duty of care where the seller makes representations that are intended to be relied upon by the buyer: see *Hanslo v. Barry*, 2011 BCSC 1624 at paragraphs 117 to 118.

19. In this dispute, the Lamontagnes made representations in a property disclosure statement (PDS) dated July 5, 2020. The PDS was expressly incorporated into the contract, as stated in a July 28, 2020 contract addendum. The Lamontagnes indicated on the PDS that they were unaware of any moisture or water problems in the walls, basement, or crawl space. They also indicated they were unaware of any problems with the plumbing system.

20. The Niensens acknowledge their inspector identified water damage. However, they say they “assumed it was an old water problem that had been taken care of” based on the PDS. I find this was not a reasonable assumption and the Niensens should have verified this with the Lamontagnes. They did not do so. Given this, I find Mr. Nielsen did not reasonably rely on the representations about moisture and plumbing. I find Mr. Nielsen’s claim for negligent misrepresentation must fail.

21. I next consider fraudulent representation. Mr. Nielsen must prove the following elements, as outlined in *Ban v. Keleher*, 2017 BCSC 1132 at paragraph 16:

- a. The respondents made a representation of fact to Mr. Nielsen,

- b. The representation was false,
  - c. The respondents knew that the representation was false when it was made, or made the false representation recklessly,
  - d. The respondents intended for the Nielsens to act on the representation, and
  - e. Mr. Nielsen was induced to enter into the contract in reliance upon the false representation and suffered a detriment.
22. On balance, I find it likely that the Lamontagnes did not know their representations about moisture and plumbing were false. I also find they did not make those representations recklessly. The Lamontagnes say they were unaware of any plumbing issues or water damage. They say, and I find, that they purchased the property in 2018, only resided in it 8 times, and rarely used the shower stall at issue. They provided some evidence that supports these submissions. When the Lamontagnes purchased the home, they obtained a July 2018 inspection report. The report shows the inspector did not identify any water or plumbing issues relevant to this dispute. Similarly, the Nielsens hired a plumber to investigate the house drain in June 2018. The plumber wrote in the invoice that the pipes were “in good shape”. A photo of the ceiling shows the water-damaged area had a small faint circle visible before it fell through. I find the Nielsens would not have necessarily noticed it or known this was a sign of water damage. As noted earlier, they rarely stayed in the house.
23. The Nielsens also provided a letter from DB, a retired real estate appraiser. DB wrote that he examined the shower pan and found a loose drain assembly and damaged gasket. He also found 2 cracks around the drain in the shower pan. The Nielsens say these were the cause of the leaks. DB noted he unscrewed the drain assembly to investigate. I find from DB’s letter and the shower pan photos that these issues would not have been readily apparent to the Lamontagnes. Consistent with my finding, the Nielsens’ inspector did not identify these specific issues in their report.
24. I note that a contractor, D, wrote in a short, undated email that someone must have opened the drain assembly, seen the damage, and put the assembly back, ignoring

the damage. D might have been referring to DB's work, so I do not find it proven that the Lamontagnes did this.

25. For these reasons, I dismiss Mr. Nielsen's water and plumbing claims. Ms. Gyles did not make any representations in the PDS so I find any water and plumbing claims against her must fail. I dismiss them as well.

***Issue #2. Did any of the respondents breach the contract of purchase and sale by taking the mirrors, curtains, or by failing to provide a suitable replacement for the main bathroom mirror?***

26. Section 7 of the contract listed items that were included with the house sale. These included fixtures and fixed mirrors. The parties typed in that the bamboo mirror in the main bathroom was excluded, but the Lamontagnes agreed to replace it with a "similar mirror". The Niensens and Lamontagnes agree that the Lamontagnes provided a dissimilar replacement. The Lamontagnes say they could not find a closer substitute. Given this, I find the Lamontagnes breached section 7 of the contract.
27. The Lamontagnes provided text messages showing they originally purchased the bamboo mirror for \$125. I find this to be the best measure of the mirror's value. So, I find that Mr. Nielsen is entitled to damages of \$125. I considered reducing this amount because he still has the replacement mirror, but I do not find its value proven by evidence. The Lamontagnes provided an ad for a new mirror that did not resemble a photo of the replacement mirror. I also find the replacement mirror has limited value for Mr. Nielsen given its different style, as shown in photos.
28. The Niensens also claim for 2 other bamboo mirrors that the Lamontagnes took with them. The Lamontagnes say they were entitled to take them because, unlike the main bathroom mirror, these mirrors were not fixed to the wall. I accept this, as photos show the mirrors had wire hangers attached to them. Given this, I find the 2 mirrors were included not items under section 7 of the contract.
29. The Niensens say they were unaware that the 2 mirrors were not fixed to the wall and asked about the mirrors in a September 4, 2020 email. I find the email did not ask a

clear question about whether the mirrors were included in the sale. I find that the principle of “buyer beware” applies. So, I find the Lamontagnes were entitled to take the 2 unattached mirrors. I dismiss this claim.

30. This leaves the curtains. Under section 7, the house sale included window coverings. The Lamontagnes agree that they breached the contract by taking the curtains. The Niensens say \$100 is appropriate compensation whereas the Lamontagnes say \$60. Neither party provided any evidence of the curtains’ value. As Mr. Nielsen has the burden to prove his claim, I find the lower value of \$60 is appropriate. I order the Lamontagnes to pay Mr. Nielsen this amount.
31. There is no indication that Ms. Gyles had any obligations about the mirrors or curtains. The Niensens did not explain why she is liable. So, I dismiss all claims against her.
32. The *Court Order Interest Act* applies to the CRT. Mr. Nielsen is entitled to pre-judgment interest on the total award of \$185 for damages from September 19, 2020, the possession date, to the date of this decision. This equals \$0.70.
33. 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 see no reason in this case not to follow that general rule. I find Mr. Nielsen is entitled to partial reimbursement of \$87.50 in CRT fees. The parties did not claim for any dispute-related expenses, so I order none.

## **ORDERS**

34. Within 14 days of the date of this order, I order the Lamontagnes to pay a total of \$273.20 to Mr. Nielsen, broken down as follows:
  - a. \$185 in damages,
  - b. \$0.70 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$87.50 in CRT fees.



35. Mr. Nielsen is entitled to post-judgment interest, as applicable.
36. I dismiss Mr. Nielsen's remaining claims.
37. I dismiss all of the claims of Mrs. Nielsen.
38. I dismiss all claims against Ms. Gyles.
39. 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 expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, 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.
40. 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.

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David Jiang, Tribunal Member