



Civil Resolution Tribunal

Date Issued: December 31, 2018

File: SC-2018-001993

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Guthrie v. Connell*,
2018 BCCRT 927

B E T W E E N :

Robert Guthrie

APPLICANT

A N D :

Derek Connell

RESPONDENT

A N D :

Robert Guthrie

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the full participation of the respondent, and applicant by counterclaim, Derek Connell, due to his non-compliance with the tribunal's directions as required, as discussed below.
2. The applicant, and respondent by counterclaim, Robert Guthrie, says he sold the contents of his convenience store through an online auction run by Mr. Connell, but Mr. Connell failed to pay him a \$1,747.25 portion of the proceeds of sale, plus \$200 he promised to add because of the late payment.
3. In his March 23, 2018 Dispute Response, Mr. Connell disagrees with the claim. Mr. Connell says Mr. Guthrie would have received whatever money was due to him, and more, if he had been more patient. He does not say that he paid Mr. Guthrie. He says Mr. Guthrie has his dates and numbers wrong but does not explain further.
4. Mr. Connell counterclaims for \$5,000, saying Mr. Guthrie disrupted his home, terrified his girlfriend and impacted his sense of personal security. Mr. Connell says Mr. Guthrie did not wait long enough before pursuing the money. He says Mr. Guthrie threatened and harassed him and his girlfriend, causing them to feel fearful. Mr. Connell says he reported the threats to police.
5. In his Dispute Response on the counterclaim, Mr. Guthrie denies these allegations.
6. Mr. Guthrie is self-represented. Prior to his non-compliance, Mr. Connell also represented himself.

JURISDICTION AND PROCEDURE

7. 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.
8. 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.
9. 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

10. The issues in this dispute are:
- a. whether I should proceed to decide the claim and counterclaim, without Mr. Connell's further participation, given his non-compliance,

- b. to what extent I should order Mr. Connell to pay the \$1,947.25 claimed by Mr. Guthrie, and
- c. to what extent I should order Mr. Guthrie to pay the \$5,000 sought in Mr. Connell's counterclaim.

EVIDENCE AND ANALYSIS

Non-compliance

- 11. My August 22, 2018 summary decision to hear the dispute without Mr. Connell's participation, given his non-compliance, was previously communicated to the parties by email, through the tribunal facilitator. The details supporting that decision are set out below.
- 12. Mr. Connell is the non-compliant party in this dispute. He 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 attempts by the facilitator to contact him with a request for a reply.
- 13. The Dispute Notice for Mr. Guthrie's claim was issued on March 21, 2018. Mr. Connell filed a Dispute Response on March 23, 2018.
- 14. A Dispute Notice in Mr. Connell's counterclaim issued on April 4, 2018. Mr. Guthrie submitted a Dispute Response in the counterclaim on April 5, 2018.
- 15. The facilitator then made the following attempts at obtaining evidence and submissions from Mr. Connell:
 - a. **June 1, 2018** – The facilitator emailed the parties with instructions to provide their evidence. A deadline of June 12, 2018 was given. Mr. Connell replied saying he had "tons of evidence" but would need time to provide it. However, he did not provide the evidence by June 12, 2018.

- b. **June 16, 2018** – The facilitator emailed requesting Mr. Connell’s evidence, or confirmation that he would not be filing any, by June 19, 2018. Mr. Connell replied, saying he had been busy and would like to submit evidence.
 - c. **June 26, 2018** – The facilitator sent an email to Mr. Connell advising that no evidence had been received from him. The email said that if nothing was received by July 1, 2018, the facilitator would move to requesting written submissions.
 - d. **July 6, 2018** – The facilitator emailed with a request for submissions and asked Mr. Connell to respond by July 12, 2018. The email warned that if Mr. Connell did not respond, the dispute would be referred to a tribunal member who may make a binding decision using only the information that had been submitted.
 - e. **July 12, 2018** – Mr. Connell emailed indicating that he would be submitting evidence.
 - f. **July 19, 2018** - The facilitator replied and indicated that any information needed to be provided no later than July 23, 2018, failing which a tribunal member would decide the dispute without his further participation. Mr. Connell did not reply as requested.
16. The facilitator referred Mr. Connell’s non-compliance with the tribunal’s rules to me for a decision as to whether I should hear the dispute without his further participation.

Should the tribunal hear the applicant’s dispute?

17. I find Mr. Connell has not provided an adequate explanation about why he failed to communicate with the tribunal as required. I find the facilitator made a reasonable number of attempts to obtain a substantive response about evidence and submissions. 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 Mr. Connell was aware of the attempts to contact him and chose not to provide the response as required.

18. 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.
19. First, this claim does not affect persons other than the parties involved in this dispute.
20. Second, the non-compliance here occurred at the outset of the facilitation process. No substantive discussions between the parties occurred. Mr. Connell effectively abandoned the process prior to evidence and submissions being exchanged. Third, given the facilitator's repeated attempts at contact and Mr. Connell's failure to respond in any meaningful way despite warnings of the consequences, I find the nature and extent of the non-compliance is significant.
21. Fourth, I see no prejudice to Mr. Guthrie in hearing the dispute without Mr. Connell's participation. The prejudice to Mr. Connell of proceeding to hear the dispute is outweighed by the circumstances of his non-compliance. If I refused to proceed to hear the dispute, Mr. Guthrie would be left without a remedy. That would be unfair.
22. 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 Mr. Connell's participation.

23. In weighing the factors, I find this dispute should be decided. In deciding to consider the 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

24. I have decided to hear the dispute without Mr. Connell's further participation. I turn to the merits of the dispute.
25. Where a respondent filed a response but has since failed to comply with the tribunal's directions, an adverse inference may be drawn against him. 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. In this case, this means that despite Mr. Connell's statements that he had "tons of evidence" in support of his claim, because he did not provide it I may prefer Mr. Guthrie's argument.
26. Having said that, I reviewed the Dispute Notice, Dispute Response, and the counterclaim Dispute Notice and Response, because these were filed prior to the Mr. Connell's non-compliance. I also considered Mr. Guthrie's evidence and submissions.
27. Mr. Guthrie says that on March 7, 2018, he entered an agreement with Mr. Connell whereby Mr. Connell would run an online auction to sell the contents of Mr. Guthrie's convenience store.

28. While Mr. Connell disputes the claim, he provided no specifics showing how Mr. Guthrie's dates and amounts were in error. He also filed no evidence. For these reasons, I draw an adverse inference against him and prefer Mr. Guthrie's evidence as follows:
- a. Mr. Connell held an online auction of the contents of Mr. Guthrie's convenience store, from February 17 to 19, 2018.
 - b. The auction sales totaled \$4,063.00.
 - c. Agreed commissions for Mr. Connell were \$1,015.75, leaving a total of \$3,047.25 owing to Mr. Guthrie.
 - d. Mr. Connell promised Mr. Guthrie payment of the balance by February 24, 2018 but failed to pay in full.
 - e. Mr. Connell paid Mr. Guthrie \$1,300, in cash, by mid-March 2018.
 - f. Mr. Connell made no further payments to Mr. Guthrie, leaving \$1,747.25 owing.
 - g. When Mr. Connell was unable to pay in a timely way, he promised Mr. Guthrie an additional \$200 for having to wait.
29. Based on this evidence, I order Mr. Connell to pay Mr. Guthrie the \$1,947.25 owing, within 10 days of this decision.
30. Mr. Guthrie also claimed \$500 for his lost time dealing with this dispute. I dismiss this claim. As set out in several past tribunal decisions, which are not binding on me but which I agree with, the tribunal generally does not award money for time spent. This practice is based on the tribunal's rules that generally state that legal fees are usually not recoverable, a principle which extends to an unrepresented party's time.
31. Mr. Guthrie also claimed 18% interest on the amount owing, which he says is the interest rate on his own credit card. Because there was no evidence of an agreement between the parties as to the rate of interest to be applied to a late

payment, I dismiss this claim. Mr. Guthrie is entitled to pre and post-judgment interest under the *Court Order Interest Act (COIA)*, as set out in my order below.

Counterclaim

32. Mr. Connell submitted no evidence in support of his counterclaim. Given his non-compliance, and that none of the filed evidence establishes the facts alleged in the counterclaim, I find Mr. Connell has not met the burden of proving his claim, on a balance of probabilities. I dismiss the counterclaim.

Fees

33. 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 Mr. Guthrie is entitled to reimbursement of \$125 in tribunal fees. I dismiss Mr. Connell's claim for fee reimbursement.

ORDERS

34. Within 10 days of the date of this decision, I order Mr. Connell to pay Mr. Guthrie a total of \$2,094.61, broken down as follows:

- a. \$1,947.25 in late payment,
- b. \$22.36 in pre-judgment interest under the *COIA*, calculated from February 24, 2018, the date by which Mr. Connell promised to pay, to the date of this decision, and
- c. \$125 in tribunal fees.

35. Mr. Guthrie is entitled to post-judgment interest, as applicable.

36. Mr. Connell's counterclaim is dismissed.

37. 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.
38. 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