



Civil Resolution Tribunal

Date Issued: February 21, 2024

File: SC-2023-002896

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kan v. Cuglietta*, 2024 BCCRT 165

B E T W E E N :

KENNETH KAN

APPLICANT

A N D :

GINO CUGLIETTA and YUKARI CUGLIETTA

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This small claims dispute is about water damage in a strata building. Kenneth Kan owns unit 4 on the ground floor. Gino and Yukari Cuglietta own unit 110 on the second floor. Mr. Kan says between October 2021 and January 2022, water leaked

3 times from unit 110's bathroom into unit 4's bathroom, damaging the ceiling. After the third leak, Mr. Kan had the ceiling repaired for \$735. He wants the Cugliettas to pay that amount. Mr. Kan represents himself.

2. The Cugliettas say they are not responsible for any damage in unit 4. They say the leaks originated somewhere else or were caused by their contractors. Yukari Cuglietta represents the Cugliettas.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has authority over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly.
4. 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, the parties in this dispute call into question each other's credibility. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions.
5. 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 court.

ISSUE

6. The issue in this dispute is whether the Cugliettas are liable in nuisance or negligence for the water leaks, and if so, what are Mr. Kan's damages.

EVIDENCE AND ANALYSIS

7. As the applicant in this civil proceeding, Mr. Kan must prove his claims on a balance of probabilities, meaning more likely than not. While I have considered all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
8. As noted, Mr. Kan owns unit 4 and the Cugliettas own unit 110, which I infer is directly above unit 4. Both parties were renting their units to tenants when the leaks happened. Mr. Kan says 3 separate water leaks damaged unit 4's bathroom ceiling. He says all the water leaks came from unit 110's bathroom.
9. The applicable law is undisputed. As discussed in the non-binding but persuasive decision *Zale et al v. Hodgins*, 2019 BCCRT 466, owners may be surprised to learn that they are responsible for repairs to their condo even though the source of the damage originated in another condo. Absent an applicable strata bylaw, which is not argued here, Mr. Kan must show that the Cugliettas are liable in either negligence or nuisance.
10. To succeed in negligence, Mr. Kan must show that the Cugliettas owed him a duty of care, that they breached the applicable standard of care, and that he experienced a loss caused by their breach (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27). To succeed in nuisance, Mr. Kan must show a substantial and unreasonable interference with the use or enjoyment of his property. If the Cugliettas did not create the nuisance, then Mr. Kan must show that they knew or ought to have known about it and failed to take reasonable steps to mitigate it (see *Sadowick v. British Columbia*, 2019 BCSC 1249, at paragraphs 89-92).

First leak

11. The first water leak happened around October 29, 2021. On that date, Mr. Kan's tenant, PB, emailed Mr. Kan about water coming through a fan vent above the toilet. Another email from PB on November 2, 2021 indicated that water was leaking through the vent again. To avoid confusion with the other leaks, I will refer to this as a single October 29 leak.
12. Mr. Kan says Mr. Cuglietta caused the October 29 leak when doing some plumbing work in unit 110. The Cugliettas deny that any plumbing work happened in unit 110 around this time.
13. Mr. Kan relies on a March 23, 2023 email from a strata council member, RB. RB said they were providing their records for the "leaks from #110." They then quoted what they said was an email they had sent to the strata manager. In that quote, they said PB told them that the tenants in 110 told PB that they had just had a shower. RB then knocked on unit 110 and the man who answered said the owner, Mr. Cuglietta, had done some "plumbing pipes work" and bathtub tile work in the bathroom a few days ago.
14. The evidence about what this person (I infer, the Cugliettas' tenant) said is hearsay, meaning a statement made outside this proceeding that a party relies on to prove its truth. While the CRT has discretion to accept hearsay evidence, I decline to do so here because there is no way to verify its reliability. There is no other evidence to suggest that Mr. Cuglietta was doing plumbing work. In contrast, on November 5, 2021, the Cugliettas had Allied Plumbing inspect both units to determine the water leak's cause. Allied's invoice said it checked the shower valve, diverter and head and found no leaks, but found water staining on floorboards under the tub and determined that spilled water had likely travelled under the tub. I find this evidence inconclusive, partly because the Cugliettas note that their tenants denied spilling water. However, it raises one alternative explanation, and the Cugliettas point to others. On the whole, I am not satisfied that Mr. Cuglietta was doing plumbing work at the time or that the Cugliettas caused the leak. The evidence also does not

establish that the Cugliettas were aware of the leak and failed to stop it. So, I find Mr. Kan cannot recover damages from the Cugliettas for the first leak.

Second and third leak

15. The second and most damaging leak happened on December 6, 2021. It is undisputed that Philip Boyd, a contractor working in unit 110, accidentally struck a pipe under the bathroom sink with a prybar, causing the leak. The tenant PB again emailed to report water coming through the bathroom ceiling. They said there was water all over the bathroom and into the living room. Apparently the only permanent damage was to the bathroom ceiling, as that is all Mr. Kan repaired. Photos show large water pockets in the bathroom ceiling paint.
16. The third leak happened on January 27, 2022. Mr. Kan says the cause was a faulty shower valve that Allied installed in unit 110. While the Cugliettas say Allied denied installing a faulty shower valve and suggested the water came from a unit above 110, nothing turns on this. As I explain below, even if Allied installed a faulty shower valve as Mr. Kan says, that does not make the Cugliettas liable for the resulting damage.
17. Generally, a party is not held responsible for the torts (wrongful acts) of an independent contractor so long as it exercised reasonable care in selecting the contractor and, in some situations, supervising the work (see *Lewis (Guardian ad litem of) v. British Columbia*, 1997 CanLII 304 (SCC) at paragraph 19).
18. Mr. Kan argues that Philip Boyd, who caused the second leak, was not competent enough to carry out demolition without damaging the property. The fact that Philip Boyd struck a pipe does not mean they were incompetent. The Cugliettas say Philip Boyd has 20 years of experience as a contractor, as indicated on a screenshot from a contractor listing website. Mr. Kan challenges this evidence, but I accept it. Mr. Kan also says the Cugliettas have not shown that Mr. Boyd had liability insurance. However, Mr. Kan does not explain how Mr. Boyd having liability insurance would have made any difference to the outcome. Nor has he shown that not having liability

insurance means a contractor is not qualified to do the work. Overall, I find it was not unreasonable for the Cugliettas to hire Philip Boyd, keeping in mind that the standard of care is that of a reasonable condo owner hiring a contractor to work in their suite. There is also no suggestion that closer supervision from the Cugliettas could have prevented the second leak.

19. As for the third leak, Mr. Kan does not suggest or provide evidence that Allied was not a qualified plumbing contractor or not a reasonable choice to do the work. Nor does he suggest that the Cugliettas should have carefully supervised Allied's shower valve installation. I find that supervision was not required because plumbing is a specialized trade and it would not be obvious to a reasonable homeowner whether a shower valve was correctly installed.
20. As for nuisance, the evidence does not establish that the Cugliettas were aware of the second and third leaks and failed to stop them. By all accounts they were spontaneous leaks. So, I find Mr. Kan cannot recover damages from the Cugliettas for the second and third leaks.
21. With that, I dismiss Mr. Kan's claim.
22. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. The Cugliettas were successful but did not pay CRT fees. I dismiss Mr. Kan's claim for CRT fees. Neither party claims dispute-related expenses.

ORDER

23. I dismiss Mr. Kan's claims and this dispute.

Micah Carmody, Tribunal Member