Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kaytor v. Wallace and McDowell Project Ltd.*, 2022 BCCRT 1356

B E T W E E N :

KIRSTIN KAYTOR and RICK SHIH

APPLICANTS

A N D :

WALLACE AND MCDOWELL PROJECT LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. Kirstin Kaytor and Rick Shih live in a strata lot in a building that Wallace and McDowell Project Ltd. (WMP) built. They moved in when construction finished in 2016. They say that their air conditioner has never worked. The applicants assumed that this was because of a known issue with a water chiller that serviced all the strata lots' individual air conditioners, which was the strata's responsibility to repair.

However, in June 2021, a neighbour told them that they had fixed their air conditioner by replacing a fan motor. The applicants did the same, and the air conditioner has worked since. They say that WMP is responsible for the $2,100 repair cost, and claim that amount. Ms. Kaytor represents the applicants.

2. WMP denies that the air conditioner's fan motor was not functioning when the applicants bought their strata lot. WMP says that if that were the case, the applicants' heat would not have worked either, which it says cannot be true. WMP also says that the 2-year warranty has expired, and it is not otherwise responsible for the air conditioner breaking down years after the applicants bought their strata lot. WMP asks me to dismiss the applicants' claim. An employee represents WMP.

3. For the reasons that follow, I dismiss the applicants' claims.

JURISDICTION AND PROCEDURE

4. 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.

5. 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 of this dispute call into question the credibility, or truthfulness, of the other. 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 *Yas v. Pope*, 2018 BCSC 282, 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.

6. 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.

7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money or to do or stop doing something. The CRT's order may include any terms or conditions the CRT considers appropriate.

8. WMP filed a third party notice against the strata but later withdrew it during facilitation. I have amended the style of cause accordingly.

9. In a preliminary decision, WMP argued that the applicants' claim was out of time under the *Limitation Act*. The tribunal member found that WMP had not proven the applicants discovered the claim more than 2 years before starting this dispute. The tribunal member noted that her decision was preliminary and that the parties were free to raise the issue in a final decision. Neither party did, so I have not considered any potential limitation issues in this decision.

ISSUES

10. The issues in this dispute are:

    a. Was the air conditioner broken when the applicants first moved in, or within the 2-year warranty period?

    b. If so, does WMP have to reimburse the applicants for the air conditioner repair cost?

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicants must prove their case on a balance of probabilities, which means "more likely than not". While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

12. Mr. Shih signed a contract to purchase the strata lot on April 5, 2014. Ms. Kaytor's name is not on the original contract. It is unclear whether she is a co-owner of the strata lot and, if she is, when she became an owner. Given my conclusion, nothing turns on this. So, for the purposes of this decision I find that the applicants are co-owners.

13. Clause 9.1 of the contract says that before the completion date, Mr. Shih or a designate would walk through the strata lot with a WMP representative to identify a "conclusive list of any defects or deficiencies". The contract required WMP to correct any deficiencies "as soon as reasonably possible" after the completion date.

14. Neither party provided a copy of the original deficiency list. However, the applicants provided a June 1, 2017 list of "warranty service requests". The last item on the list is "heating/air conditioner" and Mr. Shih described the problem as "not able to achieve desired temperatures". WMP implicitly admits receiving this list at the time. I note that the applicants provided a second list dated June 15, 2017. WMP says that this second version is "forged" but does not say why it matters given the 2 lists describe the alleged air conditioning problems in very similar terms.

15. In any event, it is undisputed that the applicants received the standard 2-5-10 year new home warranty, which started on July 20, 2016. WMP says that based on the deficiency list, it sent a contractor to inspect the applicants' air conditioner, who determined it was functioning properly. There is no statement from this contractor, but WMP relies on an email from the warranty insurer that it closed Mr. Shih's warranty file on September 5, 2018. Presumably, WMP argues that the insurer would not have closed its file if there were outstanding known deficiencies. Also, the applicants do not deny that a contractor inspected their air conditioner during the warranty period, so I find that this likely occurred as WMP says.

16. Despite this, the applicants say that their air conditioning did not work as soon as they moved in. The applicants say that they understood there was an issue with the building's shared air chiller that affected all the strata lots' air conditioners. The

chiller was the strata's common asset, so the applicants believed that they would not have air conditioning until the strata fixed the chiller.

17. The applicants say that in June 2021, a neighbour told them that they had fixed their air conditioner by replacing the fan motor. The applicants then contacted C&C Electrical and Mechanical. A C&C technician replaced their fan motor on July 2, 2021. The applicants say that the air conditioner worked after this repair, which cost $2,105.07. I assume that the applicants rounded this down to the $2,100 they claim.

18. The applicants do not set out a legal basis for their claim, which is not uncommon for self-represented participants at the CRT. In any event, the applicants' submissions make clear that they understand that to succeed, they must first prove that the air conditioner was not working when they moved in, or at the latest, when the 2-year warranty expired. I agree. However, for the reasons that follow, I find that they have not proven this.

19. First, the applicants did not provide any evidence to support their contention that there was a known issue with the building's chiller before they repaired their air conditioner in June 2021. The only objective evidence of a chiller problem is a series of memos from the strata in the summer of 2022. Nothing in these memos suggests that a problem existed before 2022.

20. Second, the applicants rely on a statement from the C&C technician who repaired the air conditioner. I note that the technician's occupation is listed in their email as "HVAC Technician", but their qualifications are not otherwise in evidence. That said, given their profession I find that they are likely qualified to give evidence about the repairs they did. WMP does not dispute their qualifications. Given the CRT's mandate for flexibility and informality, I have accepted the technician's statement as expert evidence despite imperfect compliance with the CRT's rules about expert evidence. I note that CRT rule 1.2 gives me the discretion to do so.

21. In their statement, the technician said that when they inspected the inside of the air conditioner, they saw that the "filter was clean and never looked like the fan motor

worked". The applicants say that this proves the fan motor was always broken. I disagree. I find the statement ambiguous. It is unclear how the technician determined that the fan motor had never worked. The technician does not say that the motor looked brand new, which it would if it had never worked at all.

22. I find WMP's argument about the fan motor more persuasive. WMP says that the building's heating and air conditioning uses common pipes to circulate hot and cold water to an air conditioner in each strata lot. The air conditioner has a single fan that either blows air across hot or cold pipes, depending on where the thermostat is set. WMP provided the manual of the air conditioner in the applicants' strata lot, which includes detailed schematics and diagrams. I find that the manual clearly shows that there is only 1 fan in the air conditioner. WMP argues that it makes no sense that a broken fan motor would affect the applicants' air conditioning but not their heating. WMP says that this alone proves that the air conditioner was not broken when the applicants moved in because there is no way they lived without heat for 5 winters.

23. The applicants' submissions about whether the heat worked have been inconsistent. In their initial submissions, they said that their heating had always "worked find as far as we are aware". They provided evidence to support their contention that the heat and air conditioning use separate fan motors, which they said explained why their heat worked but air conditioning did not.

24. In the applicants' reply submissions, they say that they no longer dispute that their air conditioner only has 1 fan for both heating and air conditioning. They say that 'it is possible" that their heating has never worked properly. They say that the strata keeps the common property hallways extremely hot and that they are on the top floor, which together may have indirectly kept their strata lot warm even if their heater did not work properly.

25. I find this unlikely. I rely on the applicants' monthly records from the company that tracks each strata lot's heat and cooling usage, which WMP provided as evidence. These records show that the applicants' strata lot was drawing hot water for heating from the common system during the late fall, winter, and early spring each year

(except January 2018). Given that the heater is controlled by a thermostat, this means that the temperature in the strata lot fell below a set temperature, which in turn implies that it was not indirectly heated enough to keep the strata lot warm. I find it unlikely that the applicants could have spent 5 winters in the strata lot without noticing that the heat did not work. I find it more likely that the motor worked until sometime in the spring or early summer of 2021, because the applicants had heat the previous winter.

26. I acknowledge that the same heating and cooling records show that the applicants did not draw on the cooling water until after replacing the fan motor in June 2021, other than a brief period shortly after moving in. I agree that this is some evidence that the air conditioner never worked. However, as noted, until June 2021 the applicants believed that a building-wide issue prevented their air conditioner from working. With that assumption in place, it makes sense that the applicants would not have turned on their air conditioner, which would explain the usage pattern.

27. On balance, I find that the applicants have not proven that the air conditioner was broken when they took possession of their strata lot, or within the 2-year warranty period. I dismiss the applicant's claim.

28. 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. The applicants were unsuccessful, so I dismiss their claim for CRT fees and dispute-related expenses.

ORDER

29. I dismiss the applicants' claims, and this dispute.

Eric Regehr, Tribunal Member