Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mushumanski v. City of Armstrong*, 2022 BCCRT 942

B E T W E E N :

ELMER MUSHUMANSKI and NADIE MUSHUMANSKI

APPLICANTS

A N D :

CITY OF ARMSTRONG and MUNICIPAL INSURANCE ASSOCIATION OF BRITISH COLUMBIA

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. This dispute is about water damage from a broken water main.

2. In May 2020 water escaped from a broken water main on the street in front of the house belonging to the applicants, Elmer Mushumanski and Nadie Mushumanski. The applicants say the respondent City of Armstrong (Armstrong) is responsible for

the water main leak. They claim reimbursement of $2,000 they say they paid as their homeowners' insurance deductible.

3. Armstrong denies any wrongdoing. It also says that section 744 of the *Local Government Act* (LGA) protects it from any claim in nuisance.

4. The respondent, Municipal Insurance Association of British Columbia (MIABC), is Armstrong's insurer. The applicants say MIABC wrongly refused to reimburse the applicants' paid insurance deductible. MIABC says it is not a proper party to this dispute as it has no legal obligation to the applicants.

5. Mr. Mushumanski represents the applicants. The respondents are both represented by Jordan Hauschildt, a lawyer.

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). 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.

7. 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. 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 in the interests of justice.

8. 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.

9. 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.

10. In their Dispute Notice, the applicants claim $2,000 to cover their paid insurance deductible, and also ask the CRT to order the respondents to reimburse the applicants $2,000 for their insurance deductible. As a result, the applicants' claims total $4,000 on the Dispute Notice. However, based on the applicants' submissions I find they only claim $2,000, that is the cost of their paid insurance deductible.

ISSUES

11. The issues in this dispute are:

    a. Does the MIABC have any legal obligation to pay the applicants' insurance deductible?

    b. Is Armstrong liable for the applicants' water damage in either nuisance or negligence?

    c. If either answer is "yes", what is the appropriate remedy?

EVIDENCE AND ANALYSIS

12. 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 read all the parties' submissions and weighed their evidence, but only refer to that which is relevant to explain my decision.

13. The parties agree that water escaped from a water main under the street in front of the applicants' house and entered the applicants' basement in May 2020. I find it likely

that the water main is on Armstrong's property, given Armstrong does not dispute this and that it took steps to investigate and repair the leaking water main.

14. The evidence before me is inconsistent about whether the leak happened on May 20, 26 or 27, 2020. Based on the applicants' evidence, I find the water leak likely happened on May 26, 2020. In any event, I find nothing turns on the specific date as the respondents' submissions acknowledge the leak occurred and caused water damage to the applicants' house.

15. The applicants say that their own home insurance company accepted their claim for water damage and approved the applicants to hire Belfor Property Restoration (Belfor) to restore their damaged basement. Based on Belfor's June 2020 invoice, work authorization and receipt, I find the applicants paid Belfor $2,000 toward the restoration costs, as the applicants' deductible under their home insurance policy.

MIABC's Obligations

16. In a November 16, 2020 letter the applicants asked Armstrong to reimburse their $2,000 insurance deductible. The applicants say Armstrong referred the matter to their insurer, MIABC. I accept this as true as the respondents do not deny it. Further, in a May 10, 2021 email an MIABC examiner told the applicants that it was denying the claim on Armstrong's behalf. So, I find Armstrong made a claim with their insurer, MIABC, to reimburse the applicants' $2,000 homeowners insurance deductible.

17. The respondents say the May 10, 2021 email is inadmissible as evidence because it was marked "without prejudice" and so is privileged. At law, the "without prejudice" rule protects settlement negotiations from later being disclosed as evidence in a dispute, or court action (see *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37). Although it is marked as 'without prejudice' the May 10, 2021 email contains no settlement negotiations. So, I find settlement privilege does not apply and the applicants have correctly included the email as evidence in this dispute. I will refer to the email further below.

18. As noted, MIABC insures Armstrong, not the applicants. It was Armstrong that made an insurance claim with MIABC, not the applicants. Further, MIABC told the applicants it would not reimburse them the $2,000 on Armstrong's behalf. I find the applicants have no contractual relationship with MIABC and so they have no standing (legal right) to claim against MIABC for any alleged breach of contract. Only Armstrong has the standing to claim that MIABC allegedly breached its contract by denying Armstrong's claim for the applicants' insurance deductible. Armstrong has not done so here.

19. I also find the applicants have no claim against MIABC in negligence.

20. To prove negligence, the applicants must show MIABC owed them a duty of care, MIABC failed to meet the applicable standard of care, and that failure caused the applicants' reasonably foreseeable damages (see *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27). Contrary to the applicants' argument, I do not find that MIABC has a duty of care to the applicants simply because it investigated Armstrong's potential responsibility for the water main leak. As noted at paragraph 115 of *Nelson (City) v. Marchi,* 2021 SCC 41, the neighbour principle says parties owe a duty of care to those who they reasonably should consider as being at risk when the parties act. In this case, the party at risk of harm by MIABC's actions is its insured, Armstrong and not the applicants. I find MIABC has no duty of care toward the applicants in how it investigates, or decides, Armstrong's insurance claim. So, I find the applicants' claim against MIABC in negligence cannot succeed.

21. Given my findings above, I dismiss the applicants' claims against MIABC. I now turn to the applicants' claims against Armstrong.

Negligence

22. Armstrong agrees that it owes the applicants a duty of care to maintain its water pipelines but denies that it owes any duty of care to replace or upgrade the water main on the applicants' street. I find maintenance includes replacement when necessary. In any event, many court decisions have found that municipalities owe a

duty of care to residents to maintain and operate municipal sewer systems (see *Ward v. Cariboo Regional District*, 2021 BCSC 1495). I find the same reasoning applies to municipally owned and operated water systems, such as in this dispute. So, I find Armstrong owes the applicants a duty of care to maintain and operate the city's water system, including replacement and upgrades when required.

23. Contrary to the applicants' argument, Armstrong is not liable to reimburse their paid insurance deductible simply because it owes the applicants a duty of care. As noted above, to prove negligence the applicants must also show that Armstrong failed to meet the applicable standard of care in carrying out its duty.

24. The applicable standard of care is that of a reasonable and prudent person in the same circumstances (*Ryan v. Victoria (City),* [1999] 1 SCR 201, at paragraph 28). In *Ward,* the court found the applicable standard of care was that of a reasonable public authority responsible for the operation, maintenance, repair and inspection of a sewer system. I find the same standard of care applies here in relation to Armstrong's operation, maintenance and repair of its water system.

25. Armstrong submitted a May 3, 2022 statement from Armstrong's operations manager (OM). Based on handwritten notes of city workers, OM says the workers investigated the already leaking water main and discovered a hole in the bottom of the cast iron pipe. The respondents agree this is what caused water to leak from the water main and into the applicants' home.

26. In his May 10, 2021 email, the MIABC examiner says his understanding was that Armstrong recognized that the water main had "suffered a few breaks in recent years" and had already planned to replace the water main as part of a larger public works project in 2022. The applicants rely on the email to argue that Armstrong knew of the "defect in the pipe but chose to take chances with it".

27. To the extent the applicants argue Armstrong knew of the hole in the water main outside the applicants' house, I find this argument cannot succeed. This is because Armstrong and OM specifically deny they each knew of that specific hole. There is no

contrary evidence. Specifically, there is no evidence supporting that Armstrong knew the water main had a hole at that location, until it investigated the May 2020 water leak.

28. I infer the applicants argue Armstrong acted unreasonably in not repairing or replacing the water main sooner, given the prior leaks noted in MIABC's May 10, 2021 email. For the following reasons, I find Armstrong did not act unreasonably.

29. I find MIABC examiner's statement about the "few breaks" is second-hand information from an unknown source. This makes the statement unreliable and so I give it very little weight. Further, without knowing the number, timing, or cause of the previous "few breaks", I cannot conclude that any previous breaks show new or recurring breaks were likely to occur. So, I find the May 10, 2021 email does not prove that Armstrong acted unreasonably in not replacing the water main.

30. In any event, Armstrong does not specifically deny that the water main had prior leaks. However, I find any prior leaks do not necessarily indicate any "defect" in the pipe. In his statement, OM explained that Armstrong had repaired 2 prior cracks in the main water pipe on the applicants' street in 2014. Based on handwritten workers' notes attached to the statement, and the lack of any contrary evidence from the applicants, I accept OM's statement as true. However, there is no evidence or expert opinion to show that the 2014 cracks indicated a defect in the water pipe, or any indication that future cracks would continue to occur. I find such a conclusion is beyond the knowledge and expertise of an ordinary person, which means expert evidence is required (see *Bergen v. Guliker,* 2015 BCCA 283). In the absence of such evidence, I find the applicants have not proven that Armstrong should have replaced the water main sooner, based on the 2014 cracks.

31. OM also says Armstrong had a water main maintenance policy, including annual pressure testing and water hydrant maintenance in the final quarter of each year. Further, Armstrong employees staff regularly inspected roads for signs of water main breakdown or malfunction, such as road surface holes or cracks, water buildup or drainage backups. There is no contrary evidence and so I accept OM's statement

and find Armstrong regularly carried out these tests and inspections for water main breakdowns. I find the applicants have not proven that there were other inspection or maintenance steps Armstrong could have taken to prevent the May 2020 hole and water leak.

32. OM says Armstrong decided to replace the water main at issue, along with the sewer lines, storm drains, curbs, gutters, roads and sidewalks as part of a large infrastructure replacement project. Although Armstrong initially planned to replace the infrastructure in 2019, the timeline was revised several times due to competing interests for Armstrong's available fiscal resources. City council budget meeting minutes support OM's statement and show that Armstrong initially planned the infrastructure replacement project in 2016 and reconsidered it annually, finally settling on 2020-2021 replacement. I find this decision is a core policy decision, as opposed to an operational or implementation decision. This is important because policy decisions are immune from negligence liability, provided the decision is not irrational or made in bad faith (see *Nelson*).

33. In *Nelson,* the court set out the following 4 factors to consider in determining whether a decision is a policy decision or an operational decision:

    a. The decision maker's level and responsibility,

    b. The decision-making process,

    c. The nature and extent of any budgetary constraints, and

    d. The extent to which the decision was based on objective criteria.

34. I find Armstrong's decision to delay replacing the water main is a policy decision because:

    a. The decision was made by city councilors, who are democratically accountable officials,

b. According to OM, the decision was discussed and made after seeking input at city council meetings,

c. The decision was based on city-wide and infrastructure budgetary constraints, rather than day-to-day costs, and

d. The decision was made after weighing competing interests.

35. So, even if Armstrong did not act reasonably in delaying the water main's replacement, along with the remainder of the infrastructure replacement project, I find that decision was protected from liability because it was a core policy decision of the municipality. Further, there is no indication that Armstrong's decision not to replace the water main pipe sooner was made irrationally or in bad faith.

36. Overall, I find the applicants' claim against Armstrong in negligence cannot succeed.

Nuisance

37. Although the applicants do not specifically plead or argue nuisance, I will address it briefly here, as the respondents address it in their submissions.

38. A nuisance occurs when a person (including a municipality) unreasonably interferes with another person's use or enjoyment of their property. However, section 744 of the LGA says, in part, that a municipality cannot be liable in nuisance for damages arising from the breakdown or malfunction of a sewer or water system.

39. I find that a hole in the water main is a breakdown or malfunction of Armstrong's water system. So, I find the applicants cannot rely on the law of nuisance in this case, given section 744 of the LGA.

40. For the reasons above, I dismiss the applicants' claims against both respondents.

41. 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. As the applicants were unsuccessful in this dispute, they are not entitled to reimbursement of their paid CRT fees or any dispute-related

expenses. As the successful parties, the respondents paid no CRT fees and claimed no dispute related expenses.

ORDER

42. I dismiss the applicants' claims and this dispute.

Sherelle Goodwin, Tribunal Member