



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mackenzie v. Bolshoy dba Siberian Cattery Bolshoy Dom*,
2021 BCCRT 144

B E T W E E N :

CHRISTOPHER MACKENZIE

APPLICANT

A N D :

GALINA BOLSHOY (Doing Business As SIBERIAN CATTERY
BOLSHOY DOM)

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This dispute is about an illness contracted by a pet cat named Lyra. The applicant, Christopher Mackenzie, says he purchased Lyra from the respondent, Galina Bolshoy (doing business as Siberian Cattery Bolshoy Dom). Mr. Mackenzie says that

Lyra had a virus when it was delivered to him, and that Lyra later became ill and needed to be euthanized. He claims a refund of Lyra's \$1,500 purchase price, and \$883.36 for Lyra's illness-related veterinary costs.

2. Ms. Bolshoy says that Lyra was in good health at the time it was delivered, and only developed an illness afterward. Ms. Bolshoy says that Lyra's purchase contract provides no warranties for communicable diseases beyond 72 hours after delivery, and Lyra's health costs could have been covered by insurance, so she owes nothing.
3. Mr. Mackenzie and Ms. Bolshoy are each 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. Although the parties' submissions each call into question the credibility of the other party in some respects, I find I can properly assess and weigh the written evidence and submissions before me, and that an oral hearing is not necessary in the interests of justice. In the decision *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always needed where credibility is in issue. Keeping in mind that the CRT's mandate includes proportional and speedy dispute resolution, I find I can fairly hear this dispute through written submissions.
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.

ISSUE

8. The issue in this dispute is whether Ms. Bolshoy is responsible for Lyra's illness, and if so, must she refund its \$1,500 purchase price and \$883.36 in veterinary costs?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, as the applicant Mr. Mackenzie must prove his claims on a balance of probabilities. I have read and weighed all the submitted evidence, but I refer only to the evidence I find relevant to provide context for my decision.
10. The undisputed evidence is that Mr. Mackenzie took delivery of Lyra on February 15, 2020, when Lyra was about 12 weeks old. The parties do not deny that Lyra appeared to be in good health up to this point, although Mr. Mackenzie says the cat had no appetite when it arrived at his home. On February 16, 2020 he took the cat to a veterinarian, Dr. Kwan. However, Mr. Mackenzie confirmed in an email to Ms. Bolshoy that Lyra fully bounced back by February 17, 2020 and seemed normal. At the time, the parties attributed this early lack of appetite to the temporary stress of transitioning to a new home.
11. Mr. Mackenzie says that Lyra became lethargic, with a fever and intestinal problems, starting around March 16, 2020. This is far beyond 72 hours after being delivered to Mr. Mackenzie, when the contract's infectious disease health guarantee ended, as discussed below. Mr. Mackenzie took Lyra to Dr. Kwan on March 21, 2020. In this and subsequent visits, Dr. Kwan tried to treat Lyra and diagnose its condition. Dr.

Kwan summarized these activities in an April 27, 2020 letter in evidence. Neither party disputes that Dr. Kwan is a Doctor of Veterinary Medicine with significant experience, and I find that under the CRT rules she is a qualified expert in cat medicine. I address the weight I place on her April 27, 2020 letter below.

12. In her letter, Dr. Kwan did not disagree that the stress of a new home caused Lyra's initial lack of appetite. Dr. Kwan said that Lyra gained weight between its February 16, 2020 and February 23, 2020 visits. However, she said Lyra progressively developed symptoms as of a March 21, 2020 visit and beyond. Among other investigations, Dr. Kwan tested for the presence of feline coronavirus (FCoV).
13. The undisputed evidence before me is that many cats contract FCoV and suffer no symptoms. However, a small percentage of cats develop feline infectious peritonitis (FIP) from it within weeks or months. The parties agree FIP is poorly understood and difficult to diagnose, but is almost always fatal. In an April 3, 2020 email to Mr. Mackenzie, Dr. Kwan said that based on blood tests and clinical signs, Lyra's results were "pretty much definitive" for FIP. Dr. Kwan indicated that Lyra's prognosis was poor, and that its life expectancy was about 1 month. After further deterioration in Lyra's condition, Mr. Mackenzie had Dr. Kwan euthanize the cat on April 29, 2020.
14. Ms. Bolshoy disagrees with Dr. Kwan's diagnosis and treatment plan for Lyra. I find that the appropriateness of Dr. Kwan's diagnosis and treatment is a subject outside of ordinary knowledge and experience, and requires expert evidence to prove (see *Bergen v. Guliker*, 2015 BCCA 283). I find that the brief, transcribed article excerpts submitted by Ms. Bolshoy are not expert evidence under the CRT's rules. Other than Dr. Kwan's evidence, I find there is no expert evidence before me in this dispute. I accept Dr. Kwan's expert opinion that Lyra had FIP and was euthanized as a result on April 29, 2020.
15. The question is, how did Lyra contract FCoV and FIP, and was Ms. Bolshoy responsible for Lyra developing these conditions?

16. It is undisputed that Lyra exhibited no symptoms before being delivered to Mr. Mackenzie. Ms. Bolshoy says none of the other cats in Lyra's litter had FCoV or FIP. In a May 8, 2020 email, she told Mr. Mackenzie that there was no such disease at her cattery. Dr. Kwan did not discuss when Lyra was likely to have contracted FCoV based on the FCoV incubation period and mid-March 2020 symptom onset. I find there is no direct evidence showing that any of Ms. Bolshoy's other cats had FCoV or FIP, or that Ms. Bolshoy should have suspected Lyra had FCoV before Mr. Mackenzie purchased the cat. I find that Ms. Bolshoy did not misrepresent Lyra's condition to Mr. Mackenzie, because I find she reasonably believed Lyra was healthy when sold.
17. Paragraph 4 of the parties' February 15, 2020 contract of sale recommended that Mr. Mackenzie have a veterinarian check Lyra within 72 hours to ensure its health, which I find Mr. Mackenzie did, and no disease was diagnosed. The contract said that after that time, which I find is 72 hours after taking Lyra home, Ms. Bolshoy had no responsibility for any infectious disease that may have been acquired while Lyra was outside of Ms. Bolshoy's care.
18. I find the contract says Ms. Bolshoy was not responsible for infectious diseases contracted 72 hours or more after delivery, but may be responsible for diseases contracted before then. In her submissions, Ms. Bolshoy confirms that she guaranteed the transfer of a healthy animal at the delivery time. Given this, and the contract as a whole, I find it was an implied term of the contract that Ms. Bolshoy was responsible for infectious diseases contracted earlier than 72 hours after Lyra was delivered to Mr. Mackenzie.
19. On the evidence before me, I find Lyra first displayed FIP symptoms by about March 16, 2020, long after the contractual 72 hour period ended.
20. In her letter, Dr. Kwan addressed the possible source of Lyra's FIP. She said that because there were no other cats in Lyra's household and that Lyra was a strictly indoor kitten, Lyra's FCoV would have come from the mother cat or other cats owned by Ms. Bolshoy. Dr. Kwan said that Lyra was infected either in utero before birth by

the mother, or after birth via fecal oral contamination, but did not say which. As noted, Dr. Kwan did not say when Lyra likely caught FCoV based on its incubation period.

21. On the evidence before me, I find that Dr. Kwan had no direct information about Lyra's mother and Ms. Bolshoy's other cats, including whether any of them had FCoV. Based on her letter, I find it likely that Dr. Kwan assumed FCoV and FIP must have been contracted directly from other cats or cat feces, and that Lyra's only contact with other cats or their feces had been at Ms. Bolshoy's cattery.
22. However, Dr. Kwan gave Mr. Mackenzie a handout about FCoV and FIP written by 2 veterinarians. The parties both agree with the handout's contents, and I infer that Dr. Kwan does too. The handout said that most cats become infected with FCoV through a fecal-oral route, but that the virus could be transmitted on clothing or other objects within a few hours of contact. The handout said that the virus could survive up to 24 to 36 hours in a normal environment, but that cold temperatures might extend that period for months.
23. Dr. Kwan's letter also did not address whether it was possible that Lyra had caught FCoV from clothing or other objects brought into Mr. Mackenzie's home. Mr. Mackenzie says that both he and his partner had worked outside of their home in the period before Lyra's mid-March 2020 onset of symptoms, and that Mr. Mackenzie's mother also provided care for Lyra. Further, Ms. Bolshoy suggests that FCoV may have been transmitted to Lyra from humans or other animals. Although I place limited weight on Ms. Bolshoy's document excerpts that indicate such transmission may be possible, I find Dr. Kwan did not appear to consider, or explicitly rule out, whether Lyra could have caught FCoV from humans or other animals. On balance, I find Dr. Kwan's letter failed to adequately consider and rule out other potential sources of Lyra's FCoV infection, and the likely FCoV incubation period before FIP symptoms arose. So, I place little weight on Dr. Kwan's opinion about the source of Lyra's FCoV and FIP.
24. I find there is insufficient evidence showing that Lyra had FCoV when in Ms. Bolshoy's possession, or that any of Ms. Bolshoy's other cats had FCoV. Given my finding that

Dr. Kwan's opinion does not adequately address other potential sources of Lyra's FCoV infection and its incubation period, I find it is purely speculative to say that Lyra had asymptomatic FCoV before being delivered to Mr. Mackenzie.

25. Having weighed the evidence, I find Mr. Mackenzie has not met his burden of showing that Ms. Bolshoy's other cats had FCoV that spread to Lyra, or that Lyra had FCoV earlier than 72 hours after being delivered to Mr. Mackenzie. I find Mr. Mackenzie has failed to prove that Lyra acquired an infectious disease during the period in which Ms. Bolshoy was responsible for it under the terms of their contract.
26. Mr. Mackenzie also says that Ms. Bolshoy breached implied terms set out in the "Standard of Goods Act", because Lyra was not of merchantable quality, not reasonably fit for the intended purpose, and did not last a reasonable amount of time. I find Mr. Mackenzie is referring to section 18 of the *Sale of Goods Act* (SGA).
27. Under SGA section 18(a), there is an implied warranty that goods sold are reasonably fit for the purpose the buyer identifies to the seller. Here, I find Lyra was fit to be a pet because she was a kitten of the breed shown in the contract. So, Ms. Bolshoy did not breach a section 18(a) implied warranty. I find there was no section 18(b) implied warranty that Lyra would be of "merchantable quality", because Lyra was not purchased by description but was individually selected by Mr. Mackenzie.
28. The issue here is whether Lyra was reasonably durable in all the circumstances, including the contractual limitations. SGA section 18(c) provides an implied warranty that goods sold will be durable for a reasonable period of time, having regard to the use to which they would normally be put and the sale's surrounding circumstances. Although not binding on me, other tribunal decisions have found that this implied warranty can apply to pet sales (for example, see *Ta v. Vernon*, 2019 BCCRT 675, and *Davy v. Kidwai*, 2020 BCCRT 442). I considered whether this implied warranty of durability applied to Lyra's sale. For the reasons below, I find it does not.
29. SGA section 18(e) says that an express warranty or condition does not eliminate a warranty or condition implied by the SGA unless the 2 are inconsistent. I found above

that under the parties' contract, Ms. Bolshoy had no responsibility for infectious diseases contracted more than 72 hours after delivery. I find that term was inconsistent with a section 18(c) implied warranty of durability for infectious diseases more than 72 hours after delivery. I also find that Lyra was 12 weeks old when sold and therefore was "used goods." I find this means that under section 20(2), the contractual warranty overrode the inconsistent section 18(c) implied warranty. So, I find that no section 18(c) implied warranty of durability applied to Lyra's purchase.

30. Even if I had found that an SGA section 18(c) implied warranty of durability existed here, I would not have found that Ms. Bolshoy breached that warranty, for the following reasons. I found above that the evidence fails to prove Lyra had FCoV or FIP earlier than 72 hours after being delivered to Mr. Mackenzie. On balance, I find Lyra was in good health at that time, and that Lyra more likely than not contracted FCoV or FIP later, while in Mr. Mackenzie's care.
31. A reasonably durable pet is not necessarily immune to all communicable disease. I note that a seller cannot prevent infectious disease once a pet is in a buyer's hands, other than ensuring the pet was in good health before sale. I find that contracting a communicable disease is not necessarily a flaw in the pet's "durability" unless it was contracted because of a pre-existing condition or defect in the pet. I find the evidence before me fails to show that Lyra had a pre-existing defect that made it more susceptible to FCoV or FIP than other cats. In the circumstances, despite contracting FCoV and FIP shortly after purchase, I find Lyra was "durable" within the meaning of the SGA. So, I find Ms. Bolshoy did not breach any section 18(c) implied warranty.
32. Overall, I find Ms. Bolshoy is not responsible for Lyra's FCoV infection or FIP, and is not responsible for Lyra's relatively early death. Given my conclusion above, I do not need to address Ms. Bolshoy's arguments about insurance coverage. I find Ms. Bolshoy is not responsible for refunding Lyra's \$1,500 purchase price or reimbursing the claimed \$883.36 in veterinary costs. I deny Mr. Mackenzie's claims.

CRT FEES AND EXPENSES

33. 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. Ms. Bolshoy was successful here, but paid no CRT fees. Neither party claimed CRT dispute-related expenses. So, I order no reimbursements.

ORDER

34. I dismiss Mr. Mackenzie's claims, and this dispute.

Chad McCarthy, Tribunal Member