Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Wenzel v. Kurtagic,* 2022 BCCRT 413

B E T W E E N :

JANAKI WENZEL and CLAYTON CAMPBELL

APPLICANTS

A N D :

VALERIE KURTAGIC and GORAN KURTAGIC

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Leah Volkers

INTRODUCTION

1. The applicants, Janaki Wenzel and Clayton Campbell, purchased a home from the respondents, Valerie Kurtagic and Goran Kurtagic.

2. The applicants say the respondents concealed and failed to disclose mould and water damage in the home's basement, which they say was a latent defect contrary to the

respondents' completed property disclosure statement (PDS). The applicants seek $5,000 for the partial cost of materials required for the repairs. The applicants have expressly abandoned their claim to any amounts in excess of the Civil Resolution Tribunal (CRT) $5,000 small claims monetary limit.

3. The respondents dispute the applicants' claim. They say they there were not aware of any mould or water damage in the home's basement and did not conceal anything. They say they completed the PDS honestly and to the best of their knowledge. They say they are not responsible for any of the applicants' claimed repair costs.

4. The applicants are both represented by Miss Wenzel. The respondents are self-represented.

JURISDICTION AND PROCEDURE

5. These are the CRT's formal written reasons. 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, the parties in this dispute call into question the credibility, or truthfulness, of the others. 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.

ISSUE

9. The issue in this dispute is whether the respondents failed to disclose a known latent defect, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicants must prove their claim on a balance of probabilities (meaning "more likely than not"). I have reviewed the parties' evidence and submissions but refer only to what I find is necessary to provide context for my decision.

11. I find it is undisputed the applicants discovered water damage and mould in the basement subfloor at some point after they purchased the home in 2021. As noted, the parties dispute whether the respondents knew about the water damage and mould and failed to disclose it to the applicants.

12. The respondents say the home was built in 1990, and they purchased it in 2019. The applicants do not dispute this. Sometime in 2021, the respondents listed it for sale. It is undisputed that the respondents provided the applicants with their 2019 home

inspection report prior to the applicants' purchasing the home. The 2019 inspection report was provided in evidence and does not identify any mould in the home. I find the applicants' submissions also suggests that they obtained their own home inspection prior to purchase. However, the applicants' inspection report itself was not provided in evidence. After the applicants viewed the home in person, I infer the parties signed a contract of purchase and sale (CPS) for the home. However, no CPS was provided in evidence. The PDS, signed by all parties, was provided in evidence. The PDS noted the respondents were not aware of any material latent defects.

13. Since the CPS is not in evidence, I am unable to conclude the PDS was incorporated into it. So, I have not focused my analysis on whether there was a contractual breach. Rather, I have considered the common law obligation on the respondent sellers to disclose known latent defects. In the circumstances here, the outcome would be the same even if the PDS had been incorporated into the CPS.

14. In BC, the "buyer beware" principle applies to the sale of real property. This means that the buyer is required to make reasonable enquiries about the property they wish to purchase. This principle is subject to several exceptions. The most important in this dispute is the duty to disclose latent defects. See *Nixon v. MacIver,* 2016 BCCA 8 at paragraphs 32 to 33.

15. The applicants say the basement subfloor water damage and mould is a latent defect. The respondents do not dispute this. As noted above, the applicants say the respondents knew about the water damage and mould, concealed it, and failed to disclose it in the PDS.

16. A patent defect is one that can be discovered by conducting a reasonable inspection and making reasonable enquiries about a property (see: *Cardwell v. Perthen*, 2006 BCSC 333, affirmed 2007 BCCA 313). In contrast, a material latent defect is a defect that cannot be discerned through a reasonable inspection of the property, including a defect that renders the property dangerous or potentially dangerous to the occupants, or unfit for habitation. A seller must disclose a latent defect if they have

knowledge of it. Here, I find the water damage and mould in the basement's subfloor was likely a latent defect. The issue is whether the respondents knew about it.

17. A seller will be considered to have knowledge of a latent defect where they are actually aware of the defect, or where they are reckless as to whether the defect exists. The burden of proving the requisite degree of knowledge or recklessness rests with the applicants (see: *McCluskie v. Reynolds et al* (1998), 65 BCLR (3d) 191 (SC)).

18. A PDS asks whether a seller is aware of a defect, and this awareness is inherently subjective (see: *Hamilton v. Callaway*, 2016 BCCA 189). In a PDS, a seller must disclose honestly its actual knowledge of the property, but that knowledge does not have to be correct (see: *Nixon v. MacIver*, 2016 BCCA 8). A statement in a PDS does not rise to the level of a warranty (see: *Hanslo v. Barry*, 2011 BCSC 1624, *Kiraly v. Fuchs*, 2009 BCSC 654).

19. The applicants say the respondents must have known about the mould and water damage and concealed it because repairs were completed in the basement and concrete was removed from the front of the home. They say that there was different flooring in the basement kitchen than in the rest of the basement. They say this was the area they discovered significant mould. They also say they discovered one piece of newer plywood in the subfloor when they removed the basement flooring.

20. The respondents say in the two years they lived at the home, they never experienced any water damage. The respondents say there was no visible mould or water damage on the floor or the drywall. The respondents say there was no way for them to know about the mould and water damage without removing the floors, which they say they did not do. In support of this, the respondents provided a January 20, 2022 statement from their realtor, Todd Matthews. In their statement, Todd Matthews said they acted for the respondents for the home's sale, which completed on June 21, 2021. Todd Mathews said that they also acted for the home's previous owners when the respondents purchased it from the previous owners in 2019. Todd Matthews says the home's top floor was painted prior to listing it for sale in 2021. Beyond that, they said they saw no evidence of any changes or renovations made to the home's interior.

They also said the basement flooring at the time the respondents sold the home was the same flooring as when the respondents purchased it in 2019. I accept that as the realtor for both the previous seller and the respondents, Todd Matthews was able to observe whether the basement flooring had been replaced while the respondents owned the home. I also find Todd Matthews is an independent witness and likely does not have an interest in the outcome of this dispute. Given this, I accept Todd Matthews' statement and place significant weight on it. I find that the respondents did not replace the basement flooring while they owned the home. Therefore, contrary to the applicants' position, I find the evidence does not prove that the respondents knew about or concealed any of the alleged water damage or mould in the basement's subfloor.

21. As noted, the applicants also say that the respondents removed concrete from in front of the home, as recommended by the 2019 inspection report. They say this shows the applicants knew about the basement's water damage and mould. Among other things, the 2019 inspection report identified "improper slope or drainage" on the home's front yard and walkway. It recommended replacing the cracked concrete walkway due to "chance of water damage to contents, finishes and/or structure". However, the 2019 inspection report did not identify any actual water damage or mould in the basement's subfloor. I find the respondents' decision to remove the concrete walkway due to a chance of water damage does not prove that the respondents were aware of actual water damage or mould in the basement subfloor when they completed the PDS and sold the home to the applicants. Further, the applicants agree that they received a copy of the 2019 inspection report prior to purchasing the home. So, to the extent that the applicants seek to rely on the 2019 inspection report to show that respondents knew or ought to have known about the water damage and mould and should have disclosed it to the applicants, I find the applicants also knew about the issues identified in the 2019 inspection report prior to purchasing the home.

22. The applicants also say that the smell from the basement was an overwhelming indication that there was mould and water damage and would have warranted further

investigation upon living there. The applicants say that a “cat urine” smell was identified in the 2019 inspection report, and the smell still remained when they viewed the home in 2021. They says they believed the previous owners had a cat that had urinated on the floor, and anticipated “possibly needing” to replace the laminate flooring. The applicants say they did not anticipate that almost the entire basement subfloor would be mouldy. While I accept that there was a strong odour in the basement in both 2019 and 2021, I find the 2019 inspection report did not identify any concerns about water damage or mould arising from the cat urine smell. Rather, it only noted that it was an offensive odour that should be improved. As discussed above, I find applicants knew about the issues identified in the 2019 inspection report prior to purchasing the home. The applicants did not provide their inspection report in evidence. So, I do not know whether the offensive odour was identified or whether any concerns about water damage or mould was raised in their own inspection report.

23. As noted, the applicants have the burden of proving their claim. Here, I find the evidence does not establish the respondents knew about the water damage and mould in the basement’s subfloor, or that they actively concealed it. On balance, I find the applicants have not proven the respondents improperly filled out the PDS or otherwise failed to disclose their actual knowledge about the home’s basement. For these reasons, I dismiss the applicants’ claim.

24. 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. As the applicants were unsuccessful, I dismiss their fee claim. The respondents did not pay any CRT fees or claim any dispute-related expenses, so I award none.

ORDER

25. I dismiss the applicants' claim and this dispute.

Leah Volkers, Tribunal Member