Civil Resolution Tribunal

Date Issued: November 13, 2018

File: SC-2018-002103

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Lauder Ranches Ltd v. Frolek,* 2018 BCCRT 718

B E T W E E N :

Lauder Ranches Ltd

APPLICANT

A N D :

John Frolek

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1) This dispute is about a refund of a deposit for a job that was cancelled. The applicant, Lauder Ranches Ltd, says it planned to hire the respondent John Frolek to pound fence posts. At the respondent's request, the applicant sent a $2,485

deposit, so the contract could be finalized quickly. However, the applicant says the respondent failed to begin right away, as he promised. The applicant says it ended up having to hire another crew due to the respondent's delay. The applicant says it asked for the $2,485 deposit back, and the respondent agreed but failed to return it.

2) The applicant asks for an order that the $2,485 deposit be returned. The respondent says the deposit was non-refundable.

3) The applicant is represented by Ian Lauder, its principal. The respondent is self-represented.

JURISDICTION AND PROCEDURE

4) 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.

5) 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. 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 that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's

process and found that oral hearings are not necessarily required where credibility is in issue.

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) I note the respondent alleges the applicant defamed him in writing negative reviews online. First, there is no counterclaim before me. Second, the tribunal does not have jurisdiction over defamation claims under the Act. As such, I will not comment further upon the respondent's defamation allegation or his alleged damages.

ISSUE

8) The issue in this dispute is whether the applicant is entitled to the return of the $2,485 deposit he paid for a job that was cancelled.

EVIDENCE AND ANALYSIS

9) In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

10) On July 31, 2017, the parties began their discussions by email. It is undisputed that the parties came to an agreement between them. The respondent's August 1, 2017 estimate for the entire post pounding job, including machine time, was $10,631.25 including tax.

11) It is undisputed that there is no signed written contract, although there is a draft dated August 7, 2017. A verbal contract is enforceable, but harder to prove.

12) The applicant says the respondent assured it he was able to work within the applicant's urgent timetable, and "complete by the dates mentioned". Based on the parties' July 31, 2017 email exchange, the post-pounding job was to be completed

by August 11, 2017. It is undisputed that the job's agreed start date was August 9 or 10, 2017. On August 10, 2017, Mr. Lauder emailed that the applicant was "100% ready" for the respondent to start getting the posts in the ground, and he asked for the respondent to advise "the soonest you can be here". Later that morning, the respondent replied that he was looking for a machine to rent, and he would keep the applicant posted, "next few days". On August 15, 2017, the applicant followed up asking for a time estimate of the respondent's arrival, and reiterated he needed to get the posts in the ground. The respondent did not respond.

13) The applicant says the respondent knew that the job was crucial to its ranching operation, because if the job was not done on time, the applicant could not ship its cattle in the fall. I accept the applicant's evidence in this respect, which is undisputed.

14) Again, the respondent does not dispute he knew of the job's urgency. Instead, the respondent simply says he had told the applicant he was waiting for a machine and that it was 'difficult" to work in the smoke for the surrounding fires. I do not accept the respondent told the applicant he could not work due to smoke, and the only mention of waiting for a machine was on August 10, 2017. On balance, I find the respondent failed to fulfill the parties' agreement to have the job completed in a timely fashion. Based on the evidence before me, I also accept that the respondent unreasonably failed to communicate with the applicant after August 10, given the known urgency for the job's completion.

15) The respondent says that it was "around" August 18 that he called the applicant, and was told the job had been done by someone else. I do not accept this evidence, and prefer the applicant's evidence that this occurred on August 23, 2017, 13 days after the job was to have started and the respondent had not responded to the applicant's communication efforts. I find the weight of the evidence supports the applicant's submission and I accept it.

16) Ultimately, the applicant says he had no alternative but to replace the respondent as the contractor in order to get the job done. The applicant says after several days

without contact, he was finally able to reach the respondent and advise the job had been completed, despite best efforts to reach him earlier. I find the applicant reasonably chose to proceed with another contractor, in the circumstances.

17) I turn then to the root of this dispute. The respondent says the deposit was non-refundable. I do not agree. Even if I had not found the respondent had breached the parties' agreement in terms of getting the job done on time, there is nothing in the parties' unsigned contract that specifies the deposit was non-refundable. I do not accept the respondent's submission in evidence of a "missing page" that had an excerpt of a contract with a $2,000 penalty clause. In other words, I find that the parties did not agree to any such $2,000 penalty.

18) It is undisputed that the respondent did not do the job. I do not accept the respondent's evidence to the extent he suggests they verbally agreed the deposit would be non-refundable. The draft contract that I accept reflects the parties intended agreement does not have a non-refundable or penalty clause that would suggest the respondent can keep the $2,485 deposit.

19) Given my conclusion above that the applicant reasonably proceeded to finish the job with another contractor, I find the respondent must refund the $2,485 deposit. The applicant is entitled to pre-judgment interest under the *Court Order Interest Act* (COIA) on the $2,485, from August 23, 2017.

20) I dismiss the applicant's claim for reimbursement of $580 in legal fees. As set out in the tribunal's rules, legal fees are reimbursable only in extraordinary cases, which is in keeping with the Act's section 20 provision that self-representation is the general rule. This is not an extraordinary case.

21) In accordance with the Act and the tribunal's rules, as the successful party I also find the applicant is entitled to reimbursement of $125 in tribunal fees.

ORDERS

22) Within 14 days of this decision, I order the respondent to pay the applicant a total of $2,644.46, broken down as follows:

    a) $2,485 as a refund of the deposit paid,

    b) $34.46 in pre-judgment interest under the COIA, and

    c) $125 in tribunal fees.

23) The applicant's remaining claims are dismissed. The applicant is entitled to post-judgment interest under the COIA, as applicable.

24) 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.

25) 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.

Shelley Lopez, Vice Chair