



Civil Resolution Tribunal

Date Issued: May 23, 2018

File: SC-2017-007062

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Zielke v. Macknight*, 2018 BCCRT 200

BETWEEN:

Perry Zielke

APPLICANT

AND:

Gregory Macknight

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION AND JURISDICTION

1. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the participation of the respondent, due to the respondent's non-compliance with the tribunal's directions as required, as discussed below.
2. The parties are each self-represented.

3. Section 36 of the *Civil Resolution Tribunal Act* (Act) applies if a party to a dispute fails to comply with the Act or its regulations. It also applies if a party fails to comply with tribunal rules in relation to the case management phase of the dispute, including specified time limits, or an order of the tribunal made during the case management phase. After giving notice to the non-compliant party, the case manager (facilitator) may refer the dispute to the tribunal for resolution and the tribunal may:
 - a. hear the dispute in accordance with any applicable rules.
 - b. make an order dismissing a claim in the dispute made by the non-compliant party, or
 - c. refuse to resolve a claim made by the non-compliant party or refuse to resolve the dispute.
4. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 3.1 of the 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.
5. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.
6. For the reasons that follow, I have allowed the applicant's claim.

ISSUES

7. The first issue in this dispute is whether I should proceed to hear the applicant's claim without the respondent's further participation, given the respondent's non-compliance.

8. The second issue is whether the respondent must pay the applicant for a new refrigerator and if so, what amount.

EVIDENCE & ANALYSIS

Non-compliance

9. My May 3, 2018 summary decision to hear the dispute without the respondent's participation due to the respondent's non-compliance was previously communicated to the parties by email through the tribunal case manager. The details supporting that decision are set out below.
10. The respondent is the non-compliant party in this dispute and has failed to participate in the case management phase, as required by sections 25 and 32 of the Act and tribunal rules 94 to 96, despite multiple attempts by the case manager to contact him with a request for a reply.
11. The respondent filed his Dispute Response on December 19, 2017. The case manager subsequently made the following attempts to contact the respondent, with no response:
 - a. March 26 and 27, and April 5, 9, and 11, 2018 – case manager emailed the respondent directing him to reply, and receive no responses.
 - b. March 26, March 27, April 5, and April 11, 2018 – case manager telephoned the respondent and received no response.
 - c. April 23, 2018 – case manager emailed the respondent stating that he was expected to comply with the directions and deadlines set out by the case manager, and he had failed to respond to her emails of March 26 and 27, and April 5, 9, and 11 as directed. She directed him to respond by April 25, 2018.

- d. April 26, 2018 – case manager emailed the respondent, stating that it was a final warning and if he failed to reply by May 1, 2018, she would proceed with a “noncompliance approach”.
12. The case manager then referred the matter of the respondent’s non-compliance with the tribunal’s rules to me for a decision as to whether I should hear the dispute without the respondent’s participation.

Should the tribunal hear the applicant’s dispute?

13. As referenced above, the respondent filed a Dispute Response. The respondent has provided no explanation about why he failed to communicate with the tribunal as required. I find the facilitator made a reasonable number of attempts to contact the respondent. Parties are told at the beginning of a tribunal proceeding that they must actively participate in the dispute resolution process. Given that the respondent provided his contact information in December 2018, only 3 months before the facilitator’s first attempt at contact, I find it is more likely than not that the respondent was aware of the facilitator’s attempts to contact him.
14. The tribunal’s rules are silent on how it should address non-compliance issues. I find that in exercising its discretion, the tribunal must consider the following factors:
- a. whether an issue raised by the claim or dispute is of importance to persons other than the parties to the dispute;
 - b. the stage in the facilitation process at which the non-compliance occurs;
 - c. the nature and extent of the non-compliance;
 - d. the relative prejudice to the parties of the tribunal’s order addressing the non-compliance; and
 - e. the effect of the non-compliance on the tribunal’s resources and mandate.

15. First, this claim does not affect persons other than the parties involved in this dispute.
16. Second, the non-compliance here occurred at the outset of the facilitation process and no substantive discussions between the parties occurred. The respondent has effectively abandoned the process after providing a response.
17. Third, given the facilitator's attempts at contact and the respondent's failure to respond despite warnings of the consequences, I find the nature and extent of the non-compliance is significant.
18. Third, given the facilitator's repeated attempts at contact and the respondent's failure to respond despite warnings of the consequences, I find the nature and extent of the non-compliance is significant.
19. Fourth, I see no prejudice to the applicant in hearing the dispute without the respondent's participation. The prejudice to the respondent of proceeding to hear the dispute is outweighed by the circumstances of his non-compliance. If I refused to proceed to hear the dispute, the applicant would be left without a remedy, which would be unfair to him.
20. Finally, the tribunal's resources are valuable. Its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party refuses to participate. I find that it would be wasteful for the tribunal to continue applying its resources on this dispute, such as by making further attempts to seek participation from the respondent.
21. In weighing all of the factors, I find the applicant's claim should be heard. In deciding to hear the applicant's dispute I have put significant weight on the following factors:
 - a. the extent of the non-compliance is significant;
 - b. the applicant is not prejudiced; and

- c. the need to conserve the tribunal's resources.

Replacement Refrigerator

22. Having decided to hear the dispute without the respondent's participation, I turn to the merits of the dispute.
23. Where a respondent has failed to comply with the tribunal's directions as required, as is the case here, an adverse inference may be drawn against that respondent. This means that if the person or organization refuses to participate, it is generally assumed that the other party's position is correct. This is similar to when a respondent fails to provide any response at all to the dispute and is in default and the respondent's liability is assumed.
24. The applicant says he purchased a house from the respondent, and the purchase agreement included the \$3,000 refrigerator that was in the house at the time of the home inspection. The applicant's Dispute Notice says that when he moved in, the \$3,000 refrigerator had been replaced with one that was worth \$900 or less.
25. The applicant seeks the cost of the original refrigerator, and provided an invoice and photographs from an appliance store showing a sale price for a similar refrigerator at \$2,464 including taxes.
26. The respondent's Dispute Response form says the original refrigerator was not part of the verbal contract between the parties, and it was not worth \$3,000. However, he has not provided evidence to support those assertions. Also, a verbal contract is not valid for the sale of real estate. Given the adverse inference against the respondent due to non-compliance, I accept the applicant's evidence that the original refrigerator was included in the sale contract. I also accept that a replacement refrigerator is worth \$2,464. As the respondent provided no evidence about the value of the refrigerator that was in the home when the applicant took possession, I make no deduction for it.

27. For these reasons, I order the respondent to pay the applicant \$2,464 as reimbursement for the cost of the refrigerator.
28. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees. As the applicant was successful in this dispute, I order that the respondent pay the applicant \$125 as reimbursement for tribunal fees. There were no dispute-related expenses claimed.
29. The applicant is also entitled to pre-judgment and post-judgment interest under the *Court Order Interest Act* (COIA), as set out below in my order.

ORDERS

30. I order that within 30 days of this decision, the respondent must pay the applicant a total of \$2,603.15, broken down as:
 - a. \$2,464 for the refrigerator,
 - b. \$14.15 in pre-judgment interest under the COIA, and
 - c. \$125 in tribunal fees.
31. The applicant is also entitled to post-judgment interest under the COIA.
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.

Kate Campbell, Tribunal Member