



Civil Resolution Tribunal

Date Issued: February 10, 2020

File: ST-2019-006650

Type: Strata

Civil Resolution Tribunal

Indexed as: *Aghajanianesabbagh v. Birtwistle*, 2020 BCCRT 162

B E T W E E N :

MOZHGAN AGHAJANIANESABBAGH

APPLICANT

A N D :

MOYA BIRTWISTLE

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. This dispute is about water damage to a strata lot. Both parties live in the same strata corporation (strata). The applicant, Mozhgan Aghajanianesabbagh, says that there was water leakage from the respondent, Moya Birtwistle's strata lot, that damaged his bathroom. The applicant requests \$1,800 in repair costs. The applicant represents himself.

2. The respondent says that the applicant lives two floors below her strata lot and she is not responsible for the water damage. The respondent acknowledges that a bathroom renovation was completed in September 2018 but denies that this led to water damage discovered in March 2019, long after the renovation. The respondent is represented by a family member.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal 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.
4. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
5. The tribunal 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 tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
6. In resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA: a) order a party to do or stop doing something, b) order a party to pay money, c) order any other terms or conditions the tribunal considers appropriate.

ISSUE

7. The issue in this dispute is whether the respondent is responsible for the damage caused by the water entering the applicant's strata lot.

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, the applicant must prove his claim. He bears the burden of proof on a balance of probabilities.
9. I will not refer to all of the evidence or deal with each point raised in the parties' submissions. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.
10. It is undisputed that the respondent owns unit 1005, two floors above the applicant who owns unit 805. In September 2018, the respondent renovated her bathroom.
11. According to the applicant's submissions, the strata indicated that the contractor went down to unit 905 during the renovation to investigate an alleged leak. In an April 11, 2019 letter to the respondent, the strata said that this occurred but the strata did not indicate what happened after that. There is no statement from the owner of unit 905 provided to the tribunal that says a leak was discovered coming from the respondent's unit.
12. In the April 2019 letter, the strata also told the respondent that it had come to their attention that at the time of the September 2018 renovation the wall behind some of the respondent's tiles were soft and the respondent's tenant said it had been like that for a long time.
13. There is no statement from the occupant and the respondent denies this happened. The respondent says nothing could have happened during the 2018 renovation because the water was turned off. In an April 23, 2019 email the respondent said everything was checked during and after the renovation and there were no leaks.

14. Based on this, I find that there is insufficient evidence to establish that the contractor found a leak coming from the respondent's unit during the September 2018 renovation.
15. On December 6, 2018, the strata wrote to the respondent noting that there was damage to unit 905's bathroom ceiling that possibly originated from the respondent's unit. The strata advised the respondent to contact her insurance company as well as unit 905's owners. This was apparently investigated and the building's handyman said that the ceiling of 905 was dry. Nothing followed from this incident.
16. On March 13, 2019, the applicant wrote to the strata to say that the bathroom ceiling of his strata lot, unit 805, had been damaged due to a leak from the above unit(s). The applicant asked the strata to investigate.
17. On March 26, 2019, the strata's general manager sent the applicant an email saying that "upon further investigation" the strata would not be attending to the water leak as it related to the applicant's strata lot and unit 905 above him and not the common property. The strata also said it was below their deductible so instructed the applicant to contact his insurance company or open a claim against the owners of unit 905.
18. The strata did not explain how it determined that the leak was not coming from common property or how they determined that an action should be started against unit 905. At this stage the respondent was not even mentioned as a possible source of the leak. I note that neither the strata nor the owner of unit 905 is a party in this dispute.
19. On April 11, 2019, O, who spoke in communications on behalf of the applicant, emailed the strata and noted that unit 905's owner called a plumber and a dry wall worker. They opened up the ceiling of the applicant's unit and the floor of unit 905 and determined that the leak was from the units above. They said that the leak was

from the respondent's unit 1005 "and maybe beyond." O asked the strata to handle the issue immediately.

20. The strata said later in an email on that same day that it agreed that the problem came from the respondent's unit based on the information provided when the ceiling and floor were opened. However, I find that the evidence is not clear that the leak was coming from the respondent's unit as the use of the word beyond puts the source of the leak into question. I also note that O's evidence is hearsay about what the tradespeople said. There is no formal report indicating the outcome of the investigation.
21. The strata told O that it would notify the respondent again and advise her if she did not attend to the issue that the strata would deem her negligent.

Is the respondent liable for the water damage?

22. The strata bylaws state that an owner or tenant must not use a strata lot in a way that causes a nuisance or unreasonably interferes with the right of other persons to use and enjoy their strata lot. Based on the applicant's submissions he is claiming that the respondent was negligent and that she caused a nuisance by allowing water to leak into his strata lot.
23. Liability for negligence occurs when someone owes, but fails to meet, a duty of care and damages result. Case law suggests that an owner is liable in negligence for water that escapes from his or her property, unless he or she can provide an explanation to show otherwise (*Westsea Construction v. Billedeau*, 2010 BCPC 109 at paragraph 39, and *Fontaine v. ICBC* [1998] 1 SCR 424). Decisions of this tribunal have described this scenario as a reverse onus of proof (see, for example, *Crockart v. Turcotte*, 2018 BCCRT 276). While there is a reverse onus, the standard is not strict liability.
24. Unlike the law of negligence, the law of nuisance focuses on the harm suffered rather than the prohibited conduct. Nuisance is defined as unreasonable

interference with the use of land. In a decision from this tribunal *Zale et al v. Hodgins*, 2019 BCCRT 466, the tribunal member noted that a private nuisance occurs when a person unreasonably interferes with the use or enjoyment of another person's property. However, if the person is not aware of the problem that causes the interference, and had no reason to know of the problem, they will not be liable if they did not act unreasonably.

25. The respondent says that she did not do anything to cause the leak and the applicant has not proved that the water leak is coming from her strata lot.
26. The evidence shows that the respondent consistently denied that the leak was coming from her unit and asked for evidence and an investigation into whether it could be coming from somewhere else.
27. Based on the documents, I agree that the respondent consistently stated that she did not think the leak was coming from her strata lot and requested proof. The respondent's strata lot is overseen by a property manager who communicated with O and the strata. Throughout April 2019 the property manager:
 - a. Asked for more information about whether there was an active leak in the applicant's strata lot. O said no, but that the ceiling was damaged and mouldy.
 - b. Told O there was no indication anything was wrong with the pipes in the respondent's unit and that the leak could be coming from another unit and the applicant or the strata should get professional advice on where the leak was coming from.
 - c. Wrote to the strata on April 17, 2019 and said there was no evidence the leak was coming from the respondent's unit. The property manager said that it was the strata's obligation to hire a plumber and determine what repairs were needed and who was responsible for paying for them.

28. The strata responded that the handyman noted wet drywall in the respondent's bathroom and advised her of this in writing. It said that it had told the respondent twice in writing. The property manager said that there was only one letter from December 2018.
29. I agree with the respondent that the evidence shows only one letter addressed to the respondent before April 2019 and that letter did not mention wet drywall. The property manager also stated that if the respondent's unit had wet drywall that this would mean the leak was coming from above and asked the strata to focus on damage that might be happening to the respondent's unit.
30. Further communications were exchanged between the strata and the property manager. In discussing whether a further investigation should be conducted the respondent did not give the strata permission to remove any of the new tile.
31. The strata determined that the respondent did not agree to a second inspection and therefore did not carry out any further investigation. It advised the applicant to proceed with a claim at the tribunal.
32. I find the evidence in this dispute does not establish that the respondent is liable under the bylaws or under the law of negligence or nuisance. Neither the strata nor the applicant carried out any professional investigation resulting in a report that shows the leak was coming from the respondent's strata lot. The main evidence the applicant points to is equivocal with O saying that the plumber and drywaller from unit 905 said that the leak was coming from above and possibly beyond.
33. Based on the evidence, it is unclear if the leak is ongoing or if it is coming from the respondent's strata lot, another strata lot, or the strata's common property. Again, the applicant must prove his claim on a balance of probabilities. I find he has not established that the leak is coming from the respondent's strata lot. Therefore, the respondent is not responsible for repairing any of the applicant's water damage. I dismiss the applicant's claims.

34. Nothing in this decision prevents the applicant from requesting that the strata carry out an investigation to determine the source of the leak if it is still ongoing.
35. Under section 49 of the CRTA, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. As the applicant was unsuccessful in his claim, I find he not entitled to have his tribunal fees reimbursed. There was no claim for expenses.

ORDER

36. I dismiss the applicant's claims and this dispute.

Kathleen Mell, Tribunal Member