



Civil Resolution Tribunal

Date Issued: December 14, 2021

File: SC-2021-000071

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Keeping v. Emmelkamp*, 2021 BCCRT 1305

B E T W E E N :

JANNETTE NESTA MARY KEEPING

APPLICANT

A N D :

JUDITH EMMELKAMP

RESPONDENT

A N D :

JANNETTE NESTA MARY KEEPING

RESPONDENT BY COUNTERCLAIM

A N D :

DANIELLE KERSHAW (Doing Business As KERSHAW FENCING)

RESPONDENT BY THIRD PARTY CLAIM

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about fencing between rural neighbours. The applicant (and respondent by counterclaim) is Jannette Nesta Mary Keeping. The respondent (and applicant by counterclaim) is Judith¹ Emmelkamp. Mrs. Emmelkamp filed a third party claim against sole proprietorship Danielle Kershaw (Doing Business As Kershaw Fencing). Miss Keeping did not claim against Ms. Kershaw directly.
2. Miss Keeping says Mrs. Emmelkamp replaced their adjoining properties' fence line without her prior agreement. Miss Keeping says that in doing so, Mrs. Emmelkamp's contractor Ms. Kershaw left debris on Miss Keeping's property and failed to properly re-install her own farm fencing. Miss Keeping claims a total of \$4,950 to deal with the debris and to fix her farm fencing.
3. Mrs. Emmelkamp and Ms. Kershaw both say Mrs. Emmelkamp instructed Ms. Kershaw not to leave any debris on Miss Keeping's property and that Ms. Kershaw's crew followed those instructions. In her third party claim against Ms. Kershaw, Mrs. Emmelkamp says Ms. Kershaw is responsible for any award to Miss Keeping for debris removal or farm fencing repair.
4. Mrs. Emmelkamp counterclaims for \$2,000.93, being 50% of the cost of the new fence's construction. She says Miss Keeping is jointly responsible for that expense

¹ In Miss Keeping's application, she named Mrs. Emmelkamp as "Judy Emmelkamp". In her counterclaim and third party claim, Mrs. Emmelkamp identified herself as "Judith Emmelkamp". I have used "Judith" as I find that is undisputedly Mrs. Emmelkamp's correct name.

under the BC *Trespass Act*, which says rural neighbours are jointly responsible for the cost of a shared fence's upkeep. Miss Keeping denies responsibility for the new fence because she says it was not needed and because she was not consulted about it.

5. The parties are each self-represented.

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). 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.
7. CRTA section 39 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.
8. Under CRTA section 42, 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 CRTA section 118, 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.
10. To the extent Miss Keeping alleges Mrs. Emmelkamp harassed or defamed her, I will not address those allegations. First, there is no recognized tort of harassment in

BC (see *Total Credit Recovery v. Roach*, 2007 BCSC 530). This dispute is about compensation for fencing and related debris and damage. Second, CRTA section 119 says the CRT has no jurisdiction over libel and slander, which includes defamation.

ISSUES

11. The issues are:

- a. Did Ms. Kershaw's crew damage Miss Keeping's farm fencing or deposit debris on Miss Keeping's property, and if so, what are Miss Keeping's proven damages?
- b. If yes, is Mrs. Emmelkamp responsible or is Ms. Kershaw responsible?
- c. Must Miss Keeping pay Mrs. Emmelkamp for 50% of the new fence construction's cost?

EVIDENCE AND ANALYSIS

12. In a civil claim like this one, Miss Keeping has the burden of proving her claims, on a balance of probabilities (meaning "more likely than not"). Mrs. Emmelkamp has this same burden in proving her counterclaim against Miss Keeping and in proving Mrs. Emmelkamp's third party claim against Ms. Kershaw. I have only referenced below what I find is necessary to give context to my decision. Apart from her submissions, Ms. Kershaw did not submit any documentary evidence, despite having the opportunity to do so.
13. I note that to a large extent Miss Keeping's evidence focuses on inter-personal difficulties with Mrs. Emmelkamp and the larger community, including historical conflicts. I acknowledge Miss Keeping alleges Mrs. Emmelkamp convinced neighbours to shun her and so Miss Keeping says this will cause her to incur higher debris removal costs as she will need to look outside the community for help. I find that unproven on the evidence before me, and as noted, I find I have no jurisdiction

to order a remedy for defamation. So, I will not comment on those matters and will instead focus on the narrow issues before me, which are whether Ms. Kershaw's crew (hired by Mrs. Emmelkamp) deposited debris on Miss Keeping's property and damaged her farm fencing, and, whether Miss Keeping is responsible for 50% of the cost of the new fence.

Did Ms. Kershaw's crew damage Miss Keeping's farm fencing or deposit debris on her property, and if so, what are Miss Keeping's proven damages?

14. The parties agree Miss Keeping and Mrs. Emmelkamp share a rural property line. Miss Keeping bought her property in around 2007, at which time Mrs. Emmelkamp was already living on her property and the old fence was in place. Mrs. Emmelkamp hired Ms. Kershaw to build the fence, which was completed in around August 2019. Ms. Kershaw's family member KK installed the new fence.
15. I acknowledge Miss Keeping says some of the fence did not entirely follow the property line. Since Miss Keeping expressly seeks no remedy about the new fence's location or for any alleged trespass in removing the old fence, I make no findings about it.
16. Mrs. Emmelkamp and Ms. Kershaw both say Mrs. Emmelkamp instructed Mr. Kershaw not to place debris on Miss Keeping's property while installing the fence. Both also say that no debris was deposited on Miss Keeping's property, which Miss Keeping denies. There is no suggestion that Miss Keeping saw KK or any other crew member deposit debris on her property.
17. Based on Mrs. Emmelkamp's and Miss Keeping's submitted photos, their shared property line is in a rural and largely forested area. Contrary to Miss Keeping's assertion, I find it unproven that KK dumped debris on Miss Keeping's property, which KK also denies doing. I agree with Mrs. Emmelkamp that given the surrounding property condition, the wood branches and tree stumps appear to be naturally decaying wood. Moreover, Mrs. Emmelkamp submitted a photo of a pile of debris that she says is on her side of the property line, not Miss Keeping's. Mrs.

Emmelkamp also submitted a number of clear photos showing both her and Miss Keeping's side of the fence, with no debris piles on Miss Keeping's side.

18. There is one photo submitted by Miss Keeping, her photo #11, that appears to show a few rocks and tree stumps on what I infer is her side of the property line. Yet, I cannot tell that these were not there before the fence construction as Mrs. Emmelkamp alleges, again, bearing in mind the forested and overgrown area.
19. Miss Keeping also submitted a copy of a June 27, 2020 letter from the Cariboo Regional District's Senior Bylaw Enforcement Officer. The officer wrote that Miss Keeping had "pointed out debris from the installation that was placed" onto her property. I find this is not proof that KK deposited the observed debris on Miss Keeping's property. Rather, it only reflects Miss Keeping's assertion that it was. The officer did not say anything about the debris that would support a conclusion it was likely freshly dumped wood or was not naturally occurring. The photos attached to the June 27, 2020 letter show some collection of wood and forest debris on the ground, but again, I cannot determine KK deposited the debris.
20. Miss Keeping submitted a June 23, 2021 quote for \$3,255 from Eureka Creek Bulldozing Ltd. I find this quote unhelpful for 2 reasons. First, while it describes relocation of debris and rocks, it does not say the debris was dumped there as opposed to occurring naturally. Second, the quote is almost 2 years after the new fence was built. I find that span of time too great to conclude any debris in 2021 was likely deposited there in 2019 when the new fence was built.
21. I turn to the farm fencing. Miss Keeping says that during the fence construction process she told KK that she was fine with the fence work so long as it was along the property line and that he re-install her farm fencing. Miss Keeping says after the farm fencing was re-installed it was "tacked with one staple every third post". I infer she argues this was a substandard installation. Miss Keeping says she was unhappy to have to repair it herself.

22. I do not accept that KK improperly re-attached Miss Keeping's farm fencing (situated inside Miss Keeping's side of the property line). Ms. Kershaw says KK properly re-installed the farm fence after the new fence was built. I cannot tell from Miss Keeping's submitted photos that there is anything wrong with her farm fence or that KK did anything to Miss Keeping's property that she did not consent to. In the photos submitted by Mrs. Emmelkamp, I also see nothing obviously wrong with the farm fencing. I am left here with an evidentiary tie and as noted Miss Keeping has the burden of proof on this point. Given there is nothing obviously deficient about the farm fencing, I find expert evidence would be required as it is outside ordinary knowledge (see *Bergen v. Guliker*, 2015 BCCA 283). Yet here there is none.
23. Given my conclusion above, I dismiss Miss Keeping's claim on the basis I find it unproven Ms. Kershaw's crew left debris on her property or damaged her farm fencing or re-installed incorrectly. It follows that I dismiss Mrs. Emmelkamp's third party claim against Ms. Kershaw, as Ms. Kershaw's liability in that claim turns on whether Mrs. Emmelkamp is ordered to pay Miss Keeping anything.
24. Given the above, I do not need to address the applicable law (private nuisance and trespass). I also do not need to address Miss Keeping's claimed damages in great detail. However, I would note the following.
25. First, the evidence shows Ms. Kershaw (and her employee KK) acted as an independent contractor and were not Mrs. Emmelkamp's employees. This is not disputed. This matters because employers are generally vicariously liable for their employees' conduct. However, with certain exceptions that do not apply here, an employer is not liable for the negligence of a business it hired as an independent contractor (see *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 SCR 1145 stated at paragraphs 19 and 20).
26. So, I find Mrs. Emmelkamp would not be responsible for any debris that KK left on Miss Keeping's property or for any farm fencing damage. This means that Ms. Kershaw is not liable under the third party claim because Mrs. Emmelkamp owes nothing to Miss Keeping. As noted, Miss Keeping did not name Ms. Kershaw

directly and so even if KK had deposited debris and damaged Miss Keeping's farm fencing (which I found unproven above), I would have dismissed Miss Keeping's claims against Mrs. Emmelkamp in any event.

27. Second, Miss Keeping claims a total of \$4,950. Yet, the only documentary evidence she submitted to support that value was Eureka's \$3,255 quote. Further, Eureka's quote includes "spread remaining small material" and "contour slope for planting", which I find are items that are unrelated to KK's fencing work. I would not have found even the \$3,255 quote proven because, as noted, I find all of it does not relate to the fencing issue and there is no breakdown in the quote. Next, \$500 of Miss Keeping's total \$4,950 claim is for her "possibly" having to hire a machine if she cannot find someone in the immediate area to work on her property. I find this \$500 claim is speculative and I would have dismissed it in any event.

Must Miss Keeping pay Mrs. Emmelkamp for 50% of the new fence construction's cost?

28. Mrs. Emmelkamp claims \$2,000.93, being 50% of the \$4,001.87 she paid Ms. Kershaw for the new fence. Miss Keeping and Mrs. Emmelkamp both say they had no agreement about splitting the cost of the new fence. Miss Keeping says a new fence was unnecessary.
29. Mrs. Emmelkamp relies on section 10 of the *Trespass Act*, which says owners of adjoining rural land must "make, keep up and repair" the lawful fence and any natural boundary between their land. As noted, the parties' respective properties are undisputedly on rural land. Section 10 also says that each of the owners is liable to the other for 50% of any cost reasonably incurred to do this. Miss Keeping does not directly address the *Trespass Act* in her submissions.
30. The difficulty for Mrs. Emmelkamp is that there is no evidence before me about the prior fence's condition. There are no photos of it and no correspondence about it. There is no statement from Ms. Kershaw about the former fence and Mrs. Emmelkamp does not explain why a new fence was needed. I find it unproven that

the new fence was necessary or was required under the *Trespass Act*. So, given Miss Keeping and Mrs. Emmelkamp undisputedly had no agreement about sharing the fence replacement cost, I dismiss Mrs. Emmelkamp's counterclaim for 50% of the cost.

31. 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. Miss Keeping and Mrs. Emmelkamp were both unsuccessful in their respective claims. So, I find they should each bear the expense of their paid CRT fees. Ms. Kershaw did not pay CRT fees and no party claimed dispute-related expenses.

ORDER

32. I dismiss all parties' claims and this dispute.

Shelley Lopez, Vice Chair