



Civil Resolution Tribunal

Date Issued: December 6, 2018

File: SC-2018-003994

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Davidson v. Toijanen et al*, 2018 BCCRT 808

B E T W E E N :

Fraser Davidson

APPLICANT

A N D :

Brad Toijanen and B.C.T. Fencing Ltd.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Eric Regehr

INTRODUCTION

1. The applicant, Fraser Davidson, hired the respondent, B.C.T. Fencing Ltd., to install a fence around the applicant's yard. The respondent, Brad Toijanen, is an employee and owner of B.C.T. Fencing Ltd.

2. The applicant claims \$3,500 against the respondents because the applicant says they failed to install the fence along the property line as instructed. The respondents say that they installed the fence where they were told.
3. The applicant and Mr. Toijanen are each self-represented. B.C.T. Fencing Ltd. is represented by Mr. Toijanen.

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. In some respects, this dispute amounts to a "he said, she said" scenario with both sides calling into question the credibility of the other. Credibility of 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the 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 the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.
6. 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.

7. Under tribunal rule 126, in resolving this dispute the tribunal may make one or more of the following orders:
 - a. order a party to do or stop doing something;
 - b. order a party to pay money;
 - c. order any other terms or conditions the tribunal considers appropriate.

ISSUES

8. The issues in this dispute are:
 - a. Did B.C.T. follow the applicant's instructions by building the new fence in the same location as the old fence?
 - b. Was the applicant bound by the terms of the written quote even though he did not sign it?
 - c. How much, if anything, should the respondents pay towards the cost of moving the fence?

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant must prove his case on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.
10. The applicant's house was a new build. The property line in question in this dispute is the property line between the applicant's property and property owned by the applicant's house's builder. The applicant purchased the house from the builder.

11. In April 2017, the applicant contacted B.C.T. to build a new fence around his new property in Squamish. The applicant and B.C.T. met at the house on May 16, 2017, and B.C.T. followed up with a written quote. The quote included a statement that B.C.T. would assist a customer to locate a property line if requested, but takes no responsibility for the location of the fence. The quote recommends that the customer get a property survey.
12. After the May 16 quote, the applicant changed his mind about some aspects of the fence, requiring B.C.T. to provide a revised quote, which was handwritten. Because of the somewhat rushed way that the final deal came together, the applicant never signed a B.C.T. quote.
13. B.C.T. arrived at the applicant's house on May 31, 2017, with a crew of at least 3 employees. Mr. Toijanen texted the applicant to tell him that he did not know where the property lines were. The applicant immediately telephoned Mr. Toijanen. The parties dispute what the parties said during this phone call.
14. The applicant provided an affidavit in which he states that that he called Mr. Toijanen and told him to obtain "property documents" from the builder. I infer that the applicant is referring to documents in the builder's possession that would have a survey.
15. The respondents say that the applicant told Mr. Toijanen to ask the builder where the property line was. The respondents provided affidavits from Mr. Toijanen and 3 of B.C.T.'s employees who were onsite to build the fence. They all say that the builder told them to build the fence where the old fence was.
16. In his affidavit, the applicant denies telling B.C.T. to trust the builder's word. The applicant points out that the builder has an interest in misrepresenting the location of the property line because any reduction in the applicant's property is the builder's gain.
17. The applicant provided photographs of the fence, which show that it did not line up with the edge of the lawn beside the applicant's fence. The photographs of the prior

fence show that B.C.T. built the new fence in the same location as the old fence, because the old fence also did not line up with the edge of the lawn.

18. In September 2017, a worker from the City of Squamish attended the applicant's home and informed the applicant that the fence was 3 metres inside the applicant's property line. The worker also told the applicant that the fence was built over City of Squamish water lines and a right of way.
19. The applicant emailed B.C.T. about the issue and B.C.T. provided a quote to move the fence. B.C.T. stated that it was just following instructions and, in any event, did not take responsibility for the location of the fence based on the wording of the quote.
20. I accept the respondents' evidence about what the applicant told Mr. Toijanen to do about the property line in the telephone call of May 31, 2017. I find that the email chain between the parties in September 2017 does not support the applicant's evidence. On September 22, 2017, the applicant stated that Mr. Toijanen had told the applicant that Mr. Toijanen would speak with the builder to confirm the location of the property line. There is no mention of the applicant directing Mr. Toijanen not to rely on the builder's word or to obtain documentation about the location of the property line. I find that if the applicant had told Mr. Toijanen to obtain documents from the builder, such as a survey, he would have raised it in this email correspondence.
21. The respondents provided a text message conversation with the builder from August 2018. The builder does not deny that they told B.C.T. where to build the fence.
22. I find that B.C.T. acted in accordance with the applicant's instructions by seeking guidance from the builder about where to install the fence. I find that the builder told B.C.T. to build it where the old fence was located, which B.C.T. did.
23. The applicant submits that the respondent never suggested a survey, but the quote proves otherwise. Whether or not the waiver of liability in the quote is enforceable,

the quote does prove that B.C.T. recommended a survey more than 2 weeks before it started work. The applicant provides no explanation as to why he did not get a survey at that time.

24. Therefore, I find that B.C.T. is not responsible for the fence's location. The applicant chose not to have a survey done and I find that by telling Mr. Toijanen to ask the builder where to build the fence, the applicant accepted the risk that the builder would be incorrect.
25. Due to my finding, I do not need to decide the remaining issues in this dispute.
26. I dismiss the applicant's claim for reimbursement towards the cost of moving the fence.
27. 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. I see no reason in this case not to follow that general rule. I decline to order the respondents to reimburse the applicant his tribunal fees or dispute-related expenses. The respondent did not claim any dispute-related expenses.

ORDER

28. I order that the applicant's claims, and this dispute, are dismissed.

Eric Regehr, Tribunal Member