



# Civil Resolution Tribunal

Date Issued: June 11, 2019

File: SC-2018-007654

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Barr v. Hilary Patterson (Doing Business As Hilary Patterson Photography)*,  
2019 BCCRT 713

B E T W E E N :

Susan Barr

**APPLICANT**

A N D :

Hilary Patterson (Doing Business as Hilary Patterson Photography)

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

David Jiang

## INTRODUCTION

1. This dispute is about photography sessions. The applicant, Susan Barr, says that she hired the respondent, Hilary Patterson (doing business as Hilary Patterson Photography), for 3 photography sessions of her son. The applicant submits that

she is entitled to a partial refund for the second session, a full refund for the third session, and compensation for other related expenses. The respondent disagrees that the applicant is entitled to any compensation.

2. The parties are self-represented.

## **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 (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. In some respects, both sides have called 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.
5. 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.
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 make an order 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**

8. The issue in this dispute is whether the respondent breached the parties' contract for photography sessions, and if so, what is the remedy.

## **EVIDENCE AND ANALYSIS**

9. The applicant submits that in December 2017 she hired the respondent to take photos of her son. The terms of their agreement are contained in several documents. The parties provided screenshots of the respondent's website describing the "milestone package". The package consisted of 3 photography sessions for an infant at three different ages: newborn, 6 months, and a 1-year "cake smash" session.
10. In a December 7, 2017 text message, the respondent advised that the milestone package's cost was \$850, plus \$25 for a photo CD, plus GST. The applicant provided a December 8, 2017 email money transfer receipt for \$100 and a February 5, 2018 invoice receipt for \$815.50, showing she sent the respondent a total of \$915.50. The parties also entered into a written agreement signed by the applicant on December 8, 2017. The written agreement lacks key details such as the price and photo package being purchased, but I find that the parties intended for these written terms to apply to their arrangement.

11. The applicant submits that the first photo shoot (newborn) occurred on February 18, 2018, and the respondent provided the photos the same month. The parties scheduled the 6-month photo shoot for July 13, 2018. However, the respondent sent an email on July 13, 2018, cancelling the photo shoot. She explained she was ill and hospitalized the prior night.
12. According to the applicant, the 6-month photo shoot was eventually completed on August 9, 2018. The applicant submits that she should have received her photos within 3 weeks of that date, by August 30, 2018. The applicant submits that the respondent's website guaranteed such a turnaround. The respondent appeared to acknowledge that she had breached this guarantee in a September 11, 2018 email. I therefore find that that a 3-week delivery date for photos was a term of the parties' agreement.
13. August 30, 2018 passed without the 6-month photos being sent. In a September 6, 2018 email, the applicant asked the respondent for the 6-month photos but received no reply. She also phoned the respondent and left a voicemail message without receiving a response.
14. The applicant continued to ask about the 6-month photos through Facebook. In September 9 and 11, 2018 messages, the applicant asked the respondent when she would send the August 2018 photos. In a second September 11, 2018 message, the applicant wrote that she was very uncomfortable with the respondent taking further photos. She requested the respondent produce the August 2018 photos and asked for a refund for the 1-year "cake smash" session and photo CD by September 14, 2018. If the respondent was unable to provide the August 2018 photos, the applicant also wanted a refund for the 6-month session.
15. The respondent replied by email the same day and said that she had mostly been in the hospital for the last month and a half and had been unable to respond to messages due to failing health. The respondent acknowledged that the August 2018 photos were "11 days late". She wrote that, since the applicant was cancelling, the applicant would be billed the total of price of \$850, plus \$25 for the photo CD,

for the newborn and 6-month photo sessions. The applicant replied on September 12, 2018, stating that she would not be cancelling the cake smash session and wished to schedule it.

16. On September 16, 2018, the respondent sent the applicant 12 photos from the August 2018 photo session. The applicant emailed the respondent that day stating that it was less than the 20 photos specified by the milestone package. The respondent replied and provided 8 additional photos. She added that, as the applicant had decided to “terminate [the] relationship”, the applicant would be billed for the completed photo sessions at “current session pricing”. This appears to be the first chronological reference in the correspondence or evidence to current session pricing. The respondent did not provide a breakdown of this amount in the submissions or evidence. However, it exactly equaled the amount the applicant paid.
17. The applicant replied that day, thanking the respondent for sending the additional photos and stated that she did not want to cancel the final photo session. She also sent an email on September 26, 2018 reiterating that she did not wish to cancel the contract and had not heard back from the respondent about scheduling the final session. Ultimately the respondent refused to take further photos.
18. As noted in *Kuo v. Kuo*, 2017 BCCA 245, unless an agreement is terminated, parties must fulfill their obligations. Termination by repudiation occurs when a party shows an intention not to be bound by the agreement and the innocent party accepts this repudiation. Similarly, a breach of a primary obligation may also be a repudiation as it amounts to a refusal to perform.
19. I find that by September 11, 2018, the respondent’s inaction and delay showed that she no longer intended to be bound by the parties’ contract. She did not provide the photos from the 6-month photo session within the agreed-upon time frame. I find the delay in providing the photos to the applicant was a breach of the parties’ contract. The respondent also did not provide any explanation for her failure to perform.

20. I find that, through her September 11, 2018 email, the applicant accepted the respondent's repudiation by requesting refunds. The applicant's email must be considered in the context of the respondent's continuing breach of contract and the fact that by then the applicant had paid for these services in advance. As discussed in *Kuo*, the applicant would be considered the innocent party in this situation.
21. Much of the evidence and submissions before me concerns whether the respondent was so ill that she could not run her business. However, I find that even if the respondent's breach of contract was due to illness, the applicant was still entitled to treat this breach as a repudiation. The applicant was unable to contact the respondent by phone, email, or social media. It was reasonable to conclude from the continuing breach and lack of communication that the respondent no longer wished to perform her obligations under the parties' contract.
22. The respondent submits that because the applicant cancelled the agreement she is entitled to charge the applicant current session pricing for completed work. She cited the written agreement in support of her position. However, I found no reference to current session pricing in that agreement. Instead, the signed agreement states that if the respondent cannot perform her contractual obligations due to illness or any causes beyond the control of the parties, the applicant will make every attempt to reschedule the session. It goes on to state that if the parties cannot agree to rescheduling, the respondent will return a retainer to the applicant and have "no further liability". The written agreement refers to a retainer of \$100, which matches the amount of the December 8, 2017 email money transfer receipt. However, there is no evidence or submission before me that the retainer (or any amount) was ever returned. I therefore find that this portion of the written agreement does not limit the respondent's liability.
23. The signed agreement goes on to state that if the respondent fails to perform due to any other reason, she will not be liable for any amount more than the retail value of the photo session. The respondent referred to this portion of the agreement in her

submissions. However, as the respondent maintains she failed to perform due to illness, I do not find it applicable.

24. Having found that the respondent breached and subsequently repudiated the parties' contract, I must now consider the applicant's remedy. Whether the parties' contract was repudiated or fundamentally breached, the remedy is the same. The innocent party is entitled to damages: *Mantar Holdings Ltd. v. 0858360 B.C. Ltd.*, 2014 BCCA 361. Damages for breach of contract are generally intended to place an applicant in the position they would have been in if the contract had been carried out as agreed: *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319 at paragraph 39.
25. The parties agree that the milestone package was \$850. The applicant requests reimbursement of \$350 for the cake-smash photo shoot that never occurred and \$175 for the 6-month milestone photo shoot. I find it appropriate to award \$283.33 as damages for the third photo session (being 1/3 of the package price). I find that the respondent substantially provided what was required of the 6-month photo shoot, albeit late. The applicant submits that these photos were of lesser quality and variety, but I find the parties' agreement was vague regarding both these factors. I award \$100 for the second photo shoot as my best estimate of damages. I also award \$25 for the photo CD, as the respondent admits that this has not been delivered.
26. The applicant requests compensation for GST paid and I award damages of \$20.42, as an estimate of GST on the above amounts. I considered the respondent's submission that the applicant only paid GST on the CD, but the invoice and money transfer amounts support the applicant's claim.
27. As the applicant was largely successful in this dispute, I find the applicant is entitled to reimbursement of \$125.00 in tribunal fees and \$84.78 in dispute-related expenses. The expenses consist of registered mail and courier delivery fees that were supported with receipts dated October 17, November 16, and December 19, 2018.

## ORDERS

28. I order that within 30 days of this decision, the respondent pay the applicant a total of \$644.15, broken down as follows:
  - a. \$428.75 in damages;
  - b. \$5.62 in pre-judgment interest from September 11, 2018, under the *Court Order Interest Act* (COIA); and
  - c. \$209.78 as reimbursement of \$125 in tribunal fees and \$84.78 in dispute-related expenses.
29. The applicant is entitled to post-judgment interest under the COIA, as applicable.
30. I dismiss the applicant's remaining claims.
31. 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.



32. 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.

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David Jiang, Tribunal Member