



Civil Resolution Tribunal

Date Issued: August 5, 2021

File: SC-2020-008649

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Barcelona v. Toor*, 2021 BCCRT 856

BETWEEN:

MA ELIZABETH BARCELONA

APPLICANT

AND:

AMARINDER SINGH TOOR, HARKAMALRAJ TOOR,
SURJIT SINGH TOOR, and JAGJIT KAUR TOOR

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This is a dispute about a retaining wall. The applicant, Ma Elizabeth Barcelona, and the respondents, Amarinder Singh Toor, Harkamalraj Toor, Surjit Singh Toor, and Jagjit Kaur Toor, are neighbours. Ms. Barcelona says the Toors built a retaining wall that directs water into her back yard and has damaged her landscaping. Ms.

Barcelona claims \$3,024 for fence and drainage installation, \$1,095.36 for new plants and lawn repair, \$64.89 for fence paint, \$76.09 for fence stain, and \$500 for fence painting labour.

2. The Toors deny that their retaining wall caused any flooding or damage in Ms. Barcelona's yard, and that if there was any such damage it was caused by Ms. Barcelona's own inadequate or defective drainage. The Toors say they agreed to replace fence panels they removed when constructing the retaining wall, but Ms. Barcelona replaced and upgraded the fence for an excessive amount. The Toors say they owe nothing except the reasonable replacement of the original fence panels.
3. Ms. Barcelona is self-represented in this dispute. Amarinder Singh Toor represents the Toors.

JURISDICTION AND PROCEDURE

4. 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.
5. 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.
6. 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.

7. 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

8. The issues in this dispute are:
 - a. Are the Toors responsible for damage to Ms. Barcelona's yard drainage systems and landscaping, and if so, what is the appropriate remedy?
 - b. To what extent are the Toors responsible for replacing Ms. Barcelona's fence?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, as the applicant Ms. Barcelona must prove her claims on a balance of probabilities. I have read all the parties' submitted material but refer only to the relevant evidence and arguments needed to explain my decision.
10. The parties do not say whether all of the Toors own the property adjacent to Ms. Barcelona's property, and no ownership evidence was submitted. However, none of the Toors deny that they constructed a retaining wall and removed a portion of Ms. Barcelona's fence.
11. It is undisputed that the Toors' yard abuts Ms. Barcelona's yard along one side. The Toors constructed a concrete retaining wall and patio area approximately 6 metres long on that side, immediately adjacent to Ms. Barcelona's yard. The retaining wall is approximately 5 feet high, and is slightly higher than the original wooden fence that stood there. To construct the wall, the Toors removed some of the fence panels. The Toors agree that they were responsible for replacing that section of fence with new panels, because the removed panels were rotten.

Are the Toors responsible for drainage and landscaping damage?

12. Ms. Barcelona says that no drainage, or inadequate drainage, was provided for the retaining wall. She says that the wall prevents rainwater from draining from her yard, and that water and debris collect on the Toor's concrete patio and flow over the wall and into her yard. She also says that this debris, along with the Toors' construction debris, blocked her own yard drainage systems. Ms. Barcelona says that this has caused water to pool in her back yard, damaging her lawn and landscaping. As noted, she claims \$3,024 for fence and drainage installation, and \$1,095.36 for new plants and lawn repair. I address the fence later in this decision.
13. The Toors say that water does not pool in Ms. Barcelona's yard. They say the retaining wall only borders a portion of one side of her yard and does not affect her drainage. The Toors say that the edges of Ms. Barcelona's yard have swales, or drainage areas, that allow water to drain out the back of her yard. The Toors say that Ms. Barcelona did not properly maintain her swale drainage, and blocked some of it with planters and dirt, likely causing any drainage issues. Ms. Barcelona denies having inadequate drainage.
14. I find that the law of nuisance applies here. A nuisance is an interference with a person's use or enjoyment of land that is both substantial and unreasonable (see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraph 18). Further, an upslope owner is generally not liable for water naturally flowing from their property unless they take positive steps to change the natural flow of water that interferes with another person's property, or to accumulate and then release natural water (see *Mackay v. Brookside Campsite Inc.*, 2021 BCSC 1304 at paragraphs 132-133, citing *Jorgensen v Kamloops (City)*, 2020 BCSC 864, *Trans Mountain Pipeline Company Limited v. Nicola Valley Sawmills Limited*, 1975 CanLII 1001, 62 DLR (3d) 279 (BCSC), and *Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258, among other decisions). I find the primary question here is whether the retaining wall diverted the natural flow of water in the parties' yards, and if so, whether the diversion caused a substantial and unreasonable interference with Ms. Barcelona's use or enjoyment of her yard.

15. The parties submitted photos of Ms. Barcelona's back yard before and after the retaining wall was built, and photos of the wall. I find the photos do not show any obvious standing water or areas of notable moisture. The later photos show some small yellow patches in Ms. Barcelona's lawn, including at a low point near the back fence, which are not adjacent to the Toors' yard. The photos also show a drain installed in the Toors' concrete patio. I find the photos show no obvious drain clogs or construction debris as claimed by Ms. Barcelona, apart from a short piece of rope on the ground. I also find the photos do not obviously show any debris, dirt, or water flowing over the retaining wall, or being diverted into Ms. Barcelona's yard.
16. I find that whether Ms. Barcelona's landscaping and drainage was damaged, the cause of any damage, and whether the retaining wall contributed to it, are questions outside of ordinary knowledge and experience that require expert evidence to prove (see *Bergen v. Guliker*, 2015 BCA 283).
17. Ms. Barcelona provided a March 19, 2021 Euro Landscaping quotation for landscaping, drainage, and fence work in her yard, but I find it does not indicate why the work was ordered or performed. I find Ms. Barcelona provided no expert evidence. Apart from Ms. Barcelona's unsupported submissions, I find the evidence does not show that the retaining wall diverted water or debris into Ms. Barcelona's yard, caused water to accumulate in her yard, or damaged her landscaping and drainage.
18. The Toors submitted a June 15, 2021 water drainage report and invoice from Garry Dusanjh of Bakerview Building Design Ltd. (Bakerview). The report said that Bakerview has been designing buildings for 7 years, and that Mr. Dusanjh's other work experience included being a Plan Checker for the city where the parties live, as well as work for multiple engineering firms and as an on-site Project Manager. Ms. Barcelona does not take issue with Mr. Dusanjh's qualifications, although she says that his opinion is inaccurate because it is not based on a thorough in-person inspection. On balance, I find that under CRT rule 8.3(3) Mr. Dusanjh is qualified by experience to provide an expert opinion on drainage.

19. I find that the report and invoice show that Mr. Dusanjh visited the Toors' property, but it is undisputed that he did not enter Ms. Barcelona's yard. So, I find that Mr. Dusanjh's investigation was limited to a visual inspection of what he could observe from outside of her yard. The report said that an unspecified "issue with drainage" in Ms. Barcelona's yard was caused by dirt and planted flowers and shrubs filling the drainage swale along the boundary with the Toors' yard. Mr. Dusanjh believed that any applicable building permit should have required a swale along the property line due to the difference in elevation between the yards. No applicable permit is in evidence.
20. I place reduced weight on Mr. Dusanjh's report because it was based on a limited visual inspection of Ms. Barcelona's yard. Having said that, I find the report does not support that the retaining wall caused a drainage issue or damaged Ms. Barcelona's landscaping. Overall, I find that the evidence before me does not show that the retaining wall diverted water into Ms. Barcelona's yard, or that diverted water or construction debris caused any drainage issues in Ms. Barcelona's yard or damaged her landscaping. So, I find Ms. Barcelona has not met her burden of proving that the Toors substantially interfered with her use and enjoyment of her yard. I dismiss Ms. Barcelona's claim for drainage and landscaping repairs, and for \$1,095.36 in plant and lawn repair costs.

To what extent are the Toors responsible for fence replacement costs?

21. The Toors admit that they were responsible for replacing the fence panels they removed from Ms. Barcelona's yard with new ones, because the originals were rotten. The Toors say Ms. Barcelona replaced the fence panels before they were able to. They say Ms. Barcelona installed taller, upgraded panels that cost more than original-type replacement panels. The Toors also say that Ms. Barcelona has failed to prove what she paid to replace and paint the removed fence sections, and that her claimed damages are excessive in any event. Ms. Barcelona says that the Toors' contractor delayed installing the fence for a long time and was unreachable, so she had the

fence replaced. She says the new fence is slightly taller than the old one, because otherwise the new retaining wall would have been taller than the fence.

22. The Euro Landscaping quotation for fencing and landscaping work did not break out the fence's cost separately from landscaping and other work. The quotation was a flat fee of \$2,750 plus taxes for several items of landscaping and drainage work, plus installing wood posts and lattice-top fence panels matching the old panels, including labour and materials. Ms. Barcelona signed the quotation, and submitted an image of a cheque made out to Euro Landscaping for \$3,080, which I note is only slightly higher than her \$3,024 claim for "fence and drainage installation". I find this quotation and payment fail to show the cost of the fence work alone.
23. Ms. Barcelona admits that she paid only \$210 for fence panel painting, as shown in a June 23, 2021 receipt from Master Choice painting, rather than the \$500 originally claimed. The receipt did not indicate whether the price included paint materials. She also claims \$64.89 for paint and \$76.09 for stain, but provided no receipts or other evidence showing the price of those items, that she purchased them, or that both paint and stain were needed. Ms. Barcelona also says that in light of the quoted price for painting, she will not "charge" the Toors the "\$64.06" that she initially claimed. While the meaning of this comment is not perfectly clear to me, it appears to suggest that Ms. Barcelona does not seek an amount beyond \$210 for paint or stain.
24. The Toors submitted a March 30, 2021 quotation from Argowal Construction Ltd. It quoted \$500 for 3 new cedar fence panels and \$150 for paint, totalling \$682.50 after tax. The Toors say this quote includes the cost of installing and painting the fence, which Ms. Barcelona does not directly deny.
25. I find that the evidence before me shows the reasonable cost of replacing the original fence was the quotation for \$500 plus tax, which I find equals \$560. So, I find that the Toors owe Ms. Barcelona \$560 in damages for the cost of replacing the fence.
26. Turning to painting, I find the Toors were also responsible for fence painting costs, so they bear the burden of proving that the \$210 Ms. Barcelona seeks for fence painting

is unreasonable or excessive. I find the Toors have not met this burden, as the evidence before me does not show that \$210 was an unreasonable painting cost. I find that \$210 is in the same general price range as the \$150 plus tax painting quotation the Toors submitted. I also find the evidence fails to show the cost of paint and stain, or whether the \$210 painting charge included paint or stain. On balance, I find that the \$210 charge included both labour and materials. So, I find that the Toors owe Ms. Barcelona \$210 in damages for fence painting. This means that the Toors owe a total of \$770 in damages for the replacement fence.

CRT FEES, EXPENSES, AND INTEREST

27. Under the *Court Order Interest Act*, Ms. Barcelona is entitled to pre-judgment interest on the \$770 owing. I find pre-judgment interest is calculated from June 23, 2021, the date of the fence painting receipt, until the date of this decision. This equals \$0.42.
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. I see no reason not to follow that general rule. I find Ms. Barcelona was partly successful in her claims, so I find she is entitled to reimbursement of half the CRT fees she paid, which equals \$87.50. I also find she is entitled to half of the registered mail fees she paid to serve the CRT Dispute Notice on the Toors, which equals \$24.55.
29. The Toors paid no CRT fees. In their response submissions, the Toors claimed \$420 for the cost of Mr. Dusanjh's water drainage report, as shown in a submitted invoice. Ms. Barcelona does not dispute Mr. Dusanjh's expert qualifications or the claimed report cost. Given that the Toors were partially successful in this dispute, I find they are entitled to partial reimbursement for the report expense. However, I found the report was not particularly helpful because it was based on limited information, and in these circumstances its price appears to be high. On a judgment basis, I find the Toors are entitled to \$100 as reimbursement for the reasonable cost of the report.

30. Given that the Toors admit responsibility for replacing the removed fence sections, I find that they are jointly and severally liable to Ms. Barcelona for the payment ordered in this decision. This means that Ms. Barcelona may collect the ordered amount from any one or more of the respondents.

ORDERS

31. Within 30 days of the date of this order, I order the Toors to pay Ms. Barcelona a total of \$782.36, broken down as follows:

- a. \$770 in damages for fence replacement and painting,
- b. \$0.42 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$87.50 in CRT fees and \$24.44 in CRT dispute-related expenses,
- d. Less \$100 for the Toors' CRT dispute-related expenses.

32. Ms. Barcelona is entitled to post-judgment interest, as applicable. I dismiss Ms. Barcelona's other claims.

33. 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.

34. 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.

Chad McCarthy, Tribunal Member