Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as*: Recovery Enforcement Inc. v. Selective Food Imports Inc.*
2019 BCCRT 652

B E T W E E N :

Recovery Enforcement Inc.

APPLICANT

A N D :

Selective Food Imports Inc.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This is a dispute about a contract for waste disposal services. The applicant, Recovery Enforcement Inc. (Recovery), is a collections company within the

Revolution Group of Companies, which includes Revolution Resource Recovery Inc. (Revolution). Recovery says the respondent, Selective Food Imports Inc., which does business as Capilano Market (Selective), breached its contract with Revolution when Selective purported to terminate the contract contrary to its terms. The applicant, under an assignment from Revolution, claims $1,650 in liquidated damages, representing 11 months of remaining service under the contract at $150 per month.

2. Selective says when the contract was made it was not appropriately explained and that Revolution's salesperson engaged in "shady" tactics. Selective says it was told the contract was cancelled after it phoned to do so.

3. The applicant Recovery is represented by Jennifer Rink, an employee. Selective is represented by Alex Serri, who I infer is a principal or employee.

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 9.3(2), 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 applicant Recovery is entitled to liquidated damages under a waste disposal contract.

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the burden of proof is on the applicant to prove its claims on a balance of probabilities. However, as discussed below, Selective bears the burden of proving any set-off is warranted. I have only referenced the evidence and submissions as necessary to give context to my decision.

10. As set out in the Assignment Agreement in evidence, on October 11, 2018, Revolution assigned its rights under its contract with Selective to Recovery. That same day, Recovery sent Selective the written notice of assignment and demanded payment of $1,650 as liquidated damages. The relevant chronology follows.

11. Revolution and Selective entered into a "Customer Service Agreement" on June 24, 2016 for the provision of waste and cardboard disposal services. This contract's terms included:

a. Revolution had the exclusive right to provide the waste disposal services for the 12-month term, which was automatically renewed for consecutive 12-month terms. The effective date was July 28, 2016.

b. Selective could cancel the contract on **written notice by registered mail**, not more than 120 days and not less than 90 days before the renewal date (the cancellation window). **Thus, in 2018, the cancellation window was between March 30 and April 29** (my bold emphasis added).

c. If the contract is improperly terminated by Selective, Selective will pay liquidated damages in an amount equal to the sum of amounts due for the balance of the current term (or, the sum of its monthly billings for the most recent 15 months, whichever is greater).

12. It is uncontested that the applicable monthly rate in 2018 was $150 per month, bearing in mind price increases were provided for in the contract.

13. On June 7, 2018, Revolution received a May 30, 2018 registered mail letter from Selective, which said it wanted to cancel services for the end of June 2018. This was not within the cancellation window, as required by the contract. I say the same about the July 10, 2018 letter Selective sent Revolution, in which Selective asked Revolution to remove their bins.

14. Selective says the contract's terms were not properly explained and that Revolution's salesperson did not mention "any of the terms which are not normal on average companies we always dealt with" (quote reproduced as written). Selective also says it tried to contact Revolution by phone many times during the "90 day rule of cancellation that they have" and finally got in touch with someone, who told them to send a letter and never said it was too late to cancel. Selective says it believed the contract was cancelled and signed a new agreement with a different waste hauler.

15. Recovery denies that Revolution's salesperson would allow cancellation by phone, given the contract's express term to the contrary. I agree that the evidence before me does not support such advice was given to Selective.

16. Recovery filed its manager CS's May 30, 2018 telephone notes of a conversation with Selective's representative. CS never heard back about scheduling a meeting, so on June 22, 2018 CS visited Selective's site but was asked to return the following week. On June 28, 2018, CS spoke with Mr. Serri and reviewed the agreement and the failure to cancel within the applicable cancellation window. That same day, CS wrote Revolution would continue to provide service under the agreement. CS and Mr. Serri continued to exchange emails through July 4, 2018. On July 10, 2018, Selective asked Revolution to remove their bins, given its failed negotiations with CS for a lower monthly fee.

17. On balance, I find the weight of the evidence also does not show Revolution engaged in unconscionable or unfair dealings such that Revolution breached the contract or that I could conclude Selective should not be held to the contract's terms. Essentially, Selective says that Revolution had an obligation to point out terms Selective found unusual. However, there is no suggestion Selective did not understand the English written in the contract. Selective does not say it was unable to understand the contract or explain why it did not read it fully. As noted, Selective negotiated a shorter 12-month term when the contract was signed, reduced from the standard 60-month term. Further, by its own evidence, Selective was aware of the cancellation window.

18. Next, given the case law discussed below, I cannot agree that the liquidated damages term is so contrary to the purpose of the contract that Revolution had an obligation to specifically draw it to Selective's attention. The contract states on its first page, in bold print, that by signing the agreement the customer (Selective) acknowledges having read, understood, and agreed to the general conditions that were printed on the back of the contract.

19. I turn to the respondent's more general argument that the liquidated damages clause is unfair. I acknowledge prior decisions that found disposal service contracts are onerous. However, the court in *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc.*, 2014 BCSC 690 considered virtually identical language involving the applicant and found the contract enforceable. While I am not bound by other tribunal decisions, I am bound by the BC Supreme Court's decision in *Tristar* (for similar reasoning see also: *Super Save Disposal Inc. v. Paul's Metal Service Inc*., 2018 BCCRT 191, *Super Save Disposal Inc. v. Gill's Dream Enterprise Ltd*., 2018 BCCRT 298, and *Super Save Disposal Inc. v. K.M.I. Holdings Ltd*., 2018 BCCRT 285). I note the *Tristar* decision overrides the Provincial Court's decision in *Super Save Disposal Inc. v. Angel Glass Corp*., [2015] B.C.J. No. 1191, a case in which the adjudicator concluded a liquidated damages clause similar to the one before me was unconscionable. However, I also note the Provincial Court has more recently noted that *Tristar* was binding, in *Northwest Waste v. Andreas Restaurant Ltd*., 2016 BCPC 395.

20. In short, while the contract's terms are onerous, they are enforceable. Liquidated damages are a contractual pre-estimate of the damages suffered by a party in the event of a breach of contract. The parties' contract states that if the service agreement is improperly terminated by the respondent, the applicant is entitled to liquidated damages, in the amount of the remaining monthly payments owing under the agreement. This is because the respondent failed to terminate the waste contract in the manner required under its terms, namely within the cancellation window.

21. Given my conclusion above, I find Recovery is entitled to the $1,650 claimed in liquidated damages. This is based on 11 months, which is consistent with the timing of the failed negotiations summarized above. It is entitled to pre-judgment interest under the *Court Order Interest Act* (COIA) on that sum, from October 25, 2018, the payment deadline Recovery set in its October 11, 2018 letter. This equals $17.59. Together with the $1,650, Recovery's award totals $1,667.59.

22. As noted, Selective did not file a counterclaim. However, without describing it as such Selective argues for a set-off. In particular, Selective provided June, July, and August 2018 bank statements to show Revolution debited charges for those months under a pre-authorized payment agreement. Selective alleges that despite those debits totaling $593.67, Revolution did not provide service during those 3 months. Yet, Selective did not address these allegations in its argument in response to Recovery's liquidated damages claim. Instead, Selective focused on its efforts to cancel and Revolution's alleged "shady" tactics, which I have addressed above. That said, Recovery did not address this issue either.

23. The fact that the charges were made does not mean no service was provided. I would have expected a submission or statement to show the bins were not emptied as agreed and evidence of discussions between Selective and Revolution about the issue. There is no such evidence before me. On balance, I find Selective has not shown any set-off is warranted for the alleged June and July months of 'no service', during which period the parties continued to negotiate, as summarized above.

24. However, the evidence shows Selective clearly asked Revolution to pick up their bins on July 10, 2018. The liquidated damages claim is based on the final 11 months of the contract, beginning August 1, 2018. Therefore, I find it is appropriate to set-off the August 2018 debit charge, given it was after Selective's clear termination of service. The August 21, 2018 charge was $200.97. With pre-judgment interest of $2.66 under the COIA from August 21, 2018, the total set-off is $203.63.

25. The net payment owing to Recovery ($1,667.59 - $203.63) is $1,463.96.

26. In accordance with the Act and the tribunal's rules, as Recovery was substantially successful I find it is entitled to reimbursement of $125 in tribunal fees plus $10.73 in dispute-related expenses for serving Selective with the Dispute Notice, an amount I find reasonable.

ORDERS

27. Within 14 days of this decision, I order Selective to pay Recovery a total of $1,588.96, broken down as follows:

    a. $1,449.03 in damages,

    b. $14.93 in pre-judgment interest under the COIA, and

    c. $125 in tribunal fees.

28. Recovery is entitled to post-judgment interest, as applicable.

29. 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.

30. 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

Shelley Lopez, Vice Chair