



Civil Resolution Tribunal

Date Issued: July 30, 2018

File: SC-2017-005179

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Ostwald v. Mackintosh et al*,
2018 BCCRT 394

B E T W E E N :

William Ostwald

APPLICANT

A N D :

Triplett Mackintosh, Cameron Macintosh and Bryson Bowers

RESPONDENTS

A N D :

William Ostwald

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION

1. This is a dispute about payment for residential construction services. The applicant, William Ostwald, says the respondents hired him to rebuild a deck. Mr. Ostwald says the respondents, Triplett Mackintosh, Cameron Macintosh and Bryson Bowers, failed to pay the final invoiced amount. Mr. Ostwald seeks an order that the respondents pay \$4,753.19.
2. The respondent Triplett Mackintosh provided submissions and evidence on behalf of all 3 respondents. He says the contract with Mr. Ostwald was “cost plus”, and Mr. Ostwald refused to provide the invoice for the work performed by the vinyl subcontractor and misrepresented the price of the vinyl work.
3. Triplett Mackintosh filed a counterclaim, seeking orders that Mr. Ostwald drop his claims, reimburse the respondents \$2,000 for attempted fraud, and refund \$462.44 for discrepancies in materials costs.
4. The parties are self-represented.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the 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.
6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a “he said, he said” scenario as to how the collision occurred. 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. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. 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 recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

7. 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.
8. 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

9. The issues in this dispute are:
 - a. Must the respondents pay Mr. Ostwald for the outstanding invoice, and if so, how much?
 - b. Must Mr. Ostwald reimburse the respondents for fraud or misrepresented materials costs, and if so how much?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. This means Mr. Ostwald must prove his claim that he is entitled to payment for the outstanding invoice, and Triplett Macintosh must prove his claims

of fraud and misrepresentation. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

11. The parties agree that the respondents hired Mr. Ostwald to rebuild a deck at a home, which Triplett Macintosh owns and which Cameron Macintosh and Bryson Bowers occupy. The issue in this dispute is about the price for the work, particularly the purchase and installation price for deck vinyl.
12. The evidence shows that the parties had no written contract, and no agreed final price for the work. For example, Mr. Ostwald emailed Cameron Macintosh on July 22, 2017 about the budget for the deck. Mr. Ostwald said most of the deck was built, with only 6 to 10 hours of work left. The rest of the email discussed the cost of the finished and remaining work, including the vinyl, but did not mention any dollar amounts.
13. Triplett Macintosh submits that the parties had a “cost plus contract”. Based on the emails and texts he provided in evidence, I do not agree. A cost plus contract is an agreement where a contract is paid for allowed expenses, plus additional agreed-upon amounts or percentages to allow for profit. The evidence before me shows the parties had no agreement about the charges for the deck. Rather, they negotiated periodically as the deck work progressed.
14. Mr. Ostwald’s September 13, 2016 invoice lists a \$5,500 charge for “supply and install of vinyl decking”. Correspondence provided in evidence shows that the vinyl decking was installed by Claudio, who, according to Mr. Ostwald’s July 22 email, worked for Mr. Ostwald and also had his own deck vinyl company on the side.
15. Following some conflicts with Mr. Ostwald about the \$5,500 charge, Triplett Macintosh contacted the vinyl manufacturer/supplier, Deksmart, who confirmed in a March 27, 2018 email that they supplied the vinyl in question to “Claudio from Alegria Contracting”. The email states as follows:

A call to Alegria Contracting was placed in the fall of 2016 by Deksmart, and was confirmed verbally that the total costs of the deck, including materials and installation was less than \$3600.00 CAD.

[All quotes reproduced as written]

16. Although this statement is hearsay, it was not disputed or rebutted by Mr. Oswald. For that reason, I accept it.

Fraud

17. Triplett Macintosh says this large mark up, and Mr. Oswald's attempts to make the respondents pay \$5,500, constitutes fraud. I do not agree. Mr. Oswald's July 22, email, sent before the deck work was performed, clearly states that Claudio was both his employee and a vinyl installation contractor. Also, Mr. Oswald's July 22 text message to Cameron Macintosh disclosed the \$5,500 price for the vinyl:

...we measured the vinyl and was just pricing it out. Wanted to give you heads up. Your deck is really big, and was a bit more then the around 4K I told Bryce before. More like \$5500 for the vinyl...eek I know...hope this is going to be ok.

[Reproduced as written]

18. In a statement provided in evidence, Cameron Macintosh said she understood "based on our verbal agreement" that there was no mark up on the vinyl. However, the onus is on the respondents in this counterclaim for fraud, and I find they have not established any such agreement.
19. Cameron Macintosh clearly received the July 22 text message stating the \$5,500 price of the vinyl, as she replied to it. The respondents effectively accepted the \$5,500 after it was disclosed via text, as they proceeded to have the vinyl installed. While the respondents were unhappy with the price afterward, I find they have not proven fraud.

20. While Triplett Macintosh says Mr. Ostwald asked Claudio to lie about the vinyl cost, this assertion is triple hearsay, and is not supported by any direct evidence. I therefore place no weight on it.
21. Triplett Macintosh also asserts that the vinyl supplier, Deksmart, told him that the vinyl installation price charged by Claudio to Mr. Ostwald was less than \$3,600. This is not entirely consistent with the letter from Deksmart, which says that Claudio confirmed that the total costs of the deck was less than \$3,600. There is no evidence before me indicating what Claudio charged Mr. Ostwald. The parties also had no contract limiting the amount of mark up Mr. Ostwald could charge.
22. I also note that the respondents did not actually pay Mr. Ostwald's final invoice, so they did not pay the claimed \$2,000.
23. For all these reasons, I find that Triplett Macintosh has not proven entitlement to a remedy for fraud.

\$462.44 for Materials

24. Triplett Macintosh claims reimbursement for \$462.44 in materials he paid for, because he says Mr. Ostwald has not provided receipts confirming purchase of the materials.
25. Mr. Ostwald says he provided the receipts in question at the beginning of the job. He says the respondents were out of town and there were house-sitters staying at the residence. He says the respondents could not find the receipts upon their return, and after looking for them the parties' concluded that the house-sitters must have accidentally thrown them out.
26. Mr. Ostwald says that it is not his fault that the receipts were lost, and the fact that the respondent paid for them through an installment payment proves they were for real materials that the respondents knew about.

27. As it is part of his counterclaim, Triplett Macintosh bears burden of proving his entitlement to a \$462.44 refund. I find he has not met this burden. He has not rebutted Mr. Oswald's evidence that the receipts in question were delivered to the house he owns, and lost by the respondents' house-sitters. He agrees that he initially paid the claimed amount, as he is claiming a refund. Moreover, there was no dispute that the work was performed, and there was no contract between the parties setting out a requirement that receipts were required for materials reimbursement.
28. For all of these reasons, I find that Triplett Macintosh has not established his entitlement to a specific refund for materials. However, I also find he is not required to pay anything further for the deck work, as explained below.

Payment for Vinyl Installation

29. Mr. Oswald claims \$4,753.19 as payment on an outstanding invoice for work on the deck. It is not clear from the submissions and evidence before me how Mr. Oswald arrived at this amount. The only evidence he provided is a September 13, 2016 invoice showing an outstanding balance of \$3,295.99. The invoice says 3% per month interest will be charged on unpaid accounts, but this still would not result in an overall of total \$4,753.19 by the time the dispute was filed. I therefore find that Mr. Oswald has not established a claim for \$4,753.19.
30. As summarized above, the central issue in this dispute is the \$5,500 Mr. Oswald charged for the deck vinyl.
31. Mr. Oswald texted the \$5,500 price to Cameron Mackintosh before the work was commenced, and the parties had no contract limiting mark up. This supports a finding that Mr. Oswald is entitled to payment of the full \$5,500, minus the balance of deposit payments made by the respondents. However, I place significant weight on Mr. Oswald's September 6, 2016 email, which states as follows:

I am very interested to know if Claudio did try to up charge you on the vinyl install and i might have another company come in to double check my self. I did put my trust in him and we had an argument about it already. He no longer works for me anymore. If there is a huge discrepancy for vinyl install i will try to rectify that with what ever refund out of my own pocket we both can agree on.

32. In his subsequent emails of September 16 and September 20, Mr. Oswald recanted his offer to rectify the vinyl price, and instead wrote that the vinyl price was quoted by email and accepted, and was not negotiable.
33. Deksmart's letter, which Mr. Oswald has not disputed, says Claudio's price for the vinyl purchase and installation was \$3,600. This evidence, which I accept, confirms there was a "huge discrepancy for vinyl install", as suggested in Mr. Oswald's September 6 email.
34. Mr. Oswald could easily have clarified any discrepancy by providing the tribunal with a copy of Claudio's invoice, or a document confirming his payment to Claudio for the vinyl work. He has elected not to do so. There is no evidence before me establishing what the deck vinyl actually cost (just that it was less than \$3,600).
35. Mr. Oswald also offered to negotiate rectification of any cost discrepancy with a refund on September 6, but then recanted that offer. While this is not determinative, it proves there was no firm agreement between the parties about the vinyl price. Some of Mr. Oswald's correspondence says his price was based solely on what Claudio charged, but he has never disclosed what Claudio charged. I place significant weight on that fact.
36. For these reasons, I find Mr. Oswald has not met the burden of proving his entitlement to any further payment for the deck work.

The tribunal's rules provide that the successful party is generally entitled to recovery of their fees and expenses. As no party's claims succeeded, I do not

order any reimbursement of tribunal fees. None of the parties claimed dispute-related expenses.

ORDERS

37. Mr. Oswald's claim is dismissed, Triplett Macintosh's counterclaims are dismissed, and this dispute is dismissed.

Kate Campbell, Tribunal Member