



Civil Resolution Tribunal

Date Issued: March 15, 2019

File: SC-2018-006274

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Super Save Disposal Inc. v. New Generation Concrete Ltd.*,
2019 BCCRT 319

B E T W E E N :

Super Save Disposal Inc.

APPLICANT

A N D :

New Generation Concrete Ltd.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Eric Regehr

INTRODUCTION

1. The applicant, Super Save Disposal Inc., provides waste disposal services. The respondent, New Generation Concrete Ltd., is a concrete contractor. The parties entered into a written contract for waste disposal services on December 28, 2016 (contract). The applicant says that the respondent breached the contract and owes

\$3,833.68 in unpaid invoices and liquidated damages. The respondent says that the applicant breached the contract by providing poor customer service.

2. The applicant and the respondent are each represented by an employee.

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 breach the contract? If so, was the respondent entitled to terminate the contract?
 - b. How much, if anything, does the respondent owe the applicant under the contract?

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. As mentioned above, the parties entered into the contract on December 28, 2016. The contract had a 5 year term starting in January 2017. The base monthly charge was \$68.87.
10. Clause 2 of the contract allowed the respondent to terminate the contract by providing written notice at least 90 days but not more than 120 days prior to the end of the term.
11. Clause 11 of the contract said that if the respondent terminated the contract before the end of the term, other than in accordance with Clause 2, 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.
12. The applicant delivered the bin on January 6, 2017.

13. The respondent says that on September 1, 2017, the applicant's driver attended to empty the respondent's bin. The driver asked the respondent's manager to move the bin so that the driver could service it without leaving his vehicle. The respondent's manager refused, and the respondent says that the driver began swearing and moved the bin himself "very aggressively". The respondent says that the driver left the bin in an "unacceptable" location. The applicant did not provide any evidence to refute this claim, such as a statement from the driver. I find that the September 1 incident occurred as the respondent alleges.
14. The respondent says that on September 15, 2017, the respondent noticed that there was no lock on its bin. The respondent blames the applicant. The respondent says that because of the applicant's failure to lock the bin, there was garbage in the bin that was not the respondent's. There is no evidence that the respondent had to pay any extra charges because its bin was too full. The respondent replaced the lock with its own lock.
15. The respondent emailed the applicant on September 26, 2017, to cancel the contract. In the email, the respondent said that it was disappointed with the service and wanted the applicant to pick up the bin. The respondent did not raise any issues other than the September 1 pickup and the bin's lock.
16. On October 20, 2017, the respondent sent the applicant a follow up letter. The respondent said that the applicant had not responded to its September 26, 2017 email. The respondent said that the letter would serve as the "Repudiation Date" under Clause 11 of the contract and asked the applicant to remove its bin so that the respondent could arrange for a new contractor.
17. Neither the September 26, 2017 email nor the October 20, 2017 letter were sent within the timeframe set out in Clause 2, in which the respondent was entitled to cancel the contract.
18. The applicant responded on October 25, 2017. The applicant advised that if the respondent wanted to cancel the contract, Clause 11 of the contract required it to

pay the monthly charges for the remainder of the term. The applicant gave the respondent the opportunity to continue with the service.

19. On November 6, 2017, the respondent sent the applicant a letter confirming that it wanted to cancel the contract. The respondent refused to pay the remaining monthly charges.
20. The applicant removed the bin on November 27, 2017. The applicant sent invoices totaling \$3,833.68 on November 28, 2017.
21. The applicant's claim of \$3,833.68 is broken down as follows:
 - a. \$145.69, which includes \$151.04 for removing the bin less a credit of \$5.35 as a refund for an unused fuel surcharge, and
 - b. \$3,687.99 for liquidated damages under Clause 11 of the contract, which is the monthly charge of \$68.87 for 51 months, plus GST.

Did the applicant breach the contract? If so, was the respondent entitled to terminate the contract?

22. The respondent says it cancelled the contract because the applicant breached the contract. The respondent says that there were 4 separate issues with the applicant's service:
 - a. The driver's abusive behaviour.
 - b. The driver's placement of the bin.
 - c. The removal of the bin's lock.
 - d. Poor customer service.
23. With respect to the driver's behaviour, I do not agree that the fact that a driver swore while emptying the bin is a breach of the contract. It appears to have been an isolated incident, and despite the swearing, the driver completed the pickup as

required by the contract. In addition, the respondent does not say what the driver said or that the swearing was directed at any of the respondent's employees. I accept that abusive behaviour may, in some circumstances, constitute a breach of contract. However, I find that I do not have sufficient evidence to conclude that the applicant's driver was anything more than rude and unprofessional.

24. With respect to the driver's placement of the bin, I agree with the respondent that the bin was placed at an odd angle in the respondent's parking area. However, I do not agree that the placement of the bin was dangerous. The respondent suggests that the bin could have rolled into a parked car, but I find that the photographs of the bin do not support this conclusion because the area appears flat. At most, the placement of the bin was an eyesore. On balance, I do not accept that the placement of the bin was a breach of the contract.
25. With respect to the bin's lock, the applicant says that the bin is in plain sight and so anyone could have taken the pad lock, although it does not explain this submission given that not anyone would have a key. I find that the most likely explanation for the missing lock is that the applicant's driver forgot to return the lock to the bin after emptying it. However, the respondent replaced the lock and reported no further issues. In addition, as mentioned above, there is no evidence that there were any consequences other than some extra garbage. I find that this was a minor inconvenience and does not raise to the level of a breach of the contract.
26. With respect to the applicant's customer service, there is no evidence that the applicant knew about the respondent's concerns until the September 26, 2017 email. There is also no evidence that the applicant addressed the respondent's concerns by responding to the September 26, 2017 email. However, the applicant continued serving the respondent and there is no evidence of any issues with a driver after the September 1 incident. In addition, the September 26, 2017 email indicated that the respondent had placed its own lock on the bin, so that problem did not require any further attention. Essentially, the respondent complains that the applicant refused to address the fact that its driver had been rude and

unprofessional. I find that failing to address that complaint is not a breach of the contract.

27. Therefore, I find that none of the respondent's complaints about the applicant's service were breaches of the contract. Because of my finding, I do not need to address whether any of the breaches would have allowed the respondent to cancel the contract and avoid the obligation to pay liquidated damages.

How much, if anything, does the respondent owe the applicant under the contract?

28. The bulk of the applicant's claim is for liquidated damages under Clause 11, which allows it to charge the monthly charge to the end of the term if the respondent cancels the contract.
29. Clause 11 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.
30. I have reviewed the applicant's invoices and accounting records. I am satisfied that the applicant is entitled to the amounts claimed, with a minor exception.
31. The invoice for \$151.04 for removing the bin includes an administrative charge of \$8.85. The contract only provides for an administrative charge of \$6.85. The applicant does not explain this minor discrepancy. I find that the applicant's claim must be reduced by \$2.10, the difference after taking into account GST.
32. I note that in some recent tribunal decisions, the tribunal has decided not to add GST to liquidated damages because the goods or services were not actually provided. See, for example, *Super Save Disposal Inc. v. Dagsvik*, 2018 BCCRT 296, *MAPLE LEAF DISPOSAL LTD v. JTS FOOD CORPORATION*, 2019 BCCTR 226 and *Super Save Disposal Inc. v. Qurban et al*, 2019 BCCRT 144. These

tribunal decisions are not binding on me and it does not appear that the issue of the application of section 182 of the *Excise Tax Act* was raised.

33. Section 182(1) of the federal *Excise Tax Act* states that when a person pays an amount for the breach of an agreement, the amount is deemed to include GST if it would have been subject to GST if the agreement had been completed.
34. The BC Provincial Court considered section 182(1) of the *Excise Tax Act* in *White Rock Realty Ltd. v. Parkland Ventures (Meadowvale) Ltd.*, 2003 BCPC 564. In that case, the Court had previously awarded the claimant \$10,000 for breach of contract. The claimant brought a second claim for \$700, representing 7% GST on the first judgment, relying on section 182(1) of the *Excise Tax Act*.
35. The Court found that section 182(1) of the *Excise Tax Act* applied because the service that the claimant was supposed to supply under the agreement would have been subject to GST if it had been performed. The Court found that section 182(1) deemed that the judgment included GST, so the \$10,000 judgment was, in fact, for \$9,345.79 plus \$654.21 in GST.
36. I also note that previous British Columbia court cases that awarded liquidated damages in the context of waste disposal contracts have awarded GST, although they did not provide reasons for doing so. See, for example, *Super Save Disposal Inc. v. Blazin Auto Ltd.*, 2011 BCSC 1784 and *Super Save Disposal Inc. v. Dinoking Tech Inc.*, 2012 BCPC 245.
37. Applied to this dispute, the applicant's claim for liquidated damages, before GST, is \$3,512.37. If I do not add GST to the applicant's claim for liquidated damages, I find that section 182(1) of the *Excise Tax Act* will deem that the \$3,512.37 award includes GST. In that event, the liquidated damages award would only be \$3,345.11, with the remainder as GST. Therefore, I find that if I do not add GST to the liquidated damages claim, the applicant will not be fully compensated for the breach of contract. I find that the applicant is entitled to GST even though it did not provide any goods or services.

38. I find that the applicant is entitled to liquidated damages of \$3,512.37 plus GST of \$175.62 for a total of \$3,687.99.
39. I order the respondent to pay the applicant \$3,831.58 for breaching the contract.
40. The contract provides for 24% interest per annum on overdue accounts. I find that the applicant's account was overdue as of December 28, 2017. I calculate contractual interest at \$1,116.09.
41. 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 \$175 in tribunal fees and \$84 in dispute-related expenses, which was the cost of a process server that the applicant hired to serve the respondent.

ORDERS

42. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of \$5,206.67, broken down as follows:
 - a. \$3,831.58 as damages for breach of contract
 - b. \$1,116.09 in contractual interest, and
 - c. \$259 for \$175 in tribunal fees and \$84 for dispute-related expenses.
43. The applicant is entitled to post-judgment interest, as applicable.
44. 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.

45. 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