



# Civil Resolution Tribunal

Date Issued: October 3, 2018

File: SC-2017-004035

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *TerraCana Foundation Solutions Inc. v. Atlantis Rausch Granite & Marble Installations Ltd.*, 2018 BCCRT 581

B E T W E E N :

TerraCana Foundation Solutions Inc.

**APPLICANT**

A N D :

Atlantis Rausch Granite & Marble Installations Ltd.

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kate Campbell

### INTRODUCTION AND JURISDICTION

1. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the participation of the respondent, due to the respondent's non-compliance with the tribunal's directions as required, as discussed below.

2. This dispute is about the applicant's claim for \$1,890 in unpaid rent on commercial yard space.
3. The applicant is represented by its employee or principal, Simon Whippy. The respondent is represented by its principal, Steve Rausch.
4. 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. 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.
5. 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.
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.
7. For the reasons that follow, I have allowed the applicant's claim.

## **ISSUES**

8. The issues in this dispute are:
  - a. Should I hear the applicant's claim without the respondent's further participation, given the respondent's non-compliance?
  - b. Is the respondent required to pay the applicant \$1,890 in commercial rent?

## **EVIDENCE & ANALYSIS**

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

9. My July 25, 2018 summary decision to hear the dispute without the respondent's participation due to 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 Mr. Rausch with a request for a reply.
11. The respondent filed a Dispute Response on September 22, 2018. On March 14, 2018, the facilitator emailed the parties and asked them to provide a list of evidence by March 29, 2018. After a second email reminder on April 4, Mr. Rausch replied that he would have his evidence ready "in a week or so".
12. Mr. Rausch was granted an extension until April 15, 2018 to provide evidence. This was communicated in an April 6, 2018 email. He did not reply, and did not provide evidence. Subsequently, tribunal staff made the following attempts to contact the respondent:

- a. *May 9, 2018 email:* Confirmation that the respondent had not provided evidence, despite the extension, and the process would move to the submissions stage.
  - b. *June 11, 2018 email:* Mr. Rausch was asked to confirm his preferred email address (message sent to 2 email addresses). He was also asked to respond to the applicant's submissions by June 16. No reply.
  - c. *June 21, 2018:* Mr. Rausch was asked to confirm that he would not be responding to the applicant's claims. He responded on June 22, stating that he would respond by the following week "due to current work load".
  - d. *July 3, 2018 email:* Facilitator said Mr. Rausch had until July 4, 2018 to provide his response. No reply.
  - e. *July 10, 2018 email:* Email entitled "FINAL WARNING". The facilitator summarized the previous correspondence and the respondent's failure to respond. She said the respondent was required to comply with the tribunal's instructions, and if Mr. Rausch did not respond by July 12, 2018 the matter might be referred to a Tribunal Member, who could decide the dispute without the respondent's participation.
13. The facilitator then referred the matter of the respondent's non-compliance with the tribunal's rules to me for a decision as to whether I should hear the dispute without the respondent's participation.

***Should the tribunal hear the applicant's dispute without the respondent's participation?***

14. As set out above, the respondent filed a Dispute Response and participated in some communication with the tribunal. While Mr. Rausch indicated on June 22 that he had a large workload, I find this is not a sufficient reason to conclude that he was unable to respond to the tribunal's subsequent communications, or to meet the imposed deadlines on July 4 and July 12. I find the tribunal facilitator made a

reasonable number of attempts to contact the respondent. The respondent was informed in writing at the beginning the facilitation process that it must actively participate in the dispute resolution process and respond to emails from tribunal staff. Given that the respondent responded to some of these emails, I find it is more likely than not that the respondent knew about the facilitator's subsequent contact attempts and failed to respond.

15. 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.
16. First, this dispute does not affect persons other than the named parties.
17. Second, the respondent has provided no evidence or submissions, and no settlement or resolution was achieved.
18. Third, given the facilitator's specific instructions to respond and the respondent's failure to do so despite written warning of the consequences, I find the nature and extent of the non-compliance is significant.
19. Fourth, 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, which would be unfair to it.

20. Finally, the tribunal's resources are valuable. Its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party refuses 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 participation from the respondent.
21. In weighing all of the factors, I find the applicant's claim 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; and
  - c. the need to conserve the tribunal's resources.

### ***Claim for Unpaid Rent***

22. Having decided to hear the dispute without the respondent's participation, I turn to the merits of the dispute.
23. Where a respondent filed a response but has since failed to comply with the tribunal's directions as required, as is the case here, an adverse inference may be drawn against that respondent. This means that if the person or organization refuses to participate, it is generally assumed that the applicant's position is correct. This is similar to when a respondent fails to provide any response at all to the dispute and is in default, so the respondent's liability is assumed
24. The applicant's claim is for unpaid rent for commercial yard space. Mr. Whippy, for the applicant, says the respondent paid to rent 3 parcels of outdoor yard space. Each parcel was 10 feet wide by 40 feet long, and each cost \$200 plus GST per month.

25. On September 23, 2016, the applicant emailed the respondent and said it had billed for 4 yard spaces because that was what the respondent was currently using. The applicant asked for retroactive payment for the additional yard space for July and August 2016, in the amount of \$420.
26. On November 15, 2016, the applicant emailed the respondent and said the account was severely past due, and immediate payment was due. The applicant asked for \$2,940, comprised of the \$420 retro payment plus rent for 4 yard spaces for September, October, and November 2016.
27. On December 1, 2016, the applicant emailed the respondent again, asking for payment of the account or a response to the September 23, 2016 email. A second December 1, 2016 email said the outstanding balance was \$3,780.
28. The applicant requested payment again in a February 24, 2017 letter. In early March 2017, the respondent paid the outstanding amounts for the originally-agreed 3 yard spaces. In a March 6, 2017 email, the respondent said it was using the same amount of space as originally charged, not the additional space as claimed by the applicant.
29. The parties continued to exchange emails disagreeing about payment for the additional yard space. The applicant decided to stop renting to the respondent, and required it to move its items out of the yard by March 27, 2017.
30. Based on the assumption of liability against the respondent described above, I find the respondent used 4 yard spaces, and did so without having paid for the 4<sup>th</sup> space. I find that the respondent must pay the applicant \$1,890. This amount is consistent with the applicant's invoices for 9 months of rent on 1 yard space, at the rate of \$200 plus GST. In addition to the assumption of liability against the respondent for non-compliance, I note that the respondent did not respond to any of the applicant's allegations of increased space use for over 5 months. The applicant first informed the respondent of the space issue on September 23, 2016, and the respondent did not respond until March 6, 2017. The respondent took no

steps to visit the rental site to clarify the problem or reduce its space use. This supports the conclusion that the applicant is contractually entitled to the extra rent, based on the terms set out in the initial rental letter of June 15, 2016.

31. While the applicant's invoices allow for contractual interest at 2% per month, the applicant has not claimed this amount. Accordingly, I do not order it. Rather, I find that the applicant is entitled to interest under the *Court Order Interest Act* (COIA), as set out in my order below.
32. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and dispute-related expenses. As the applicant was successful in this dispute, I order that the respondent pay the applicant \$125 as reimbursement for tribunal fees.
33. The applicant claims \$10.50 spent to serve the Dispute Notice to the respondent. I find that amount is reasonable in the circumstances, and order the respondent to pay it.

## **ORDERS**

34. I order that within 30 days of this decision, the respondent must pay the applicant a total of \$2,052.69, broken down as:
  - a. \$1,890 for the debt,
  - b. \$27.19 in interest under the COIA, and
  - c. \$135.50 in tribunal fees and dispute-related expenses.
35. The applicant is also entitled to post-judgment interest under the COIA.
36. 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.

37. 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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Kate Campbell, Tribunal Member