Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Gingras et al v. Smith-Friesen et al*, 2018 BCCRT 826

B E T W E E N :

Duane Gingras and Elizaveta Gingras

APPLICANTS

A N D :

Erin Smith-Friesen and Remco Wijnhorst

RESPONDENTS

AND:

Duane Gingras and Elizaveta Gingras

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This is a dispute about a cancelled booking for a vacation rental. The applicants, Duane Gingras and Elizaveta Gingras, received partial refunds from other sources, and seek the return of the remainder of the rental fee they paid to the respondents. The respondent Remco Wijnhorst says that he is not required to return the funds, and has brought a counterclaim against the applicants seeking payment for the entire cost of the cancelled rental fee. The respondent Erin Smith-Friesen says the dispute should not have been brought against her.

2. The applicants are represented by Duane Gingras as the primary applicant. The Remco Wijnhorst represents the respondents as the primary respondent, and as the sole applicant in the counterclaim.

JURISDICTION AND PROCEDURE

3. 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.

4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

5. 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.

6. 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

7. The issues in this dispute are:

    a. whether the applicants are entitled to reimbursement of $1,000, which is the rental fee balance that has yet to be refunded; and

    b. whether the respondents are entitled to payment of $2,000, being the outstanding rental fee from the applicants.

EVIDENCE AND ANALYSIS

8. The applicants booked a vacation at a property called Birch Haven in Horsefly, British Columbia. The property is rented out by the respondents under the name Birch Haven Vacations. As this entity is not incorporated, I will consider the respondents' personal liability in the applicants' claim, and Mr. Wijnhorst's personal standing in the counterclaim. The applicants' booking was set to commence on July 22, 2017 and last for two weeks. In accordance with a contract between the parties, the applicants paid $3,000 for the booking, plus a $500 damage deposit.

9. In the summer of 2017, wildfires were burning in many areas of British Columbia. The applicants became concerned about the proximity of the fires to Horsefly, the accessibility of the area, and the possibility of food and fuel shortages. After conducting inquiries with the respondents and with provincial government agencies, the applicants decided to cancel their booking.

10. The respondents refunded the damage deposit of $500 to the applicants, but took the position that the $3,000 rental fee was not refundable. The applicants obtained partial refunds totaling $2,000 through a payment provider. The applicants' dispute concerns the remaining $1,000 that they paid to the respondents.

11. The applicants say that, in the weeks leading up to their scheduled vacation, they were told by provincial government agencies that Horsefly was not accessible. They also say that there were food and fuel shortages affecting the area, as well as very poor air quality. The applicants say that the contract entitles them to a full refund in the event of a natural disaster, and ask that I order the respondents to return the $1,000 outstanding balance.

12. The respondent Remco Wijnhorst says that the property, and Horsefly, were never under evacuation alert or evacuation order due to the wildfires. He says that there were travel options to reach the property, and that the applicants chose to cancel their vacation and forfeit their deposit in accordance with the cancellation policy in the contract. Mr. Wijnhorst submits that the contract provides for a full refund only if the property was struck by disaster, which was not the case. Mr. Wijnhorst says that he should not have to refund the remaining $1,000 to the applicants. Further, by counterclaim, he seeks the return of the $2,000 that had been refunded from the full rental fee.

13. In response to the counterclaim, the applicants reiterate their position that it was not possible to access the property at the time of their scheduled vacation. The applicants say that their contract with the respondents was frustrated by natural disaster and a full refund is expected under the contract.

14. The respondent Erin Smith-Friesen says that she is not a legal representative of Birch Haven Vacations and she was not a party to the contract, although she did witness the signature of the respondent, Mr. Wijnhorst. Ms. Smith-Friesen says that this dispute should not have been brought against her.

15. Based on the evidence before me, I find that Ms. Smith-Friesen's involvement with the applicants was more than acting as a witness to Mr. Wijnhorst's signature on the contract. I do note that, in a September 4, 2018 letter, Mr. Wijnhorst stated that Ms. Smith-Friesen is not authorized to represent Birch Haven Vacations, and that he is the "sole owner of the property and business". However, Ms. Smith-Friesen is identified on page 9 of the contract between the parties as a "representative" of Birch Haven Vacations. Birch Haven Vacation's email address identified the sender as "Erin Smith Friesen". Further, email messages between the applicants and Birch Haven Vacations about the cancellation of the booking were signed "Remco & Erin". It is not clear whether one or both of the respondents authored the messages. In these circumstances, I find that it was appropriate for the applicants to include Ms. Smith-Friesen as a respondent to their dispute.

16. In a claim such as this, an applicant (whether by claim or counterclaim) bears the burden of proof, on a balance of probabilities. The parties have provided submissions and evidence in support of their respective positions. Although I have read the submissions and evidence in their entirety, I will comment on only what is necessary to provide context to my decision.

17. The Short Term Rental Agreement was signed by both applicants and the respondent, Mr. Wijnhorst, who is identified in the document as the owner of the property. This contract permits the owner to cancel the contract, but it does not allow for a renter to cancel without penalty. If a renter cancels a scheduled stay, and the owner is not able to find a replacement booking, then the contract provides that the damage deposit will be refunded, but the rental fee will be forfeited.

18. The contract also provides that if "the property is struck by disaster then all contracts will be null and void and payments refunded". The property is identified as a particular address in Horsefly. I find that the available evidence does not establish that there was a natural disaster on the property itself. A map provided by the applicants confirms that Horsefly was not impacted by evacuation orders or alerts, but areas to the west were affected. I find that the contract does not contemplate

cancellations if the areas other than the property are affected by disaster. Despite the presence of the nearby wildfires, I find that the contract between the parties could not be cancelled on the basis of the disaster clause.

19. Although the disaster clause did not apply, the applicants were free to cancel the contract. However, they were bound by the clause about the forfeit of their rental fee.

20. The applicants also argue that the contract was frustrated due to the presence of wildfires in the area. A contract is frustrated if an unforeseeable event occurs that makes it impossible (not merely inconvenient, undesirable, or uncomfortable) to perform the contact as there has been a radical change in the obligation (see, for example, *Wilkie v. Jeong*, 2017 BCSC 2131).

21. The applicants suggest that fuel and food shortages affected the Horsefly area at the time of their proposed vacation. I do not find that such shortages would have prevented the applicants from attending for their scheduled vacation and bringing their own food and fuel to the area. Similarly, while the presence of smoke may have been unpleasant and not what the applicants preferred, I do not find that it would have caused the contract to be frustrated.

22. The more significant issue is access to the property. The applicants' position is that it was not possible for them to travel to the property, as the main access roads to and from Horsefly were in the evacuation zone. These areas were not accessible to non-residents and there was some suggestion that families with children were not allowed to access the area for a brief period of time (the applicants intended to travel with a child). There was a permit process in place to allow access to residents only via the main roads, although the parties have differing views as to whether Mr. Wijnhorst could have obtained a permit for the applicants despite their non-resident status. However, I do not find that the analysis turns on this point.

23. Although the main routes were impacted by the wildfire evacuations, this does not mean that the property was inaccessible. Horsefly, and the property, could be

accessed through a back road. Mr. Wijnhorst provided a map published by the local chamber of commerce, showing that some portions of the route are paved, and others are “well maintained gravel road”. The route is also described as a “delightful journey”.

24. The respondents made the applicants aware of this alternate route. The applicants did not dispute its availability, but they questioned the safety of using a back road. The applicants provided screenshots of social media postings indicating that some local residents were not familiar with the back roads, and suggesting that it may be hazardous to drive in the countryside. However, these same postings also contain comments that the condition of the back roads was “good” and that they were accessible by pick-up truck and car. I am not persuaded that this evidence shows that the property could not be accessed by an alternate route.

25. I acknowledge the applicants’ belief that it was impossible for them to attend for their scheduled vacation. However, I am satisfied that the purpose of the contract, being the exchange of money for the rental of the property, was entirely unaffected by the wildfires. Although the circumstances were not ideal, they did not amount to a substantive change in the nature of the fundamental contractual obligation. I find that the contract was not frustrated in this case.

26. The next issue is the counterclaim brought by the respondent, Mr. Wijnhorst. As discussed above, the contract was valid and binding upon the parties. In accordance with the cancellation policy to which they agreed, the applicants forfeited the full rental fee when they decided to cancel their booking. However, the applicants initiated claims with their payment provider, which debited payments of $500 and $1,500 from Mr. Wijnhorst’s account on behalf of the applicants. The applicants were not entitled to the refunds they obtained through their payment provider. I find that the applicants must reimburse the respondent Mr. Wijnhorst, with whom the contract was made, for the $2,000 obtained in refunds.

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. The applicants' claim for tribunal fees is dismissed. I find the respondent Mr. Wijnhorst is entitled to reimbursement of $125 in tribunal fees. He did not claim any dispute-related expenses. It does not appear that Ms. Smith-Friesen incurred any tribunal fees or dispute-related expenses, and I make no order in this regard.

28. The respondent Mr. Wijnhorst is also entitled to pre-judgment interest under the *Court Order Interest Act* (COIA). The applicants received refunds from their payment provider on two different dates, and therefore the interest is calculated accordingly. A $500 refund was processed on August 22, 2017, which attracts pre-judgment interest of $7.48. A further $19.53 is payable in respect of the $1,500 refund processed on December 1, 2017, for a total of $27.01 in pre-judgment interest.

ORDERS

29. Within 30 days of the date of this decision, I order the applicants to pay the respondent, Remco Wijnhorst, a total of $2,152.01, broken down as follows:

    a. $2,000 in respect of the forfeited rental fee;

    b. $27.01 in pre-judgment interest under the COIA, and

    c. $125 in tribunal fees.

30. Mr. Wijnhorst is entitled to post-judgment interest, as applicable.

31. 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.

32. 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.

Lynn Scrivener, Tribunal Member