Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as*: Hindi v. Teranishi et al,* 2019 BCCRT 692

B E T W E E N :

DANIELLE HINDI

APPLICANT

A N D :

KATHRYN TERANISHI, Blair Poon, Shalene Poon, Bradley Kothlow, and Derma Pro Canada Inc.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about a plasma pen medical device (device) and a related training course (course) that took place in March 2018. The applicant student, Danielle Hindi, claims a refund of $4,782.50. The applicant alleges a breach of contract and

misrepresentation and fraud when the respondents said the device was not a medical device, without confirming this first with Health Canada. The applicant says the training course is useless without the device.

2. The personal respondents, Kathryn Teranishi, Blair Poon, Shalene Poon, and Bradley Kothlow, are all directors or officers of the corporate respondent Derma Pro Canada Inc. (Derma Pro). Derma Pro is a business that trains estheticians. The respondents deny liability and say at the time the applicant took the course they reasonably understood from the device's manufacturer and Alberta Health Services that there was no regulation preventing the device's use in Canada. It was not until June 18, 2018 that Health Canada advised it considered the device to be an unapproved medical device and prohibited its sale and distribution.

3. The applicant is self-represented. The respondents are represented by an articled law student, Matthew Desmarais. For the reasons that follow, I dismiss the applicant's claims.

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 section 61 of the Act, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate.

8. 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.

Applicant's document production requests

9. In her submissions, the applicant first seeks an order for the respondents' production of the following documents:

    a. Documentation on their course enrollment between December 27, 2017 and present,

    b. Copy of financial records related to enrollment in Canada and the United States,

    c. Copy of shareholders' agreements,

    d. Documentation on the relationship with the United States entity Derma Pro International,

    e. All bill of ladings, Canada Customs documentation, import/export broker information, and

f. A copy of Derma Pro's web 'disclaimer' as it read before it was changed on May 15, 2018.

10. Broadly speaking, the applicant makes these requests because she says the individual respondents knowingly incorporated Derma Pro as part of a sham, in part because she says Derma Pro advertised that its students could work 3 days a week and earn $100,000 (per year, I infer). I do not agree that this earnings claim on its face means the respondents engaged in a sham.

11. The applicant says after Health Canada's concerns arose in June 2018, Derma Pro appeared to disappear, and the applicant's and other students' concerns went unaddressed. The applicant says the respondents knowingly sold the course and the device without having Health Canada's approval and further that the respondents said such approval was not required when it was. The applicant says this amounts to fraud. As such, the applicant says the individual respondents should be held personally liable and the 'corporate veil' should be pierced accordingly.

12. Apart from the web disclaimer I address below, I find the applicant's document requests are far too broad and not reasonably connected to her small claims dispute for a $4,500 refund of her training course cost. While the applicant argues the documentation requested would show the respondents' profit from the training course, I find such profit is not reasonably connected to the issues before me: a) whether the respondents misrepresented the device and induced the applicant to take the training course, and b) whether having Health Canada approval of the device was an implicit term in the parties' contract.

13. I further find that the bulk of the documentation that would be produced if I made the requested order would contain confidential information relating to an unidentified number of people who are not parties to this dispute. I also find such an order would be unduly onerous to fulfill and simply not be in keeping with the tribunal's "speedy and efficient" mandate that includes proportionality.

14. As for the web disclaimer, the applicant questions whether the update on May 15, 2018 was to add the clause that the student is responsible for ensuring the device complied with "all local, provincial, and federal regulations". She suggests that if it was, that would be proof the respondents misrepresented the device to her. Yet, the February 3, 2018 student handbook signed by the applicant said essentially the same thing. So, I find nothing turns on the May 15, 2018 update, even if it was to repeat that onus on the student. I find disclosure of the earlier web disclaimer is unnecessary and I decline to order it.

15. For the above reasons, I dismiss the applicant's request for document production.

ISSUES

16. The issues in this dispute are:

    a. Whether the respondents misrepresented the device to induce the applicant to take the training course,

    b. Whether having Health Canada approval of the device was an implicit term in the parties' training course contract, and

    c. If there was misrepresentation and/or a breach of contract by the respondents, what is the appropriate remedy, including whether the personal respondents should be held responsible.

EVIDENCE AND ANALYSIS

17. In a civil claim such as this, the burden of proof is on the applicant to prove her claims on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.

18. Bearing in mind the tribunal's mandate and that most parties are self-represented, I infer the applicant's claims are rooted in misrepresentation and breach of contract even though she did not explicitly frame them using those terms. I find these legal

claims reflect the substance of what the parties addressed in their evidence and submissions.

19. By way of general background, the respondents Ms. Teranishi and Ms. Poon are trained estheticians who wanted to start a training course, based on their own training. Derma Pro was incorporated in BC on December 27, 2017 for this purpose.

20. On February 2, 2018, the applicant enrolled in Derma Pro's "Plasma Skin Tightening Course", for which she paid $4,500, inclusive of $214.29 GST. It is unclear why the applicant claims a "refund" of $4,782.50 in this dispute.

21. While the course was focused on how to use the device in treatment, Derma Pro was not the device's manufacturer.

22. While the applicant lives in the Lower Mainland, in March 2018 she attended Derma Pro's 3-day course in Windsor, Ontario. For the purposes of this decision, nothing turns on whether the applicant paid separately for the device. I accept she indirectly paid for it, when she paid for the course that included the device as part of its student kit.

23. It is undisputed that when the applicant enrolled in Derma Pro's course, plasma pen treatment was new within the esthetics industry.

Misrepresentation

24. In *Shaughnessy v. Sidhu,* 2016 BCPC 308, the judge said a fraudulent misrepresentation is a representation of fact made without any belief in its truth, with the intent that the person to whom it is made will act on it, and causing that person to act on it. As set out below, I find the applicant failed to establish these elements.

25. The applicant submits when she attended the course in March 2018 she was told the device was not a medical device that required Health Canada approval. This is not disputed, as the respondents' position was that it understood the device was a cosmetic device, until Health Canada said otherwise in June 2018.

26. The applicant also says that when the personal respondents became aware of Health Canada's requirement, they engaged in a "deceitful coverup" and that instead of notifying the applicant of the concern simply assured "their customers" that the device was "either, approved, pending approval or straight up not requiring Health Canada approval". The applicant does not clearly say what it was the respondents told her after June 2018. I find nothing turns on it, given the issues before me and my conclusions set out below. In any event, I find the applicant has not proved any 'deceitful coverup'.

27. I turn to the relevant chronology. On February 3, 2018 the applicant signed a Derma Pro "student contract", which is brief and written largely in plain language. Its relevant terms included:

    a. The industry is always changing and developing new devices, techniques, services and standards, and no guarantees are made about job availability or popularity of the service.

    b. The applicant will continue to educate herself on the device after completion of the course, as well as abide by all health and safety requirements in her province or state, to provide the safest, cleanest service possible.

    c. The deposits and fees for the education and "student kit" (including the device) are non-refundable.

28. There is nothing in the student contract that says the device was authorized, at all or as a medical device. If anything, as summarized above, the contract expressly put the onus on the applicant student to ensure she followed the applicable health and safety requirements in the province she worked in.

29. On February 23, 2018, as part of the course the applicant created a profile in Derma Pro's online portal, which set out 59 modules. One of the requirements was that the applicant review the "Provincial Regulations/Insurance Module", which stated that it was "the student's responsibility to check with their local Health Authority" if they were authorized to treat their clients in their province or state. It is undisputed that

the applicant completed this module on March 8, 2018. The module further stated it was “the sole responsibility of each student to research and adhere to their state or provinces regulations”. The module stated that the course was a personal service regulated under the Alberta Public Health Act – Regulated Activities Regulation. I infer Alberta was the reference because that is where at least Ms. Poon resided.

30. There is no dispute that at the time the applicant was enrolled in the course, between February and March 2018, there was no prohibition on the device or even any published warning about it. The applicant’s dispute is that the respondents ought to have taken positive steps to ensure that Health Canada approved it.

31. The applicant’s position is in part based on Health Canada’s June 18, 2018 “regulatory letter” to Derma Pro that the device’s manufacturer “may not hold licenses for the class III medical device”, as required under the federal *Medical Devices Regulation*. On that date, Health Canada asked that Derma Pro stop its sale and distribution of the device.

32. Up until June 18, 2018, Derma Pro included the device as part of its course fee. The student witness statements provided by the applicant, which say they were told the device was a ‘gift’, do not materially alter the fact that the device was included in the course fee and not separately charged to students. Derma Pro stopped doing so after it received Health Canada’s letter, which complied with Health Canada’s request.

33. On Ms. Poon’s inquiry about continuing to use the device in the company’s training course, Health Canada responded on June 20, 2018: “We are still gathering information (to determine the best approach) and at this time we are focusing on stopping distribution of the unlicensed devices” and said, “we do not recommend continuing training and educating on an unlicensed medical device”. I find this shows Health Canada was responding to the relatively new issue of the plasma pens being used for cosmetic purposes, rather than Health Canada taking the position Derma Pro ought to have known the device was unlicensed and was being improperly used.

34. On July 3, 2018, Health Canada wrote Ms. Teranishi and indicated that it was the manufacturer's responsibility to address the device's classification. Health Canada wrote, among other things, that Derma Pro was not the only company it had contacted concerning the plasma pens. I find this shows that at the time the applicant took the course, while plasma pen devices were novel they were also somewhat widely used by companies providing esthetician training. I find this shows Health Canada approval of the device was not an industry standard in March 2018. In short, at the time the applicant took Derma Pro's course in March 2018, the device was not sanctioned in any way, by Health Canada or otherwise.

35. On November 26, 2018, Health Canada issued a public advisory that plasma pens may pose health risks but did not issue a recall of the devices.

36. On balance, given the above interactions with Health Canada I find there is simply insufficient evidence to support a conclusion that the respondents misrepresented the course or the legality of the included plasma pen device.

37. I also find the fact that the respondents had contacted Alberta Health Services on December 20, 2017 is support for my conclusion that they did not misrepresent the course or the device's legality. In particular, on December 20, 2017 Ms. Poon wrote to the Public Health Inspector/Executive Officer in Alberta and asked for "any rules, guidelines or regulations pertaining to plasma pen" treatment. Ms. Poon expressly stated she was looking for guidance on answering the question 'is this service Health Canada approved', so she could provide clients and students with a clear and definitive answer.

38. The Officer responded on December 27, 2017 to say that there were no specific guidelines around the service, and that it would fall under the (Alberta) "Personal Services Regulation", because it was considered a cosmetic service "at this point in time". The Officer added that "Health Canada currently does not prohibit this service either" and suggested Ms. Poon contact them directly "for better messaging on this if you'd like". Nothing in the tenor of that exchange with an Alberta Health Officer suggests Ms. Poon ought to have ensured Health Canada approved the device.

39. The applicant says Ms. Poon essentially 'stacked the deck' in her email to Alberta Health Services, because when Ms. Poon asked, "is this service Health Canada approved?" she also said, "it's not a medical device". The applicant also says the respondents ought to have known Alberta Health Services was not the appropriate body to ask.

40. I find the evidence shows Ms. Poon believed "it's not a medical device" to be true at the time and was making reasonable inquiries about the device's proper use. Again, there is no evidence before me that Health Canada had declared the device to be a medical device before its June 18, 2018 letter. In hindsight, it certainly would have been better had she asked Health Canada directly. However, given the inquiries she did make, I find it is clear the respondents did not misrepresent the device to the applicant.

41. While the applicant argues that other students were also negatively affected, and I have reviewed their witness statements in evidence, those students are not party to this small claims dispute. These other unhappy students are not disinterested, in that the form of their written statements indicate they may wish to make their own refund claim at some point.

42. In any event, some student witnesses took the course on different dates and at a different location. Overall, I find the applicant's witness statements are inconsistent about what Derma Pro told them about the device's legality in March 2018. At least one witness, JL (located in Winnipeg), says that she was falsely led to believe that the device treatment was esthetic and therefore there was no need for medical device licensing or regulation. Yet, that advice is in fact consistent with what Derma Pro says it advised its students up until June 18, 2018, as noted. The issue before me is whether such advice was a misrepresentation in March 2018, when the applicant took the course.

43. I note the applicant provided a witness statement from TC who says she took the course in Windsor on March 10 and 11, 2018. TC says Derma Pro "and its leaders" directly told her that the device was Health Canada approved, and that she had

email correspondence with Derma Pro to this effect. Yet, the applicant provided TC's statement but not the referenced email, with no explanation for its absence. TC elsewhere stated Derma Pro later said the device was not a medical device and did not require approval. Given these issues, I place no weight on TC's statement.

44. On balance, I find the witness statements do not assist the applicant in proving the respondents made a misrepresentation to her. The applicant provided no written correspondence between herself and the respondents, apart from the student contract. I find the student contract is the best evidence about the respondents' communication about the course and the device. As noted, it put the onus on the applicant student to be sure the device was authorized for use in her province.

45. I find the applicant has not met the required threshold of providing "clear and convincing" proof that any of the respondents made fraudulent or reckless misrepresentations to her at all, and in particular she has not proved that I should 'pierce the corporate veil' and hold the personal respondents responsible. I find that at the time the applicant took the course the evidence shows the respondents reasonably understood the device was a cosmetic device not requiring approval.

46. I dismiss the applicant's claims against Derma Pro based on misrepresentation. I dismiss the applicant's claims against the personal respondents, which were based on misrepresentation or fraud.

Breach of contract

47. Was Health Canada approval of the device an implicit term of applicant's contract with Derma Pro? For the following reasons, I find the answer is no.

48. Based on my conclusions and the facts summarized above, I find there was no implied term that the device, which was used as part of a cosmetic training course, was approved by Health Canada as a medical device. I have found the respondents did not know or believe it was a medical device at the time the applicant took the course. I have also found they never represented that Health Canada had approved it. Rather, at most Derma Pro had said in February and March 2018 that approval

was not necessary. I find this was reasonable at the time given their communications with Alberta Health Services and the fact that Health Canada did not engage on the issue until June 2018.

49. In coming to my conclusion, I rely on the student contract and the course's module that make it clear the esthetic industry is largely unregulated and often changing. As noted above, those documents also make it clear the onus was on the applicant student to ensure she complied with the applicable regulations, presumably because of the very fact that it was a novel area and the regulations could change.

50. Significantly, there is no evidence before me from an esthetician training company that is critical of the respondents or that says Health Canada approval should have been obtained before the course was sold. There is no evidence that Health Canada even took that position, based on its emails with Derma Pro. I find the applicant has not proved Derma Pro had a positive obligation to proactively ensure Health Canada had no concerns with the device. I dismiss the applicant's claims for breach of contract.

51. In accordance with the Act and the tribunal's rules, as she was unsuccessful I find the applicant is not entitled to reimbursement of tribunal fees.

ORDER

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

Shelley Lopez, Vice Chair