



Civil Resolution Tribunal

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File: SC-2018-000059

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Myers v. Gibson*, 2018 BCCRT 513

B E T W E E N :

Seryna Myers

APPLICANT

A N D :

Shana Lee Gibson

RESPONDENT

A N D :

Seryna Myers

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. The applicant, Seryna Myers, is a website designer. The respondent, Shana Lee Gibson, is a clairvoyant medium and spiritual teacher, who in that capacity works as a mentor, speaker, author and event host. Ms. Myers says Ms. Gibson hired her to do a website design project, but then terminated the agreement and refused to pay Ms. Myers' final invoice that she had discounted to \$1,557.50.
2. In her counterclaim, Ms. Gibson says the website she ordered was not what Ms. Myers provided, as it was inconsistent with her brand, incomplete, and contained errors. Ms. Gibson seeks either a full \$3,000 refund of what she paid Ms. Gibson, or a partial \$2,500 refund based on advice that Ms. Myers' work was worth \$500. 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 I can fairly resolve this dispute based on the documentary evidence and submissions before me.
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, if any, Ms. Gibson owes Ms. Myers an outstanding balance of \$1,557.50 for the website design project, and b) to what extent, if any, Ms. Myers owes Ms. Gibson \$2,500 or \$3,000 as a refund of what she paid Ms. Gibson.

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, the applicant bears the burden of proof on a balance of probabilities. This means that in her claim, Ms. Myers must prove that she is entitled to the final \$1,557.50 payment claimed, under the parties' contract. It also means that Ms. Gibson must in her counterclaim prove Ms. Myers failed to reasonably fulfill their contract such that she is entitled to a refund of \$2,500 or \$3,000. I have only commented upon the evidence and submissions to the extent necessary to give context to these reasons.
9. In her claim, Ms. Myers says she had nearly completed the website project, but then Ms. Gibson terminated it, hired someone else (Mr. Hasan Akthar), and refused to pay Ms. Myers. Ms. Myers says she had made many concessions to Ms. Gibson, beyond their agreed terms: amending a payment plan, building a staging site rather than on a live site (to minimize downtime), moving Ms. Gibson's site before final payment was received, even after termination, delivering graphics that had not been paid for, and removing Ms. Myer's portion of the payment on her final invoice. In the latter respect, Ms. Myer's discounted invoice at issue is what she says is owed to her subcontractors, E and S.
10. Largely relying on the opinion of Mr. Akthar, Ms. Gibson says Ms. Myers breached their agreement:

- a. Social media buttons were not created on the website
 - b. Cheap graphics were used without branding aspects
 - c. Logo was not placed on any website pages (apart from the home page)
 - d. Files were place haphazardly, scattered and overlapping
 - e. Mobile optimization was not done
 - f. Emphasis was not given to headings and the typography arrangement was missing
 - g. “Everything was separated with an unpleasing look and feel”.
 - h. Many links were not working and had not been streamlined.
 - i. There was no design formatting and placement of things in a meaningful and cohesive way.
 - j. The membership area that connected to the app “was not fixed”.
 - k. Plug-in issues were created and not remedied.
11. Ms. Gibson also says Ms. Myers’ associate E took several days to migrate her website, and yet Ms. Myers did very little more than what she had done on the staging site. Ms. Gibson says the greatest design elements were on the home page, but other pages were bare with little to no design or branding aspects. Ms. Gibson adds that new problems had been created that Ms. Myers failed to address (although what these problems are is unclear) and Ms. Gibson says Ms. Myers was dishonest about what could be done. In the latter respect, this relates to Ms. Myers saying she could not work on the website at certain stages due to a “code” problem created by a prior designer.
12. I turn then to what I find are the relevant terms of the parties’ July 25, 2017 contract, which are as follows (my bold emphasis added):

- a. The web design project was titled “Website with **Basic Branding and Copy review**”.
- b. Ms. Myers’ flat fee was \$4,760 plus GST. As the project exceeded \$500, Ms. **Gibson agrees to pay 50% of the total project cost before any services are provided, and the 50% balance before any workable files are delivered.**
- c. The website project would include:
 - i. **A new website** built on “Divi” with 8-10 pages, with a **restyling** of Ms. Gibson’s Woo Commerce shop and blog.
 - ii. A copy review, taking Ms. Gibson’s copy but “polish it up and help it have more impact”.
 - iii. **All necessary graphics for the site**, button images, headers, etc.
 - iv. **Amendments to Ms. Gibson’s existing logo**, to align it to her current brand, with various graphic formats.
 - v. **Advisement** on finalizing Ms. Gibson’s colours and fonts, and a guide of where to use them.
 - vi. Strategy session on streamlining Ms. Gibson’s existing style for “crystal clear content delivery”.
 - vii. Management of the entire project for the most efficient roll out.
- d. Out of scope: paid fonts or stock photos, professional version of Wordfence for additional online security, maintenance beyond the initial launch, hosting or domain names.
- e. As the client, **Ms. Gibson’s responsibility was to provide content and feedback on deliverables, including any images, text, product information, and links.**

- f. Ms. Myers is not responsible for errors in the Work after Ms. Gibson accepts the Work.
 - g. Cancellation: Either party may in writing or verbally terminate the service at any time, if for any reason, the relationship is found unsatisfactory. Upon termination, Ms. Gibson is responsible for payment of all expenses incurred and the percentage of work completed, as determined by Ms. Myer.
13. On July 27, 2017, at Ms. Gibson's request, Ms. Myers adjusted her invoice by creating 3 payments (rather than 2 as per the contract), with the first due July 27th, the second due on August 24, and the final third due on September 21, 2017. As referenced above, it is undisputed that Ms. Gibson ultimately paid Ms. Myers \$3,000, leaving \$1,750 plus GST owing under the contract. As also noted above, in this dispute Ms. Myers claims a lesser sum of \$1,557.50 as a "discounted invoice", which reflects the amount Ms. Myers paid her sub-contractors S and E.
14. In a September 12, 2017 email, Ms. Myers offered to extend beyond the parties' agreed project plan, and include the website pages "home, about, teen, services", which Ms. Myers noted were Ms. Gibson's "meat and potatoes" on her website. I find these items became part of the parties' contract, included within the agreed-upon pricing. This contractual amendment did not require fresh consideration (see *Rosas v. Toca*, 2018 BCCA 191).
15. Ms. Gibson also relies on a September 14, 2017 email from Ms. Myers in which Ms. Myers set out the various parts of the website design project, which included "Teen – the oracle + the app". It is not entirely clear to me from the evidence and the parties' submissions to what extent the My Account "membership site" and the Teen app overlap. Nothing turns on this as based on the parties' contract and their correspondence, I am satisfied that both the membership site and the "app" were included in the contract, in terms of look and placement. However, I find the parties' contract clearly does not include coding or any "architecture" or "hardware" design of the app. I say this given the contract's terms, listed above, and that it

was for “basic branding” and copy review only. In other words, Ms. Gibson was responsible for content, and Ms. Myers was hired to provide a restyled look.

16. I turn to the relevant chronology.
17. Between August and the end of September 2017, the parties exchanged numerous emails. I find that Ms. Myers (and her subcontractors) spent a significant amount of time working on the website design and asked for feedback, which Ms. Gibson provided, often asking questions and requesting changes. The tenor of the communications was amicable up until around September 25, 2017, when Ms. Myers requested final payment as per the contract, but Ms. Gibson wanted to see the full website first. As noted by Ms. Gibson, the issue before me is not the time spent, but whether the fixed-price contract was reasonably fulfilled.
18. On September 25, 2017, Ms. Myers advised that the staging site was currently awaiting Ms. Gibson’s feedback, and that it represented most of her site, with the exception of the blog and shop that could only be restyled on the live site. Ms. Gibson agreed they would finalize the design and once Ms. Myers was ready to move the files to her site she would send final payment. Later in the evening, Ms. Gibson wrote everything had been cleared up and she was “happy with how things are coming along” and she was grateful for the time and energy spent by Ms. Myers to date. Ms. Gibson’s requested “tweaks” at this point were relatively minor, such as to increasing the font size, making a colour change, and moving a piece of text. Based on this exchange, I find that Ms. Gibson was satisfied with Ms. Myers’ work, save for the blog and shop pages that Ms. Myers said needed to be restyled later on the live site.
19. The parties exchanged further emails, including one in which Ms. Myers said that while she agreed to move the “app”, she did not agree to modify it. I find this position is consistent with the parties’ contract, in that Ms. Myers’ role was design, rather than content.

20. On September 27, 2017, Ms. Gibson emailed Ms. Myers with a few things she said she had forgotten to ask about, such as links to be added and adding a contact page. Ms. Myers sent a detailed response. Later, Ms. Gibson replied (my bold emphasis added):

Okay all is good, I took a sneak [peek] at the site and saw two things I'd love to shift and otherwise you've made it great :-)

Everything else about the shop is great because I even have a video on ... that I want to keep, so just accounting for everything!

The testimonials page needs to be completed with the heart boxes all the way down between the choral and the grey?

There are extra words on the Work With Me page that don't apply ...

Love the Events page but the top banner needs some brightness! ...

21. I find this September 27, 2017 exchange further supports the conclusion that Ms. Gibson indicated she approved of Ms. Myers' work, save for what had yet to be completed on the live site. Based on the above quoted exchange, by September 27, 2017, Ms. Gibson had seen the shop part of the website and substantially approved it.

22. Ms. Gibson's objections in part stem from the fact that certain links did not work. I find this was not Ms. Myers' responsibility under the parties' contract. In any event, Ms. Myers later responded that what could be fixed was fixed, and Ms. Gibson emailed that she accepted this. Ms. Gibson's friend, who Ms. Gibson described as being someone who had helped her business in the past, wrote:

I think your site is kick [a**], I think the design is mega, I loooooove the new logo, colours, fonts and overall feel. I think it's totally current, and something you should be proud of. ... Your site is amazing, definitely some things need to be ironed out, and I hope one day you can oversee the experience and look at your site with a sense of pride, it is stunning!

23. Again, I find Ms. Gibson's friend's comments support the conclusion that up to this point, Ms. Myers' work was satisfactory to Ms. Gibson and consistent with the parties' contract. It is undisputed that at this point Ms. Myers expected to finish certain items, which I find falls within "some things need to be ironed out".
24. On October 1, 2017, Ms. Gibson sent E a detailed email that included the statement Ms. Gibson was not willing to compromise on her vision "and we got there in the end". I find this quoted phrase further supports the conclusion that Ms. Myers' work (and that of her subcontractors) was largely satisfactory to Ms. Gibson, who was the client. This conclusion is also supported by Ms. Gibson's other statements in this email, including, "I am happy with the site and everyone who sees it will also feel the time, energy and dedication put into it".
25. Given the subjective nature of the website design services at issue, in that they were largely about restyling and the "look", I place less weight on Mr. Akthar's criticism of the look and branding of the website, and more emphasis on Ms. Gibson's expression of pleasure with it. I find this supports a conclusion that Ms. Myers provided work of value, well beyond the \$500 value assessed by Mr. Akthar.
26. It appears that from October 1 to 3, 2017 that Ms. Gibson's requests for further changes became objectionable to Ms. Myers and her sub-contractors. The parties' relationship deteriorated to the point of termination on October 3, 2017. That day, Ms. Gibson was frustrated that her website was live online but was a "mess". Ms. Myers denies it was a mess, but acknowledges that "things needed to be finished". I find the evidence before me does not support a conclusion it was a "mess". Ms. Myers emailed Ms. Gibson her feedback on Ms. Gibson's concerns, noting the "app" was not included in the project and neither was the "my account page". Ms. Myers wrote Ms. Gibson had "signed off" on the Blog styling on the staging site, which Ms. Gibson denies.
27. Ms. Gibson submits she revoked Ms. Myers' website access (later on October 3, 2017) with a plan to reinstate it once Ms. Myers "was honest and communication

was clear". At that point however, Ms. Gibson wrote "I am done going back and forth to try and get you to finish what we agreed to", and half an hour later followed up with another email, forwarding Ms. Myers' email back to her in which Ms. Myers discussed the design of the online shop and blog.

28. Given Ms. Gibson's termination of access, later on October 3, 2017, Ms. Myers confirmed their agreement was terminated, she had "forgone my final payment", and that "this is done".
29. I find the question then is whether Ms. Gibson reasonably terminated the parties' agreement, or, whether Ms. Myers should have had the ability to finish it. I find Ms. Myers did not breach the parties' contract for the work she did perform. However, as noted above, I find moving the app and restyling its look, and the "my account page", were both included in the parties' contract, contrary to Ms. Myers' October 3, 2017 statements. I also find the evidence does not support a conclusion Ms. Gibson signed off on the blog. I say this because Ms. Myers repeatedly told Ms. Gibson the blog could not be restyled on the staging site. On balance, in the circumstances, I find Ms. Gibson was entitled to terminate the parties' contract.
30. I turn then to the value of the work that remained outstanding under the contract.
31. Mr. Akthar's October 4, 2017 email is critical of Ms. Myers having used too many different types of fonts, and that the site was not customized for a tablet or smartphone versions. As referenced above, based on Mr. Akthar's opinion Ms. Gibson lost faith in Ms. Myers entirely and hired Mr. Akthar to finish the website, for \$1,500. I place little weight on Mr. Akthar's opinion for the following reasons. First, both Ms. Gibson and her friend said they thought the website looked great (subject to a few things being "tweaked" or "ironed out"). Second, Mr. Akthar's point was largely that, contrary to Ms. Myers' suggestion, the logo could be placed without writing or deleting code, and he said the same about social media buttons. Yet, Mr. Akthar's evidence was that placing these items was a quick and easy thing to do, and therefore those items would not have been a large financial part of the parties' outstanding contract value.

32. The other objections listed by Ms. Gibson in this dispute, set out above, I find are largely addressed by the fact Ms. Gibson was largely happy with the project before she terminated Ms. Myers. However, I find I have little evidence as to how to value the customization for mobile versions, which was not particularly disputed, and which I accept should have been done by Ms. Myers as part of the parties' contract. I also find I am unable to establish the value of the outstanding 'restyling' work to the shop and blog (which may have involved adding a banner). I say the same about creating the 'My Account' page and moving the 'app'.
33. I find that Ms. Myers has not proved she is entitled to the outstanding balance claimed. I say this because I have found above Ms. Gibson was entitled to terminate the contract when she did, and given my comments above about the value of the items outstanding under the contract. I therefore dismiss Ms. Myers' claims and her dispute.
34. As for Ms. Gibson's counterclaim, I dismiss it also. I say this because I have found above that Ms. Myers did perform a significant amount of work that Ms. Gibson was happy with and approved. I place little weight on the fact that Mr. Akthar later criticized the "unpleasing look and feel", given Ms. Gibson's own earlier acceptance of the bulk of the website design. By denying Ms. Myers her claimed outstanding payment, I have addressed Ms. Gibson's expense in hiring Mr. Akthar to finish the work.
35. Ms. Gibson also expresses concern that the staging site was in fact live on the internet. Ms. Gibson seeks an order that this staging website be deleted. Ms. Myers advised she kept it available for the purposes of this tribunal proceeding, and agrees to delete it once this decision is issued. I order Ms. Myers to immediately delete the staging site.
36. Given both parties were substantially unsuccessful, in accordance with the Act and the tribunal's rules, I find that each party must bear the expense of their tribunal fees.

ORDERS

37. Ms. Myers' claims and therefore her dispute are dismissed.
38. I order Ms. Myers to immediately delete the staging site she created for Ms. Gibson's website project. Otherwise, Ms. Gibson's counterclaims and therefore her dispute are also dismissed.

Shelley Lopez, Vice Chair