



Civil Resolution Tribunal

Date Issued: December 19, 2018

File: SC-2017-005861

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Esper Transport Ltd v. 557317 BC Ltd dba T-Lane Transportation and Logistics, 2018 BCCRT 882*

B E T W E E N :

Esper Transport Ltd

APPLICANT

A N D :

557317 BC Ltd dba T-Lane Transportation and Logistics

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the participation of the respondent, 557317 BC Ltd dba T-Lane Transportation and Logistics, due to its non-compliance with the tribunal's directions as required, as discussed below.
2. The applicant, Esper Transport Ltd, says that on May 2 and 3, 2017 it provided delivery services to the respondent but was not paid in full. The applicant claims \$2,500 in unpaid charges.
3. In its Dispute Response submitted November 6, 2017, the respondent that said that damage was noted on the May 2, 2017 shipment, and they started an insurance claim. The respondent says it withheld the \$2,500 as a deductible that the applicant had to pay under a contract between the parties.
4. The applicant is represented by its employee or principal Lynn Esper. The respondent is represented by through corporate contact Mike Haydu.

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 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.
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 first issue is whether I should proceed to decide the applicant's claim, without the respondent's further participation given its non-compliance.
9. The second issue is whether or to what extent I should order the respondent to pay the applicant the claimed \$2,500.00.

EVIDENCE AND ANALYSIS

Non-compliance

10. My June 13, 2018 summary decision to hear the dispute without the respondent's participation, given its non-compliance, was previously communicated to the parties

by email, through the tribunal facilitator. The details supporting that decision are set out below.

11. The respondent is the non-compliant party in this dispute. It participated in facilitation but then failed to respond to multiple attempts by the case manager to contact it for a reply, as required by section 32 of the Act and tribunal rule 119.
12. The respondent last communicated with the tribunal on March 2, 2018. After that, the case manager then made the following attempts at contact:
 - a. **May 8, 2018** – The case manager emailed the respondent asking for submissions in the tribunal decision process on or before May 18, 2018. The email warned that if the respondent failed to reply, a tribunal member may make a binding decision using only the information that had been submitted. The respondent did not reply.
 - b. **May 22, 2018** – The case manager phoned the respondent to inform it that it had failed to respond and that a tribunal member may now decide the dispute without its further participation. The case manager left a voice mail. The respondent did not respond.
 - c. **May 23, 2018** – The case manager emailed the respondent asking him to provide response submissions, or to indicate if he was not going to do so, before May 25, 2018. The respondent did not respond.
 - d. **May 28, 2018** – The case manager emailed a final written warning indicating a response was required by May 31, 2018, failing which the case manager would refer the dispute to a tribunal member for a decision without the respondent's further participation. The respondent did not respond.
13. The case manager referred the respondent's non-compliance with the tribunal's rules to me for a decision as to whether I should hear the dispute without its further participation.

Should the tribunal hear the applicant's dispute?

14. The respondent did not explain why it failed to communicate with the tribunal as required. I find the case manager made a reasonable number of attempts to contact it. Parties are told at the beginning of a tribunal proceeding that they must actively participate in the dispute resolution process. I find it is more likely than not that the respondent was aware of the attempts to contact it and chose not 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 claim does not affect persons other than the parties involved in this dispute.
17. Second, the non-compliance here occurred after the facilitation process. The respondent stopped participating in the process, having provided some email submissions and a confirmation that he would not be filing any separate evidence. Regardless of whether it planned to provide any further documents, the respondent was obliged to respond to the case manager's communications but did not.
18. Third, given the case manager's repeated attempts at contact and the respondent's failure to respond despite warnings 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. That would be unfair.
20. Finally, the tribunal's resources are valuable. Its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is impaired if one party fails to participate. I find that it would be wasteful for the tribunal to continue applying resources to this dispute, such as by making further attempts to seek the respondent's participation.
21. In weighing the factors, I find the applicant's claims 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 if such an order is made; and
 - c. the need to conserve the tribunal's resources.

Merits of the Dispute and Damages

22. I have decided to hear the dispute without the respondent's participation. I turn to the merits of the dispute.
23. Where a respondent filed a Dispute Response but then failed to comply with the tribunal's directions, an adverse inference may be drawn against it. This means that if the respondent refuses to participate, it is generally reasonable to assume that the applicant's position is correct on the issue at hand. This concept is similar to where liability is assumed when a respondent has failed to provide any response to the dispute and is in default.
24. Having said that, I reviewed the following parts of the respondent's position, because they were provided prior to its non-compliance:

- a. The Dispute Response,
 - b. The respondent's February 27, 2018 email submission, and
 - c. The respondent's March 2, 2018 indication that it would not file evidence and would only refer to the applicant's evidence.
25. The undisputed facts are as follows:
- a. The applicant and respondent had a contract for delivery services.
 - b. On May 2, 2017, the respondent's driver was dispatched to the Port of Tacoma to pick up a Dynapac machine for a company called JR Contracting.
 - c. The machine was loaded onto the respondent's trailer and delivered to JR Contracting the next day.
 - d. Once the machine was removed from the trailer, the recipient noticed some damage on it. The Bill of Lading shows notations reading "Slight scratch side glass. Slight dibbit lower body. Slight scratch right front panel. Tear in rear fabric, All damage likely done at Port of Tacoma or ocean travel. Rust is visable (sic) /pictures taken." The notation is agreed to and signed by Joe Weultjes of JR Contracting.
 - e. The respondent withheld \$2,500 of the money owing for shipping service provided by the applicant.
26. The parties disagree about whether the damage to the equipment was caused by the applicant's driver or someone else, such as Port of Tacoma staff.
27. Rust was observed in the damaged areas, suggesting the damage occurred prior to the respondent shipping it.
28. For this reason, I find that the damage most likely occurred before the applicant picked up the machine at the Port of Tacoma.

29. The respondent says it was entitled to withhold the \$2,500 as a deductible, under the terms of a contract with the applicant. The respondent says the contract specifies that a deductible of \$2,500 is charged to the driver until a claim is resolved.
30. The respondent did not provide any evidence to support his contention that the \$2,500 could be withheld under the parties' contract. The respondent's emails with the applicant show it ignoring repeated requests for information about whether an insurance claim had been filed, then suggesting one had but failing to provide any information about it. Given the lack of evidence supporting the respondent's argument and its non-compliance, I draw an adverse inference against the respondent.
31. I find that the machine was delivered, and that \$2,500 is owing to the applicant for providing the respondent shipping services.
32. 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 find the applicant is entitled to reimbursement of \$125 in tribunal fees.

ORDERS

33. Within 10 days of the date of this order, I order the respondent to pay the applicant a total of \$2,646.93, broken down as follows:
 - a. \$2,500 owing on the invoice for delivery services,
 - b. \$21.93 in pre-judgment interest under the *Court Order Interest Act*, calculated from May 3, 2017, when the machine was delivered, to the date of this decision, and
 - c. \$125 in tribunal fees.
34. The applicant is entitled to post-judgment interest, as applicable.

35. 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.
36. 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.

Julie K. Gibson, Tribunal Member