



Civil Resolution Tribunal

Date of Original Decision: June 5, 2019

Date of Amended Decision: June 14, 2019

File: SC-2018-008688

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Yen v. Cui et al*, 2019 BCCRT 683

B E T W E E N :

CHIH HSUN YEN

APPLICANT

A N D :

YING CUI, LAICHI CUI, and ANGELO BONATO

RESPONDENTS

AMENDED REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This is a contract dispute.
2. The respondents hired the applicant, Chih Hsun Yen, to build fences and a gate. The applicant says that the respondents failed to pay the contract amounts and

claims \$2,719.60 from the respondents, Ying Cui and Laichi Cui (the Cuis) and \$550 from the respondent, Angelo Bonato. The respondents deny the applicant's claims.

3. Mr. Yen and Mr. Bonato are each self-represented. The Cuis are represented by Scott Edwards, who is a family member and not a lawyer. Mr. Bonato made submissions but provided no evidence in this proceeding.

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*. 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 some respects, this dispute amounts to a "he said, he said" scenario with both sides calling into question the credibility of the other. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.
6. 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 the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.

7. 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.
8. Under tribunal rule 9.3(2), 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.

ISSUE

9. The issue in this dispute is what amount, if any, are the respondents required to pay Mr. Yen for the work he did building fences and a gate?

EVIDENCE AND ANALYSIS

10. 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.
11. This dispute involves three separate projects. In September 2018, the Cuis entered into written fixed price contracts with Mr. Yen to supply and build a fence on their parent's property (fence #1) for \$2,520 and a custom gate on their parent's property for \$273. At the same time, the Cuis and Mr. Bonato entered into a written fixed price contract with Mr. Yen to supply and build a different fence (fence #2) for \$2,310.
12. According to the terms in all three contracts, the respondents were required to pay a 10% deposit upfront, followed by 40% of the contract price on delivery of materials,

and the balance on completion. The Cuis and Mr. Bonato signed the contracts and paid the 10% deposits. Mr. Bonato also paid the additional 40% for fence #2.

The Gate and Fence #1 Projects

13. Mr. Yen delivered the materials for fence #1 but did not build the fence. He subsequently removed the fence materials because the Cuis failed to pay for them. Mr. Yen did not deliver the materials or commence the gate project.
14. Mr. Yen says that because the Cuis signed the contracts and did not pay, they are in breach of contract and owe him the full value of both contracts. I do not agree. While contracts may exist that strictly bind parties on their signature, as I explain below, these two contracts did not.
15. I find the parties' contracts were future performance contracts governed by the *Business Practices and Consumer Protection Act* (BPCPA). The contracts fit the definition of a future performance contract under section 17; they were for the supply of goods and services and payment was not due at the time the parties entered into the contracts. Sections 19 and 23 of the BPCPA say that certain information must be contained within the terms of a future performance contract. The required information includes, among other terms, the supply date and the date the supply of goods or services would have been complete. I find the parties' contracts were missing these two pieces of information.
16. Section 23(5) of the BPCPA says that if the contract does not contain the required information, a consumer may cancel the future performance contract by giving notice of cancellation to the supplier not later than 1 year after the date the consumer receives a copy of the contract. It is not clear from their submissions whether the Cuis intended to cancel the contracts or whether they provided notice of cancellation under the BPCPA. As a year has not yet passed since the Cuis received copies of the contracts and the work was not performed, I find the Cuis are still entitled to cancel the contracts and receive a full refund of their deposits as provided by the BPCPA.

17. Accordingly, I find the Cuis are not required to pay Mr. Yen any additional portion of these two contracts. Since the Cuis did not file a counterclaim, I make no order with respect to their deposits.
18. Mr. Yen also claims the Cuis must reimburse his labour costs for moving the fencing materials. However, Mr. Yen has not shown the parties agreed to this work. The Cuis say they did not know he would move the materials and had never seen an invoice until these proceedings. These are facts Mr. Yen does not dispute. I find Mr. Yen has not proved he is entitled to this additional cost.

Fence #2

19. On September 29, 2018, the materials were delivered, and Mr. Yen substantially built fence #2. However, the Cuis refused to pay Mr. Yen the 40% owed on delivery of materials because they were concerned the fence was not properly built. Mr. Yen stopped building and did not finish.
20. An October 2, 2018 email shows that the Cuis notified Mr. Yen that the fence had the following problems that required fixing: the posts were shorter than agreed, the fence was not straight, the posts were not capped, and the posts needed concrete bases. Mr. Yen admitted there were issues with the alignment. The parties agree that Mr. Yen subsequently fixed the alignment issue. Mr. Yen also admitted to using shorter posts and that he had not capped them, which he did not fix.
21. The evidence shows the parties disagreed about whether Mr. Yen should have used concrete to secure the posts. I reviewed the contract and find it lists the materials used in the project but does not list concrete bases. The contract is not sufficiently detailed to show the parties agreed that the posts would be secured by concrete. There is insufficient evidence for me to conclude that the original contract included concrete bases or to determine how the posts were to be secured.
22. After the dispute arose, the parties' emails show they met and agreed to a new plan showing posts secured with concrete. However, the respondents refused to pay the

applicant any additional charge to add concrete bases. The applicant refused to add them without further payment.

23. When a party, in this case Mr. Yen, holds himself out as qualified to perform a specific trade, the law implies a warranty into the contract that he will perform the job in a professional manner consistent with the standards of the trade and employ the proper skill and care required to perform the task at hand. I find these terms were implied into the contract between the parties.
24. To be successful in his claim, the applicant must prove on a balance of probabilities, that he performed his part of the contract and the respondents breached the contract by not paying the remainder of the invoice. In a “defective work” case, the Provincial Court has said the party who asserts the breach of warranty, as described above, has the burden to prove its breach (*Lund v. Appleford*, 2017 BCPC 91).
25. Mr. Yen submits he properly built the fence according to the parties’ contract despite the shorter posts and the initial alignment problem. He says the fence was 99% complete at the time he stopped building it. Since industry standards do not require perfection, I find the fact that he had to correct certain deficiencies does not in itself mean the applicant’s work fell below an accepted standard.
26. The focus of the respondents’ submissions was on the posts not being secured with concrete or two feet underground. Both parties provided website references on fence building. I accept that there are different ways to secure posts apart from using concrete such as in gravel. Though it is not clear in the evidence exactly how the applicant secured the posts. I agree, based on the photographs, that the posts were not installed two feet underground and this was contrary to the specifications in the contract. While it is undisputed the applicant did not use concrete bases, I find the contract did not specify concrete and the respondents provided no independent evidence demonstrating that Mr. Yen’s work fell below industry standards by not using concrete bases.

27. Since the respondents benefited from a new fence, I find Mr. Yen is entitled to be paid for his materials and labour. However, because I find the fence was incomplete and contained deficiencies the respondents are entitled to deduct some payment. I note that the respondents do not claim the deficiencies were so severe as to fundamentally breach the contract. The Cuis' position is that they are entitled to hold back 25% of the total contract price. Mr. Bonato provided no submissions related to deductions.
28. Normally, a deduction is measured by the cost to remedy the deficiencies (*McCrea v. Fournier*, 2017 BCPC 20). The evidence does not allow me to determine how much the deficiencies would have cost to repair. While the respondents have claimed a deduction of 25%, they provided no basis in evidence to justify that amount. For example, the Cuis did not provide evidence showing how much it cost them to remedy the deficiencies. However, I accept that it would have cost them something in time and material. On a judgment basis, I find a 10% deduction is appropriate.
29. The Cuis paid a deposit of \$121 and Mr. Bonato paid \$550. After deducting the 10% and deposits from the total contract price of \$2,310, I find the respondents are jointly and severally liable to pay the applicant a total of \$1,408.00.ⁱ
30. Mr. Yen claims an additional fee for removing and cleaning up a retaining wall, which the Cuis dispute. Since "clean up" was a listed item in the fixed price contract, I find Mr. Yen is not entitled to reimbursement of this additional fee.

Fees and Dispute-Related Expenses

31. Under 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. Mr. Yen was partially successful. I find Mr. Yen is entitled to reimbursement of half of his tribunal fees of \$175 for a total of \$87.50 and half his dispute-related expenses. Mr. Yen submitted receipts totaling \$25.95 for the costs

of registered mail and producing photographs. I find these expenses were related to his claims and reasonably incurred. He is entitled to expenses of \$12.98.

ORDERS

32. Within 30 days of the date of this decision, I order the respondents to pay Mr. Yen a total of \$1,523.89, broken down as follows:
 - a. \$1,408.00 owing on the contract,
 - b. \$15.41 in pre-judgment interest under the *Court Order Interest Act* calculated from October 25, 2018, the date Mr. Yen gave notice payment was due, and
 - c. \$100.48 broken down as \$87.50 in tribunal fees and \$12.98 for dispute-related expenses.
33. Mr. Yen is entitled to post-judgment interest, as applicable.
34. 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.

35. 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.

Trisha Apland, Tribunal Member

ⁱ Amendment Notes: Paragraphs 29 and 32 are amended to correct an inadvertent arithmetical error pursuant to section 64 of the Act.