



Civil Resolution Tribunal

Date Issued: June 14, 2019

File: SC-2018-006866

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *DIRECT ACCESS SYSTEMS INC v. LEMAY et al*, 2019 BCCRT 735

B E T W E E N :

DIRECT ACCESS SYSTEMS INC

APPLICANT

A N D :

BRETT LEMAY and KEVIN FOLEY

RESPONDENTS

A N D :

Novo Solar Solutions Inc.

RESPONDENT BY THIRD PARTY CLAIM

REASONS FOR DECISION

Tribunal Member:

Sarah Orr

INTRODUCTION

1. The applicant, DIRECT ACCESS SYSTEMS INC (DAS), says they installed a generator for the respondents BRETT LEMAY and KEVIN FOLEY, for which they have not been paid. DAS wants Mr. Lemay and Mr. Foley to pay them \$2,908.12 for the work.
2. Mr. Foley and Mr. Lemay say that D.T., the representative of DAS who installed the generator, completed the work as an employee of the respondent by third party claim Novo Solar Solutions Inc. (Novo). Mr. Foley and Mr. Lemay want Novo to pay DAS's \$2,908.12 invoice.
3. Novo says they referred Mr. Foley and Mr. Lemay to DAS to install the generator and that they had nothing to do with that work, therefore they do not owe Mr. Foley, Mr. Lemay or DAS anything.
4. DAS and Novo are each represented by an owner or principal. Mr. Foley is representing himself and Mr. Lemay.

JURISDICTION AND PROCEDURE

5. 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.
6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a "he said, he said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanor in a courtroom or tribunal

proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. 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 recent decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

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 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.

ISSUES

9. The issue in this dispute is which party, if any, is responsible for paying DAS \$2,908.12 for their outstanding invoice.

EVIDENCE AND ANALYSIS

10. In a civil claim like this one, DAS must prove their claim on a balance of probabilities. This means I must find it is more likely than not that DAS's position is correct. Mr. Foley and Mr. Lemay are also responsible for proving their third party claim on a balance of probabilities.
11. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.

12. Mr. Lemay and Mr. Foley co-own a cabin on an island near West Vancouver (property). The solar energy system on the property was destroyed in a windstorm and they made an insurance claim. Their insurer's restoration contractor was Canstar Restorations (Canstar).
13. On January 16, 2017, Novo provided an estimate to Mr. Foley and Mr. Lemay to supply and install a replacement solar energy system for \$22,321.97. On April 18, 2017 Novo provided an updated estimate for \$26,541.37. Novo says Canstar accepted this estimate, Novo completed the entire project, and Canstar paid Novo in full for the work. Novo submitted an email from Canstar dated March 5, 2019 which supports these claims.
14. Novo's updated estimate included a line item for "Generator auto start with temperature and voltage starting" for \$411.45 and a line item for "complete electrical wiring, permit and connection" for \$7,892. However, Novo says the generator itself was not damaged and therefore it was not included in Mr. Foley's insurance claim, so Novo did not replace the existing generator. Novo says the generator worked well and had adequate power supply, but it did not have the capacity to connect to an auto start system. Novo says they informed Mr. Foley and Mr. Lemay of this situation on May 8, 2017. Novo says its representative made it very clear to Mr. Foley that he would have to start his generator manually if the batteries ran low.
15. Neither Mr. Foley nor Mr. Lemay dispute any of this, but they say Novo should not have charged Canstar the \$411.45 for the auto start system if it was not compatible with the existing generator. Novo says they included the auto start as a courtesy in case Mr. Foley decided to replace the generator at a later time. However, it is undisputed that it was Canstar, not Mr. Foley or Mr. Lemay, that paid Novo for its work, which included the \$411.45 charge for the auto start system. Therefore, I find Mr. Foley and Mr. Lemay have no standing to make a claim for \$411.45 against Novo.
16. Novo says that once they completed their work at the property Mr. Foley changed his mind and asked Novo about a price for a new generator with an auto start

function. Novo says by that point they did not want to work with Mr. Foley, so they referred him to D.T. at DAS. Neither Mr. Foley nor Mr. Lemay dispute this.

17. Mr. Foley says neither he nor Mr. Lemay ever had any discussions about any additional charges for work associated with replacing the generator. However, I find the evidence proves otherwise. On October 26, 2017 Mr. Lemay texted D.T. asking for an estimate to replace their existing generator with one that had auto start capacity. D.T. estimated it would cost approximately \$10,000.
18. Novo says that after Mr. Foley received D.T.'s estimate he contacted Novo to complain about the cost. Novo says their representative told Mr. Foley there was nothing they could do about it. Novo says that soon after that conversation Mr. Foley contacted Novo again to ask if a generator he found on sale at Walmart for \$3,000 would work with his electrical system. Novo says their representative told him he would refer the question to his electrical engineer, but Mr. Foley was "in a panic" because the generator was on sale and was almost sold out. Novo says their representative looked briefly at the Walmart generator's specifications and noted it had low voltage terminals, so he told Mr. Foley the generator would probably work with the electrical system and the auto start system. Novo says Mr. Foley immediately bought the \$3,000 generator and asked Novo if they would install and connect it. Novo says it referred him to DAS. Neither Mr. Foley nor Mr. Lemay dispute any of this.
19. Mr. Foley says that neither he nor Mr. Lemay ever contemplated that the work to install the new generator would be completed by a company other than Novo. However, I find the evidence before me proves otherwise. On December 17, 2017 Mr. Foley exchanged emails with D.T. about installing a generator auto start system. These emails clearly state that D.T. was communicating as a representative of DAS. The evidence indicates that D.T. had email addresses with both Novo and DAS, and that he worked for both companies. While I appreciate this may have been confusing for Mr. Foley and Mr. Lemay, I find the December 17, 2017 emails are clearly from DAS, not Novo. This is consistent with Novo's

uncontested claim that they did not want to complete any additional work for Mr. Foley and Mr. Lemay, and that they referred them to DAS to install the new generator.

20. On December 23, 2017 Mr. Foley sent Novo and DAS photographs of the new generator he had purchased and placed next to his original generator at the property.
21. DAS says that between January 31, 2018 and February 6, 2018, they connected Mr. Foley and Mr. Lemay's new generator to the electrical system. DAS says at the same time they also installed a set of lights and outlets inside the cabin on the property.
22. Mr. Foley says D.T. came back and forth to the property several times without working for very long, and that on the third day he told Mr. Foley and Mr. Lemay that something went wrong, but he provided no details. After D.T. left, Mr. Foley says he learned the property was without power and he had to stay in a hotel for the night.
23. DAS says the auto start device, which was installed under the Novo contract with the original generator, did not work with the new generator. Novo said the 3 components of the monitoring system (battery monitor, auto start unit, and main display) all worked fine until the new generator was integrated into the household wiring system. Novo determined that one of these 3 components could have been faulty, so they sent them to the manufacturer for replacement under warranty.
24. On February 7, 2018 DAS sent Mr. Lemay and Mr. Foley an invoice for \$2,908.12 including GST which remains unpaid. The invoice states, "supply and installation of material only for generator set, mounted and fueled by others."
25. On March 1, 2018 Canstar sent an email to Mr. Foley setting out a "list of final items warranted or good will that will be done." The list included "Install the BMK. Install the AGS. Set up the new Generator system."

26. On March 6, 2018 D.T. sent an email to Canstar and Mr. Foley from a Novo email address which indicates that on March 5, 2018 he completed some work on the property on behalf of Novo. The email says that work included installing the BMK, AGS, and Display, which had all been replaced by warranty. The email also states, “set up the NOVO SOLAR SYSTEM to accept the already completely installed, functional, and operational second generator system which was working perfectly and installed as a separate contract, prior to Monday, into the factory replaced monitor system.” There is no indication that Novo charged Mr. Foley or Mr. Lemay for this additional work. The bottom of the email states, “I have an outstanding invoice with Mr. Kevin Foley, for the installation of lights and outlet, a switch, and generator installation and commissioning, which he has indicated he will not pay. This issue has not been resolved. None of this work was included in the installation in the NOVO SOLAR contract.”
27. Mr. Foley says the installation work for the new generator is covered on Novo’s invoice, so DAS should not be charging him anything. However, I find this is not borne out by the evidence. Novo’s invoice does not indicate anything about a new generator, and Mr. Lemay’s text messages with D.T in October 2017 clearly contemplate paying D.T. to install a new generator. After D.T. estimated \$10,000 for the work Mr. Lemay responded, “I think that’s a lot of dough. But I can talk to the team.”
28. Alternatively, Mr. Foley says DAS overcharged them for the work, which was just for “installation work – parts only,” and says the work was substandard. While DAS and Novo both agree there were problems with the electrical system after D.T. installed the new generator, I find the evidence establishes that those problems were not caused by D.T.’s substandard work, rather they were caused by malfunctioning parts which Novo replaced in March 2018. There is no evidence to indicate that Mr. Foley and Mr. Lemay experienced problems with their generator or electrical system after Novo replaced the parts on March 5, 2018.

29. For all of these reasons, I find Mr. Foley and Mr. Lemay must pay DAS \$2,908.12 for their outstanding invoice. DAS is entitled to pre-judgment interest under the *Court Order Interest Act* (COIA) on this amount calculated from February 7, 2018, which is the date of the invoice.
30. I find Mr. Foley and Mr. Lemay have not established any basis on which Novo is required to pay DAS's invoice, and therefore I dismiss their third party claims against Novo.
31. Under section 49 of 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. I see no reason in this case not to follow that general rule. Since DAS was successful I find Mr. Foley and Mr. Lemay must reimburse them \$100 in tribunal fees, and \$21 in dispute-related expenses for postage fees, which I find to be reasonable in the circumstances. Since Mr. Foley and Mr. Lemay were unsuccessful in their claims against Novo I find they are not entitled to reimbursement of their tribunal fees. They did not claim any dispute-related expenses.

ORDERS

32. Within 14 days of the date of this order, I order Mr. Foley and Mr. Lemay to pay DAS a total of \$3,089.78, broken down as follows:
 - a. \$2,908.12 as payment of DAS's outstanding invoice,
 - b. \$60.66 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$121 for \$100 in tribunal fees and \$21 for dispute-related expenses.
33. DAS is entitled to post-judgment interest, as applicable.
34. Mr. Foley's and Mr. Lemay's third party claims against Novo are dismissed.

35. 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.
36. 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.

Sarah Orr, Tribunal Member