Civil Resolution Tribunal

Date Issued: July 5, 2019

File: SC- 2018-005409

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *White v. Burton*, 2019 BCCRT 807

B E T W E E N :

Tamara White

APPLICANT

A N D :

Reeve Johnni Burton

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. The applicant, Tamara White, claims that the respondent, Reeve Johnni Burton, refused to pay for renovation services she performed at his condominium. She says the respondent owes her $4,580.00 for her services plus interest of 5% per year.

2. The respondent denies the claim. He says the applicant was his realtor under a BC Multiple Listing Service (MLS) contract for the sale of his condominium. He says the applicant's claim for $4,580.00 is inflated and she did not competently perform her services. He says in any event, that the applicant was paid in full for her renovation services through the brokerage when the property sale closed.

3. The applicant says she performed the services competently. She says she was not paid for her renovation services through the brokerage fees. Instead, she says the respondent agreed to pay her an hourly rate after the condominium sold and he did not pay.

4. The parties are each self-represented.

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, she said" scenario. Credibility of interested 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. 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.

7. 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.

8. 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.

9. 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

10. The issue in this dispute is what amount, if any, does the respondent owe the applicant for the renovation services.

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicant bears the burden of proving her claims on a balance of probabilities. The parties submitted extensive evidence and arguments. While I reviewed all the parties' material, I have only addressed what I find necessary to explain my decision.

12. In 2016, the applicant acted as the respondent's real estate agent for the sale of his condominium in Port Moody, British Columbia. In August 2016, the respondent

decided to make some upgrades to the condominium before listing it. He asked the applicant to help coordinate the contractors and material. He promised to pay her for the work and she agreed. The parties dispute the scope of the work and the payment terms, which I discuss later.

13. On September 1, 2016, the respondent started the renovations with the applicant's help. According to the text messages, the respondent was mostly out of town and the applicant coordinated the renovations on site. The renovations were complete and the condominium was listed on Realtor.ca, by about October 5, 2016.

14. The condominium sold in November 2016 and the brokerage paid the applicant's commission. It is undisputed that the respondent did not pay the applicant any additional amount for her renovation services. In his Dispute Response filed at the outset of this proceeding, the respondent said that the applicant was paid in full through her brokerage as per section 5 of their MLS contract "Brokerage Renumeration". The respondent did not provide a copy of the MLS contract. In its absence, I find I have no reliable evidence of the contract date or the specific brokerage renumeration. I infer the contract was a standard BC Real Estate Association contract where the brokerage is paid on a percentage-based commission. I also infer the contract did not expressly include the applicant's renovation services since the respondent did not say that they had added them to the schedule of services.

The Renovation Contract

15. Based on the parties' text messages and submissions, I find in August 2016, the parties had initially agreed that the respondent would pay the applicant an additional 1% to 2% commission to help coordinate the renovations. I also find that after entering into the commission-based agreement, the parties mutually increased the scope of the applicant's renovation services beyond mere coordination.

16. The applicant was a new realtor who had just obtained her license. She says that after agreeing to be paid on a commission basis, she learned that payment for

renovation services was not permitted in MLS contracts. The applicant says the respondent agreed that he would instead pay her an hourly rate, separate and apart from the listing contract.

17. The respondent says that on about September 22, 2016, the applicant called him to say that adding 1% on her first sale would look "shady". He says he did not appreciate the late timing but did not want to "sabotage her new job". The respondent does not say that he refused to change the payment agreement. Instead, he says he remembers "responding by taking a deep breath and slowly exhaling through [his] nose to show [his] disapproval" and that he said something to leave the conversation on a "good note" like "well let's get this place listed".

18. On September 22, 2016, the applicant texted the respondent to say she would charge the applicant for her "reno / project management time but we can work that out after the sale. It'll certainly be cheaper than the labourers". The respondent replied within about 3 minutes, "Yup for sure. I know it's been a crazy ride. Not too many people I would have trusted to get things done". In a later text message, the respondent asked the applicant to send him her hours. He also paid the applicant's invoices for her out of pocket expenses, namely items she purchased on his behalf and for her daughter's cleaning services.

19. Based on the parties' recall of the conversation, together with their text messages, I find that the respondent agreed to pay the applicant for her renovation services on an hourly rate. The exact rate was not determined at the outset.

20. The applicant had already performed most of the renovation services by the time the parties changed the payment agreement. However, at common law, if the variation in the parties' terms is enforceable, she would still be entitled to reasonable payment for the services she performed over the course of the renovation. This is known in law as '*quantum meruit'*, or value for the work done.

21. When parties to a contract agree to vary its terms, the variation is enforceable as long as there is no duress, unconscionability or other public policy reason not to

enforce the contract. Although the existence of consideration (something of value given by each party) is a factor to consider, it is not necessary that there be "fresh consideration" to enforce a variation (see *Rosas v. Toca,* 2018 BCCA 191).

22. While the respondent submits that he was displeased with the change, I find he provided no evidence of duress or unconscionability. I find the parties varied both the scope and payment terms of their verbal agreement. I find the applicant had performed the renovation services and after they varied the terms, continued to perform them in reliance on being paid. I find she completed the renovation services in time for the sale. I find the respondent benefited from her renovation services, particularly because he was out of town and not able to perform the services himself. He also benefited because the evidence shows he received a comparatively good price on the sale. I find the parties' variation of the agreement is enforceable. I find its terms require the respondent to pay the applicant an hourly rate for her renovation services.

Hourly Rate and Number of Hours Worked

23. I find the parties' verbal agreement did not specify the hourly rate. The first mention of an hourly rate is when the applicant sent the respondent her invoice on January 15, 2017. In the body of the email attaching the invoice, the applicant wrote, "I am charging a minimum of $35/hr; however, if you are pleased with the results, I leave it to your discretion to pay a higher rate for my services." In this first invoice, she charged 99.50 hours. The invoice has no due date.

24. The parties' subsequent communication shows the respondent disputed the invoice. Around February 17, 2017, the applicant sent the respondent a revised invoice for $4,580, which is the amount claimed in this dispute. The February invoice is for the same work, but the applicant increased her rate to $40 per hour and billed 114.50 hours, adding 15 extra miscellaneous hours. The invoice states it is due within 30 days.

25. The applicant submits that I should find she is entitled to be paid $40 per hour. She says this rate is reduced from her normal $85 per hour rate and her services increased the profit on condominium sale by over $65,000.

26. I find the applicant's renovation services were mostly coordinating and communicating with the respondent's contractors at the job site, providing status updates, shopping, and carrying out some minor repairs and installations, and some minor sanding, cleaning and painting. The applicant provided no evidence that she was in the renovation business or had a normal rate for renovation services. She also provided no evidence of the industry standard rate for these services.

27. To the extent her work increased the value of the condominium sale, I find this is not the appropriate measure of her hourly rate. The evidence does not prove that the applicant's renovation services increased the selling price by a certain amount. In any event, hourly rate is not the same as a percentage commission.

28. I infer from the applicant's first invoice that she had decided in January that $35 per hour was an acceptable value for her services. The applicant has not justified that the value should be more. The respondent did not address the appropriate value in his submissions. I find on a *quantum meruit* basis that $35 per hour is an appropriate hourly value for her renovation services.

29. The applicant claims 114.50 hours for her renovation services. The respondent argues that the applicant's hours are inflated because she claims for work she did not perform, he did not ask her to perform or was performed for others. It is undisputed that the applicant had not tracked or provided her hours to the respondent over the course of the job. She also provided no time sheet.

30. On review of the parties' text messages, I find they provide some account of the work the applicant performed, and the work the respondent had agreed to. The parties exchanged texts either daily or several times a week on the progress of the renovation and the work she had performed on a given day. In the absence of any time sheets and written contract setting out the scope of the work, I have assessed

the number of hours by comparing the parties' texts to the daily list of services the applicant described in her February invoice. I could find not more than 45 hours of work that where both accounted for and agreed on. I found that the large number of hours the applicant listed for painting, cleaning and miscellaneous were not supported by the evidence.

31. On a balance of probabilities, I find it more likely than not that the applicant had performed 45 hours of work related to the renovation services. I find subject to any set-off, that the respondent owes the applicant a total of $1,575 for the renovation services, which I calculated based on 45 hours at $35 per hour.

32. The parties made significant submissions about whether the applicant performed the renovation services competently and caused any increased costs or delays. While it appears that there were some problems with the contractors, it was the respondent who hired and dealt with the contractors' deficiencies by email. The respondent has not established that the applicant was responsible for the deficiencies in her role as a coordinator or that she caused the deficiencies. I find over the course of the renovation the respondent expressed no concern and instead had praised the applicant's work by texts message. Further, apart from his own submission, the respondent has provided no evidence to establish that he suffered any loss as a result of the applicant, or at all. Therefore, I apply no set-off to the award.

33. The applicant argues that she is entitled to 5% interest per year calculated from January 2017. I find the parties made no agreement to the interest rate. I find the applicant is entitled to pre-judgment interest of $44.97 under the *Court Order Interest Act*, calculated from March 19, 2017, which is the due date stated in the February invoice on which she based her claim.

False Statement

34. The respondent submits that the applicant made a false statement to the tribunal, with the intention to mislead, which is an offence under section 92 of the Act. The

applicant wrote in her submissions that she did the renovation work before becoming a fully licensed realtor. The respondent says this is clearly false because she sent him a text message in August that she was licensed. The applicant's licensing information with the Real Estate Commission of BC is not in evidence.

35. The applicant explains that her statement is true. She received her license before she performed the renovation services, but still needed to complete the applied practice course before completing the full requirements. I find the applicant's explanation is consistent with the Real Estate Commission of BC rules that allow a new realtor to complete the applied practice course after receiving their license. The evidence does not establish that the applicant intended to mislead the tribunal.

Fees and Dispute-Related Expenses

36. 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 find the applicant was partially successful and allow half her tribunal fees and dispute-related expenses. The applicant submitted receipts in the amount of 479.10 for expenses she incurred in serving the respondent. I find the evidence supports that she had difficulty serving the respondent and these expenses were reasonably incurred. Therefore, I find the applicant is entitled to reimbursement of $87.50 in tribunal fees and $239.55 in dispute-related expenses.

ORDERS

37. Within 30 days of the date of this decision, I order the respondent to pay the applicant a total of $1,946.97, broken down as follows:

    a. $1,575.00 as payment for renovation services

    b. $44.92 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $327.05, for $87.50 in tribunal fees and $239.55 for dispute-related expenses.

38. The applicant is entitled to post-judgment interest, as applicable under the *Court Order Interest Act*.

39. 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.

40. 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