Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *In A Wink Beautique (2013) Inc. v. Hankins,* 2019 BCCRT 495

B E T W E E N :

In A Wink Beautique (2013) Inc.

APPLICANT

A N D :

Liandra Hankins

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. The respondent, Liandra Hankins, had a chair rental contract in the hair salon operated by the applicant, In A Wink Beautique (2013) Inc. The applicant says the respondent breached the parties' contract by terminating 9 months early on July 31,

2018. The applicant claims $5,000 in liquidated damages, for those 9 months of rent.

2. The respondent says she gave notice on July 10, 2018, which the applicant accepted and made no mention of any money owing under the contract.

3. The applicant is represented by its principal Kristy Brunner. The respondent is self-represented.

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 any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

5. 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.

6. 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.

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.

ISSUE

8. The issue is to what extent, if any, the respondent owes the applicant $5,000 under the parties' chair rental contract.

EVIDENCE AND ANALYSIS

9. 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.

10. The underlying facts are not in dispute. The parties agree:

11. They signed a May 25, 2017 contract for the respondent to rent a chair in the applicant's salon, with an effective term of May 1, 2017 to April 30, 2018.

    a. Section 4.1(b) of the contract states the contract automatically renews for up to 2 additional 1-year terms.

    b. The parties did not sign a new chair rental contract for May 2018 to April 2019.

    c. On April 29, 2018, Ms. Brunner texted the applicant to see if she wanted to renew the contract, and she did. The parties' text messages show they planned to "re-initial your old paperwork".

    d. On July 6, 2018, the respondent asked about a rent reduction in the context of possibly moving to another salon as an alternative, and as discussed below the applicant offered a reduced rent.

e. On July 10, 2018, the respondent emailed Ms. Brunner that she had decided she would move to a different salon. Ms. Brunner responded that day, “Not a problem, I have passed this along to [the salon manager]. She will get your key from you on your last day and just check over your area etc and I'll e-transfer you the damage.” There was no mention of any expectation that the respondent would pay liquidated damages under the contract.

f. On July 31, 2018, the respondent vacated the chair at the applicant’s salon.

12. On August 2, 2018, the applicant refreshed their memory about the contract’s terms and advised the respondent the deposit would in fact not be returned. The applicant claimed the respondent owed $7,871.25, less the $400 deposit it was now keeping, leaving a balance of $7,471.25 “due immediately”. This amount includes an alleged $75 rent shortfall that the respondent says had never been mentioned previously.

13. I note in this dispute the applicant has abandoned its claims in excess of the tribunal’s small claims monetary limit of $5,000.

14. Section 5.1 of the parties’ contract states that either party may terminate the agreement for any reason on 30 days’ written notice before the end of the then-current term. Section 18 of the contract states that written notice can be done by email.

15. Section 5.5 of the contract contains a liquidated damages provision. It states that if the respondent contractor terminates the agreement before the full contract term has elapsed (defined as ‘early termination’):

a. The respondent “ipso facto” (by the fact of early termination) loses all claim to the deposit ($400) “as a portion of pre-estimated damages”, and

b. The respondent will “remain liable” for the monthly rent payments “for the remainder of the term” and will pay this amount “on demand” by the applicant.

16. I find the parties’ contractual terms continued after April 30, 2018, given the auto-renewal term and also because the parties agreed to its renewal even though the

contract was not formally re-signed. This means the term was to end April 30, 2019. The applicant says the respondent's monthly chair rental was $866.25 including tax, though the parties' contract shows a total payment of $866. However, that is not the end of the matter.

17. This dispute comes down to whether the applicant waived reliance on the liquidated damages provisions in the contract. I find the answer is yes, for the reasons that follow.

18. Liquidated damages are a contractual pre-estimate of the damages suffered by a party in the event of a breach of contract. Such clauses are arguably onerous. However, they are enforceable, and most often arise in waste disposal contracts (see *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc*., 2014 BCSC 690). Due to their onerous nature, a party seeking to rely on a liquidated damages clause must strictly prove a breach of contract. I find the applicant has failed to do so.

19. First, on July 4, 2018, Ms. Brunner emailed in response to the respondent's request for a rent reduction, and on July 6 offered $787.50 including tax. I find this ended the existing contract with the parties negotiating a new contract. The respondent decided to leave and go to another salon and as noted above gave her written notice on July 10.

20. Second, even if I am wrong about the effect of Ms. Brunner's July 6 emailed rent reduction offer, there is Ms. Brunner's July 10 response. Ms. Brunner says that on July 10 she was "thinking that I could only keep deposit for damage like in tenancy", but that she later double-checked the contract at the end of the month and recalled that she could keep the deposit for breaking the agreement. Ms. Brunner explains this "was why I said yes initially and changed my mind".

21. The respondent relied on Ms. Brunner's July 10 communication, expecting that at the end of the month if her station passed inspection (I find that it did) she would receive her $400 deposit back and the parties' relationship would end as she moved to the new salon. This was unqualified without any reference to relying on the

contract's terms that she could instead keep the deposit or expect payment of the balance of the term's rent.

22. In law, "waiver" occurs where one party to a contract takes steps which amount to giving up or foregoing reliance on a known right to performance by the other party. Waiver may be expressed formally or informally or may be inferred from conduct. See *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., [1994] 2 S.C.R. 490.

23. I find the applicant offered a waiver of the contract's terms on July 10 and the respondent accepted that waiver. Ms. Brunner's statement that she "changed her mind" after she re-read the contract later in the month of July supports this conclusion.

24. This July 10 communication would then be an amendment of the parties' existing contract in the event I am wrong about the effect of the July 6 rent reduction offer, so no additional consideration (payment) was required by the respondent (see *Rosas v. Toca*, 2018 BCCA 191).

25. I note that if I had found the applicant was entitled to 9 months of rent as liquidated damages, I would not have also allowed the applicant to keep the $400 deposit despite the 2017 contract's terms otherwise. To allow both would be a penalty, rather than a genuine pre-estimate of damages. The case law is clear that liquidated damages clauses that are penalties are generally not enforceable (see *H.F. Clarke Ltd.* v*. Thermidaire Corp.* (1974), [1976] 1 S.C.R. 319 and more recently, *IRIS The Visual Group Western Canada Inc. v. Park*, 2016 BCSC 2059 at paras. 54 to 56).

26. Given my conclusions above, I find the applicant waived the contractual liquidated damages terms about keeping the $400 deposit and for payment of rent until April 30, 2019.

27. What about the $75 portion of the applicant's claim, which she says reflects an underpayment on past rent? The applicant's evidence in support is a typed list

showing the respondent's 3 deposits of $860 for May 1, June 1, and July 3, 2018. Based on the $866.25 rate (including tax), this amounts to only an $18 debt. However, the respondent denies any short-payment, and notes the applicant never requested it before the respondent left the salon. On balance, I find the applicant has not proved the respondent owes the applicant anything for past short-paid rent.

28. In summary, I dismiss the applicant's claims. As the respondent did not file a counterclaim, I make no order for the return of her $400 deposit. Nothing in this decision prevents the respondent from filing a claim for that deposit, subject to any applicable limitation period.

29. The applicant was unsuccessful in this dispute. In accordance with the Act and the tribunal's rules I find it is not entitled to reimbursement of tribunal fees.

ORDER

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

Shelley Lopez, Vice Chair