



Civil Resolution Tribunal

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File: SC-2018-004593

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *0955824 B.C. Ltd. v. Swartz*, 2019 BCCRT 67

B E T W E E N :

0955824 B.C. Ltd.

APPLICANT

A N D :

Brian Irving Swartz

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This is a dispute about a contract for waste disposal services. The applicant, 0955824 B.C. Ltd., does business as VanPro Disposal. The applicant says that in 2017 it bought the company Housewise Construction Ltd. dba Segal Disposal (Segal) and assumed all of Segal's accounts receivable. The respondent, Brian

Irving Swartz, contracted with Segal for waste disposal services, with a 5-year term starting on October 6, 2016.

2. The applicant claims \$1,066.04 in debt for waste services provided and \$396.91 in liquidated damages. The respondent denies liability.
3. The applicant is represented by Xia Fan, an employee or principal. The respondent is self-represented.

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. 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.
6. 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.
7. 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.

ISSUE

8. The issue in this dispute is whether the respondent breached the waste disposal contract between the parties, and if so, what remedy is appropriate.

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 referenced the evidence and submissions as necessary to give context to my decision.
10. The respondent signed a “customer service agreement” with Segal on October 6, 2016 (contract). The service location was an address on Union Street, in Vancouver. The contract’s relevant terms are as follows (my bold emphasis added):
 - a. The “monthly charge” is \$30, for a twice-monthly service of a 3-yard organic bin. Extra “lifts” were charged at \$30. Delivery was \$12, a handwritten and initialed change from the printed \$85 price, and container exchange and removal were \$150 each. The contract states the prices quoted are based on 2016 year rate, and that a fuel surcharge “currently is 10%”.
 - b. The contract is effective as of October 6, 2016, for a renewable 5-year term. The customer can cancel the contract with 90 days written notice by registered mail to Segal at least 90 days, but not more than 120 days, before the end of the existing term (the cancellation window).
 - c. Interest is payable on overdue accounts past 30 days at the rate of 2% per month.
 - d. If the respondent customer attempts to terminate the agreement before the term’s expiry, the applicant may, at its option, accept the respondent’s repudiation. In that case the respondent agrees to immediately pay liquidated damages consisting of either 12 months of billing, or, the sum of the balance of the term remaining on the agreement.

- e. Segal reserves the right to adjust its monthly rates.
 - f. Segal is entitled to assign the agreement at any time without the customer's consent.
11. First, I accept that Segal assigned its accounts receivable to the applicant, which is permitted by the contract as noted above. This is consistent with January 2018 correspondence from Segal's Samuel Au announcing the name change to VanPro Disposal.
 12. Second, apart from the respondent's contract with Segal, the only other relevant evidence from the applicant is a November 19, 2018 Affidavit of Samuel Au. I note Samuel Au was Segal's representative on the contract with the respondent.
 13. The respondent says he asked for a copy of the waste contract when he signed it, but says he never got it in the mail as promised by Segal. The respondent says a few days later, before the 1st scheduled pick-up, he called Segal to cancel the contract and made repeated similar calls asking Segal to make arrangements to pick up their tote. The respondent never heard back from Segal for several months and assumed the waste contract was cancelled and that Segal did not want their tote back. The respondent says no service was ever provided as he had moved the tote and Segal had no access to it.
 14. The respondent provided a signed statement from 4 of his commercial tenants, who all agreed that they had never seen a Segal truck or employee (or one from VanPro) enter the secured parking lot. The witnesses also say the respondent, their landlord, had never provided a Segal or VanPro disposal tote for the collection of organic waste.
 15. Mr. Au's Affidavit states that he is the driver for the applicant and has personal knowledge of the relevant matters, and that he signed the contract with the respondent. The balance of Mr. Au's Affidavit is simply that Segal provided organic removal service on October 6, 2016, twice per month, until June 30, 2018 at the

Union Street address for the respondent. Mr. Au stated he “witness” that the respondent “used Segal and Van Pro’s service”.

16. While the applicant in reply submits it did provide the respondent with a copy of the contract, it provided no proof of this. Notably, Mr. Au’s Affidavit did not address this issue, although the respondent clearly raised it in his Dispute Response filed at the outset of this proceeding. The applicant’s submissions also appear to be that they would have no reason to call back a customer, but that the applicant repeatedly called the respondent to ask for payment. On balance, I find the respondent’s evidence is more consistent and reliable, and I prefer it where the facts are in dispute.
17. In particular, I find the respondent never received a copy of the signed waste contract and never received a call-back in response to his calls to cancel the service. I find however that nothing turns on these things, contrary to the respondent’s submission. I say this because it is undisputed the respondent signed the contract. In doing so, he agreed to its terms, which include the requirement that termination must be by registered mail and in writing, and, that the contract could only be terminated in the cancellation window. There is no suggestion in the evidence that the respondent lacked capacity or understanding of those terms. The respondent was therefore bound the contract’s terms, whether he had a copy of the contract or not.
18. Put another way, having a copy of the contract would not have changed anything: the respondent would be bound by the cancellation terms in the contract: only between 90 and 120 days before the end of the contract, which was October 6, 2021. In other words, the respondent’s cancellation window was in 2020, which has not happened yet.
19. I turn to the applicant’s debt claim first, for \$1,066.04, for services it says it provided from October 6, 2016 to June 30, 2018. I reject this submission and dismiss this claim. I find the applicant did not provide waste delivery services, as claimed. I say this given the unreliability of the applicant’s evidence, as noted above, and because

I prefer the weight of the respondent's evidence together with his 4 tenants, who all say there was no such service. This said, I do find the respondent should pay the \$150 invoiced to him for removal of the organics bin or tote, because that is what the respondent agreed to and he never cancelled the contract in writing, as required, before the bin was delivered.

20. Given my decision to dismiss the applicant's debt claim, apart from the \$150 charge referenced above, I find I do not need to address the specific amounts claimed in the applicant's debt invoices.
21. I turn then to the applicant's liquidated damages claim for \$396.91. There is no invoice before me for this amount. In the applicant's submissions, it says it "had choice the less amount which is 12 months service amount". I read this as the applicant chose to claim the lesser liquidated damages option of 12 months of service, rather than the remainder of the term to October 2021.
22. I acknowledge prior decisions that found disposal service contracts are onerous. However, the court in *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc.*, 2014 BCSC 690 considered virtually identical language involving the applicant and found the contract enforceable. While I am not bound by other tribunal decisions, I am bound by the court's decision in *Tristar* (for similar reasoning see also: *Super Save Disposal Inc. v. Paul's Metal Service Inc.*, 2018 BCCRT 191, *Super Save Disposal Inc. v. Gill's Dream Enterprise Ltd.*, 2018 BCCRT 298, and *Super Save Disposal Inc. v. K.M.I. Holdings Ltd.*, 2018 BCCRT 285).
23. In short, while the contract's terms are onerous, they are enforceable. Liquidated damages are a contractual pre-estimate of the damages suffered by a party in the event of a breach of contract. The parties' contract states that if the service agreement is improperly terminated by the respondent, the applicant is entitled to liquidated damages.
24. So, what is the appropriate amount for liquidated damages? The applicant claims \$396.91, which is \$33.08 per month for 12 months. The applicant's most recent

monthly billing was \$31.50 for the monthly charge, and with GST that equals \$33.08. I find the \$396.91 claim is appropriate and I order the respondent to pay it.

25. The applicant is entitled to pre-judgment interest under the *Court Order Interest Act* (COIA) on the \$546.91 I have ordered (\$396.91 plus \$150) from June 1, 2018, the date the applicant invoiced the respondent for bin removal. This interest equals \$5.
26. The applicant was only partially successful. In accordance with the Act and the tribunal's rules, I find the applicant is entitled to reimbursement of \$62.50, half its \$125 in tribunal fees. The applicant is also entitled to reimbursement of \$4.50, half its \$9 dispute-related expense for serving the Dispute Notice. This totals \$67.

ORDERS

27. Within 14 days of this decision, I order the respondent to pay the applicant a total of \$618.91, broken down as follows:
 - a. \$150 in debt,
 - b. \$396.91 in liquidated damages under the parties' contract,
 - c. \$5 in pre-judgment interest, and
 - d. \$67, with \$62.50 for tribunal fees and \$4.50 in dispute-related expenses.
28. The applicant is also entitled to post-judgment interest under the COIA, as applicable. The applicant's remaining claims are dismissed.
29. 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.
30. 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