



# Civil Resolution Tribunal

Date Issued: January 10, 2019

File: SC-2018-002678

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *RTO ASSET MANAGEMENT INC. v. FERLAINO*, 2019 BCCRT 41

Default decision – non-compliance

**B E T W E E N :**

RTO ASSET MANAGEMENT INC.

**APPLICANT**

**A N D :**

GENNARO FERLAINO

**RESPONDENT**

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## **REASONS FOR DECISION**

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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 Gennaro Ferlaino, due to his non-compliance with the tribunal's directions as required, as discussed below.

2. The applicant RTO Asset Management Inc. says it leased a television valued at \$1,899.00 to the applicant, on February 3, 2018. The respondent made only 1 payment of \$129.58. The applicant says it became aware of this claim as of March 1, 2018, when the respondent failed to make payment under the lease. The respondent did not pay the balance or return the television. The applicant claims \$2,698.80 owing under the lease. The applicant also asks for an order that the respondent return the television.
3. In his May 7, 2018 Dispute Response, the respondent agrees that the claim description is accurate, but says the applicant told him the television would be only \$48 per month and that it would only be a “tryout”.
4. The applicant is represented by Kristine Jagusiak. While he was participating, the respondent represented himself.

## **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 118 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 his non-compliance.
9. The second issue is to what extent I should order the respondent to pay the applicants the claimed \$2,698.80 and/or order the return of the television.

## **EVIDENCE AND ANALYSIS**

### ***Non-compliance***

10. My August 30, 2018 summary decision to hear the dispute without the respondent'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.

11. The respondent 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.
12. During the facilitation process, the parties entered an informal settlement agreement. The respondent then failed to make payments as required by the agreement and stopped participating in the tribunal process. The agreement provided that if the respondent failed to pay as required by the agreement, the applicant would proceed to a binding decision for the full amount claimed.
13. After the respondent stopped participating, the facilitator made the following attempts at contact:
  - a. **July 18, 2018** – The facilitator emailed, phoned and texted the respondent requesting a reply by noon that day. The respondent did not reply.
  - b. **July 18, 2018** – The facilitator emailed and phoned the respondent asked for a response by July 20, 2108, and warning him that if he failed to respond, the dispute would be referred to a tribunal member who may decide it without his further participation. The respondent did not reply.
  - c. **August 10, 2018** – The facilitator called and emailed the respondent and asked him to respond by August 13, 2018. The email included a final warning that, if he did not respond, the dispute would be referred to a tribunal member for a decision without his further participation. The respondent did not reply.
14. The facilitator 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 his further participation.

***Should the tribunal hear the applicant's dispute?***

15. The respondent provided no explanation about why he failed to communicate with the tribunal as required. I find the facilitator made a reasonable number of attempts to contact him. 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 him and chose not to respond.
16. 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.
17. First, this claim does not affect persons other than the parties involved in this dispute.
18. Second, the non-compliance here occurred late in the facilitation process. However, the respondent failed to fulfil his payment obligation under the settlement agreement. Since the settlement agreement provided that if he failed to make payments, the applicant could proceed to seek a decision on the full amount claimed, I will consider the applicant's claims.
19. Third, given the facilitator's repeated attempts at contact and the respondent'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.

20. 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 his non-compliance. If I refused to proceed to hear the dispute, the applicant would be left without a remedy. That would be unfair.
21. 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.
22. 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***

23. I have decided to hear the dispute without the respondent's participation. I turn to the merits of the dispute.
24. 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 applicants' 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.
25. Having said that, I reviewed the Dispute Response, because it was filed prior to the respondent's non-compliance.

26. In his Dispute Response, the respondent admits the claims. At the same time, he implies that he was misled as to the price of the television lease and the length of the lease term. He provided no evidence supporting those arguments.
27. As well, given his non-compliance, I draw an adverse inference against the respondent.
28. For these reasons, I prefer the applicant's evidence that the respondent leased a television and made only one small payment toward the lease. He kept the television.
29. Given that the respondent did not meet his payment obligations under the lease, I order him to pay \$2,698.80, as the remaining debt under the lease and total protection coverage.
30. I accept that the lease also allows the applicant to repossess the television if the respondent does not make payments. However, given that I have ordered payment for the television, I do not order the television to be returned to the applicant. I find that such an order would create double recovery for the applicant.
31. 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 \$75 in tribunal fees.

## **ORDERS**

32. Within 10 days of the date of this order, I order the respondent to pay the applicant a total of \$2,807.80, broken down as follows:
  - a. \$2,698.80 as debt owing under the lease,
  - b. \$34.00 in pre-judgment interest under the *Court Order Interest Act*, from March 1, 2018 to the date of this decision, and

c. \$75 in tribunal fees.

33. I dismiss the applicant's remaining claims. The applicant is entitled to post-judgment interest, as applicable.

34. 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. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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Julie K. Gibson Tribunal Member