Civil Resolution Tribunal

Date Issued: October 3, 2019

File: SC-2019-002035

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Holt et al v. Etmanski*, 2019 BCCRT 1157

B E T W E E N :

GREGORY HOLT and PATRICIA MCGUIRE

APPLICANTS

A N D :

HELEN ETMANSKI

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This dispute is about property damage. The applicants, Gregory Holt and Patricia McGuire, say that their shed was damaged by a branch that fell from a tree owned by the respondent, Helen Etmanksi. They seek an order that the respondent pay them $1,313.76 for the cost of a new shed and $750 for an arborist's report. The

respondent denies that she is responsible for the damage to the shed or any amounts claimed by the applicants.

2. The applicants are represented by Mr. Holt. 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 by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

5. Under section 10 of the CRTA, the tribunal must refuse to resolve a claim that it considers to be outside the tribunal's jurisdiction. A dispute that involves some issues that are outside the tribunal's jurisdiction may be amended to remove those issues.

6. On July 12, 2019, I issued a preliminary decision in which I determined that the tribunal did not have the jurisdiction to address the applicants' request for an order requiring the removal or maintenance of trees on the respondent's property. This is because such an order is injunctive relief that is not permitted under section 118 of the CRTA. While I refused to resolve that portion of the dispute under section 10 of the CRTA, the tribunal proceeded with the remainder of the applicant's claims.

7. 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.

8. Under tribunal rule 9.3(2), 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.

ISSUES

9. The remaining issues in this dispute are:

    a. whether the respondent should pay the applicants $1,313.76 for the cost of replacing a damaged shed, and

    b. whether the respondent should pay the applicants $750 for the cost of an arborist's report.

EVIDENCE AND ANALYSIS

10. In a civil dispute such as this, an applicant bears the burden of proof on a balance of probabilities. The respondent provided evidence, but the applicants did not. Both parties provided submissions in support of their respective positions. While I have considered all of this information, I will refer to only that which is necessary to provide context to my decision.

11. The applicants say that, in late August or early September of 2018, a tree branch went through the roof of their shed. The applicants say that the shed was pre-

fabricated plastic and, as that model has been discontinued model, it must be replaced rather than repaired.

12. The applicants say the tree that caused the damage to the shed is located on the respondent's property. According to the applicants, the respondent admitted that she was responsible for the damage and agreed to cover the cost of the shed in a September 26, 2018 telephone conversation. However, they say that she has since refused to pay for these costs. The applicants also state that one of the respondent's relatives agreed that the trees on her property were dangerous. The applicants obtained an arborist's report to assess the safety of the respondent's trees, some of which they say have been deemed dangerous. As noted above, the applicants seek $1,313.76 as the shed's replacement cost and $750 for the arborist's report.

13. The respondent denies that she is responsible for the damage to the shed or that she made an agreement with the applicants to pay for the cost of a new shed. The respondent's position is that the applicants have not proven that a tree on her property damaged their shed. Once her insurance company determined that she was not liable, the respondent says that she considered this matter closed. The respondent suggests that the applicants brought this dispute with the aim of having her trees removed to increase sunlight on their own property.

14. The parties have opposing views as to whether the respondent agreed to pay the costs of the damaged shed. The applicants say that she did, while the respondent says that there were discussions but no agreement as she intended to refer the matter to her insurance company. While I accept that the parties discussed the matter of damage to the shed, the evidence before me does not establish that they came to an agreement.

15. The law of nuisance applies to this type of claim. The general principle is that people are entitled to use and enjoy their land without reasonable interference. When there is actual physical damage, there is a strong indication that the interference is not reasonable and that a claim for damages should succeed (see

Royal Ann Hotel Co. v. Ashcroft, 1979 CanLII 2776 (BCCA)). However, where the nuisance is caused by trees, the case law indicates that there may not be an award for damages simply because there is actual damage. An award of damages will depend upon whether the nuisance was known or ought to have been known and whether reasonable steps were taken to remedy the nuisance (see *Hayes v. Davis*, 1991 CanLII 5716 (BCCA) and *Lee v. Shalom Branch #178 Building Society*, 2001 BCSC 1760).

16. As discussed above, I do not have the jurisdiction to address the issue of whether trees should be removed from the respondent's property. I must determine whether the evidence establishes that a branch from the respondent's property caused the damages claimed by the applicants, and, if so, whether respondent knew or ought to have known that the tree was a potential nuisance.

17. The applicants attribute the fallen branch to a particular big leaf maple tree on the respondent's property. Images in the respondent's evidence establish that there are coniferous and deciduous trees of varying heights on her property. The property has a downward slope on its edge, and the shed is located very close to the property line at the bottom of this slope. The big leaf maple described by the applicants is located on the sloped area.

18. The mere proximity between the respondent's tree and the applicants' shed is not determinative of the matter. There is no photographic evidence before me of the damage to the shed or the branch that is said to have caused it. Although the applicants say they have such images, they did not provide them in support of their claims. Further, there is no receipt or other documentation about the replacement cost of the shed. As the applicants have not provided evidence to support the damage to or the replacement cost of the shed, I find that they have not met their burden of proving their claims, both in terms of the respondent's liability and the amount of their damages.

19. Even if I had found that the source of the branch or the shed damage had been proven by the applicants, I would not grant the order they seek. I find that the

evidence does not support the conclusion that the respondent knew or ought to have known that the tree in question was a potential nuisance.

20. The applicants say that a utility provider had expressed concern about some of the trees on the respondent's property in 2015. However, no documentation of this concern was provided, and there is no current statement from the utility provider before me about the state of any of the trees on the respondent's property.

21. According to the respondent, she had the trees assessed by an arborist in approximately 2014 and acted on the resulting recommendations. She also says that the arborist who assessed the respondent's trees in 2018 (after the shed damage occurred) did not identify a particular concern with the big leaf maple.

22. A September 19, 2018 email message from SC (a neighbour who is not a party to this dispute) discussed a dead tree on the respondent's property that she felt was a danger to the nearby power lines. However, SC also stated that the big leaf maple that was the suspected source of the fallen branch "didn't appear distressed".

23. While the respondent (and possibly her family members) may have been aware of concerns about the health of some trees on other areas of her property, there is no indication that the big leaf maple tree in question was among them. Based on the evidence before me, I cannot conclude that the respondent knew or ought to have known that this tree was stressed, damaged or diseased such that it posed a risk. The fact that the respondent subsequently has had an arborist assess and perform work on some of her trees does not alter my conclusion. I dismiss the applicants' $1,313.76 claim for the shed's replacement.

24. The applicants also claim reimbursement for the cost of an arborist's report they obtained to assess the respondent's trees. The applicants' report was authored by the same firm that had recently performed work on the respondent's trees. It does not appear that the respondent consented to this assessment of her property or agreed to pay any of the associated costs. The report was obtained in early 2019, several months after the branch fell, and does not comment on whether the

respondent should have known about any issues with the big leaf maple tree in question.

25. The applicants appear to have been motivated by safety concerns when obtaining the arborist's report, which relates to the issue of tree removal over which I have no jurisdiction. I am satisfied that the arborist's report does not relate to the shed damage issue before me. I find that the respondent is not responsible for its cost. I dismiss the applicants' claim for $750 for the arborist report.

26. Under section 49 of the CRTA and tribunal rules, the tribunal generally will order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. As the applicants were not successful, I dismiss their claim for reimbursement of tribunal fees and dispute-related expenses.

27. The applicants also claimed for 53 hours of their time spent on the dispute at a rate of $54.94 per hour. Even if I had found in favour of the applicants, I would decline to order this remedy as under the tribunal's rules, it does not order compensation for a party's time spent on a dispute unless it is an extraordinary case. This is consistent with section 20 of the CRTA which says that parties generally are self-represented. This is not an extraordinary case.

ORDER

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

Lynn Scrivener, Tribunal Member