Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Caracciolo v. Potts*, 2023 BCCRT 102

B E T W E E N :

AEISHA CARACCIOLO and CHRISTOPHER BLAUEL

APPLICANTS

A N D :

GEORGE POTTS and LYNNE POTTS

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Megan Stewart

INTRODUCTION

1. The applicants, Aeisha Caracciolo and Christopher Blauel, live next door to the respondents, George and Lynne Potts. The applicants allege the respondents (or their unnamed contractor, who is not a party to this dispute) damaged the applicants'

gate, side fence panel, tree and side yard while landscaping the respondents' backyard in November 2021. They claim $3,401.66 in damages.

2. The respondents deny any responsibility for the claimed damage and allege the applicants failed to properly maintain the parties' communal fence. The respondents also say the applicants owe them $3,422.83 for fencing replacement, topsoil and a slinger rental. Since they did not file a counterclaim, I infer the respondents request a set-off against any award to the applicants for their claims.

3. Ms. Caracciolo represents the applicants. Mr. Potts represents the respondents.

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. 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.

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 do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

Preliminary issues

8. In the Dispute Notice, the applicants claim $5,000 for repairs. However, in submissions the applicants reduce that amount to $3,401.66 on the basis they no longer wish to claim the estimated repair cost of the communal fence they had originally included. They say this is because the fence is on the respondents' property and is therefore the respondents' responsibility.

9. While the applicants submit the respondents caused a nuisance by creating a mud pit and leaving rocks in the applicants' side yard, I find I do not need to address these issues because the applicants claim no remedy for them.

10. The respondents ask that I levy a penalty over $10,000 against the applicants for allegedly misusing confidential information the respondents submitted during this dispute. CRTA section 92 says it is an offence to provide false or misleading information. However, the CRT has no jurisdiction to impose fines or a conviction under section 92 or to impose the penalty the respondents seek for misuse of confidential information under any other section of the CRTA. So, I address this request no further.

11. Finally, the applicants submitted late evidence in answer to the respondents' submissions and evidence in support of the respondents' requests for a penalty and a set-off. Given the CRT does not have jurisdiction to impose the penalty and given my conclusion below on the respondents' request for a set-off, I find the late evidence is irrelevant. So, I declined to view it and have not admitted it into evidence.

ISSUES

12. The issues in this dispute are:

a. Are the respondents responsible for damage to the applicants' gate, side fence panel, tree, and side yard, and if so, are the applicants entitled to the claimed $3,401.66 in damages?

b. Are the respondents entitled to a set-off for fencing replacement, topsoil and a slinger rental?

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities (meaning more likely than not). The respondents have the burden to prove any claimed set-off. I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

Respondents' liability for the applicants' claimed property damage

14. The applicants say the respondents or their contractor damaged the applicants' property when they used the applicants' driveway and side yard to access their backyard. Though they do not use these words, I find the applicants claim the respondents or their contractor were negligent in carrying out their work. The applicants admit they allowed access to their driveway on November 2, 2021 thinking it would be a single trip as had been the case on a previous occasion. However, they say the respondents did not tell them it would involve multiple trips and include vehicles crossing their side yard. So, I infer the applicants also claim the respondents' contractor trespassed on the applicants' property on November 3, 2021 when they returned to remove soil from the side of the respondents' house.

15. Though the applicants say the respondents "or their contractor(s) directly or indirectly caused the damage to the gate, fence panel, lawn and Dwarf Alberta Spruce tree", I find there is no evidence before me that the respondents themselves directly caused any of the alleged damage or that they trespassed on the applicants' property.

Therefore, I find the applicants' claim is that the respondents are vicariously liable for their contractor's alleged negligence and trespass.

16. First, I consider whether the respondents' contractor was their employee or an independent contractor. This matters because employers are generally vicariously liable for their employees' conduct. However, with certain exceptions, an employer is not liable for the negligence of a business it hired as an independent contractor (see *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 SCR 1145 at paragraphs 19 and 20).

17. The relevant factors to consider in determining whether a person or business is an independent contractor or employee are discussed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59 and further in *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044. They include:

    a. The level of control the employer has over the worker's activities.

    b. Whether the worker provides their own equipment.

    c. Whether the worker hires their own helpers.

    d. The degree of financial risk taken by the worker.

    e. The degree of responsibility for investment and management held by the worker.

    f. The worker's opportunity for profit in the performance of their tasks.

18. These factors are not exhaustive, and the relative weight of each factor depends on the facts and circumstances of each case. The central question is whether the worker is performing services as a person in business on their own account. If so, the person is more likely an independent contractor.

19. On the evidence before me, I find the respondents likely engaged their contractor as an independent contractor rather than as an employee. The respondents say they hired their contractor to excavate their backyard. I infer from the parties' submissions

and evidence the contractor had their own equipment and vehicles, hired their own workers, and were not directly supervised in how they conducted their work. The respondents submit the contractor decided to delay completion of the work by several months to May 2022 due to the impact of an atmospheric river on their ability to operate their machinery on water-saturated ground. I find this indicates the contractor had a considerable level of control over their work activities. None of this is particularly disputed and my conclusion is consistent with the factors summarized above.

20. Next, I turn to whether this dispute involves one of the exceptions that might lead to a conclusion the respondents are liable for their contractor's alleged wrongdoing. In *Lewis*, which involved highway maintenance, this involved a discussion of whether a duty can be delegated or whether it is non-delegable. Where there is a strict statutory duty to do a particular thing, a party cannot escape liability by delegating the job to an independent contractor. There is no relevant statutory duty in this dispute.

21. In these circumstances, I find the task of excavating the respondents' backyard is not a non-delegable duty such that the respondents would be held liable for their independent contractor's negligence or trespass. There is also no inherent harm or risk in the task, which are other factors discussed at paragraph 51 in *Lewis* that might give rise to a non-delegable duty.

22. In *Lewis,* the court found the duty to take reasonable care may be met by hiring and, if needed, supervising a competent and qualified contractor to perform the particular work. If this is done, the person hiring the independent contractor will not usually be held liable for injury the independent contractor causes. I note the applicants do not allege the respondents failed to supervise their contractor.

23. Were the respondents negligent in hiring their contractor? Generally, neighbours owe each other a duty of care with respect to the other's property, and for the purposes of this dispute, I accept the respondents owed the applicants that duty of care. I find the applicants suggest the respondents breached the reasonable standard of care by hiring a contractor who worked "under the table" and who did not offer a warranty. However, the only reference in evidence to working under the table is in a text

message between Mr. Potts and Ms. Caracciolo about hiring a worker to replace the parties' communal fence. There is no evidence the applicants' landscaping contractor worked under the table or did not offer a warranty. Even if the respondents had hired their landscaping contractor under the table, I find that does not demonstrate the contractor was unqualified or incompetent. So, I find it unproven the respondents were negligent in hiring their contractor.

24. In these circumstances, I find the respondents are not vicariously liable for their contractor's alleged negligence or trespass, and so I find I do not need to further address the applicants' claimed damages. I dismiss the applicants' claims.

Respondents' entitlement to a set-off

25. A set-off may be appropriate where there is a sufficient connection between the set-off and the award granted to the applicant and where the set-off amounts are proven. Here, I have not ordered an award to the applicants, so there is nothing to set off. I make no findings about the merits of the respondents' allegations.

26. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to the recovery of their CRT fees. The respondents did not pay fees or claim any dispute-related expenses, so I award none. As the applicants were unsuccessful, I dismiss their claim for reimbursement of CRT fees and dispute-related expenses.

ORDER

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

Megan Stewart, Tribunal Member