Civil Resolution Tribunal

Date Issued: May 27, 2022

File: SC-2021-008589

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Fone v. MacDonald*, 2022 BCCRT 626

BETWEEN:

ANN CHOO FONE and ALAN CHOO FONE

APPLICANTS

AND:

JOHN MACDONALD

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Andrea Ritchie, Vice Chair

INTRODUCTION

1. The applicants, Ann Choo Fone and Alan Choo Fone, purchased a home from the respondent, John MacDonald. The Fones say Mr. MacDonald concealed and failed to disclose a leak and water damage in the home's detached garage, contrary to the completed Property Disclosure Statement (PDS). The Fones seek $5,000 for the partial cost of repairing the garage's roof leak. The Fones have expressly abandoned

their claim to any amount in excess of the Civil Resolution Tribunal (CRT) small claims monetary limit of $5,000.

2. Mr. MacDonald says he filled out the PDS honestly about the home, and that the Fones elected not to have an inspection done at their own risk. Mr. MacDonald denies owing the Fones any money.

3. The parties are each self-represented.

JURISDICTION AND PROCEDURE

4. 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 parties to a dispute that will likely continue after the dispute resolution process has ended.

5. Section 39 of the CRTA says that the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. 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.

6. Section 42 of the CRTA says that 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.

7. 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

8. The issue in this dispute is whether Mr. MacDonald concealed a water leak and associated damage when selling his home to the Fones, and if so, whether he is responsible for the cost of repairs.

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, as the applicants the Fones must prove their claims on a balance of probabilities (meaning "more likely than not"). While I have read all of the parties' submitted evidence and arguments, I have only addressed those necessary to explain my decision.

10. The background facts are not in dispute. Mr. MacDonald listed his property for sale and the Fones viewed it on May 5, 2021. On May 11, 2021 the Fones purchased the property with no conditions. The Fones did not have an inspection done. The Fones took possession on August 28, 2021.

11. On September 19, 2021, the Fones noticed a leak in the detached garage. The parties spoke, and Mr. MacDonald says out of goodwill he offered to pay the Fones $2,000 towards repairs. In exchange, Mr. MacDonald asked the Fones to sign a release of all claims related to the property. The Fones refused to sign that release, instead changing the release's terms to say all claims related to the "detached garage" were released. The release was signed by the Fones, but not witnessed, and sent to Mr. MacDonald. The evidence is that Mr. MacDonald did not accept the changes made, and so did not pay the $2,000. So, the Fones started this CRT dispute seeking $5,000.

12. I find the signed release is not binding on the parties. I find there was no meeting of the minds on the terms of the parties' settlement agreement. So, I find I am able to decide the claim before me. I turn then to whether Mr. MacDonald is responsible to pay $5,000 towards the leak repairs.

13. The principle of “buyer beware” generally applies to home sales. A buyer is required to make reasonable pre-purchase enquiries about the property. Exceptions include negligent or fraudulent misrepresentations and the seller’s duty to disclose known latent defects (see: *Nixon v. MacIver*, 2016 BCCA 8).

14. A latent defect is one that a buyer cannot discover through reasonable inspection and includes defects which make the property unfit or dangerous for living. A patent defect is one that can be discovered through inquiry or reasonable inspection. A seller does not have to disclose patent defects to a buyer, but cannot actively conceal them (see: *Cardwell v. Perthen*, 2007 BCCA 313).

15. The parties’ property sales agreement says that the property, and all included items, would be in substantially the same condition on possession as it was when viewed by the Fones. The agreement also states the PDS would form part of the contract.

16. The entirety of the sales agreement is not before me. The pages that have been included make no reference or specific warranty about the detached garage. So, I find Mr. MacDonald was required to leave the garage in substantially the same condition as when it was viewed by the Fones.

17. The Fones say the garage’s leak is clearly longstanding and was not disclosed to them. They say they looked in the garage when viewing the property but it was dark and they could not find any lights. The Fones further say the garage was “less inviting than the house and had a smell to it”. As noted, the Fones did not have an inspection done on the property.

18. The Fones say due to the tight timelines to purchase the home, they were unable to conduct an inspection. However, Mr. MacDonald says the garage was fully accessible during the Fones’ viewing and in the time before the Fones submitted their offer to purchase the property nearly a week later. This is supported by a letter from Mr. MacDonald’s realtor. Mr. MacDonald says he only used the garage for long term storage, but admits knowing of a small leak in an extension added on to the garage, and says this would have been evident to anyone viewing the garage.

19. The Fones say Mr. MacDonald should have disclosed the garage's leak and water damage. I find the leak and damage are not a latent defect, but a patent defect, as they could easily have been found on inspection.

20. As noted, the Fones also say Mr. MacDonald misrepresented the property on the PDS.

21. Mr. MacDonald says he filled out the PDS honestly, and that because it referred to the "BUILDING", his answers were relevant to the physical home, not the detached garage. A seller is required to honestly disclose their actual and current knowledge of the property in completing a PDS (see: *Hamilton v. Callaway*, 2016 BCCA 189). A seller does not need to give detailed comments in answer to the questions posed (see: *Nixon*, paragraph 48). Further, a statement in a PDS does not rise to the level of a warranty (see: *Hanslo v. Barry*, 2011 BCSC 1624 and *Kiraly v. Fuchs*, 2009 BCSC 654).

22. On the PDS, under the heading "BUILDING", Mr. MacDonald answered "no" to the questions about whether he was aware of any moisture and/or water problems in the walls, basement or crawl space, any damage due to wind, fire or water, and any roof leakage or unrepaired roof damage.

23. In *Ban v. Keleher*, 2017 BCSC 1132, the court said that in order to prove fraudulent misrepresentation in the purchase and sale of a residential property, the applicant must show that:

    a. The respondent made a representation of fact to the applicant,

    b. The representation was false,

    c. The respondent knew that the representation was false when it was made, or made the false representation recklessly,

    d. The respondent intended for the applicant to act on the representation, and

e. The applicant was induced to enter into the contract in reliance upon the false representation and suffered a detriment.

24. To prove negligent misrepresentation, the applicant must establish 5 elements (see: *Hanslo v. Barry*, 2011 BCSC 1624):

    a. There must be a duty of care,

    b. The representation in question must be untrue, inaccurate, or misleading,

    c. The respondent must have acted negligently in making the misrepresentation,

    d. The applicant must have reasonably relied on the negligent misrepresentation, and

    e. The reliance must have resulted in damages.

25. In real estate transactions, the law presumes a special relationship between buyer and seller, and the seller owes the buyer a duty of care (see: *Hanslo*). The applicable standard is that of a reasonable person (see: *McCluskie v. Reynolds* (1998), 1998 CanLII 5384 (BCSC)).

26. I accept that Mr. MacDonald answered the questions about the main home building, and not the detached garage. I note there is nothing on the PDS which indicates it must be filled out for all detached structures on the premises. Therefore, on balance, I find Mr. MacDonald filled out the PDS honestly about the main home building and that no representations were made about the detached garage. So, I find although Mr. MacDonald did not actively disclose the leak in the garage, I also find he did not conceal it. As noted, there is no obligation to disclose patent defects.

27. On balance, I find Mr. MacDonald's contractual obligation was to deliver the garage in the same condition as when it was viewed by the Fones, which I find it was. So, I dismiss the Fones' claim for damages relating to the garage leak and water damage.

28. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses. I see no

reason to deviate from that general rule. As the Fones were not successful, I find that they are not entitled to reimbursement of their paid tribunal fees. Mr. MacDonald did not pay tribunal fees or claim any dispute-related expenses.

ORDER

29. I order the Fones' claims, and this dispute, dismissed.

Andrea Ritchie, Vice Chair