



# Civil Resolution Tribunal

Date Issued: May 3, 2023

File: SC-2022-005076

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Xue v. Ma*, 2023 BCCRT 367

BETWEEN:

JUN XUE

**APPLICANT**

AND:

SU QUAN MA

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Sarah Orr

## INTRODUCTION

1. This is a dispute about a fence. The parties own adjacent properties. In November 2021, a bear broke the fence between their backyards. The applicant, Jun Xue, says the respondent, Su Quan Ma, negligently left her garbage bins unlocked in her backyard which attracted the bear. Mr. Xue also says Ms. Ma's tenants regularly trespass on his property. Mr. Xue wants Ms. Ma to pay him \$1,050 to repair the

broken fence and \$525 to build a new one to prevent her tenants from trespassing on his property, for a total of \$1,575.

2. Ms. Ma says she is not responsible for the bear breaking the fence. She says the bear was attracted to the blueberry plant in Mr. Xue's backyard and that his dog startled the bear, causing it to fall and break the fence. She also says she is not responsible for her tenants' trespassing on Mr. Xue's property.
3. Both parties are self-represented in this dispute.

## **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.
8. In the Dispute Notice Mr. Xue claims \$1,050 to repair the fence and \$525 to build the new fence, for a total of \$1,575. During the decision stage of the CRT's dispute resolution process Mr. Xue increased the amount of his fence repair claim to \$2,100, which increased the total amount of his claim to \$2,625. Mr. Xue did not amend the Dispute Notice as is generally required. Ms. Ma appears to have had notice of the increased value of the claim, but nothing turns on it in any event given my decision below to dismiss Mr. Xue's claims.
9. Ms. Ma submitted some evidence and argument after the deadline to do so. Mr. Xue provided a response, so I find he is not prejudiced by the CRT accepting this late evidence and I have considered it in my decision.

## **ISSUES**

10. The issues in this dispute are:
  - a. Is Ms. Ma required to pay Mr. Xue \$1,050 to repair the broken fence?
  - b. Is Ms. Ma required to pay Mr. Xue \$525 to build a new fence on her property?

## **EVIDENCE AND ANALYSIS**

11. In a civil proceeding like this one, as the applicant, Mr. Xue must prove his claims on a balance of probabilities. I have read all the parties' evidence and submissions but refer only to what I find relevant to explain my decision.

### ***Is Ms. Ma required to pay Mr. Xue \$1,050 to repair the fence?***

12. It is undisputed that in November 2021 a bear broke 2 panels of the fence between the parties' backyards. Mr. Xue says Ms. Ma's unlocked garbage bins in her backyard attracted the bear. He says her failure to lock her garbage bins was negligent and in

breach of municipal bylaws, and he wants her to pay him \$1,050 for the cost of repairing the fence.

13. Ms. Ma admits that her garbage bins were unlocked at the time of the incident but denies that this is what attracted the bear. She says there have been bears wandering through her backyard for the past 10 years and they have never broken her fence before. She says the blueberry plant in Mr. Xue's backyard is what initially attracted the bear, and Mr. Xue's dog barked and startled it, causing it to fall and break the fence.
14. To prove Ms. Ma was negligent, Mr. Xue must establish that she owed him a duty of care, that she breached the required standard of care, and that her breach caused Mr. Xue to incur damages (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27).
15. I find that as Mr. Xue's neighbour, Ms. Ma owed him a duty of care to take reasonable steps to avoid attracting bears to her property. Mr. Xue submitted Port Coquitlam's Solid Waste Bylaw 6.1. Bylaw 6.1(f) requires all owners and occupiers of land receiving Port Coquitlam's solid waste services to ensure wildlife resistant containers that are stored outside on the property are locked, except when set out for collection as provided by the bylaw. Ms. Ma was undisputedly in breach of this bylaw at the time of the incident. Although a breach of a municipal bylaw is not necessarily proof of negligence, in the circumstances here I find it is proof of the standard of care. I am satisfied that by failing to lock her garbage bins at the time of the incident Ms. Ma breached the required standard of care.
16. However, Mr. Xue must also prove causation. As noted, Ms. Ma denies that her unlocked garbage bins attracted the bear, and instead says it was Mr. Xue's blueberry plant that caused the incident. Mr. Xue says the blueberry plant and fruits in his yard were "long gone" before the bear incident in November 2021.
17. Ms. Ma undisputedly does not live on her property and did not witness the incident. It is unclear whether Mr. Xue witnessed the incident. Neither of the parties submitted statements from anyone who claims to have witnessed it. Mr. Xue says his dog's

barking alerted his son to the bear in the backyard, and that his son went next door to warn Ms. Ma's tenants. Mr. Xue did not provide a statement from his son, and Ms. Ma did not provide a statement from any of her tenants. Both parties submitted photos of the damaged fence, although I find they are unhelpful in determining which yard the bear entered first, or how it broke through the fence.

18. I am unaware of any bylaw prohibiting blueberry plants in backyards, and I find it more likely than not that the plant would not have been bearing fruit in November. On balance I find it is more likely than not that Ms. Ma's breach of her duty to lock her garbage bins attracted the bear to her yard.
19. Next, Mr. Xue must prove that Ms. Ma's breach caused him to incur damages. I find this is where Mr. Xue's claim fails. There is no map, land survey, or other document in evidence explicitly showing whether the fence lies on Mr. Xue's property, Ms. Ma's property, or along the border of their properties. At no point in his submissions does Mr. Xue claim the fence is on his property. In her late submissions Ms. Ma says, "I have the right to decide what action to take for my fences." Mr. Xue does not dispute this statement in his response submissions.
20. I also note that since the incident in November 2021, Ms. Ma's tenants have undisputedly taken several actions to repair the broken fence. In January 2023 Ms. Ma's tenants removed the 2 broken fence panels and 2 other fence panels and replaced them with orange netting. In March 2023 Ms. Ma's tenants reinforced the orange netting to create a more permanent fence structure. While Mr. Xue is not satisfied with this repair work, he does not suggest that Ms. Ma's tenants or anyone else trespassed on his property to do this work. Given Mr. Xue's trespass claim in this dispute, I would have expected him to raise this if the fence was on his property.
21. On balance, I find it is more likely than not that the fence is on Ms. Ma's property. So, I find Mr. Xue is not responsible for the cost of repairing it. Mr. Xue says Ms. Ma's agent promised that Ms. Ma would repair the fence but that she failed to do so. However, I find there is nothing in the evidence proving Ms. Ma promised to repair the fence by a certain date, and her tenants undisputedly built an enclosure across

the fence line in January 2023. Mr. Xue does not claim that the broken fence caused him to suffer any damages between November 2021 and January 2023. There is some evidence that Mr. Xue relied on Ms. Ma's fence to contain his dog in his backyard. However, nothing prevents Mr. Xue from creating an enclosure on his own property to contain his dog, subject to municipal bylaws.

22. Mr. Xue says that after the bear incident the garbage remained strewn across Ms. Ma's yard for "many days" and crows brought the garbage to his yard and onto his roof. However, he has not requested a remedy related to the garbage on his property, so I decline to grant one.
23. I find Mr. Xue has not proven that he suffered damages from the bear incident. I dismiss this claim.
24. In her submissions Ms. Ma says Mr. Xue owes her \$1,320 plus tax for the cost of repairing the fence. She did not file a counterclaim, so I find she claims this amount as a set-off. Generally, if a respondent can prove they have a claim sufficiently connected to the applicant's claim, a set-off may be ordered against any damages found payable to the applicant. However, since I have dismissed Mr. Xue's claim, there is nothing to set off against, so I find it is unnecessary for me to address Ms. Ma's allegation that she is owed money to repair her fence.

***Is Ms. Ma required to pay Mr. Xue \$525 to build a new fence on her property?***

25. Mr. Xue says Ms. Ma's current and former tenants have regularly trespassed on his property. He says there is a gap between a fence and a hedge along the side of Ms. Ma's property which her tenants walk through to take a shortcut across his front lawn. He says the tenants damaged his plants, but he is more concerned about the risk of future liability if the tenants continue to trespass and have an "unexpected accident" on his property. Mr. Xue wants Ms. Ma to build a new fence across the gap on her property to prevent her tenants from trespassing on his property.

26. Ms. Ma says she told her tenants not to trespass on Mr. Xue's property, but she cannot control their actions. She has since put ropes across the gap Mr. Xue is concerned about to prevent her tenants from trespassing on his property.
27. Trespass to land occurs when someone enters the land of another without lawful justification and directly interferes with that land (see *Lahti v. Chateauvert*, 2019 BCSC 1081). None of Ms. Ma's current or former tenants are parties to this dispute, so I cannot make any findings against them. In any event, the only evidence Mr. Xue submitted to support his claim is a photo of an unidentified footprint in the snow. Even if Mr. Xue could prove that Ms. Ma's tenants trespassed, there is no evidence Ms. Ma instructed or allowed them to do so such that she might be responsible for their actions. Even if Ms. Ma was responsible for her tenants' trespassing, I find I cannot award compensation to Mr. Xue to build a fence on Ms. Ma's property without her consent.
28. In his reply submissions Mr. Xue says he saw Ms. Ma trespassing on his property once. However, since Ms. Ma did not have an opportunity to respond to this allegation, I find it would be procedurally unfair to make a finding about it in this decision, and I decline to do so.
29. I find Mr. Xue has failed to prove that Ms. Ma instructed or allowed her tenants to trespass on his property. I dismiss this claim.
30. 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. Since Mr. Xue was unsuccessful, I find he is not entitled to reimbursement of his CRT fees or dispute-related expenses.
31. As the successful party, Ms. Ma is entitled to reimbursement of her reasonable dispute-related expenses. She claims \$1,200 in dispute-related expenses, but for the following reasons I dismiss this claim. She submitted receipts for flights, hotel accommodation, and ground transportation for her and her husband's travel between

San Francisco and Vancouver in March 2023. Ms. Ma's husband is not a party to this dispute, and I find she has not explained the necessity of either her or her husband traveling to the Vancouver area for this dispute. The CRT is an online tribunal and conducts its dispute resolution process remotely. Ms. Ma did not at any time communicate to the CRT that she had any difficulties participating in the dispute resolution process remotely. The evidence also shows Ms. Ma had an agent in the Port Coquitlam area at the time of the incident. I find Ms. Ma has failed to show that her travel expenses were reasonable in the circumstances. I dismiss her claim for dispute-related expenses.

## **ORDERS**

32. I dismiss Mr. Xue's claims and this dispute.

33. I dismiss Ms. Ma's claim for dispute-related expenses.

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Sarah Orr, Tribunal Member