



# Civil Resolution Tribunal

Date Issued: July 10, 2018

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Santiago Hernandez (d.b.a.) B & R Professional Painting v. Duva*,  
2018 BCCRT 316

B E T W E E N :

Santiago Hernandez (d.b.a.) B & R Professional Painting

**APPLICANT**

A N D :

Sam Duva

**RESPONDENT**

A N D :

Santiago Hernandez (d.b.a.) B & R Professional Painting

**RESPONDENT BY COUNTERCLAIM**

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## REASONS FOR DECISION

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Tribunal Member:

Shelley Lopez, Vice Chair

## **INTRODUCTION**

1. The applicant, Santiago Hernandez (d.b.a.) B & R Professional Painting (B & R), and the respondent, Sam Duva (Mr. Duva), had an agreement that B & R would paint and stain the interior and exterior of Mr. Duva's house. B & R says it completed the work under their contract, and claims payment of its \$4,195 invoice. B & R also says it did additional work without charge to Mr. Duva, valued at \$1,300.
2. In his counterclaim, Mr. Duva claims B & R failed to properly finish the work as required by the parties' contract and failed to fix deficiencies. Mr. Duva claims \$3,445, which is the estimate he obtained. The parties are self-represented.

## **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, and I note that neither party requested 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: 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.

## **ISSUES**

7. The issues in this dispute are: a) to what extent has B & R proved it completed the job under its agreement with Mr. Duva, such that it is entitled to payment of its outstanding \$4,195 invoice, and b) to what extent has Mr. Duva proved he is entitled to \$3,445 for his claimed cost of completing the painting job and fixing B & R's alleged deficiencies.

## **EVIDENCE AND ANALYSIS**

8. In civil claims such as these, the applicant bears the burden of proof, on a balance of probabilities. This means B & R must prove it is entitled to payment of the \$4,195 invoice balance. In his counterclaim, Mr. Duva must prove B & R is responsible for the claimed \$3,445 charges. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
9. On May 25, 2016, B & R gave Mr. Duva a "bid proposal" for the painting job, totaling \$18,000 plus G.S.T. It is undisputed that this bid became the parties' contract. The bid states the contract is in effect once the job starts. It also provides staged payments, with the balance owing in full upon the job's completion.
10. It is not entirely clear to me when B & R started the painting job, but they were at Mr. Duva's house in mid September 2016, based on the text messages in evidence. B & R's employee's witness statement says they had completed priming and 2 coats throughout the house "in November 2016". The employee wrote that there was then approximately 2 weeks of no work, due to other work being done in the house. The employee wrote that upon return they were supposed to do final touch-ups throughout the house, but Mr. Duva decided to do further repairs due to damage to the drywall and ceilings by other trades. The employee stated the drywall made repairs using a red spackle on walls and ceilings already painted

by B & R. Finally, the employee stated that Mr. Duva gave her a gift for the excellent painting job she did.

11. There is no evidence before me that Mr. Duva expressed any concerns about the painting job in October or November 2016.
12. Mr. Duva does not address B & R's evidence and submissions that other trades damaged the drywall and ceilings already painted by B & R. On balance, I accept B & R's evidence in this respect as I find it most consistent with the overall timeline, as discussed further below.
13. B & R's November 30, 2016 invoice #460 reflected the \$18,000 contract, less a \$3,000 deduction for paint overspray on the exterior stucco. Therefore, the contract price was reduced to \$15,000 plus \$750 G.S.T., for a total of \$15,750. However, the invoice added charges for "extras": repairs and repainting to drywall and ceilings throughout, for \$900, plus \$45 G.S.T., totaling \$945. Thus, the net invoice total was \$15,695, with a balance owing of \$9,195 as Mr. Duva had paid \$7,500 on October 16, 2016. Mr. Duva paid a further \$5,000 on December 8, 2016, leaving a balance of \$4,195, the amount claimed in this dispute.
14. On December 19, 2016, after an earlier exchange, B & R texted Mr. Duva to suggest it would come do the touch-ups the next day. Mr. Duva refused, saying he was too busy and there was too much snow. B & R replied "Ok let me know" and Mr. Duva said he would get back to B & R. The next text message is B & R's May 13, 2017 follow-up request to Mr. Duva about coming to finish the touch-ups, noting that the weather had improved. Mr. Duva has not provided any reasonable explanation for why he never got back to B & R about the touch-ups.
15. On June 18, 2017, Mr. Duva sent B & R a letter with a list of deficiencies and attached photos. At this point, it was about 7 months after B & R had done its painting work. Mr. Duva's complaints are generally summarized as follows:
  - a. *Exterior east black overspray on stucco.* Mr. Duva says the stucco is pre-coloured, that this was B & R's employee's error that has a \$1,123 repair

cost. B & R says Mr. Duva agreed to accept a \$3,000 deduction from their contract price, as reflected in the final invoice. B & R says this \$3,000 was to cover damages on stucco and the portion of stucco not painted, along with clean up areas of overspray, including minor painting touch-ups. I accept B & R's evidence and submission on this point, which was not particularly addressed by Mr. Duva.

- b. *Living room fireplace surround – repairs and sanding incomplete and a finished coat required.* B & R says the fireplace was not in the contract for painting. I agree, as the contract specified interior “ceilings and walls”. In any event, B & R says it did some additional painting around fireplaces at no charge, as a courtesy.
- c. *Paint roller marks on front entrance and living room ceilings.* B & R says Mr. Duva's photos show light reflection on the ceiling and uneven tape on the drywall, which are due to last minute repairs. In another photo, B & R says it offered a touch-up and Mr. Duva refused. I find Mr. Duva unreasonably failed to permit B & R to come and do touch-ups, when this issue could have been addressed.
- d. *Master bedroom-bathroom – unfinished filling, sanding and painting.* B & R says this unfinished baseboard was finished and that the opening at the corner shown in the photo was due to humidity on M.D.F. materials or water on the floor. I find B & R's response speculative, particularly given that it appears to be based on a months-old photo.
- e. *Exterior front door – filling, sanding & staining.* B & R says the main front door was not part of the parties' contract. I disagree, as the contract for exteriors simply included “doors”, without limitation. However, there is nothing in the parties' contract that says B & R must fill and sand, and, the contract specifies 2 coats of semi-gloss enamel. If Mr. Duva wants stain, that would be at his cost.

- f. *Unfinished painting on the exterior – Mr. Duva’s photos indicate minor small areas near the ground.* I agree with B & R says these “weed edge” photos would involve a quick touch-up and Mr. Duva unreasonably failed to permit B & R to do them. I say the same about the exterior window casement trim, the basement door exterior trim, the basement door gap, and the carport trim.
  - g. *Other flashing areas, which B & R says were another trade’s responsibility.* Flashing is not included in the contract, and any cost to fix overspray I find was covered in the \$3,000 deduction to the invoice.
16. In May 2017, B & R indicated that the only outstanding things among the exterior items were:
- a. 2 outside back doors
  - b. Soffits under garage cover
  - c. Minor touch-ups on black paint
  - d. Garage door and side door, which Mr. Duva had said earlier were not a priority because he “might change down the road”. Mr. Duva did not particularly respond to this submission.
17. B & R says that Mr. Duva waited 9 months to let it know their services were no longer required, and to point out the alleged deficiencies. B & R says Mr. Duva never substantively responded to its December 2016 and May 2017 texts that tried to arrange a time to deal with touch-ups. I agree, and find the delay unexplained and unreasonable.
18. On balance, I prefer B & R’s evidence, with 2 exceptions as detailed above: 1) the master bedroom-bathroom “filling/sanding/painting” baseboard job (worth \$65 as set out in Mr. Duva’s estimate from a third party contractor), and 2) the \$945 for “extras”. Given B & R’s defence to the alleged deficiencies, namely that the damage was caused by other trades, I do not accept that B & R ever actually completed the “extras”, though I accept that is because Mr. Duva failed to follow-

up and permit B & R to return to do so. Next, by B & R's own evidence, the garage door and soffit work remained outstanding, which Mr. Duva's estimate valued at \$400.

19. I accept other trades caused damage to ceilings and walls already painted by B & R, which is not particularly disputed by Mr. Duva and is supported by B & R's employee's statement. I find it was unreasonable for Mr. Duva to refuse B & R's attempt to deal with touch-ups, fail to contact them for several months when Mr. Duva said he would let them know, and then now claim another contractor's estimate for doing that aspect of the contract.
20. I find a reasonable outcome is a reduction of \$1,410 in B & R's final invoice, to reflect the garage door work and "extras" it did not do and the bathroom baseboards. Therefore, I find B & R is entitled to \$2,785 as full payment of its outstanding invoice #460, plus pre-judgment interest under the *Court Order Interest Act* (COIA) on that amount from November 30, 2016. I find that this outcome fully addresses Mr. Duva's counterclaim.
21. There was mixed success for each party in their respective claims. I therefore find neither is entitled to reimbursement of tribunal fees.

## **ORDERS**

22. Within 14 days I order Mr. Duva to pay B & R a total of \$2,823.69, broken down as follows:
  - a. \$2,785 as final payment of B & R's outstanding invoice #460, and
  - b. \$38.69 in pre-judgement interest under the COIA.
23. The parties' respective claims are otherwise dismissed. B & R 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.

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Shelley Lopez, Vice Chair