



Civil Resolution Tribunal

Date Issued: May 17, 2018

File: SC-2017-005747

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Super Save Disposal Inc. v. Paul's Metal Service Inc.*, 2018 BCCRT 191

B E T W E E N :

SUPER SAVE DISPOSAL INC.

APPLICANT

A N D :

PAUL'S METAL SERVICE INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Penelope Pearson

INTRODUCTION

1. The applicant Super Save Disposal Inc. says the respondent Paul's Metal Service Inc. breached the parties' disposal service contract. The applicant claims

liquidated damages as set out in the contract. The respondent says it signed the contract in error and cancelled it, and that the claimed damages are excessive. The respondent asks that the dispute be dismissed.

2. Both the applicant and respondent represented themselves.

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 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.
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. 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. One: Did the parties enter into an enforceable contract?
 - b. Two: Did the respondent repudiate or was it in breach of the contract?
 - c. Three: Was the applicant entitled to accept the repudiation of the contract?
 - d. Four: What damages, if any, should the applicant receive?

EVIDENCE AND ANALYSIS

8. I have reviewed all of the documents and submissions provided by both the applicant and the respondent. I set out the facts:
 - a) On August 21, 2013, Dan Loik on behalf of Paul's Metal Service Inc. and Eric Byrne on behalf of Super Save Disposal Inc. signed a Service Agreement (the "Agreement"). The Agreement's terms provided:
 - the applicant would provide waste collection services to the respondent.
 - The respondent would pay \$60.00 per month for these services.
 - The term of the Agreement was 5 years (clause 2).
 - The Effective Date of the Agreement was September 21, 2013.
 - The Effective Date of the Agreement would be delayed to the day after the end of any existing contract for the same services the respondent had with a different disposal service (clause 3).
 - The respondent had the obligation to notify any existing service provider that it would not be renewing its contract with them (clause 3).
 - If the respondent terminated the Agreement prior to the end of the term, the applicant could accept the repudiation of the Agreement and terminate the Agreement (clause 11).

- Upon termination of the contract, the respondent agreed to pay as liquidated damages the amount of the remaining monthly charges plus the sales tax (clause 11).
- The respondent could not terminate the Agreement except by providing written notice to the applicant within 120 to 90 days before the end of the 5 year term (clauses 2 and 15).

(document A1)

- b) At the time the respondent signed the Agreement, it had a service contract with BFI Canada (“BFI”), another disposal company. This contract was signed by the respondent’s prior owner. It expired on October 30, 2016. (document A3)
- c) When Mr. Loik signed the Agreement, he did not know about the existing contract with BFI.
- d) On August 27, 2013 a form letter was sent to BFI “re: 1270 Boundary Road, Burnaby – Paul’s Metal”, purporting to cancel the BFI contract. It stated that the expiry date of that contract was September 21, 2013. There is an illegible signature attached to this letter. There is no name typed under the signature. (document A2)
- e) On September 10, 2013 the respondent and BFI modified their contract. The term commenced September 1, 2013 and ended on September 10, 2016. (document R3)
- f) On October 3, 2013, the respondent wrote to the applicant, saying that they could not use the applicant’s services, due to the existing contract with BFI. The respondent enclosed a copy of its contract with BFI. (document A3)
- g) The applicant did not answer the letter of October 3, 2013.
- h) On August 10, 2016 a letter was delivered to Progressive Waste Solutions, which is BFI “re: Paul’s Metal Service Inc.” It is identical in form to the earlier letter delivered August 27, 2013. This letter says that the existing contract expired October 30, 2016. Again the signature is illegible. There is no name typed under the signature. The customer receipt from Canada Post has the customer as the Respondent. (document A4)

- i) Both the letters delivered August 27, 2013 and August 10, 2016 contain the sentence “I do not wish to be contacted by a representative of your company in the attempt to induce me to sign an additional contract”.
- j) On August 19, 2016, Progressive Waste Solutions advised the respondent they would cancel the September 1, 2013 contract, provided that the respondent did not use any other company to haul their waste, during the remaining term of the contract. They referred to the expiry date of that contract as August 31, 2019. I assume this expiry date was after a 3 year renewal of the September 1, 2013 contract. (document R8)
- k) On October 3, 2016 the respondent entered a new contract with Progressive Waste Solutions. It also wrote to the applicant. They advised the applicant of their contract with Progressive Waste. The respondent said they did not require the applicant’s services. (document R4, R5)
- l) On October 31, 2016, the applicant attempted to deliver a bin to the respondent. The respondent refused to accept the bin. No services were provided by the applicant to the respondent. (document A5)

9. **Issue One: Did the parties enter into an enforceable contract?** The respondent signed the Agreement in error. The respondent’s owner did not know he had an existing contract with BFI. This was a business error and not the applicant’s fault. Mr. Loik, on the respondent’s behalf, intended to sign the Agreement, when he signed it. I find the Agreement is a binding contract between the applicant and the respondent.

10. **Issue Two: Did the respondent repudiate or was it in breach of the contract?** The respondent wrote to the applicant both on October 3, 2013 and October 3, 2016 advising that it did not require the applicant’s services. The respondent is only permitted to cancel the Agreement as set out in clause 2. Clause 2 did not apply on either October 3, 2013 or October 3, 2016. I find the respondent repudiated the Agreement. The respondent confirmed that repudiation on October 31, 2016 when the applicant attempted to deliver the bin.

11. **Issue Three: Was the applicant entitled to accept the repudiation of the contract?** Clause 11 of the Agreement gives the applicant the right to accept the repudiation, which it did. I find the Agreement was terminated.
12. **Issue Four: What damages, if any, should the applicant receive?** Clause 11 of the Agreement provides that on termination of the Agreement, the respondent agrees to pay as liquidated damages an amount equal to the number of months remaining in the term, plus the sales tax.
13. Simply because a contract says damages are liquidated damages and not a penalty does not make them liquidated damages. It is a question of the contract's construction. The damages will be a penalty if the amount is extravagant and unconscionable when compared to the greatest loss that could possibly come from the breach. The courts have said their duty is to assess whether the clause is a genuine pre-estimate of the anticipated losses or a clause intended to compel performance of the contract. This issue was decided in the case of *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc.* 2014 BCSC 690 (CanLII). Madam Justice Fenlon (at paragraph 46) found that the income stream loss over the remaining term of the contract amounts to a genuine pre-estimate of damages and is not a penalty.
14. I note that in paragraph 35 of the decision, Madam Justice Fenlon says that at common law the Plaintiff, also Super Save Disposal Inc., would be entitled to the loss of the income stream, less its costs of providing the services under the contract. She assumed minimal costs would be incurred. I am not certain why she made that assumption. Clause 4 of the Agreement sets out some of the costs of providing the services under the Agreement. These include fuel costs, driver wage costs, transportation equipment costs, contamination waste surcharges, disposal facility and landfill costs, recycling commodity fees, bridge and road tolls, government taxes and levies including the carbon tax. In addition there would be office and administration charges. Her finding that the loss of income stream are liquidated damages appears to be based on her assumption. If evidence showed

the applicant's actual costs of providing the services under the contract the issue of whether the loss of income stream are liquidated damages or a penalty could be reconsidered.

15. There is no evidence before me as to the applicant's costs in providing the services. I find the *Tristar Cap & Garment Ltd.* decision is binding on me. I find that the applicant is entitled to the loss of income stream on the remaining months of the Agreement, plus the sales tax. This amount is $59 \times \$60 = \$3,540.00$ plus taxes of \$177.00. A total of \$3,717.00. I find that the applicant is not entitled to the cost of the bin delivery. The respondent had clearly indicated prior to its delivery that they did not want the applicant's services. A phone call would have confirmed this prior to the delivery.
16. The respondent says the applicant has failed to mitigate its loss. The respondent has the onus of proving a failure to mitigate. The respondent has not provided any evidence on this issue. I find that there is no reduction to the applicant's damages based on a failure to mitigate.

OTHER MATTERS

17. The respondent has raised the issue of Right of First Refusal. The respondent has misunderstood this concept, and it is not applicable in the circumstances of this case.
18. Mr. Loik alleges that the applicant forged his signature on the August 10, 2016 letter. The applicant denies forging Mr. Loik's signature. The applicant does not deny that it sent the letter. There is no evidence as to who signed the letters of August 27, 2013 and August 10, 2016. As the signature is illegible it is not known whose signature it is supposed to be. Thus, I cannot conclude Mr. Loik's signature was forged.
19. I have considered:
 - a) the form of the letters of August 27 2013 and August 10, 2016;

- b) the wording of the letters as set out in paragraph i) of the facts listed above;
- c) the date of October 30, 2016 referred to in the letter of August 10, 2016 (the original expiry date of the BFI contract, which had been modified); and
- d) the actions of the respondent when he dealt with Progressive Waste Solutions \ BFI.

These are not likely letters the respondent sent. I find that the applicant sent both the August 27, 2013 and August 10, 2016 letters. The applicant sent the letters intending the recipient to think the letters were from the respondent. The applicant sent the letters without the respondent's consent, which I find was inappropriate. No damages are claimed as a result of this action by the applicant. It does not effect the outcome of this matter.

- 20. I have reviewed the comments of His Worship B. G. Baynham in *Super Save Disposal Inc. v. Lee 2015 BCPC 0157 (CanLII)* and in *Housewise Construction v. Nguyen 2015 BCPC 0156 (CanLII)*. His Worship refers to the onerous nature of the terms of disposal service contracts. He states the need for consumer protection with respect to these contracts. I agree with him.
- 21. 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. I find the applicant is entitled to reimbursement of \$175.00 in tribunal fees.

ORDERS

- 22. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of \$3,892.00, broken down as follows:
 - a. \$3,717.00 as damages, and

b. \$175.00 in tribunal fees.

23. The applicant is entitled to post-judgment interest, as applicable.
24. 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.
25. 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.

Penelope Pearson, Tribunal Member