



Civil Resolution Tribunal

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File: SC-2018-006017

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Super Save Disposal Inc. v. 315363 B.C. Ltd.*, 2019 BCCRT 190

B E T W E E N :

Super Save Disposal Inc.

APPLICANT

A N D :

315363 B.C. Ltd.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Eric Regehr

INTRODUCTION

1. The applicant, Super Save Disposal Inc., provides waste disposal services. The respondent, 315363 B.C. Ltd., operates a pizzeria. The applicant and the respondent entered into a contract for garbage disposal on September 27, 2016. The respondent says that the applicant fundamentally breached the contract by

failing to pick up its waste on schedule. The applicant says that it did not breach the contract and claims \$2,935.42 owing under the contract.

2. The applicant is represented by an employee, Marli Griesel. The respondent is represented by an employee or principal, Bryan Dobb.

JURISDICTION AND PROCEDURE

3. 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*. 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.
4. 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.
5. 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 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

7. The issues in this dispute are:
 - a. Did the applicant fundamentally breach the contract by failing to pick up the bins between December 26, 2016 and January 2, 2017?
 - b. What remedy, if any, is appropriate?

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant must prove its case on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision. In addition, I have read all of the cases that the parties referred to, even though I do not mention them specifically in this decision.
9. The parties entered into a contract on September 27, 2016, which took effect on October 1, 2016. The contract provided for garbage disposal twice per week.
10. The contract was for a term of 1 year. Clause 11 of the contract said that if the respondent terminated the contract before the end of the term, the applicant may accept the termination. If the applicant accepted termination of the contract, the respondent agreed to pay all amounts owing up to the date of termination plus the amount of any remaining monthly charges as liquidated damages.
11. Clause 15 of the contract said that the respondent was responsible for providing unobstructed access to the bins to allow the applicant to pick up the garbage.

The Failed Pickups

12. The respondent says that the applicant failed to pick up the garbage on December 26, 29, 30 and 31, 2016. December 26 and 29 were regularly scheduled pickups. On December 30 and 31, the respondent says that it telephoned the applicant to request a pickup to make up for the missed pickups.

13. The applicant says that its driver attended on December 26 and 29, but could not access the garbage bin. The applicant says that it has no record of the respondent requesting a pickup on December 30. The applicant admits that the respondent requested a pickup on December 31, but its driver failed to attend.
14. On January 1, 2017, the respondent notified the applicant that it was terminating the contract as of that day. The respondent stated that the applicant failed to provide it with adequate service. The respondent said that because of the applicant's breach, the contract was no longer in force.
15. The parties disagree about whether the bin was accessible on December 26 and 29.
16. With respect to the December 26 failed pickup, the applicant has not provided any direct evidence from the driver about why the bin was not accessible on December 26. The driver's notes simply say "NA", which the applicant says stands for "not accessible". The applicant submits that the respondent failed to provide unimpeded access.
17. On January 11, 2017, the applicant emailed the respondent about why they were unable to get to the bin on December 26. The applicant said that it "can happen from time to time due to Work Safe regulations, conflicts with traffic, road closures/construction, schedule issues, trucking issues, or any number of other issues". This email suggests that the applicant did not know why its driver said it could not access the bin. Some of the possible reasons for the missed pickup are within the applicant's control, such as schedule issues and trucking issues.
18. I find that the applicant's position in this dispute is inconsistent with its January 11, 2017 email. I find that the applicant has failed to prove that the respondent failed to provide unfettered access to the bin. I therefore find that the applicant breached the contract by failing to pick up the garbage on December 26.
19. With respect to the December 29 attempt, the driver's notes indicate that there was snow. The respondent says that there was not snow, and provided a printout of

weather conditions for Vancouver from December 24, 2016 to January 9, 2017, to support its position. These weather reports suggest that it did not snow during this time period. However, the respondent's evidence also includes a photograph from January 3, 2017, which shows that the respondent had shoveled and salted the area around the bin. There is snow visible in the photograph. The respondent says that it did snow during the week of January 1, 2017. The respondent's location is in Chilliwack, not Vancouver. I therefore do not accept that the weather reports are an accurate record of whether there was snow on the ground at the respondent's location on December 29, 2016.

20. Unlike the December 26 driver's note, the December 29 driver's note is specific. There is no compelling evidence to suggest that the driver was not accurate when they made the note. I accept that snow prevented the applicant from collecting the garbage on December 29. I find that the applicant did not breach the contract by failing to pick up the garbage on December 29 because it is the respondent's responsibility under the contract to ensure unfettered access.
21. The applicant says that it has no record of the respondent's telephone calls on December 30, but does not deny that they were made. I accept that the respondent telephoned the applicant on December 30 and that the applicant failed to follow through on its agreement for an extra pick up that day.
22. I find that the applicant therefore breached the contract by failing to pick up the garbage on December 26, December 30 and December 31.

Fundamental Breach

23. There is no dispute between the parties about the law of fundamental breach. While the parties rely on different cases, the principles are the same. Not every breach of a contract is a fundamental breach. Where a party fails to fulfill a primary obligation of a contract in a way that deprives the other party of substantially the whole benefit of the contract, it is a fundamental breach. See *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC). Put another way, a fundamental breach is a

breach that destroys the whole purpose of the contract and makes further performance of the contract impossible. See *Bhullar v. Dhanani*, 2008 BCSC 1202.

24. Whether a breach of contract is a fundamental breach matters because there are different remedies available to the wronged party. For most breaches of contract, the wronged party can claim against the other party for damages arising from the breach. For a fundamental breach, the wronged party can terminate the contract immediately. If the wronged party terminates the contract because of a fundamental breach, they do not have to perform any further terms of the contract. See *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA).
25. Applied to this case, if the applicant fundamentally breached the contract, the respondent was entitled to terminate the contract and be relieved from any further performance of the contract. Because the applicant's monetary claims are all based on the contract, the applicant would not receive any money if it fundamentally breached the contract.
26. The respondent submits that the failure to pick up the garbage was a fundamental breach because the heart of the contract is regular garbage pickup. The respondent points to the *Food Premises Regulation*, which prohibits conditions that lead to the harbouring or breeding of pests. The respondent does not say that the conditions at the garbage bins got bad enough to lead to the harbouring or breeding of pests. While I accept as a general point that accumulated food waste and garbage can be a problem for pests, in the absence of expert evidence I cannot conclude that the failed pickups led to a breach of the *Food Service Regulation*.
27. The test for whether a breach of contract is a fundamental breach is an objective test. That means that I must assess the nature of the breaches from the perspective of a reasonable person in the respondent's shoes. I find that a reasonable person would not consider the contract to be completely undermined because the applicant failed to pick up the garbage for 5 days.

28. While I accept that the situation was frustrating for the respondent, I do not agree that on January 1, 2017, the respondent could reasonably say that it had lost the entire benefit of the contract. After the failed pickups, the applicant was attempting to arrange more pickups to get service back on track. I find that the applicant was willing to continue to perform the terms of the contract. I find that it was reasonably possible for the respondent to continue with the contract.
29. I also agree with the applicant that its past performance is relevant to whether there was a fundamental breach. The applicant had not missed a pickup prior to December 26.
30. Therefore, I find that the respondent was not entitled to terminate the contract on January 1, 2017.

Remedy

31. The respondent did not make a payment on the account after January 1, 2017, which is a breach of the contract. The applicant continued charging the respondent its monthly service fee until it accepted termination of the agreement on August 4, 2017. At that time, the applicant says that the respondent owed \$2,072.19 under the contract. The applicant provided the respondent's invoices. I have reviewed the invoices and find that the respondent owed \$1,853.37. I award this amount.
32. The termination clause of the contract is onerous, particularly the amount of liquidated damages the respondent must pay. However, I am bound by the decisions of the BC Supreme Court, which found a nearly identical contract to be enforceable. See *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc. v. Lee*, 2014 BCSC 690.
33. Therefore, I find that the applicant is entitled to liquidated damages in the amount of \$863.03, which is 3 months of monthly charges at the respondent's current rate.
34. The applicant is also entitled to contractual interest at a rate of 24% per annum, as set out in clause 5 of the contract. I calculate this amount as \$1,141.58.

35. 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 \$125 in tribunal fees and \$78.75 in dispute-related expenses.
36. The respondent claimed \$800 in expenses. Because the respondent was not successful, I decline to order any reimbursement for its expenses.

ORDERS

37. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of \$4,061.73, broken down as follows:
- a. \$2,716.40 in debt,
 - b. \$1,141.58 in pre-judgment interest at 24% per year, and
 - c. \$203.75 for \$125 in tribunal fees and \$78.75 for dispute-related expenses.
38. The applicant is entitled to post-judgment interest, as applicable.
39. 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.

40. 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.

Eric Regehr, Tribunal Member