



Civil Resolution Tribunal

Date Issued: November 2, 2018

File: SC-2018-001471

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Lowe v. Lowe*, 2018 BCCRT 677

B E T W E E N :

Cynthia Lowe

APPLICANT

A N D :

Don Lowe

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION

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

- 2) The applicant, Cynthia Lowe, says the respondent failed to pay back a \$5,000 loan from May 23, 2017. She seeks an order for payment of the loan.
- 3) The respondent filed a Dispute Response form stating that there never any loan, and no verbal or written payment agreement.
- 4) The applicant is self-represented. The respondent, while he participated, was also self-represented.

JURISDICTION AND PROCEDURE

- 5) 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.
- 6) These are the tribunal's formal written reasons. 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.

- 7) 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.
- 8) For the reasons that follow, I have allowed the applicant's claim.

ISSUES

- 9) The issues in this dispute are:
 - 1) Should I hear the applicant's claim without the respondent's further participation, given the respondent's non-compliance?
 - 2) Should I refuse to resolve the applicant's dispute due to lack of jurisdiction?
 - 3) Is the applicant entitled to \$5,000 as payment of an outstanding loan?

EVIDENCE AND ANALYSIS

Non-Compliance

- 10) My September 4, 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 (TF). The details supporting that decision are set out below.
- 11) 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 contact attempts by the TF.
- 12) The respondent filed a Dispute Response on May 22, 2018. From June 26, 2018 to July 26, 2018, the TF sent the respondent 9 emails asking him to provide 2 or 3 specific dates and times in a specific upcoming period that he would be available to have a telephone meeting with her. Although the respondent replied to some of these emails, he never provided the requested 2 or 3 available meeting times. On a

few occasions, he emailed that he was available “now”, or “for the next half hour”. I find that this was non-compliant with the TF’s emailed directions, which were very specific.

- 13) I also note that in her initial email of June 26, 2018, the TF explained her role, and how the facilitation process would work.
- 14) In a July 24, 2018 email, the TF said that the respondent had failed to comply with her previous requests to provide 2 or 3 times for a telephone meeting. The email said it was a final written warning, and that the respondent was required to comply with her instructions. The TF said the respondent must reply by July 27, and must provide 3 dates and times of availability for a 30 minute telephone meeting between August 7 and 10, 2018. The TF said that if the respondent did not do this, the dispute could be referred for adjudication without the respondent’s further participation, under section 36 of the Act.
- 15) The respondent did not provide the requested 3 available meeting times. Rather, he replied on July 25, “where would you like to meet”, and in another email, he instructed the TF to call him the following afternoon.
- 16) The TF replied on July 25, 2018, stating that she was not available that week. She said the respondent’s reply did not fit with her instructions in the July 24 email. She again asked him to provide 3 appointment times during the week of August 7. The respondent replied, but did not follow the TF’s instructions to provide appointment times during the week of August 7.
- 17) On August 24, 2018, the TF emailed the respondent and said she was providing the respondent one further opportunity to meet. She provided teleconference dial-in information, and said the respondent should call in on August 28 at 1:00 pm. The email said that if the respondent did not call, the dispute would be referred to a tribunal member and decided without his participation.
- 18) The respondent did not call in for the teleconference.

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

- 19) As referenced above, the respondent filed a Dispute Response. The respondent has provided no explanation about why he failed to follow the TF's instructions. I find the tribunal staff made a reasonable number of attempts to contact the respondent. The respondent was informed in writing that he would lose his right to participate if he failed to follow the TF's directions. Given that the respondent replied to several of the TF's emails, I find it is more likely than not that the respondent knew about the TF's directions and failed to follow them.
- 20) 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.
- 21) First, this dispute does not affect persons other than the named parties.
- 22) Second, the non-compliance here occurred early in the facilitation process, and the respondent provided no evidence or submissions. The respondent effectively abandoned the process after providing a response.
- 23) Third, given the TF's attempts at contact and the respondent's failure to respond despite written warning of the consequences, I find the nature and extent of the non-compliance is significant.

- 24) Fourth, I see no prejudice to the applicant in hearing the dispute without the respondent's participation. The prejudice to the respondent from proceeding to hear the dispute is outweighed by the circumstances of his non-compliance. If I refused to proceed to hear the dispute, the applicant would be left without a remedy, which would be unfair to her.
- 25) 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.
- 26) 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.

Jurisdiction – Family Law Act

- 27) Having decided to hear the dispute without the respondent's participation, I will now address the merits of the dispute.
- 28) Where a respondent filed a Dispute 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.

- 29) The applicant says the parties were in a relationship at the time she gave the respondent \$5,000 on May 23, 2017. She says the relationship ended in December 2017. The respondent agrees that the parties were in a relationship, although he denies there was any loan. He did not deny taking \$5,000 from the applicant in May 2017, but says there was no loan or repayment agreement.
- 30) Generally, the tribunal must refuse to resolve matters involving family property and family debt falling under section 92(a) of the *Family Law Act* (FLA). Section 94(1) of the FLA says the BC Supreme Court may make an order under Division 4 of the FLA, about family debt and/or dividing family property. I interpret this to mean that the BC Supreme Court has jurisdiction to make orders about the division of family property and related family debt.
- 31) However, neither party in this dispute has asserted that they were in a marriage or common law relationship that would fall under the FLA. Nor has either party asserted that the debt in question was a family debt, as contemplated in the FLA. In his Dispute Response Form, the respondent did not dispute the tribunal's jurisdiction to decide this dispute. For these reasons, and because of the adverse inference against the respondent due to his non-compliance with the tribunal's directions, I find that the tribunal has jurisdiction to resolve this dispute.

\$5,000 Loan

- 32) The applicant claims \$5,000 for a loan she says she gave to the respondent on May 23, 2017.
- 33) While the respondent denies the loan, I make an adverse inference against the respondent due to his non-compliance, as explained above. Based on this adverse inference, I find that there was a \$5,000 loan, and the respondent failed to repay it as agreed between the parties. I find that the respondent must pay the applicant \$5,000 for the loan. The applicant is also entitled to pre-judgment interest on this amount, from May 23, 2017, under the *Court Order Interest Act* (COIA). This equals \$75.60.

- 34) Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. As the applicant was successful in this dispute, I find she is entitled to reimbursement of \$200 in tribunal fees.
- 35) The applicant claims \$10 in registered mail expenses. I find this amount is reasonable in the circumstances, and so I order reimbursement. The applicant also claims \$484.29 for a process service to serve the Dispute Notice on the respondent. That amount is high in the circumstances, however the invoice shows that it took 3 attempts to serve the respondent. Also, the respondent effectively forfeited his right to dispute that expense by failing to following the tribunal's directions. Based on the adverse inference against the respondent, I order payment of \$484.29.

ORDERS

- 36) I order that within 30 days of this decision, the respondent pay the applicant a total of \$5,769.89, broken down as:
- a) \$5,000 for the loan,
 - b) \$75.60 in pre-judgment interest under the COIA, and
 - c) \$694.29 in tribunal fees and dispute-related expenses.
- 37) The applicant is also entitled to post-judgment interest under the COIA.
- 38) 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.
- 39) 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.

Kate Campbell, Tribunal Member