



Civil Resolution Tribunal

Date Issued: March 5, 2019

File: SC-2018-000493

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Whitaker v. Masters Touch Portrait Design Inc.*, 2019 BCCRT 258

B E T W E E N :

Kalie Whitaker

APPLICANT

A N D :

Masters Touch Portrait Design Inc.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Megan Volk

INTRODUCTION

1. This is a claim about payment for a portrait. The applicant, Kalie Whitaker, says the respondent, Masters Touch Portrait Design Inc., charged her \$1,522.60 that was not agreed to. The applicant seeks an order for repayment from the respondent as well as \$2,500 for time spent.

2. While the respondent makes no counterclaim, it does claim \$15,000.26 in dispute-related expenses as discussed below.
3. The applicant represents herself. A principal represents the respondent.

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 relationships between parties that may continue after the dispute resolution process has ended.
5. The tribunal may decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. I find that I can fairly resolve this dispute by writing based on the documents and written positions before me because 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 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.

ISSUES

8. Whether the applicant is entitled to a refund of \$1,522.60 and time spent totaling \$2,500.

9. Whether the respondent is entitled to \$15,000.26 for time spent, consultation and costs spent in collecting the alleged debt.

EVIDENCE AND ANALYSIS

10. The applicant bears the burden of proof for the claim on a balance of probabilities. I have reviewed all submissions and evidence provided. I refer only to the relevant evidence necessary to give context to my decision.
11. The applicant says she won a portrait donated by the respondent at the 2013 Ladies Rotary Night auction. The applicant says the auction certificate was worth \$1,000 and that the respondent did not correctly apply that credit. The respondent says the certificate was for design consultations worth \$500 and a \$500 credit towards purchasing a portrait for a total value of \$1,000. For reasons that follow, I agree with the respondent.
12. Although the respondent suggested in this dispute that the applicant may not have won the portrait, I find she did. In particular, the applicant's name is on the silent auction sheet as the highest bidder. If the respondent's representative genuinely questioned the credit, I would have expected him to raise the issue sooner or asked the organizers to include that information in their witness emails discussed below.
13. The respondent gave the applicant a copy of the certificate he says she would have received from the rotary auction. That certificate is consistent with the respondent's version of events.
14. The respondent also provided emailed unsigned witness statements from 2 witnesses who say they each collected donations for the action during the time in question and that each year the respondent donated the same gift certificate. And, that the certificate was for design consultations including a portrait session and \$500 credit towards a finished portrait totaling \$1,000 in value.

15. The applicant says that one of the witnesses told her the respondent contacted her and told her what to write. That is consistent with the respondent's own version of events. I do not infer from the request that the witness statement was inaccurate.
16. The respondent also included a third statement, but it related to a different year and, as such, I place no weight on it. The 2 statements that I rely upon are consistent with one another and with the respondent's version of events.
17. The applicant could not provide the certificate she won. There was an issue in delivering the certificate to the applicant and it was subsequently lost. Given the evidence, and the burden, I find it more likely than not the certificate was for consultations worth \$500 and \$500 credit towards a finished portrait.
18. The parties agree that on November 20, 2013 the applicant ordered a portrait from the respondent. The order form (#1583) describes the portrait and lists the amount as \$2,200. The applicant says the total agreed cost was \$2,200 less the auction credit. As well, the applicant says she agreed to the terms of the order. The respondent says the order form was not an estimate. Given that, I find the order form became the parties' contract and that it was a fixed price contract.
19. The terms of the contract were set out on the order, including that the balance was due within 20 days of the respondent notifying the applicant that the portrait was complete. Interest terms set out for late accounts were 1.5% per month (annual rate of 18%).
20. The parties disagree on some of the details leading up to the completion of the portrait. I find nothing turns on these issues. The parties agree that on December 23, 2013 the applicant received the finished portrait with a frame, which the applicant wanted.
21. The respondent says that on that same day he gave the applicant a completed copy of the order contract totaling \$2,139.20. The applicant disputes whether she received the completed order contract that day. I do not find anything turns on that issue. On the completed copy the respondent has written in \$500 next to the rotary

auction credit and added \$210 for a frame and recorded the applicable GST and PST.

22. According to the applicant, the original order included a frame. A frame is not noted in the description of the item on the order. The respondent says the frame was not included in the original order. It is the respondent's practice for its representative to select a frame and if the client likes it, he tells them the price, and they choose to buy it or not. Given that the order form did not initially include a frame, I find a frame was not included in the \$2,200 fix price contract.
23. The applicant says she paid \$1,200 to the respondent for the portrait. The respondent's documents show differing payments. One group of documents shows the applicant paid \$1,100 in 3 or 4 payments between December 2013 and November 2014. Another group of documents shows the applicant paid \$1,200 in 2 payments between April 2014 and November 2014. Since some of the respondent's documents are consistent with the applicant's evidence, I find it is more likely than not the applicant paid the respondent \$1,200. And, that \$500 was paid by April 2014 and \$700 was paid by November 2014.
24. In summary, the contract was a fixed price contract for \$2,200. The auction credit that applied was for \$500. The frame added in December 2013 cost a total of \$235.20 (\$210 plus taxes). As such, the applicant owed a total of \$1,935.20 within 20 days of receiving the completed portrait on December 23, 2013 per the terms of the contract. The applicant paid a total of \$1,200 (\$500 by April 2014 and \$700 by November 2014) leaving \$735.20 owing.
25. Between December 2013 and December 2016, the respondent contacted the applicant on numerous occasions to follow up on the outstanding balances. Of particular note is that in June 2014 the respondent's representative warned the applicant that after June 23, 2014 he would begin charging interest.
26. Later, in May 2016 the respondent's representative explained that if the applicant was not able to pay the alleged outstanding balance he would send the matter for

collection. On October 17, 2016 the respondent sent the applicant a demand letter and requested the account be paid in full by November 15, 2016. Then in December 2016 the respondent sent the matter to a collection agency. Subsequently, on November 6, 2017 the applicant paid the collection agency \$1,522.60, the amount the applicant now seeks a refund for in this dispute.

27. Although the contract permitted the respondent to charge interest in January 2014 the respondent choose to begin charging interest in June 2014. At that time, the applicant owed \$1,435.20. The interest set out in the contract was 18% per annum or 1.5% per month. Interest on the amount owing between June 23, 2014 and November 1, 2014 totals \$92.72. The amount owing on the principal after the November 2014 payment was \$735.20. The interest on that amount owing between November 1, 2014 and payment of the account on November 6, 2017 totals \$399.18. The total interest owing was \$491.90.
28. Given the above, I find the applicant owed the respondent \$1,227.10 (\$735.20 plus \$491.90 in interest) as of November 6, 2017. As such, I find the credit company, on the respondent's behalf, collected \$295.50 more than owing.
29. The respondent says the applicant should not receive the value of the credit and should have to pay for the consultation because she could not produce the certificate. The respondent did not file a counterclaim. However, I find the claim is sufficiently connected such that those damages, if proven, may be set-off against anything reasonably owing under the applicant's invoice (see *Wilson v. Fotsch*, 2010 BCCA 226 for a description of the criteria for equitable set-off).
30. Given my findings above about the certificate, I would not award the respondent fees for consultation or reverse the credit.
31. Similarly, the respondent seeks a set off and says that the cost of collecting the money from the applicant was \$723.26 or 50% of the amount owing. According to the contract between the respondent and the collection company the collection fee was 50% because the debt was more than 1 year past due. If the respondent had

proceeded with collection sooner, the cost to the respondent would have been 30%. On a judgment basis, I find the respondent is entitled to set off \$368.13 against the amounts owing to the applicant, which is 30% of \$1,227.10, the amount that should have been collected. Given that the \$295.50 the respondent owes to the applicant is less than \$368.13, I dismiss the applicant's claim for reimbursement.

32. The parties each also claim reimbursement of costs for time spent. In particular, the respondent claims for \$14,000. The tribunal generally does not award parties compensation for their time spent on dealing with the dispute. The practice of denying these costs is based on the tribunal's rules that legal fees are not usually recoverable, except in extraordinary cases. I find that the same principle should apply to parties' time spent. This was not an extraordinary case calling for expenses for time spent and so I do not award them to either party.
33. As the applicant was unsuccessful, under the Act and rules I also dismiss her claim for reimbursement of tribunal fees and other dispute-related expenses.

ORDERS

34. I find the applicant's claims, and therefore this dispute, must be dismissed.
35. I dismiss the respondent's claims for dispute-related expenses.

Megan Volk, Tribunal Member