



Civil Resolution Tribunal

Date Issued: January 29, 2019

File: SC-2018-005843

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Falconer v. Afanasev*, 2019 BCCRT 113

B E T W E E N :

Lynn Falconer

APPLICANT

A N D :

Dmytro Afanasev

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION

1. This dispute is about payment for interior residential painting work.
2. The applicant, Lynn Falconer, hired the respondent, Dmytro Afanasev, to paint the interior of a newly purchased home. She says the respondent completed the primer

coat, but his work was unacceptable, did not meet their agreed terms, and had to be redone. In particular, the applicant says the latex primer the respondent used did not cover up the nicotine stains and odour from the previous occupants, which the applicant had specifically requested. The applicant seeks a refund of the \$1,443.19 she paid the respondent for labour and supplies.

3. The respondent says the applicant is not entitled to a refund. He says he promised to do his best to cover the heavy smoke smell, but did not promise to fix the problem. He says the applicant's realtor approved and ordered the latex primer.
4. Both parties are self-represented.
5. For the reasons set out below, I find that the applicant has not met the burden of proving her claim, so she is not entitled to any refund.

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. 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.

ISSUES

10. The issue in this dispute is whether the applicant is entitled to a refund of the \$1,443.19 she paid for the respondent's painting work.

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 addressed the evidence and arguments to the extent necessary to explain my decision.
12. The parties agree that the respondent only completed preparation work and priming, and did not do any finish coats. The text messages provided in evidence show that the parties corresponded about the job on June 25, 2018, and the respondent started the work on June 29.
13. The applicant says when she initially met with the respondent at the home, she told him her primary concern was nicotine stains and smell, and he told her he would be above to cover them up. The respondent says he promised to do his best to remove the nicotine stains and smell, but did not promise to remove them entirely. The respondent says he would not have made that promise because the floors,

windows, and kitchen cabinets were saturated with the smell, so painting the walls alone would not remove all the smell.

14. The text messages in evidence confirm that the applicant was particularly concerned about nicotine stains and smell. I find the text messages also confirm that the respondent did not promise to remove the stains and smells entirely. On June 29, after he had started the job but before he finished, the respondent texted the applicant and said it might not be possible to cover the smell, "as it was years upon years of smoking". The respondent wrote that the primer made a big difference, "however it can really only do so much." then wrote that he could do another coat of primer, and that 2 coats of paint on the ceiling, walls, and doors would also help. The applicant replied "that's ok", and she said it was more important right now to paint another property that she owned.
15. I place significant weight on this text exchange, as it is a written record of the parties' understanding about the nicotine stains and smells at the time the work was performed. It confirms that the applicant knew the work done by the respondent did not entirely remove the smell, and that she declined the respondent's suggested second coat of primer. I find that this shows that the respondent performed the work agreed to by the parties, and is entitled to keep the full amount paid.
16. The applicant says that later, after she paid the bill, she discovered the respondent's work was "ineffective". I disagree. First, as explained above, the respondent told her on June 29, before she paid the bill, that the nicotine smell remained. Second, the applicant says she later called 12 paint stores, and was told that latex primer would not cover nicotine, and that shellac or oil primer should be used. The applicant says the respondent should have known that, and should have chosen a non-latex product.
17. I place little weight on the applicant's evidence about what employees at other paint stores told her, as it is unverified hearsay. There is no direct evidence from a paint expert or tradesperson stating that latex primer was inappropriate for the job. Also, none of the paint store employees the applicant spoke to saw the jobsite. For those

reasons, I find the applicant has not proven that an experienced painter would reasonably have known not to use latex primer in the circumstances. The fact that the applicant later used shellac primer successfully is not determinative, as this was done after the cleaning and priming already done by the respondent. Also, the respondent texted on June 29 that further coats of paint would likely help.

18. I also find that there was no agreement between the parties that the respondent would use any specific type of primer. The applicant texted the respondent on July 9 to ask him what kind of primer he used, and wrote that she hoped it was oil-based, or something that would seal the nicotine smell in. This shows that the parties had no previous agreement about the type of primer. If that were a fundamental term of the contract, the applicant would have had to raise it before the work was complete, if not before it started. The various text messages show that the applicant and respondent discussed the brand to be used, but they did not discuss the type of primer.
19. The applicant submits that she had already paid the respondent's invoice before she was "able to discover that his work had been ineffective." This is not correct. A text message the applicant provided shows that she wrote that the smoke smell was still strong, and she was not sure what to do next, and in the same message she then asked the respondent to write up his time and materials and she would transfer funds. Thus, she was aware of the lingering smoke smell before she paid the respondent, and paid him anyway. I find this supports a conclusion that the applicant never understood the respondent to have promised total removal of the smoke smell.
20. For all of these reasons, I find the respondent did the preparation and priming work as agreed between the parties. The applicant has not met the burden of proving that work was deficient, or that the parties' contract required the respondent to use non-latex primer. For these reasons, I dismiss the applicant's claim.
21. The tribunal's rules provide that the successful party is generally entitled to recovery of their fees and expenses. The applicant was unsuccessful and so I dismiss her

claim for reimbursement of tribunal fees. The respondent did not pay any fees and there were no dispute-related expenses claimed by either party.

ORDER

22. I dismiss the applicant's claim and this dispute.

Kate Campbell, Tribunal Member