



Civil Resolution Tribunal

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File: SC-2018-003544

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Fountain v. Wall et al*, 2019 BCCRT 792

B E T W E E N :

Wendy Fountain

APPLICANT

A N D :

Constance Wall and Sandra Child

RESPONDENTS

A N D :

Wendy Fountain

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This dispute is about events arising from the rental and failed purchase and sale of a food truck.
2. The applicant Wendy Fountain says the respondents, sisters Constance Wall and Sandra Child, stole restaurant equipment and supplies from her food truck.
3. Ms. Fountain asks for an order that Ms. Wall and Ms. Child pay:
 - a. \$4,000, being the replacement cost of equipment and supplies taken, and
 - b. \$700 for costs to repair damaged cabinets, hot water tank and pump.
4. The parties agreed that Ms. Child and Ms. Wall would pay a \$300 monthly rent to operate the truck, with an option to purchase.
5. Ms. Child counterclaims against Ms. Fountain for a \$4,000 deposit paid for the food truck.
6. Ms. Fountain says the \$4,000 deposit was a non-refundable down payment toward the “lease-to-own/purchase price” of the food truck.
7. Ms. Wall says that three different written agreements were discussed, but that Ms. Fountain found problems with each of them. The sale of the food truck was to complete on April 25, 2018, but this never happened.
8. Ms. Wall denies wrongly removing any equipment or supplies from Ms. Fountain’s food truck. Ms. Wall and Ms. Child agree that they temporarily removed some items while she and Ms. Child were away.
9. The parties also dispute who is responsible for hydro costs. Ms. Fountain says she paid for hydro when Ms. Wall and Ms. Child should have done so. Ms. Wall and Ms. Child say they paid Ms. Fountain for their share of the hydro, in cash
10. The parties are each self-represented. Ms. Wall is the primary respondent in the main claim, providing submissions on behalf of herself and Ms. Child.

JURISDICTION AND PROCEDURE

11. 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.
12. 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, she 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.
13. 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.
14. 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.
15. 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.

ISSUES

16. The issues in this dispute are:

- a. Is Ms. Fountain entitled to the claimed \$4,700 for damages to or removal of equipment and supplies from the food truck by Ms. Child and Ms. Wall?
- b. On the counterclaim, is Ms. Child entitled to a refund of the \$4,000 deposit paid to Ms. Fountain?

EVIDENCE AND ANALYSIS

17. In the main claim, Ms. Fountain has the burden of proving her claims, on a balance of probabilities. Ms. Child bears that same burden in her counterclaim.
18. On January 18, 2018, Ms. Wall attended at Ms. Fountain's home to discuss buying the café.
19. It is undisputed that on February 13, 2018, Ms. Wall and Ms. Child came to Ms. Fountain's home with \$4,000 in cash. Ms. Fountain accepted the \$4,000 as a deposit, which she says was non-refundable. I find that it was not, for reasons I detail below.
20. A February 13, 2018 receipt that Ms. Fountain provided for the \$4,000 deposit reads "Downpayment on \$20,000 purchase price of Sister's Café & agreed equipment & shed."
21. On March 7, 2018, Ms. Fountain says she drove by the café and found it open, without her consent or knowledge. She says she reminded Ms. Wall and Ms. Child to attend to a written agreement for the purchase as soon as possible.

22. On March 14, 2018, Ms. Fountain went to see Ms. Wall and Ms. Child again. At this point they had not paid the agreed monthly rent.
23. About a week later, Ms. Fountain returned with documents to finalize the sale. She left a copy of the paperwork, which she had signed, with Ms. Wall and Ms. Child.
24. Ms. Wall and Ms. Child did not return the paperwork to Ms. Fountain.
25. In summary, Ms. Child and Ms. Wall attempted buy Ms. Fountain's food truck/mobile kitchen business. However, the sale never completed.

Lease

26. I reviewed two lease documents, which were unsigned, and substantially similar, describing an agreement that Ms. Fountain would rent the food truck business to Ms. Wall and Ms. Child, starting April 1, 2018, on a year-to-year basis. I find that the lease contains the terms of the agreement between the parties.
27. The lease says that if the tenant defaults on payments or any other terms of the lease, the lease will terminate at Ms. Fountain's option and the tenant will vacate the property.
28. The lease specifies \$300 per month in rent, including use of the food truck, decks, tool shed and all included equipment and garden accessories.
29. The draft lease says that all improvements, maintenance, repairs, utilities and "other costs related to the Property" are the Tenant's sole responsibility. I find that utilities includes hydro to run the food truck.
30. If the lease is terminated, the tenant must return the property in the "same state of repair" it was in on April 1, 2018.
31. The draft lease also says the tenant will make required repairs to plumbing, range, heating apparatus and electric and gas fixtures whenever damage occurs.

32. Nothing in the draft lease documents filed by any of the parties says the \$4,000 is non-refundable, nor would anything in those documents imply such a term.
33. On April 15, 2018, Ms. Fountain says Ms. Wall returned the signed lease agreement to her. It was not witnessed. No one filed a copy of this signed version of the agreement in evidence.
34. On April 22, 2018, Ms. Fountain says she agreed to a reduced price of \$16,000 total, made up of the \$4,000 deposit and an expected further payment of \$11,000, plus \$1,000 for the tenure deposit.
35. The parties agree, and I find, that Ms. Child and Ms. Wall paid Ms. Fountain \$300 for March and \$300 for April rent, but that both payments were overdue.
36. However, Ms. Wall and Ms. Child then failed to make any further payments and the agreement fell apart. I find that, by May 1, 2018, Ms. Child and Ms. Wall had left the food truck.
37. Ms. Fountain discovered that Ms. Wall and Ms. Child had moved their food business to a new location.
38. Ms. Fountain says that Ms. Wall and Ms. Child took her supplies and left some of her equipment damaged. She says she reopened again on June 16, 2018.

The \$4,000 Deposit

39. The \$4,000 deposit is a central issue in this dispute. Although it arises in the counterclaim, I find it efficient to determine it first.
40. I find that the \$4,000 deposit was refundable to Ms. Child and Ms. Wall, because neither the written lease agreement nor the receipt Ms. Fountain issued for the deposit said that it was non-refundable. As such, I prefer the evidence of Ms. Child and Ms. Wall on this point, because their evidence is more consistent with the documents than that of Ms. Fountain.

41. I find that, once the lease agreement was ended by Ms. Child and Ms. Wall vacating the premises, Ms. Fountain was entitled to the return of the food truck and its surrounding area in the condition it was in on April 1, 2018.
42. At the same time, Ms. Fountain was obliged to refund the \$4,000 deposit, less any damage to the premises or equipment, utilities and or other tenant's obligations under the agreement.
43. I allow the counterclaim by Ms. Child for the return of the \$4,000 deposit.
44. However, I now turn to the extent to which the \$4,000 refund should be reduced to account for items taken, or damage to the premises by Ms. Child and Ms. Wall, utilities and other expenses, as set out in Ms. Fountain's claim.
45. Ms. Fountain did not explain precisely how her alleged damages add up to the \$4,000 she claimed. I have addressed the particular items at issue below.

Hot Water Tank and Pump

46. Ms. Fountain claims that the hot water tank and pump from the business were damaged.
47. I accept the evidence of Ms. Child and Ms. Wall that the hot water tank that came with the food truck was not working properly. The health inspection documents show it was not heating to the required temperature. Therefore, I find it was reasonable for Ms. Child and Ms. Wall to replace the hot water tank. The lease agreement specifies it was their responsibility to do so.
48. The receipt filed in evidence shows that the new hot water tank cost \$373.46. Under the lease agreement, Ms. Child and Ms. Wall were not permitted to take the hot water tank with them, but I find that they did so. I base my finding on their admission that they took equipment and supplies to one of their homes, and their video showing that the hot water tank was missing after the end of their rental.

49. On August 4, 2018 Ms. Fountain bought a new pump for \$134.39. I find that this cost was also incurred due to damage by or the removal of the hot water tank.
50. I find that Ms. Fountain may reduce the refund of the \$4,000 deposit by \$507.85 for these items.

Sandwich Board

51. I find, based on photographs filed in evidence, that Ms. Child and Ms. Wall took the sandwich board and continued to use it after the lease agreement ended.
52. No receipts were provided to value the sandwich board. I find that that the sandwich board was an asset of the business and value it at \$20, on a judgment basis.

Equipment and Supplies

53. Ms. Fountain filed a series of receipts for items she says she bought to replace things that Ms. Child and Ms. Wall removed when they left. These receipts are as follows:
 - a. On June 26, 2018, for purchase of a cutting board, several condiment bottles and a steak weight for \$90.92.
 - b. On July 3, 2018 for purchase of two fryer filters and one more condiment bottle, \$14.34.
 - c. On July 14, 2018, a hose for \$29.99.
 - d. On July 23, 2018, six platter baskets and 3 more fryer filter cones, for a combined cost of \$21.30.
 - e. March 2015, a salad spinner for \$24.99.
 - f. April 2015, Ms. Fountain a buffet server and a jumbo cooker for a total cost of \$60.

- g. March 2015, a hamburger patty maker and some hamburger disk separators for \$13.42.
- h. March 2015, a griddle for \$44.99 and a square mesh skimmer for \$4.48.
- i. A tote and store for \$197.95, which she says Ms. Wall and Ms. Child damaged causing broken parts she values at about \$40.
- j. 14 fry baskets valued at \$12.60, based on a per unit price from Ms. Fountain's June 2016 purchase of 24.
- k. a glass decanter (Bunn coffee pot) for \$15.00.
- l. two steak weights valued at \$10.80 each.

54. I accept Ms. Fountain's evidence that some supplies, which were not perishable, were removed from the food truck by Ms. Wall and Ms. Child when they departed. For these items, based on the receipts filed in evidence, I find that Ms. Fountain may reduce the refund of the \$4,000 deposit by a further \$382.83.

Propane Tanks and Refills

55. Ms. Fountain also claims for propane tanks and propane refills she bought in August 2018. While I find that there were propane tanks that were removed or discarded by Ms. Wall and Ms. Child, I find that the propane itself is not something that Ms. Fountain is entitled to compensation for. I say this because there is no evidence as to whether the tanks were full when Ms. Wall and Ms. Child started renting nor is there evidence of how much propane was used during their rental.

56. I allow Ms. Fountain's claim for the propane tanks, for a total of \$71.98.

Hydro Bill

57. Ms. Fountain filed a hydro bill showing a total of \$224.93 due May 22, 2018, for late February to late April inclusive.

58. Ms. Wall and Ms. Child say they paid Ms. Fountain cash for the hydro bill, but they did not file a receipt for the cash payment in evidence. I find that they did not give Ms. Fountain cash for the Hydro bill.
59. I find that, because Ms. Wall and Ms. Child rented the food truck for March and April 2018, Ms. Fountain may reduce the \$4,000 deposit further by hydro costs for this interval, which I accept was \$224.93.

Property Taxes

60. Property taxes for 2018 for the café lot were \$336.35. Ms. Fountain argues that Ms. Wall and Ms. Child were to pay 50% of this cost, because they used the café grounds for three months of the six month “season”.
61. I find that Ms. Wall and Ms. Child were tenants for only two full months. They are responsible for property taxes for this period, under the lease, which I calculate at \$56.04. I find that Ms. Fountain may reduce the deposit repayment by this amount.

Cabinet

62. I do not allow Ms. Fountain’s claim for damage to a cabinet or a missing cabinet.
63. Although she filed a photograph showing a cabinet was missing by June 2018, relative to an earlier photograph, I find that Ms. Fountain did not prove that the cabinet was in place at the time of renting the business to Ms. Child and Ms. Wall. I also find that Ms. Fountain did not she prove the cost of replacing or repairing it.

Miscellaneous Items

64. On June 14, 2018, Ms. Fountain bought parts for a propane conversion kit and a fryer filter for a total of \$312.31. I do not allow these claims by Ms. Fountain, since she did not prove, on a balance of probabilities, that these items were in good repair when Ms. Child and Ms. Wall rented the food truck, nor that they were either damaged or taken.

65. On June 14, 2018, Ms. Fountain purchased a gazebo for \$108.64. I do not allow this claim, because I did not have evidence about the gazebo's condition at the time of the rental, nor of damage to the gazebo by Ms. Wall or Ms. Child.
66. Ms. Fountain also filed in evidence a July 5, 2016 receipt for greenware cups, lids and straws for which she paid \$237.23.
67. On July 26, 2018 Ms. Fountain bought 2000 12 x 12 black checkerboard sheets for a cost of \$54.84.
68. On June 12, 2018, Ms. Fountain bought a package of hamburger foil bags at a cost of \$99.89.
69. I deny these claims, and Ms. Fountain's other claims to usable packaging and flatware, because I find Ms. Fountain did not prove these items were provided when the food truck was rented, nor that Ms. Child and or Ms. Wall took them.

Summary

70. I allow Ms. Child's counterclaim and order that Ms. Fountain repay her the \$4,000 deposit paid by Ms. Child and Ms. Wall, minus the following damages for replacement of items taken or broken, in the total amount of \$1,263.63:
 - a. Hot water tank and pump, \$507.85,
 - b. Sandwich board, \$20,
 - c. Equipment and supplies, \$382.83,
 - d. Propane tanks, \$71.98,
 - e. Hydro expenses, \$224.93, and
 - f. Property taxes, \$56.04.

71. In summary, I find that Ms. Fountain must pay Ms. Child and Ms. Wall \$2,736.37, being the \$4,000 deposit less the \$1,263.63 for equipment, damage, and other expenses.
72. 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. Ms. Fountain was largely successful in her claim, and Ms. Child succeeded on the counterclaim. I order all parties to bear their own tribunal fees and expenses.

ORDERS

73. Within 30 days of the date of this order, I order Ms. Fountain to pay Ms. Wall and Ms. Child a total of \$2,789.50, broken down as follows:
- a. \$2,736.37 as the remaining refund of their \$4,000 deposit under the lease agreement after set-off of amounts owing to Ms. Fountain and
 - b. \$53.13 in pre-judgment interest under the *Court Order Interest Act*, calculated from May 1, 2018 to the date of this decision.
74. Ms. Wall and Ms. Child are entitled to post-judgment interest, as applicable. The balance of the parties' claims are dismissed.
75. 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.
76. 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.

Julie K. Gibson, Tribunal Member