Civil Resolution Tribunal

Date Issued: March 9, 2022

File: SC-2021-006249

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *MacLeod v. Vaughan,* 2022 BCCRT 256

B E T W E E N :

MARY MACLEOD

APPLICANT

A N D :

CASSANDRA VAUGHAN (Doing Business As Blue Coyote Bed, Bale & Boarding)

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. This dispute is about soil for a garden bed.

2. The applicant, Mary MacLeod, purchased 12 yards of “topsoil” from the respondent, Cassandra Vaughan (dba Blue Coyote Bed, Bale & Boarding), for her garden. She says Ms. Vaughan misrepresented the product as “topsoil” when it was allegedly a

nutrient deficient “subsoil”. She says she could not use the soil to put in her planned garden and ended up buying prepackaged soil instead. Ms. MacLeod seeks a refund of $1,610 for the soil, $180 for a soil analysis, and $370 for the prepackaged soil.

3. Ms. Vaughan disputes the claim. She says Ms. MacLeod was initially happy with her “topsoil”, accepted its delivery, and then simply changed her mind because of the effort to move that much soil into a garden. She says Ms. MacLeod is not entitled to any reimbursement.

4. The parties are each self-represented.

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.

9. As a preliminary issue, Ms. MacLeod submitted evidence past the CRT's deadline. The evidence includes some of the parties' own text messages with Blue Coyote's advertisement and photographs of Blue Coyote's "topsoil" and payment receipts. I find the CRT provided Ms. Vaughan with an adequate opportunity to respond to all the late evidence and she is not prejudiced by it. Given the CRT's flexible mandate, I allow this late evidence and refer to it where relevant for context in my decision below.

ISSUES

10. The issues in this dispute are:

    a. Did Ms. Vaughan negligently misrepresent the soil product?

    b. If so, what if any, are the damages?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the applicant Ms. MacLeod must prove her claims on a balance of probabilities (which means "more likely than not"). I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.

12. Ms. Vaughan is in the business of selling soil from her farm “Blue Coyote”. Ms. MacLeod says she contacted Ms. Vaughan after seeing a Blue Coyote Facebook advertisement for “topsoil” with a picture of dark soil running through a person’s fingers. She says the parties spoke about the advertised topsoil and Ms. Vaughan told her it was from “nutrient rich pasture land containing over 50 years of compacted manure” and that it would be “excellent” for her raised garden. Ms. Vaughan does not specifically dispute that she described her topsoil in this way and she described the product similarly in argument and the parties’ emails. So, I find it more likely than not that Ms. Vaughan represented her product as nutrient rich topsoil that is excellent for a garden.

13. After their phone discussion, Ms. MacLeod ordered 12 yards of the Blue Coyote “topsoil” at $70 per yard, plus extra for delivery. Ms. Vaughan delivered the soil onto Ms. MacLeod’s driveway and Ms. MacLeod paid $1,040 by e-transfer on April 16, 2021. Ms. MacLeod did not inspect the soil before she paid for it. These facts are not disputed.

14. Ms. MacLeod was present during delivery and says the soil initially seemed “fine” but after it dried in the sun for a few hours it formed hard clumps that were “next to impossible” to break up with her hands. The parties agree they spoke on April 17, 2021 about the alleged problem.

15. As shown in the parties’ emails, Ms. Vaughan returned to Ms. MacLeod’s property to inspect her delivered soil but did not agree that there was a problem with it. However, she offered to refund any returned soil “measured” at $70 per yard. Ms. Vaughan said Ms. MacLeod would be responsible to pay for the trucking or shipping costs to send the soil back and ensuring it was fee of “contaminates”. Ms. MacLeod says this was unrealistic and it would cost her more to return the soil than it was worth and so she kept the soil even though she says she could not use it for her raised garden as is.

16. To support her position about the soil quality, Ms. MacLeod submitted a Pacific Soil Analysis Inc. (Pacific) soil sample analysis and 2 reports from K.A. Enns, B.Sc., M.Sc., who is now retired but undisputedly owned a firm that specialized in soil

analysis. K.A. Enns' May 5, 2021 and May 25, 2021 reports provide their assessment of soil samples allegedly taken from the delivered soil.

17. I note Ms. Vaughan says K.A. Enns is Ms. MacLeod's "friend" and made negative posts about her on Facebook, which Ms. MacLeod disputes. I do not accept Ms. Vaughan's assertion about K.A. Enns as they are not supported by the alleged Facebook posts.

18. I find K.A. Enns has the qualifications to provide an expert opinion about the soil, which is outside common knowledge. I also find K.A. Enns' reports are neutral, professional and supported by the independent data from Pacific Soil Analysis Inc. and British Columbia Landscape Standard for soil. I find K.A. Enns' reports meet CRT's rule 8.3 for admissibility of expert opinion evidence and I allow them.

19. According to K.A. Enns' May 2021 reports:

    a. Topsoil is organically enriched surface soil with higher organic matter content from underlying subsoil.

    b. The tested Blue Coyote soil has less than 5.5% organic matter and far below the topsoil standard of 10% to 20% and it is an "organics-poor native subsoil".

    c. The consequence of insufficient organic matters is that the plants cannot take up nutrients.

    d. The Blue Coyote soil's sand and silt contents will also cause an "impenetrable cemented structure" (concretion) already present on observation.

    e. The Blue Coyote soil will need at least 1/10th to 2/10ths volume of organic matter such as aged manure or compost and fertilizer to be added to support raised garden beds (additives).

20. Ms. Vaughan says her "personal speculation" is that the tested soil samples were some other soil on Ms. MacLeod's property and not Blue Coyote's soil. However, I find K.A. Enns description of the sampled soil in the reports matches the Blue Coyote

soil's visual characteristics and location in the driveway as shown in the photographs. Also, Ms. Vaughan could have submitted a current soil analysis of her Blue Coyote soil if she disputed the Pacific data and she did not. I find it more likely than not that K.A. Enns tested the soil that Blue Coyote delivered to her on April 16, 2021.

21. Rather than submitting a current soil sample, Ms. Vaughan submitted a soil analysis she had done by the City of Trail in 2016. She says the sample was taken from the same soil pile as she sold to Ms. MacLeod in 2021. The City's analysis says the soil meets "low traffic lawn" requirements and will need turf starter before seeding for germination. It says nothing about its suitability for raised gardens. The analysis is also 5 years old and there is no current professional opinion interpreting it. I find the 2016 soil analysis is not helpful in determining the present quality of the soil Ms. Vaughan delivered to Ms. MacLeod in 2021.

22. On balance, I prefer K.A. Enns' reports and current soil analysis data from Pacific about the delivered soil's quality. I am satisfied on the submitted evidence that Ms. Vaughan delivered "organics-poor native subsoil" that was not "topsoil".

Negligent Misrepresentation

23. A "misrepresentation" is a false statement of fact made during negotiations or in an advertisement that has the effect of inducing a reasonable person to enter into the contract. A "negligent" misrepresentation occurs where a seller fails to exercise reasonable care to ensure representations are accurate and not misleading. If a buyer relies on that misrepresentation in making the purchase, the seller may be responsible for any losses arising from that misrepresentation: *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC). I find the test is met here.

24. I find Ms. Vaughan's representation that the soil was a nutrient rich topsoil that was excellent for a raised garden was false. Given Ms. Vaughan had not tested her soil in 5 years, I find Ms. Vaughan failed to exercise reasonable care in representing the quality or condition of her soil in this way. I accept, on balance, that Ms. MacLeod reasonably relied on Ms. Vaughan's representation when purchasing the soil over the

phone. Had Ms. MacLeod known the soil was only subsoil, I find it unlikely that she would have purchased it from Ms. Vaughan given its unsuitability for growing plants. I find the submitted evidence establishes that Ms. Vaughan negligently misrepresented the soil she sold to Ms. Macleod.

25. While the parties did not mention it, the *Sale of Goods Act* (SGA) applied to this sale as well. In a sale by description like this one, SGA section 17(1) implied a condition into the parties' contract the soil would correspond with Ms. Vaughan's description. As she sold Ms. McLeod "subsoil" and not the agreed "topsoil", I find Ms. Vaughan breached this condition of the contract. Because I have already found Ms. Vaughan is liable for negligent misrepresentation and the SGA was not argued, I have not discussed this breach any further.

Damages

26. In an action for negligent misrepresentation, the applicant is entitled to be put in the position they would have been in if the misrepresentation had not been made: *Ban v Keleher*, 2017 BCSC 113.

27. But for the misrepresentation, Ms. MacLeod would have had topsoil for her raised garden. Instead, she had nutrient deficient subsoil that was already "cementing" and needed additives to grow plants. Though the cost of additives is not before me, they would clearly cost something, plus time and effort mix into the hardening soil. Given this, I find the delivered Blue Coyote soil likely had little to no residual value to Ms. MacLeod. I find Ms. Macleod is entitled to a refund of the $1,040 purchase price.

28. I acknowledge that Ms. Vaughan argues Ms. MacLeod should have accepted her offer for a refund if Ms. MacLeod returned the soil uncontaminated at her own cost. However, I find Ms. MacLeod had no obligation to pay to return the soil. If Ms. Vaughan wanted the soil returned, I find she should have reasonably refunded the purchase price and picked up the soil herself, at her own cost. I make no order about the soil that Ms. MacLeod kept and nor is any order requested about it. I also find no basis for a reduction for the kept soil considering my conclusions above.

29. In addition to a refund, Ms. MacLeod claims $370 for pre-packaged soil. However, Ms. Macleod did not submit evidence, such as receipts, to prove that she incurred this extra expense and I already awarded a full refund for the delivered soil. I find Ms. McLeod has not proven that Ms. Vaughan owes her anything for packaged soil and so I dismiss this part of her claim.

30. The *Court Order Interest Act* applies to the CRT. Ms. MacLeod is entitled to pre-judgment interest on the $1,040 damages award from the date of loss to the date of this decision. The interest equals $4.21.

31. 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 Ms. MacLeod was the primarily successful party and is entitled to reimbursement of $125 in paid CRT fees.

32. Ms. MacLeod did not claim anything for the K.A. Enn's reports but claims $180 for Pacific's soil analysis, which is supported by an e-transfer receipt. I find this expense was reasonably incurred and will allow it. I find Ms. Vaughan must reimburse Ms. MacLeod $180 for the soil analysis as a dispute-related expense.

ORDERS

33. Within 30 days of the date of this order, I order Ms. Vaughan to pay Ms. MacLeod a total of $1,349.21, broken down as follows:

    a. $1,040 in damages,

    b. $4.21 in pre-judgment interest under the *Court Order Interest Act*,

    c. $125 in CRT fees, and

    d. $180 in dispute-related expenses.

34. Ms. MacLeod is entitled to post-judgment interest, as applicable.

35. 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.

36. 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.

Trisha Apland, Tribunal Member