



Civil Resolution Tribunal

Date Issued: July 12, 2018

File: SC-2017-005436

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Benda v. Cao et al*, 2018 BCCRT 323

B E T W E E N :

Nicole Benda

APPLICANT

A N D :

Ming Cao and Kingstone Development Inc.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This is a dispute about the respondents' alleged trespass on the applicant's property and related replacement and relocation of a backyard fence. The applicant Nicole Benda says the fence was entirely located on her property, and not on the adjacent property owned by the respondent Ming Cao. The applicant wants the new fence removed and her original fence re-built in its exact prior

location and in the exact same quality and size. She also claims compensation to allow her to build a hedge and repair her lawn, and also claims an unspecified amount of punitive and aggravated damages.

2. The respondent Kingstone Development Inc. (Kingstone) was the contractor doing work on Ming Cao's property, including dealing with the fence along with Ming Cao. While Kingstone did not provide a formal Dispute Response, its principal Tim Wang participated in the tribunal process. The parties are each 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, 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: 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.

ISSUE

7. The issue in this dispute is whether the respondents improperly replaced and relocated the applicant's fence, and if so, to what extent is the applicant entitled to the damages claimed?

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
9. The applicant's property sits to the east of Ming Cao's property. The parties dispute that the fence sat entirely on the applicant's property. Yet, the respondents also submit that they moved the fence (west), to the property line leaving a strip of earth exposed on the applicant's property, where the old fence had been. As such, taking the evidence as a whole I find the most likely scenario is that the old fence sat entirely on the applicant's property.
10. On July 28, 2017, the respondents removed the fence. It is undisputed that there had been construction on Ming Cao's property that had led to at least some damage to the old fence. It is undisputed that Mr. Wang, on Ming Cao's behalf, agreed to replace the applicant's damaged fence with a new one. This dispute is not about Mr. Wang's obligation to replace the applicant's damaged fence, but I mention that undisputed agreement because it informs what happened next.
11. The applicant went away for the weekend on July 30, 2017, and upon her return home found a new fence. It is undisputed that the respondents replaced the fence in a different location and in a different style and height. There was now a strip of about 6" of uncovered dirt where the old fence used to sit. The applicant also complains that there were 6" gaps in the front and back panels where the adjoining panels used to meet at exact 90 degree angles.

12. The applicant says she was misled by Mr. Wang that he would replace the exact same fence as the old one. On August 3, 2017, the applicant says she found all he had done was put in wooden posts to close the gaps. The applicant told Mr. Wang this was unacceptable and that she wanted the exact same fence as before and in the exact same location. In response, Mr. Wang texted the applicant that his landscaper would bill the applicant for any work done and that the applicant and respondent Ming Cao would have to share costs. I agree with the applicant, for the reasons that follow.
13. The applicant is entitled to be put in the position she would have been had the damage not occurred. While the respondents may have wanted to have the fence sit on the property line, it was not open to them to unilaterally make that decision given the old fence sat entirely on the applicant's property. The respondents' submission may have made sense for various aesthetic or practical reasons, but that does not change the fact that it is undisputed the respondents did not have the applicant's consent to move the fence's location and to install an entirely different style of fence in place of the applicant's old one.
14. I find the respondent Ming Cao is responsible here, not the respondent Kingstone. I say this because it is undisputed that any work done by Kingstone was at Ming Cao's direction. I dismiss the applicant's claims as against Kingstone.
15. Given my conclusions above, I turn then to the amount of the applicant's claimed damages, for which I find Ming Cao is responsible.
16. The applicant makes 2 claims. First, for the current 'new' fence to be removed and have the applicant's original fence rebuilt to the exact style, quality, size and location – at the respondents' cost and at the applicant's approval. Second, she claims \$4,500, which is for "punitive damages and aggravated damages and compensation to repair our property totaling \$4,500.00". in particular, for the second claim the applicant wants to hide the fence with a hedge, make repairs to her lawn where the 6" strip has been exposed along the length of her property, and to repair the front and back fence panels, including a new door, so that they

properly fit the adjoining fence panel, and her time to coordinate the repairs. None of these items are particularized or broken down in specific amounts. The only relevant evidence is a copy of the respondent's landscaper's October 28, 2017 invoice for \$3,003 for wood and fence panels. There is no evidence before me as to what it would cost to build a hedge, make lawn repairs or to repair the fence door and back panels.

17. I find it would be unreasonable duplication to require the respondents to both rebuild the applicant's old fence and to also compensate her as requested in her second claim described above. I also find that ordering a new fence "at her approval" will likely prolong the parties' disagreement, which I find is inconsistent with the tribunal's mandate to be mindful of ongoing relationships and to provide finality and certainty.
18. Further, an order for specific performance, meaning an order to do something, is usually only ordered if a monetary order will not be sufficient. I do not have enough information before me to set terms as to how the old fence, now destroyed, must be re-built. Based on the evidence before me, I find an order for \$3,000 is appropriate, which I find compensates the applicant's desire to have a fence in its old location and in the same format. In other words, the applicant can use the \$3,000 to build a fence in front of the fence that now sits on the shared property line. Alternatively, the applicant is free to use the \$3,000 instead to build a hedge on her side of the property line, along with making whatever lawn repairs she considers necessary.
19. Nothing in this decision prevents the parties from coming to an alternative mutually agreeable arrangement about the current fence.
20. I dismiss the applicant's claims for aggravated and punitive damages as the evidence and submissions do not support such an award. Generally speaking, punitive damages are reserved for malicious and high-handed conduct, and I find the evidence before me does not rise to that level. While I find the respondent's unilateral action without the applicant's consent was undoubtedly surprising and

offensive to the applicant, I find that aggravated damages are not warranted given the evidence before me.

21. In accordance with section 49 of the Act and the tribunal's rules, I find the applicant was the substantially successful party and is entitled to reimbursement of her \$175 in tribunal fees. There are no claimed dispute-related expenses.

ORDERS

22. I order that within 14 days of this decision, the respondent Ming Cao must pay the applicant a total of \$3,175, broken down as follows:
 - a. \$3,000 as compensation, and
 - b. \$175 in tribunal fees.
23. The applicant is entitled to post-judgment interest, as applicable. The applicant's claims against the respondent Kingstone are dismissed. The applicant's remaining claims are dismissed.
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 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.

Shelley Lopez, Vice Chair