



Civil Resolution Tribunal

Date Issued: August 18, 2021

File: SC-2020-006110

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Boles v. Harrison*, 2021 BCCRT 906

B E T W E E N :

PAMELA BOLES

APPLICANT

A N D :

PATRICIA HARRISON

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about a painting. The applicant, Pamela Boles, says she purchased it through a live online auction from the respondent, Patricia Harrison. Ms. Boles says Mrs. Harrison breached their contract and committed the tort of conversion by failing to deliver the painting and subsequently consigning it. Ms. Boles says she had to

purchase the painting again in order to preserve it. She seeks reimbursement of \$1,120 paid to Mrs. Harrison.

2. Mrs. Harrison denies liability. She says Ms. Boles released her claims against Mrs. Harrison under the terms of a settlement agreement. I also find she alleges Ms. Boles' claims are barred by the rule against "double recovery", though she did not use this term.
3. The parties are self-represented.
4. For the reasons that follow, I dismiss Ms. Boles' claims.

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. Some of the evidence in this dispute amounts to a "she said, she said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. 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. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38,

the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.

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.

Objections about Late Evidence and Settlement Discussions

9. Mrs. Harrison provided late evidence in this dispute. It consists of emails between her and 2 online auctioneers, MaxSold Incorporated (MaxSold) and Westbridge Auctions. I discuss their roles in this dispute below. Some of the late evidence and Mrs. Harrison's other evidence includes emails from MaxSold advising of settlement discussions between itself and Ms. Boles, and asking for Mrs. Harrison's cooperation. Ms. Boles objects to the late evidence. She also objects to all evidence that references settlement discussions.
10. I will first discuss the evidence referring to settlement discussions. CRTA section 42(2) says the CRT is not bound by the rules of evidence, but may not admit evidence that is inadmissible in a court because of a privilege under the law of evidence or otherwise. Settlement privilege protects documents and communications created for the purpose of settlement from production to other parties to the negotiations and to strangers. See *Middlekamp et al v. Fraser Valley Real Estate Board et al (1992)*, 1992 CanLII 4039 (B.C.C.A.) at paragraphs 18 to 20.
11. I find that all emails between MaxSold and Mrs. Harrison from May 25, 2020 onwards are about ongoing settlement negotiations. I find these emails are protected by settlement privilege, and I therefore I place no weight on them in making this decision.

12. This leaves the late evidence that is not protected by settlement privilege. I do not find Ms. Boles is prejudiced by the late evidence. Ms. Boles had the opportunity to review the evidence and provide submissions and evidence in response. I find it relevant to the issues in this dispute. For those reasons, I find it admissible.
13. Ultimately, I find nothing turns on the late evidence or documents protected by settlement privilege, for the reasons discussed below.

ISSUE

14. The issues in this dispute are as follows:
 - a. Is Ms. Boles' claim prevented by the principle of double recovery?
 - a. Did Ms. Boles release her claims against Mrs. Harrison, and if not, must Mrs. Harrison pay Ms. Boles damages for breach of contract or the tort of conversion?

EVIDENCE AND ANALYSIS

15. In a civil proceeding like this one, the applicant Ms. Boles must prove her claims on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and arguments that I find relevant to provide context for my decision.
16. I begin with the undisputed background facts. In February 2020, Mrs. Harrison auctioned the painting using the online auctioneer MaxSold. MaxSold emailed Ms. Boles on February 20, 2020, to advise that she won with an already-paid bid of \$26.00. MaxSold instructed her to pick up the painting on February 22, 2020 from Mrs. Harrison's residence.
17. Ms. Boles went as instructed but the painting was gone when she arrived. Mrs. Harrison says this is because she asked Westbridge Auctions to pick up the painting on February 22, 2020. Mrs. Harrison explains she did so because she instructed

MaxSold to remove it from the auction before it went live, and it failed to do so. I make no findings on whether MaxSold is to blame as it is not a party in this dispute.

18. Mrs. Harrison then listed the painting for sale in a March 2020 online auction. Westbridge Auctions delayed the auction until August 8, 2020 due to concerns about COVID-19. From March to August 2020, Ms. Boles contacted Mrs. Harrison, including through email, to get the painting. Mrs. Harrison did not reply. Ms. Boles purchased the painting again during the August 2020 auction, this time for \$1,120. Ms. Boles currently possesses the painting.

Is Ms. Boles' claim prevented by the principle of double recovery?

19. The fundamental principle of damage awards is that an applicant should be compensated for the full amount of their loss, but not more. Courts have held that there is a rule against “double recovery” as it breaches this principle. This is because double recovery would place an applicant in a better position than if the tort or breach of contract had not occurred. See *Ashcroft v. Dhaliwal*, 2008 BCCA 352, leave to appeal ref'd [2008] S.C.C.A. No. 488 at paragraph 2 and *Henry v. British Columbia (Attorney General)*, 2017 BCCA 420, leave to appeal ref'd [2018] S.C.C.A. No. 53 at paragraphs 29 to 30.
20. Mrs. Harrison says MaxSold paid Ms. Boles \$7,500 for Ms. Boles to release her claims against MaxSold and herself. Ms. Boles disagrees that she released any claims against Mrs. Harrison. There is no copy of the settlement agreement in evidence. So, I will put that issue aside for the moment. Though she did not use the term, I find Mrs. Harrison also says, in essence, that Ms. Boles' claim should be dismissed because it breaches the rule against double recovery.
21. Our Court of Appeal has held that it may be appropriate to review settlement documentation to ensure there is no excess recovery. This is an exception to settlement privilege. Further, the Court has said that the concern to prevent double recovery outweighs the public interest in encouraging settlements. See *Henry* at paragraphs 32 and 35.

22. Given Mrs. Harrison's submissions, I asked Ms. Boles to provide a copy of the settlement agreement with MaxSold and to comment on whether ordering payment would result in double recovery. Ms. Boles asked for extra time to reply, which I granted, but ultimately provided no further submissions or evidence.
23. Ms. Boles bears the burden to prove her claims. This includes showing a compensable loss. She did not deny Mrs. Harrison's allegations about double recovery. She did not deny the existence of the settlement agreement. In these circumstances I find it appropriate to make an adverse inference against Ms. Boles. So, I find Ms. Boles has not proven any entitlement to damages. I therefore dismiss her claim for reimbursement of money paid for the painting.
24. Given the above, I find it unnecessary to consider whether Ms. Boles released her claims against Mrs. Harrison in the settlement agreement.
25. 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. Mrs. Harrison did not pay any CRT fees or claim any dispute-related expenses, so I order no reimbursement. I dismiss Ms. Boles' claims for reimbursement of CRT fees and dispute-related expenses.

ORDERS

26. I dismiss Ms. Boles' claims and this dispute.

David Jiang, Tribunal Member