



Civil Resolution Tribunal

Date Issued: March 25, 2022

File: SC-2020-007505

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *McCallum v. Dudka*, 2022 BCCRT 338

BETWEEN:

DAN MCCALLUM

APPLICANT

AND:

MATTHEW DUDKA

RESPONDENT

AND:

DAN MCCALLUM

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about a sailboat purchase. The applicant and respondent by counterclaim, Dan McCallum, agreed to purchase a 34-foot sailboat from the respondent and applicant by counterclaim, Matthew Dudka, for \$16,000. Mr. McCallum says Mr. Dudka represented that the sailboat came with an assumable live-aboard moorage at a certain marina. After paying Mr. Dudka a deposit, Mr. McCallum says he discovered live-aboard moorage was unavailable at the marina, so he decided not to complete the purchase. Mr. McCallum claims a refund of the \$4,000 deposit he paid to Mr. Dudka.
2. Mr. Dudka says he told Mr. McCallum that live-aboard moorage was unavailable at the marina. He says the parties' agreement had no conditions, and the deposit was non-refundable.
3. Mr. Dudka counterclaims \$5,000 for the difference in price that he ultimately sold the sailboat for and lost wages for the time he says he spent preparing the sailboat for Mr. McCallum.
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. In some respects, both parties to this dispute call into question the credibility,

or truthfulness, of the other. 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 28, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.

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. Both parties made allegations that the other committed slander or libel against them in the context of this dispute. Section 119(a) of the CRTA specifically excludes libel and slander from the CRT's small claims jurisdiction. In any event, no remedy is sought for these allegations, so I will not comment on them further.
10. I also note that Mr. McCallum says Mr. Dudka lied and asks that he be charged with perjury. I have no authority under the CRTA to do that, and so I make no findings about it. I also have no authority to revisit a prior CRT default decision in this matter that was cancelled, or the BC Provincial Court's proceedings related to that default decision. As set out below, I find the issues to be decided in this CRT dispute are limited to the terms of the parties' agreement about the purchase of Mr. Dudka's sailboat and the impact of any misrepresentation during their negotiations.

11. Mr. McCallum submitted 2 items of evidence after the CRT's deadline. The first is a 23-page collection of various documents, some of which appear to be duplicates of evidence previously submitted on time, though with different highlighting and handwritten notes on them. The other late evidence consists of receipts for claimed dispute-related expenses. Mr. Dudka had the opportunity to provide submissions on all the late evidence. While I find some of the documents contained in the first item are of marginal relevance, given the CRT's flexible mandate, I admit both of Mr. McCallum's late evidence items and have considered them in my analysis below.

ISSUES

12. The issues in this dispute are:

- a. What were the terms of the parties' agreement?
- b. Did Mr. Dudka misrepresent the availability of live-aboard moorage?
- c. To what extent, if any, is Mr. McCallum entitled to a refund of his \$4,000 deposit?
- d. To what extent, if any, is Mr. Dudka entitled to \$5,000 in damages for breach of contract?

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, Mr. McCallum must prove his claims on a balance of probabilities (meaning "more likely than not"). Mr. Dudka bears the same burden to prove his counterclaims. I have read all the parties' evidence and submissions, but I refer only to what I find is necessary to explain my decision.

14. Mr. Dudka advertised his sailboat in September 2020 for \$15,000, on Facebook, Kijiji, and Craigslist. Mr. McCallum says he responded to the ad on Facebook, which is undisputed. Neither party submitted evidence of their initial communications over Facebook. I find the Facebook ad in evidence does not mention anything about the

sailboat's existing slip, including whether live-aboard moorage was available at the marina.

15. Mr. Dudka says that Mr. McCallum first contacted him about the sailboat on September 12. Mr. Dudka had already agreed to sell the sailboat for the listed price to another buyer, who had paid him a \$1,000 deposit. Nevertheless, he offered to show the boat to Mr. McCallum that day in case the other sale fell through. After viewing the boat, Mr. McCallum undisputedly offered to buy the boat for \$16,000, and pay a \$4,000 cash deposit.
16. The parties provided a photo taken of a table displaying Mr. McCallum's \$4,000 cash deposit, the parties' driver's licenses, the sailboat's registration, and a signed handwritten note that stated Mr. Dudka agreed to sell the sailboat to Mr. McCallum on September 12, 2020 "with the deposit cash of \$4,000 - of the total price of \$16,000 Cdn". Based on this note, I find Mr. Dudka accepted Mr. McCallum's offer. I infer that Mr. Dudka then advised the first buyer that he was cancelling their deal.
17. Mr. McCallum says that the parties agreed to complete the sale in 2 weeks to provide them each with the opportunity to get certain things in order. Specifically, Mr. McCallum says Mr. Dudka agreed to change the oil, install a part in the transmission, remove all his belongings, and clean the boat, whereas Mr. McCallum needed to obtain the marina's approval for a live-aboard moorage licence. Mr. McCallum says these were conditions to the sale that the parties verbally agreed to.
18. Mr. Dudka denies that he agreed to any delay in the sale's completion, and says he anticipated full payment right away. He also says there were no conditions on the sale, and specifically denies that the sale was conditional on Mr. McCallum securing live-aboard moorage at the marina.
19. It is undisputed that Mr. McCallum advised Mr. Dudka on September 16, 2020 that he decided not to buy the sailboat. Mr. McCallum says it was because he learned that he could not get live-aboard moorage, contrary to Mr. Dudka's alleged representation discussed further below. Mr. Dudka says Mr. McCallum told him that he decided not

to buy the boat for health reasons. In any event, Mr. Dudka refused to refund Mr. McCallum's deposit.

20. On balance, I do not accept that the parties agreed to complete the sale 2 weeks after Mr. McCallum paid the deposit. I find that had that been the case, Mr. Dudka likely would have included that term in the handwritten note documenting the paid deposit. Further, since Mr. Dudka pulled out of a previous deal in order to sell the boat to Mr. McCallum, I find it unlikely Mr. Dudka agreed to any delay in completing of the sale. Rather, I find it was an implied term of the parties' contract that Mr. McCallum would pay the balance as soon as reasonably possible.
21. For the same reasons, I find the parties likely did not agree to any conditions on the sale. While Mr. Dudka may have offered to perform some minor maintenance and cleaning, I find the parties' agreement was not conditional on that work being completed.
22. As for the moorage, Mr. McCallum says Mr. Dudka told him the boat's existing moorage included power, water, "live aboard", and security. I infer from the parties' evidence that the marina generally allowed those with an existing moorage licence to transfer the licence to a boat's new owner. However, Mr. Dudka says he specifically advised Mr. McCallum while he was first viewing the boat that live-aboard moorage was not available at that marina.
23. Generally, the principle of "buyer beware" applies to purchases of used goods: see *Connors v. McMillan*, 2020 BCPC 230. This means that the buyer assumes the risk that the purchased goods might be either defective or unsuitable to their needs. That said, sellers cannot misrepresent the goods.
24. 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] 1 SCR 87 at paragraph 110.

25. I do not find either party's evidence on what Mr. Dudka told Mr. McCallum about live-aboard moorage entirely credible. I accept that Mr. McCallum intended to live on the boat. So, if Mr. Dudka had told him that live-aboard moorage was unavailable, I find he likely would not have offered to purchase the boat. However, I also find it is very unlikely that Mr. Dudka specifically said the existing moorage was live-aboard, as it clearly was not.
26. The parties agree that they went together to the marina office to arrange the transfer of the boat's existing slip. This is when Mr. McCallum says he learned that live-aboard moorage was unavailable. Yet, he admits he said nothing at the time, and simply took the forms home with him. Had Mr. Dudka previously represented that the boat came with live-aboard moorage, or if it was a condition of the sale, I would have expected the parties to raise this issue immediately.
27. I find the most likely scenario is that Mr. Dudka said nothing about whether live-aboard moorage was available during negotiations. Even if Mr. McCallum advised Mr. Dudka of his intention to live on the boat, I find Mr. Dudka was not obligated to bring it to Mr. McCallum's attention that live-aboard moorage was unavailable at that marina. I find there is insufficient evidence before me to conclude that Mr. Dudka actively tried to hide that fact, or that he made any statements to mislead Mr. McCallum into believing he could live on the boat at the marina.
28. I find Mr. McCallum has not proven that Mr. Dudka falsely represented that the boat came with live-aboard moorage. I also do not find it credible that Mr. Dudka agreed the sale was conditional on Mr. McCallum securing approval for live-aboard moorage at the marina. On balance, I accept Mr. Dudka's evidence that the boat's existing non-live-aboard slip was transferrable, and that he agreed only to assist Mr. McCallum with the transfer.

29. So, was the deposit refundable under the parties' agreement? I find there is no evidence before me that the parties discussed or came to any agreement in advance about whether the deposit was refundable if the sale did not complete.
30. In law, there is a distinction between a true deposit and a partial payment. A true deposit is designed to motivate contracting parties to carry out their bargains. When a buyer refuses to purchase what they had previously agreed to buy (which is called repudiating the contract), generally the buyer forfeits the deposit. In contrast, a partial payment is made with the intention of completing a transaction, such as with a down payment to cover work to be done or materials to be purchased under the contract. For a seller to keep a partial payment, the seller must prove actual loss to justify keeping the money received: see *Tang v. Zhang*, 2013 BCCA 52 at paragraph 30 and *Drozd v. Evans et al*, 2006 BCSC 1650 at paragraph 34.
31. Here, I find Mr. McCallum's \$4,000 deposit was a true deposit rather than a partial payment. I find the purpose of the deposit was to encourage Mr. Dudka to hold the sailboat for Mr. McCallum until he made full payment, and to encourage Mr. McCallum to pay the balance. Since Mr. McCallum undisputedly refused to purchase the boat (so, he repudiated the purchase agreement), and Mr. Dudka did not misrepresent the moorage, I find Mr. McCallum forfeited the \$4,000 deposit. I find Mr. McCallum is not entitled to a refund, and I dismiss his claims.

The counterclaim

32. I turn then to Mr. Dudka's counterclaim for damages, based on Mr. McCallum's repudiation of his agreement to purchase the sailboat. Mr. Dudka says Mr. McCallum "pushed out" the boat's first buyer, who was willing to pay the \$15,000 list price, and that he ultimately sold the boat for only \$8,000.
33. Mr. Dudka claims the \$3,000 difference between the \$15,000 list price and the \$12,000 he received (\$8,000 sale price, plus Mr. McCallum's \$4,000 deposit). He also claims \$1,000 for the amount Mr. McCallum agreed to pay over the list price, and a further \$1,000 for lost wages.

34. Damages for breach of contract are generally intended to put the innocent party in the position they would have been in if the contract had been carried out as agreed: see *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319. Here, had Mr. McCallum completed the sale as agreed, Mr. Dudka would have received \$16,000 for his sailboat.
35. Mr. Dudka provided an October 1, 2020 receipt for the sale of his sailboat for \$8,000. The receipt shows 3 purchasers bought the boat in equal shares, though Mr. Dudka has redacted their names. It is signed by only one of the 3 alleged purchasers.
36. Mr. Dudka says he had to sell the boat for such a low price because it was getting close to winter, so interest in buying a boat was significantly reduced. Mr. McCallum suggests it is not credible that after receiving offers of \$15,000 and \$16,000, Mr. Dudka sold the boat for half-price only 3 weeks later. I agree. I find the unsigned receipt alone is insufficient to establish that Mr. Dudka received only \$8,000 for the sailboat. In the absence of further evidence from the alleged purchasers confirming the amount paid and some explanation for why they paid so much less than the listed price, I find it is unreasonable to hold Mr. McCallum responsible for the alleged difference in price Mr. Dudka says he received.
37. However, I find it is unlikely that Mr. Dudka would have received another offer for over the \$15,000 listed price. I find that Mr. McCallum induced Mr. Dudka to pull out of his agreement with the first buyer by offering \$1,000 more. So, I find that Mr. Dudka is entitled to \$1,000 for Mr. McCallum's breach in failing to complete the purchase for \$16,000, and I order him to pay Mr. Dudka that amount.
38. Mr. Dudka did not provide any evidence in support of his claim for lost wages. He says only that he spent "considerable" time to facilitate the sale with Mr. McCallum, including teaching him about sailing and about the boat. I find this is insufficient to conclude that Mr. Dudka missed work or lost any income, so I find this requested remedy unproven.

39. The *Court Order Interest Act* applies to the CRT. Mr. Dudka is entitled to pre-judgment interest on the \$1,000 from September 16, 2020, the date of Mr. McCallum's breach, to the date of this decision. This equals \$6.84.
40. 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. Mr. McCallum was unsuccessful and so I dismiss his claim for CRT fees and dispute-related expenses.
41. Mr. Dudka was partly successful on his counterclaim. So, I find he is entitled to reimbursement of half his CRT fees, which equals \$87.50. Mr. Dudka also claims \$26.42 for registered mail, but he did not explain what that expense was for or provide any evidence in support, so I decline to allow it.

ORDERS

42. Within 14 days of the date of this decision, I order Mr. McCallum to pay Mr. Dudka a total of \$1,094.34, broken down as follows:
 - a. \$1,000 in damages for breach of contract,
 - b. \$6.84 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$87.50 in CRT fees.
43. Mr. Dudka is entitled to post-judgment interest, as applicable.
44. I dismiss Mr. McCallum's claims and the balance of Mr. Dudka's counterclaims.
45. 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.

46. 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.

Kristin Gardner, Tribunal Member