



# Civil Resolution Tribunal

Date Issued: September 11, 2018

File: SC-2017-005822

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *3937748 Manitoba Ltd. v. Mackey*, 2018 BCCRT 515

**B E T W E E N :**

3937748 Manitoba Ltd.

**APPLICANT**

**A N D :**

Eriven Mackey

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Julie K. Gibson

### **INTRODUCTION AND JURISDICTION**

1. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the respondent's participation, due to the respondent's non-compliance with the tribunal's directions as required, discussed below. The applicant 3937748 Manitoba Ltd.'s claim is that the respondent Eriven Mackey owes \$887.20 for cabinet and countertops that were installed but not fully paid for.

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. Rule 6 of the tribunal's Rules provides that parties must make themselves available to participate in the dispute resolution process, including following the directions provided by tribunal members and facilitators (case managers). 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 is whether I should proceed to hear the applicant's dispute, without the respondent's further participation given his non-compliance.
8. The second issue is to what extent, if any, I should order the respondent pay the claimed \$887.20 for the countertops and cabinets, plus tribunal fees of \$125.00, expenses of \$11.35 and interest.

## **EVIDENCE & ANALYSIS**

### ***Non-compliance***

9. My June 8, 2018 summary decision to hear the dispute without the respondent's participation, given the respondent's non-compliance, was previously communicated to the parties by email, through the tribunal facilitator. 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 facilitator to contact him with a request for a reply.
11. In particular, the applicant's Dispute Notice was issued on October 17, 2017.
12. The respondent submitted a Dispute Response on October 31, 2017.
13. When facilitation did not resolve the dispute, the case manager asked both parties for evidence and submissions. The respondent failed to reply. The details of the non-compliance are as follows:
  - a. *March 16, 2018* – The case manager emailed a request for evidence to be provided by April 3, 2018. The respondent did not reply.

- b. *April 9, 2018* – The case manager emailed a further request for evidence, asking for a reply stating whether the respondent had evidence to submit or not, by April 11, 2018. The respondent did not reply.
  - c. *April 17, 2018* – The case manager emailed another reminder, requesting evidence. The case manager requested a reply, confirming whether or not the respondent had any evidence to submit, by April 20, 2018. The respondent did not reply.
  - d. *May 9, 2018* – The case manager emailed requesting submissions by May 18, 2018. The email warned that if the respondent did not respond, a tribunal member could make a binding decision in the dispute with only the information that had been submitted.
  - e. *May 21, 2018* – The case manager emailed requesting the submissions by May 23. The respondent did not reply.
  - f. *May 24, 2018* – The case manager called the contact number the respondent had provided and left a message for a call back as soon as possible. The respondent did not reply.
  - g. *May 31, 2018* – The case manager emailed the respondent a final warning allowing them until May 31st to provide evidence and submissions. The email included a warning that this matter could be referred to a tribunal member for a decision without the respondent's further participation, under s. 36 of the Act. The respondent did not reply and has not filed any evidence or submissions.
14. The facilitator referred the respondent's non-compliance with the tribunal's rules to me for a decision as to whether I should hear the dispute in the absence of the respondent.
15. As noted, the respondent filed a response, but has provided no explanation about why it then suddenly stopped communicating 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. I find it is more likely than not that the respondent was aware of the facilitator's contact attempts but chose not to respond.

16. 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.
17. First, this claim does not affect anyone other than the parties involved in this dispute.
18. Second, the non-compliance here occurred before the respondent filed evidence or submissions. The respondent has effectively abandoned the process after filing a Response. 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. 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 its non-compliance. If I refused to proceed to hear the dispute, the applicant would be left without a remedy. That would be unfair.

20. Finally, the tribunal's resources are valuable and its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party does not want 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 the respondent's participation.
21. In weighing all of the factors, I find the applicant's claims 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 if such an order is made; and
  - c. the need to conserve the tribunal's resources.

### ***Merits of the Claim and Damages***

22. Having decided to hear the dispute without the respondent's participation, I turn to the merits of the dispute. Where a respondent filed a response but has since failed to comply with the tribunal's directions as required, an adverse inference may be drawn against that respondent. This means that if the respondent refuses to participate, then it is generally reasonable to assume that the applicant's position is correct on the issue at hand. This concept is similar to where liability is assumed when a respondent has failed to provide any response to the dispute and is in default.
23. The applicant says it installed kitchen cabinets and countertops for the respondent in fall 2016. Upon completion, the respondent expressed dissatisfaction with some aspect of the work. The applicant sent a service person to fix the problem. The respondent then indicated he would not pay the balance of the invoice.

24. On September 29, 2016, the applicant issued an invoice to the respondent for \$9,387.20. The applicant says, and I accept, that all but \$887.20 was paid by the respondent.
25. The respondent, in his Dispute Response, says that the countertops and cabinets were not measured properly or installed properly. The respondent says the water faucet was not centered in the sink, and that it waited a long time for the applicant to respond to the concerns. The respondent does not dispute that there is an unpaid amount for the work, but says he is not satisfied with the job that was done. The respondent did not provide any independent evidence that the work was substandard.
26. I accept the applicant's evidence that it completed the work, addressed the respondent's concerns, and did not receive full payment. I draw an adverse inference against the respondent because he failed to file any evidence or provide any submissions after being provided with the applicant's arguments, whereas the applicant filed an invoice detailing the work that was done (countertops, cabinets, freight, installation and assembly) and the cost.
27. I find for the applicant and award the claimed \$887.20. I also award interest according to the 2 % per month (24% per annum) specified in the invoice, for overdue accounts.

## **ORDERS**

28. Within 30 days of this decision, I order the respondent to pay the applicant a total of \$1,453.45, comprised of:
  - a. \$887.20,
  - b. \$237.97 in pre-judgment interest from the date of the invoice to the date of the dispute notice;

- c. \$191.93 in pre-judgment interest at the contractual rate from the date of the Dispute Notice to the date of this decision,
  - d. \$11.35 in expenses for delivery of the Dispute Notice, and
  - e. \$125.00 in tribunal fees.
29. The applicant is also entitled to post-judgment interest.
30. 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.
31. 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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Julie K. Gibson, Tribunal Member