Civil Resolution Tribunal

Date Issued: January 15, 2019

File: SC-2018-000388

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Malik v. McQuary,* 2019 BCCRT 58

B E T W E E N :

Rashida Malik

APPLICANT

A N D :

Dan McQuary

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about renovation work the applicant, Rashida Malik, says the respondent, Dan McQuary, failed to complete. The applicant says the respondent

abandoned the project on the 1st day, and is withholding her 50% deposit of $2,541.04. That is the amount the applicant claims refunded in this dispute.

2. The respondent says he did a number of things at the applicant's request in order to prepare for the renovation work, but that ultimately the applicant did not have the job ready as agreed. The respondent billed the applicant for his efforts, and told her he had a cheque for $1,680.04 available for pick-up, being the balance he said was owed as a refund from the deposit. The applicant refused.

3. The parties are each self-represented. For the reasons that follow, I order the respondent to refund the applicant $1,680.04. The applicant's remaining claims are dismissed.

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 118 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. Some of the evidence in this dispute amounts to a "he said, she said" scenario. Credibility of interested 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. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary 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 that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue. 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 order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

7. To the extent the parties respectively make allegations of defamation, I have not considered them, because defamation is expressly outside the tribunal's jurisdiction.

ISSUE

8. The issue in this dispute is to what extent, if any, the applicant is entitled to a refund from her $2,541.04 deposit paid towards a renovation job that did not proceed.

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. I have only addressed the evidence and submissions below as necessary to explain my decision.

10. The respondent did business under the name DT Drywall & Renovations. The applicant had volunteered to take responsibility for renovations to a Mosque Temple (the job). Thus, the applicant acted as the general contractor for the job. The parties connected through another contractor G, who recommended the respondent. On the first day of work on the job site at the Mosque, November 6, 2017, the respondent decided he could not proceed with the job. The relevant chronology follows.

11. The respondent's October 3, 2017 quote was for $4,840.80. I find this written quote was the parties' contract. The job was for the supply and installation of drywall, leaving it taped and ready for paint. The job also included: the removal of "old wall and framing" and the installation of a stud and track for a new wall, "install door provided by owner", and replacement of ceiling tile in the office space.

12. The respondent's quote for the job expressly set out things the applicant or the Mosque Temple needed to do: "door needs to be on site before job starts", "all wiring to be done by owner before work starts", "all sprinkler systems to be removed by owner before work starts and reinstalled after work has been completed in office ceiling", and "not responsible for carpet already in place owner to remove for framing to take place".

13. It is undisputed that the respondent inspected the job site on arrival and that he concluded it was not ready. As discussed below, I find these circumstances amounted to a breach of contract by the applicant.

14. The parties dispute who was responsible to set up plastic sheeting to contain the construction dust and debris. I find the applicant was responsible, under the parties' contract, which stated the respondent was not responsible for "dust or final cleanup (all furniture and computer related equipment to be removed from work area by owner)". Even if the respondent was responsible for the plastic sheeting, given the incomplete wiring and sprinkler removal work, which the applicant was responsible to do, I find the respondent was entitled to abandon the project on the basis the applicant was in breach.

15. In an October 3, 2017 email, the respondent required a 50% non-refundable deposit to cover "special order materials". It is undisputed the applicant paid $2,541.04. It is not clear to me what special order materials were in fact ordered and paid for by the respondent. On balance, I find whatever was ordered has been included in the respondent's later invoice for time and materials, as discussed below.

16. On October 13, 2017, the applicant emailed the respondent to say she had found a door for the job, that was 36 x 80 in size, “unless you find wider than this”. The same day, the respondent asked to view the door before a decision was made to install it into a pre-hung frame.

17. The evidence shows the respondent arranged to view the door at the applicant’s tenant’s home, on November 3, 2017. It is undisputed the respondent picked up the door and transported it, at the applicant’s request, to a third party to have it framed so it could be hung. The evidence shows the door was never on site, ready to be hung, as required by the parties’ contract.

18. In the early morning of November 6, 2017, the Imam from the Mosque texted the applicant. He wrote he had the room cleared with 2 main items left, and the shelves and storage closet could not be removed and reused “so if you could ask your contractor to just remove it”. The Imam added the carpet was stitched and rolling it would make it useless, and so he asked the applicant to ask her contractor to rip it out. I find that this shows the job was not ready as required by the parties’ agreement, as set out in the respondent’s October 3, 2017 quote which I have found was the parties’ contract.

19. The applicant’s evidence from an electrician shows that before the job she did not have the required electrical work ready, as required by the parties’ contract. That electrician set out his expectations for the ceiling work, but those expectations were not in line with the parties’ contract. In this dispute, the applicant is bound by her contract with the respondent.

20. I find the evidence shows the applicant had not removed the wiring or the sprinkler systems, as required by the parties’ contract. Further, the applicant had not finished the framing for the door, as required by the parties’ contract. I accept that in the circumstances, the respondent reasonably refused to proceed with the job on the basis that the applicant had breached their contract.

21. Nothing turns on the applicant's allegations that the respondent arrived without workers or tools. I say this because I have accepted the applicant failed to have the job ready as required. That said, I accept the respondent's explanation that his tools were in his van along with other workers. This is supported by his worker PD's written statement.

22. Given the correspondence set out above, the parties agreed the paid deposit was non-refundable. However, I find the respondent waived that term to the extent he offered a $1,680.04 refund, and billed the applicant $861 for his time and expenses. I say this because the deposit was expressed as being necessary to cover special order materials that could not be returned, and those materials are addressed in the respondent's later invoice, discussed below.

23. In particular, on November 7, 2017, the respondent sent the applicant an invoice for the job, with "breach of contract" in the subject line. The invoice showed the $2,541.04 deposit and the "rebate" of $1,680.04. The body of the invoice set out the respondent's time and expenses to date ($861), noting that the respondent picked up the door as requested by the applicant, and delivered it to a third party for framing, but the applicant had not dealt with the door and had it on site. The door was still at the lumber store for framing or awaiting the applicant's pick-up. The respondent billed for 8 hours of time at $85 per hour, plus gas and time for delivery of a couch ($140) that he did at the applicant's request. I find the respondent's billing of $861 was reasonable on a *quantum meruit* basis, meaning value for the work that was done.

24. On January 10, 2018, the applicant emailed the respondent, again requesting the return of her $2,541.04 deposit. The applicant wrote that the respondent was welcome to deduct $50 from the deposit for "the kind gesture" of picking up her couch and bringing it to her, saying it was a surprise because the respondent had initially refused to do it. I do not accept the respondent's delivery of the couch was ever agreed to be a favour, as essentially described by the applicant. The parties' contract was a business transaction.

25. I note the applicant provided a written statement of support from the Mosque's Imam. While the Imam wrote that he was present "for the first meeting" with the respondent, along with the designer JM and the applicant, the Imam provided no details to support his statement the respondent failed to honour the contract. I prefer the other evidence before me, which I find shows that the applicant failed to ensure the job was ready for the respondent, as agreed in the parties' contract.

26. I find the applicant is entitled to the $1,680.04, as offered by the respondent before the dispute began. I find this is the most reasonable outcome to compensate the respondent for the work he did for the applicant, bearing in mind my conclusion the applicant breached the parties' contract.

27. The applicant is entitled to pre-judgment interest under the *Court Order Interest Act* (COIA) on the $1,680.04, from November 7, 2017, as set out in my order below.

28. In accordance with the Act and the tribunal rules, ordinarily a successful applicant is entitled to reimbursement of tribunal fees. However, here the respondent offered the applicant the $1,680.04 on November 7, 2017, before this dispute began, and the applicant refused. In these circumstances, where the applicant has done no better than the offer given before the dispute began, I find the applicant is not entitled to reimbursement of her tribunal fees.

ORDERS

29. Within 14 days of this decision, I order the respondent to pay the applicant a total of $1,705.44, being the principal debt of $1,680.04 plus $25.40 in pre-judgment interest under the COIA.

30. The applicant is entitled to post-judgment interest, as applicable. The applicant's remaining claims are dismissed.

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.

Shelley Lopez, Vice Chair