



Civil Resolution Tribunal

Date Issued: April 19, 2018

File: SC-2017-003208

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Dignan v. Pilon*, 2018 BCCRT 142

BETWEEN:

Deanna (Kim) Dignan

APPLICANT

AND:

Denis Pilon

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Salima Samnani

INTRODUCTION

1. The applicant, Deanna Kim Dignan, hired the respondent, Denis Pilon, to stain her deck. The applicant was unhappy with the results. The respondent attempted to fix the issues and offered to strip and redo the stain on the deck. The applicant has lost confidence in the respondent's workmanship and seeks a full refund plus

compensation for expenses to fix the respondent's work. Both the applicant and the respondent are self-represented.

JURISDICTION AND PROCEDURE

2. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). 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.
3. 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.
4. Some of the evidence in this dispute amounts to a "he said, she said" scenario. Credibility of interested 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. As noted in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA), the assessment of what is the most likely account depends on its harmony with the rest of the evidence. In considering what is most likely to be the truth, I consider what "a practical and informed person would readily recognize as reasonable in that place and in those conditions". In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the recent decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court also recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

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. Under tribunal rule 126, in resolving this dispute the tribunal may make one or more of the following orders:
 - 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

7. The issues in this dispute are:
 - a. Did the respondent fail to meet a reasonable standard of workmanship?
 - b. If so, is the applicant entitled to a full refund of the money she paid to the respondent?
 - c. Is the applicant entitled to an award of \$605, to cover the additional cost of what she will pay a new contractor to repair and replace the stain on the deck?

EVIDENCE AND ANALYSIS

8. The applicant bears the burden of proof on a balance of probabilities. The applicant has provided a significant amount of detailed information in her submissions and included comprehensive supporting evidence. In contrast, the respondent has provided very little information in his submissions and provided minimal supporting evidence. I have only referred to the evidence as necessary to provide context to my decision.

9. On July 18, 2016 the applicant hired the respondent to stain her deck including the stairs, railing, and so on. The respondent gave the applicant a quote and work order that stated he would be responsible for power washing and staining the deck.
10. In every contract for service there is an implied agreement that the work will be done to a standard that a reasonable person would find acceptable. The applicant alleges that the respondent failed to complete the staining of the deck to a reasonable standard.

Failure of deck stain

11. The applicant says that the deck was not properly cleaned before staining and once stained, the stain peeled, congealed, and portions of the deck were left bare.
12. The respondent says he gave the applicant options for the type of stain to use and recommended Sunfast stain because he has had great results with it. The respondent also says the applicant was motivated to save money so he recommended Sunfast stain because it was cost effective.
13. Based on the evidence before me, including the stain's directions for use, Sunfast should not have been used on a horizontal surface, like the applicant's deck.
14. The respondent says that applicant should bear some of the responsibility of Sunfast failing because she picked a low-cost option. However, there is no evidence that the respondent warned the applicant that the product might fail or that the Sunfast stain was not recommended for her deck.
15. The parties provided contrasting evidence about the number of stain coats that were discussed. I find the issue of two versus one coat is irrelevant as it is clear that the product should not have been used for the horizontal surfaces.
16. I find that if a client asks a service provider to recommend a low-cost option, it is implied that the low-cost option must still be functional.

17. I find that the respondent made an improper stain recommendation to the applicant. As such, I find that the respondent is liable for the failure of the stain on the horizontal deck surface. The result is that the respondent failed to provide a reasonable quality of workmanship. That the respondent sent a worker to try and repair the deck is not determinative. Here, that worker did not solve the problem.

Mitigating damages

18. The law requires that if a respondent wishes to claim that an applicant has failed to mitigate their damages, it is the respondent who must prove that failure to mitigate on the balance of probabilities test. The respondent must prove both that the applicant failed to make reasonable efforts to mitigate and that mitigation was possible: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, paragraph 24.
19. The respondent was responsive to the applicant's complaints and has attempted to resolve issues. The respondent even offered to re-do the stain on the deck in the spring of 2017. However, the applicant does not want the applicant to re-do the staining. She instead brought this claim seeking a refund and wants to hire another company to re-do the staining.
20. I find the applicant has given the respondent many chances to complete the work to a reasonable standard. However, the respondent has repeatedly come up short. Given the quotes obtained by the applicant, I prefer the applicant's evidence that the old stain must be removed using a chemical stripping product, over the respondent's apparent suggestion, that a power washer will be sufficient.
21. I find the respondent has not proven on a balance of probabilities that the applicant has failed to mitigate her damages. I find it is reasonable for the applicant to refuse to give the respondent a chance to re-do the deck stain, given the respondent's failures to date, and that I have accepted the repair method suggested in the applicant's quotes.

Amount of refund

22. Based on the weight of the evidence before me, including detailed and consistent explanations from the applicant and little explanation from the respondent, I accept the applicant's evidence that she paid the respondent \$2,713.76 for his work, split into two cheques of \$1,056.88 and \$600 in cash. In particular, I reject the respondent's unsupported assertion that the applicant did not pay him \$600 in cash.
23. The applicant claims a full refund of the money paid to the respondent. The respondent claims that the deck is the only problem area and it made up only 25% of the work completed. He claims that the other 75% of his work was on the railings, lattice, screen and skirting and that this work was completed to a reasonable standard.
24. The applicant says all of the respondent's work was poor and has provided photographs that I find show deficiencies in not only the horizontal surfaces but also the vertical surfaces.
25. The applicant has met the burden of showing that overall the respondent's work was poorly executed. Further, the respondent has not provided any details as to how he arrived at the 75% apportionment. Further, given all the evidence before me, I do not accept that such a large portion of the respondent's work was of reasonable quality.
26. I find that the applicant is entitled to a full refund of \$2,713.76.

Additional repair cost

27. Ordinarily, a full refund would put the applicant in the position she was in before she hired the respondent. However, I have found that the deck is in a worse condition than which it was prior to the contract. The deck now requires chemical stripping as opposed to the cleaning it needed before the respondent started his work.

28. I find that the quotes submitted by the applicant are reasonable. As such I find that applicant is entitled to an award of \$605 to fully put her in the position she was in before she hired the respondent.

Fees and dispute related expenses

29. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. As the applicant was largely successful, I find the applicant is entitled to reimbursement of \$50 in tribunal fees and \$90.25 in reasonable dispute-related expenses.

ORDERS

30. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of \$3,497.45, broken down as follows:
- a. \$2,713.76 as a refund for the amount paid to him by the applicant;
 - b. \$605 as an award for additional repair costs;
 - c. \$38.44 in pre-judgment interest under the *Court Order Interest Act*, and
 - d. \$50 in tribunal fees and \$90.25 for dispute-related expenses.
31. The applicant is entitled to post-judgment interest, as applicable.
32. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

33. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Salima Samnani, Tribunal Member