Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Urban Fireplaces Ltd. v. Catherine Brown dba Kennedy Crawford Design*, 2019 BCCRT 98

B E T W E E N :

Urban Fireplaces Ltd.

APPLICANT

A N D :

Catherine Brown dba Kennedy Crawford Design

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This is a dispute about payment for a fireplace and related installation, plus payment for repair to the fireplace. The applicant, Urban Fireplaces Ltd., claims

$978.87 for the outstanding balance of its fireplace and installation invoice, plus $656.25 for its repair invoice, for a total of $1,635.12.

2. The respondent, Catherine Brown dba Kennedy Crawford Design (KCD), says the applicant incorrectly installed flashing for the fireplace, and that this incorrect installation punctured the roofing membrane that in turn caused a water leak into the fireplace. The respondent says it should not have to pay for faulty installation or the repair call to address the water leak that was a result of the faulty installation. The respondent also raises various expenses to repair further damage to the area around the fireplace after the water leak repair, although I note there is no counterclaim before me.

3. The applicant acknowledges that its installation of flashing was incomplete, because it was not equipped or trained to deal with torch-on roofing. The applicant says it told the respondent's agents this at the outset, and again when the flashing work was not done before their venting installation, and that they needed to arrange for the flashing to be properly installed by a torch-on roofer.

4. The applicant is represented by Amy Patz, an employee or principal. The respondent is represented by Clifton Chin, an employee of KCD.

5. For the reasons that follow, I dismiss the applicant's claims.

JURISDICTION AND PROCEDURE

6. 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.

7. 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.

8. 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.

9. 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

10. The issue in this dispute is whether the respondent is entitled to payment of its fireplace installation and repair invoices.

EVIDENCE AND ANALYSIS

11. 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.

12. The applicant says it fulfilled its obligation to supply and install the fireplaces and venting and supplied the flashing to site. The applicant says that it told 2 of the respondent's contacts on site that due to the type of roof on the house, its fireplace installers were not trained or equipped to work on it and so the flashing would have to be installed by the respondent's roofer. The applicant says the respondent's agent R was anxious to get the flashing to site as he knew it was to be installed by the respondent's roofer before the applicant came to do their fireplace venting.

13. The central issue in this dispute is whether the applicant was responsible for correctly installing roof flashing for the fireplace venting, given that it is undisputed that the applicant's incomplete flashing installation is what led to the water leak into the fireplace. A related question is whether the applicant reasonably communicated the admittedly insufficient flashing work to KCD and its representatives and contractors, as the applicant alleged it did so that the respondent could arrange for appropriate trades to complete the job.

14. The billing records and evidence about dates are somewhat unclear. It appears the applicant installed the fireplace in September or October 2016, but the venting installation was left to be done after an inspection that passed on November 1, 2016. The respondent earlier paid the applicant's invoice #2093 for $6,880.50 on July 28, 2016, before installation, as required.

15. Because the water leak into the fireplace was discovered in mid-December 2016, the respondent never paid the $978.87 balance owing on an unrelated fireplace job (invoice #2618, dated September 22, 2016) the applicant did for the respondent. It is that $978.87 the applicant claims in this dispute, as outstanding on the job described in invoice #2093.

16. The applicant's invoice #2093 describes the fireplace job as "supply and install" a gas fireplace with, among other things, a "VENT – Vented Up and Out". There is otherwise no mention of flashing or roofing work in this invoice. Invoice #2093 is the only description of the parties' agreement in evidence before me, and I find it constitutes the parties' contract.

17. In addition, in December 2016 and January 2017 the applicant attended twice to deal with the fireplace repair after the water leak. The applicant's January 20, 2017 invoice #3532 is for $656.25, the other amount claimed in this dispute. This is for "repair of water damage" to the fireplace, reflecting 5 hours of work at site, with a reduced rate from $165 to $125 per hour. The invoice notes "flashing dropped off prior to install for roofer". The invoice also notes there was additional 2 hours of travel time that the respondent did not bill for.

18. I turn then to the parties' evidence about the alleged flashing delivery. The applicant's sales representative L states that he delivered the flashing to the site, and spoke with the respondent's contracted worker Z about having the flashing installed before the applicant returned. L states Z took the flashing and agreed. In particular, L states that the flashing was delivered "ahead of the install so the roofer could install it before we came to install".

19. There is no statement in evidence from either R or Z. The respondent has not explained why not. However, the respondent did provide a statement from her general contractor GW, in which GW denied it or anyone at FD received "parts for venting" from the applicant.

20. There are also undated text messages (screenshots) from L to the respondent's agent R that "it needs a roofer to torch on the flashing". Texts from L to R also state that L would call Z (who worked for FD, the respondent's framer) who was "supposed to have it torched on after we installed it. I dropped this flashing off weeks before we installed so the roofers could torch it on". These 2 undated texts were sent 1 minute apart. I find these texts were written after the leak was discovered in mid-December 2016. In other words, they are not contemporaneous

evidence of what the applicant's representatives said at the time it 'placed' the flashing that a roofer would need to torch on and seal it. In the same texts, L said he "dropped this flashing off weeks before we installed so the roofers could torch it on".

21. In its reply submission, the applicant says the flashing was delivered on site to Z in the week of December 12, 2016. I cannot reconcile this December 12 date with the applicant's other evidence that the flashing was provided to site "weeks" before installation. I say this because the applicant's own business records show that the fireplace was "Vented Up and Out" somewhere between November 1 and December 8, 2016. Further, those business records show it was discovered on December 16, 2016 that "flashing was not torched on by their roofer". Thus, the venting installation appears to have occurred before the flashing was said to have been delivered in the week of December 12, 2016. At the same time, it cannot be said the alleged December 12 delivery of flashing occurred "weeks" before the venting or flashing installation that had already occurred by that date. Even if the venting or flashing was not installed until December 12, that is not "weeks" before December 16 by which date the flashing was clearly installed because it was found to be leaking. I find the applicant has not proved it delivered the flashing before the venting installation.

22. Further, while the applicant says its records track their site visits, there is no reference in them to delivering the flashing to site. As referenced above, there is at most an undated reference between November 1 and December 8, 2016 of "vented up and out", which matches the task description in invoice #2093. But this timing does not match the applicant's statement that the flashing was delivered in the week of December 12, 2016, "weeks" prior to the venting installation.

23. In a statement, the applicant's installer, C, says that when he went to install the venting the flashing had not yet been installed. This is undisputed, as the respondent says it did not know the applicant was not dealing with the flashing or that anything needed to be done about it by anyone associated with KCD.

24. Given my observations above, I find the most likely scenario is that when C went to install the venting the flashing was not installed because the applicant had not yet provided it to the respondent or its authorized agent, such as the framer or the general contractor.

25. I turn then to whether the applicant reasonably dealt with its admittedly incomplete flashing installation.

26. C states that he spoke with the “site supervisor” (who the applicant identifies as Z) to advise that C would silicone the flashing in place, but that the seal had to be installed properly and torched on by a roofer to achieve a proper seal. C stated he did the silicone work and installed the storm collar.

27. The respondent’s roofer, CR, acknowledged in a June 21, 2017 email that it did not install the flashing, but this was because “we were never told that something had to be installed through that roof”.

28. The respondent denies receiving any instruction about the need for proper installation of the flashing. There is no suggestion the applicant told KCD about the need to have the flashing properly sealed, bearing in mind KCD was the only party with whom the applicant had a contract. The applicant’s evidence therefore rests on what C and L said they told Z about the flashing and that a roofer would need to torch it on.

29. The applicant submits that proper flashing installation was not its responsibility and that KCD was informed and had full knowledge. I find the applicant has not proved this: the applicant at one point states that it is not their role to tell other trades what to do, and yet that is exactly what it did when it chose to rely on its staff telling Z to have the roof sealed properly. Given the significance of the issue, an open unsealed roof in winter months, I find this choice was unreasonable. The applicant’s contract was with KCD and there is no indication that the applicant did anything to alert KCD directly about the roof issue. On balance, I find the applicant has not proved it

reasonably communicated to the respondent that the roof needed to be properly sealed after it admittedly installed the flashing incompletely.

30. I find that the applicant breached its contract with the respondent to install the fireplace in a professional manner, because of the ventilation installation issues described above.

31. Given these conclusions, I find the applicant has not proved it is entitled to payment of either claimed invoice. Invoice #2093 does not break down a separate amount for the ventilation work. Instead, the invoice is a lump sum figure for the entire job.

32. The respondent's evidence about the water leak damage is significant, though I acknowledge there is a dispute about whether the severity of the damage was in part due to the homeowner's error in leaving the fireplace on too long. I am not satisfied the applicant was sufficiently clear about that timing issue, in the circumstances. In any event, I accept that the applicant is responsible for at least $1,644.12 of damage, which is the amount the applicant claims in this dispute. I also note that $656.25 of the applicant's total claim relates to the repair invoice, and given my conclusion above I find the applicant reasonably ought to bear that cost in any event.

33. The respondent did not file a counterclaim. However, I find the respondent's evidence of expenses is sufficiently connected to the applicant's claims. In these circumstances, this means the respondent's damages may be set-off against the applicant's invoices (see *Wilson v. Fotsch*, 2010 BCCA 226 for the criteria for equitable set-off).

34. In other words, even if I had found the applicant was entitled to payment of the claimed $1,644.12, I would find that the respondent would be entitled to a set-off against the $1,644.12 claimed, given the respondent's expenses for repairing the damage that exceed this amount. As there is no counterclaim before me, I make no other order in respect of the respondent's expenses.

35. In accordance with the Act and the tribunal's rules, as the applicant was unsuccessful in this dispute I find it is not entitled to reimbursement of $125 in tribunal fees or dispute-related expenses.

ORDER

36. I order the applicant's claims and this dispute are dismissed.

Shelley Lopez, Vice Chair