



# Civil Resolution Tribunal

Date Issued: July 18, 2019

File: SC-2018-009472

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *O'Neill v. JTorres Construction Ltd.*, 2019 BCCRT 867

B E T W E E N :

DEREK O'NEILL

**APPLICANT**

A N D :

JTORRES CONSTRUCTION LTD.

**RESPONDENT**

A N D :

DEREK O'NEILL

**RESPONDENT BY COUNTERCLAIM**

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**REASONS FOR DECISION**

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Tribunal Member:

Julie K. Gibson

## **INTRODUCTION**

1. This dispute is about residential construction services.
2. The applicant Derek O'Neill says the respondent JTorres Construction Ltd. (JTorres) did unsatisfactory renovation work in a bathroom.
3. Mr. O'Neill asks for an order that JTorres pay him \$1,383.23 in damages, broken down as:
  - a. \$975.23 to pay another contractor to install a shower kit, toilet and sink and to repair problems with the shower tiles,
  - b. \$74.00 to replace a shower-wand head he says was damaged,
  - c. \$54.00 to replace a damaged toilet lid,
  - d. \$280.00 to repair a damaged bath tub.
4. JTorres says Mr. O'Neill owes it money for construction work completed outside the scope of their contract. JTorres counterclaims for \$1,230.00 in debt, broken down as:
  - a. \$280.00 for faucet gasket replacement,
  - b. \$350.00 for countertop installation,
  - c. \$350.00 to remove a mirror and repair a wall, and
  - d. \$250.00 to remove the toilet and install a new one.
5. Mr. O'Neill is self-represented. JTorres is represented by principal Jose Torres.

## **JURISDICTION AND PROCEDURE**

6. 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.

7. 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, he 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.
8. 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.
9. 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.
10. 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**

11. The issues in this dispute are:

- a. whether or to what extent Mr. O'Neill is entitled to damages for JTorres' bathroom renovation work that he says was unsatisfactory, and
- b. on the counterclaim, to what extent Mr. O'Neill should pay JTorres for bathroom renovation work it says it completed, but for which it was not paid.

## **EVIDENCE AND ANALYSIS**

12. In this civil claim, Mr. O'Neill bears the burden of proving his claim on a balance of probabilities. JTorres bears that same burden in its counterclaim.

13. A contractor is a person engaged by an owner to provide work or supply material for a renovation. A subcontractor is someone the contractor then engages to perform work or supply material for that job.

14. I find that Mr. O'Neill hired JTorres, as a contractor, for a bathroom renovation. I find that JTorres' plumber was a subcontractor. I find that JTorres is a properly named respondent to Mr. O'Neill's claims. Mr. O'Neill does not need to name the plumber in this dispute.

15. On September 8, 2018, JTorres provided a written estimate to Mr. O'Neill. The estimate specifies work on the bathroom including:

- a. replace controllers for shower,
- b. supply and reinstall drywall for damage,
- c. install new bathtub,
- d. install regular size tile surround bathtub,
- e. grout tile, and

- f. dispose of garbage created by the project and do a final clean.
16. The estimate was signed only by Mr. Torres. Mr. O'Neill did not contest the contents of the written agreement, except to argue that some extras were added verbally. As I explain below, I find that some verbal and handwritten extras were added later. I find that the estimate was a written agreement between the parties (contract), with Mr. O'Neill providing the bathtub, grout, tile and shower controllers.
17. The contract also included work on a bedroom, for a total price of included items at \$3,750.
18. Based on the banking documents provided, I find that Mr. O'Neill, through NK, paid \$3,750 in full payment for the included items under the contract.
19. Based on a handwritten addendum to the contract, I find that the parties agreed to extras for a total of \$995, as follows:
  - a. removal of carpet and disposal - \$300
  - b. remove heat and fir wall - \$60
  - c. install baseboard - \$250
  - d. remove and dispose of a cabinet - \$120
  - e. install a cabinet – no price specified on contract
  - f. install sink - \$180
20. Jtorres says that the extras did not include a charge to install the sink. I disagree. The contract that he filed in evidence specifies sink installation for \$180, and I find that this was paid.
21. On September 29, 2018, Mr. O'Neill paid the \$995 to Jtorres, by e-transfer.
22. Based on text messages file in evidence, I find that Jtorres agreed not to charge separately for cabinet installation.

## ***Second Contractor – Repair of Deficiencies***

23. At the request of Mr. O'Neill, Paul Nelson of Big Reach Construction reviewed the bathroom renovation done by JTorres. Mr. Nelson provided a November 5, 2018 letter saying that JTorres' bathroom renovation was incomplete, contained several errors and displayed poor workmanship. I accept Mr. Nelson's opinion, as an experienced contractor, that the JTorres' work fell below a satisfactory standard.
24. Mr. Nelson and his subcontractors completed the following tasks:
- a. removing three tiles to place the shower head at the proper height, including extending the water pipe leading to the shower, then replacing and grouting the tiles,
  - b. removing and replacing some tiles around the diverter and the shower bar, because JTorres had made the holes too large at the first installation, resulting in a "visibly rough finish",
  - c. fixing the bathroom vanity countertop that was installed "out of square" and with backsplash pieces glued to the wall askew, by removing the vanity and countertop, sliding them over ½ inch into the drywall, and
  - d. re-installing the undermount sink and hooking up drainage and waterlines.
25. Mr. Nelson repaired the defects in JTorres' work for a total of \$900.23, broken down as \$758.62 labour and \$141.61 materials. I find that the \$900.23 should be reimbursed to Mr. O'Neill by JTorres, for the reasons that follow.

## ***Height of Shower Head***

26. The parties disagree about whether the pipe to connect the shower head was to be installed at the higher of two locations on the shower wall.
27. Based on the weight of the evidence, including photos and a specification sheet plus Mr. Nelson's opinion, I find JTorres had installed the shower head too low,

bearing in mind the instruction was to install it at 6'5", to accommodate a 6'2" tall person. JTorres failed to install the shower head correctly.

### ***Bathroom Vanity, Countertop and Undermount Sink***

28. Mr. O'Neill says the JTorres' subcontractor shifted their vanity forward and secured the countertop in a different location than they had chosen, leaving a "thumb-sized gap" between the wall and the counter, and a hole in the drywall. As well, Mr. O'Neill says the plumber cut a piece of Mr. O'Neill's brand new vanity.
29. Mr. O'Neill says JTorres refused to refund his money for this problem.
30. JTorres says the sink position was specified by NK in a text message and installed there in a satisfactory way. I find that the text message does not prove that the sink was installed properly, or as NK requested.
31. The photographs of the sink installation show sloppy overuse of silicone. The photographs also show other defects in the bathroom work, including a large space left between the floor tiling and the wall behind the toilet. Based on these photographs, and Mr. Nelson's opinion, I find that JTorres' installation of the vanity, countertop, undermount sink and tiling, was unsatisfactory.

### ***Bathroom Tiles***

32. Mr. O'Neill says JTorres cut holes in the tiles that were too large, meaning that the holes were still visible once the shower fixtures were in place.
33. The photographs of JTorres' completed work prove that the tiling was incomplete. They also show that there was excess silicone used in the bathroom work. Based on these photographs, and Mr. Nelson's opinion, I find that the bathroom tiling was unsatisfactory.
34. Given my findings above, I order JTorres to reimburse Mr. O'Neill the \$900.23 he paid Mr. Nelson to repair the deficiencies in JTorres' work.

35. Tiles were to be provided by Mr. O'Neill for JTorres' work. Mr. O'Neill filed a receipt for \$233.88 paid for tiles in December 2016. Mr. O'Neill says this is an example of the cost of replacement tiles. Mr. O'Neill did not provide a receipt for replacement tiles purchased for Mr. Nelson's repair work, but he claims \$75. Mr. O'Neill says he bought the replacement tiles from his parents. I find that \$75 is a reasonable claim for the replacement tiles. I order that JTorres reimburse Mr. O'Neill for \$75 for the tiles.

### ***Shower Wand***

36. Mr. O'Neill says JTorres' plumber chipped and damaged the shower-wand head when installing it. JTorres denies damaging the shower-wand head.

37. Mr. O'Neill filed an October 8, 2018 email sent by NK to JTorres' including photographs of the chipped shower wand. JTorres says that because a separate text message from NK to him did not mention the shower wand damage, it did not occur. I disagree. The October 2018 email from NK shows damage to the shower wand, raised with JTorres close in time to the job being completed.

38. I find that JTorres damaged the shower wand. I order JTorres to pay Mr. O'Neill \$74.00, which I find is a reasonable replacement cost for the shower wand.

### ***Toilet Seat***

39. Mr. O'Neill says that his new toilet seat was also scratched during the renovation by JTorres. JTorres denies causing this damage.

40. No photographs were filed in evidence proving that the toilet seat was damaged. I find that Mr. O'Neill has not met the burden of proof on this aspect of his claim. I dismiss the claim for \$54.00 for toilet seat replacement.

### ***Bath Tub Damage***



41. NK says that JTorres told her it was safe to use the bath, providing she did not fill the bath from its tap, part way through the bathroom renovation. Mr. O'Neill then used the bath, only to have a loose tile fall, cut his foot and chip the bathtub.
42. JTorres says the tub damage was caused by Mr. O'Neill. JTorres says he should not have to pay for it.
43. I disagree. I find that the tub damage was caused by JTorres or his subcontractor leaving a tile in a precarious position, and then instructing NK that the tub could be used.
44. I allow the claim for bath tub damage. However, Mr. O'Neill did not file any evidence to prove the cost to repair the minor defect in the tub. There is no evidence that a \$280 refund is warranted. Based on the photographs, I find the damage is a minor cosmetic issue that does not dictate a replacement. On a judgement basis, I award \$25 for the defect.

### ***Counterclaim***

45. In his counterclaim, JTorres says Mr. O'Neill failed to pay for the following renovation services:
  - a. \$280.00 for faucet gasket replacement,
  - b. \$350.00 for countertop installation,
  - c. \$350.00 to remove a mirror and repair a wall, and
  - d. \$250.00 to remove the toilet and install a new one.

### ***Faucet Gasket***

46. Mr. O'Neill says JTorres installed a bathtub spout that leaked. Mr. O'Neill says that JTorres' plumber acknowledged that the installation was unsatisfactory. The plumber said the problem was likely a broken gasket. Mr. O'Neill says the plumber did not fix it.

47. A new faucet was installed by another contractor.
48. Mr. O'Neill filed text messages between NK and JTorres proving that the faucet was leaking shortly after JTorres installed it. As well, Mr. O'Neill provided video footage that shows the faucet leaking.
49. Jtorres did not file evidence to prove that it replaced the gasket or the faucet. Based on the evidence from Mr. O'Neill, I find that the faucet was faulty and was not replaced or repaired by JTorres.
50. I dismiss JTorres' counterclaim for \$280 for faucet gasket replacement.

### ***Countertop***

51. JTorres says it installed a countertop for Mr. O'Neill but was not paid.
52. Mr. O'Neill says JTorres told him that there would be no additional charge for the countertop installation, and it was not charged in JTorres' final invoice.
53. While I agree that the written contract does not include countertop installation, I have found that JTorres installed the countertop out of square. Even if Mr. O'Neill agreed to pay separately for the installation, I find he was not obliged to pay JTorres because the installation had to be fixed. I therefore find that JTorres is not entitled to any payment for the countertop. I dismiss this aspect of his counterclaim.

### ***Mirror Removal and Wall Repair***

54. JTorres says it removed a mirror and fixed the wall behind it, at Mr. O'Neill's request. JTorres says it was not paid for this work.
55. Mr. O'Neill says this work was built into the bathroom renovation contract. He says it was not charged separately, nor included as a line item in JTorres' final invoice.

56. I agree with Mr. O'Neill. I find that drywall repair within the bathroom was included in the contract. As such, JTorres is not entitled to additional payment for it. I dismiss this aspect of his counterclaim.

### ***Toilet Removal and Installation***

57. JTorres says it removed a toilet and installed a replacement at Mr. O'Neill's request.

58. Mr. O'Neill says he paid in full for the bathroom renovation. Mr. O'Neill says JTorres verbally agreed to remove the toilet and install the replacement.

59. The written contract did not include toilet removal and installation. However, given that JTorres did not include this work in his extras invoice, I find that he agreed to include it without additional charge. I dismiss this aspect of JTorres' counterclaim.

### ***Tribunal Fees and Dispute-Related Expenses***

60. 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. I find Mr. O'Neill is entitled to reimbursement of \$100 in tribunal fees and \$29.30 in dispute-related expenses for courier delivery of the Dispute Notice, which I find reasonable.

61. In his counterclaim, JTorres claimed \$560 for an expert report. He did not file an expert report in evidence. I have dismissed the counterclaim. It follows that I dismiss JTorres' claims to tribunal fees and dispute-related expenses in his counterclaim, including the \$560 expert report claim.

## **ORDERS**

62. Within 30 days of the date of this order, I order JTorres to pay Mr. O'Neill a total of \$1,216.10, broken down as follows:

- a. \$1,074.23, made up to \$900.23 for repair work, \$75 for tiles, \$74 for a replacement shower wand and \$25 for damage to the bathtub,
- b. \$12.57 in pre-judgment interest under the *Court Order Interest Act*, which I calculate from December 5, 2018, 30 days after the repair invoice was due, to the date of this decision, and
- c. \$129.30, for \$100 in tribunal fees and \$29.30 for dispute-related expenses.

63. Mr. O'Neill is entitled to post-judgment interest, as applicable.

64. I dismiss the remaining claims, including JTorres' counterclaim.

65. 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.

66. 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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Julie K. Gibson, Tribunal Member