Civil Resolution Tribunal

Date Issued: July 31, 2019

File: SC-2018-008822

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Hao v. Au et al*, 2019 BCCRT 928

B E T W E E N :

Peng Hao

APPLICANT

A N D :

Wing Yuen Au, Xia Fan and HOUSEWISE CONSTRUCTION LTD. dba SEGAL DISPOSAL

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This is a contractual dispute. The applicant, Peng Hao, says that he signed a contract for waste disposal services with the respondents. In anticipation of the sale of his business, the applicant says the respondents agreed to terminate the contract

in exchange for $3,452.40, which the applicant said was to be returned when he sold his business. The applicant paid the money to the respondents, but says that they refused to return the money to him once the business was sold. He seeks an order that the respondents repay him the $3,452.40.

2. The respondents deny responsibility for the damages claimed by the applicant. The respondents HOUSEWISE CONSTRUCTION LTD. dba SEGAL DISPOSAL (Segal) and Wing Yuen Au say that the payment was made to terminate the agreement, and there was no agreement to refund money to the applicant. The respondent Xia Fan says that she is Segal's employee and is not a proper party to this dispute.

3. The applicant is self-represented. Mr. Au, who is a director of Segal, represents both Segal and himself. Ms. Fan is self-represented.

JURISDICTION AND PROCEDURE

4. 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.

5. 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, they said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour 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. Here, I find that I am able to properly assess and weigh the documentary evidence and submissions before me. 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 in *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.

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 one or more of the following orders, where permitted under section 118 of the Act:

    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 respondents must refund $3,452.40 to the applicant.

EVIDENCE AND ANALYSIS

9. In a civil dispute such as this, an applicant bears the burden of proof on a balance of probabilities. The parties have provided evidence and submissions in support of their respective positions. While I have considered all of this information, I will refer to only that which is necessary to provide context to my decision.

10. There is no dispute that, on July 7, 2012, the applicant signed an agreement with Segal for waste disposal services for his business, Yin Xue Restaurant Limited (Yin Xue). The agreement contemplated a 60-month term with a renewal for a

successive 60-month term unless the contract was terminated not more than 120 days and not less than 90 days prior to the renewal date. As the applicant was under contract with another service provider, the service effective date was delayed until June 1, 2017.

11. In late 2017, the applicant was in the process of closing Yin Xue and asked Segal to remove the waste bins. He says that, as there was no response, he attended Segal's offices with his wife and a friend, Mr. W. According to the applicant, the parties signed a supplemental agreement that he would pay a deposit of $3,452.00 which would be returned to him after the business closed and the closure was "registered" with the appropriate government authority. The applicant says that Ms. Fan told him that she and Mr. Au would be responsible to return the money. He says that Segal removed the bins and stopped its services.

12. The Registrar of Companies issued a Certificate of Dissolution for Yin Xue on May 7, 2018. The applicant says he contacted Segal to ask for the return of the deposit but did not receive a response. According to the applicant, the respondents have refused to return his deposit.

13. The respondents deny that there was an agreement to refund any portion of the money paid by the applicant, which they say was not a deposit but liquidated damages for the early termination of the agreement. Mr. Au denies that he signed the supplemental agreement. Ms. Fan says that, as an employee, she did not make any decisions on this matter.

14. The parties' agreement was binding for the duration of the 60-month term, and provided only for termination within a specific cancellation window (namely, prior to its renewal in 2022). The agreement did not contemplate early termination due to the sale of a business. As noted above, if the agreement was not terminated in the appropriate way, Segal would be entitled to liquidated damages in an amount equal or greater to the sum of the applicant's monthly billing for the most recent 9 months or the sum of the balance of the term remaining on the agreement.

15. The applicant wanted to end the agreement before the end of its term and the termination window. Under the terms of the agreement, the applicant was obliged to pay liquidated damages if he were to terminate the agreement early. In order for the applicant to be successful in this dispute, he must prove that the respondents agreed to modify the parties' agreement and forego the liquidated damages to which they were contractually entitled. I note that the parties' agreement states that they "may renegotiate any part of this Service Agreement even if the effect of such renegotiation is to extend the Term".

16. The applicant says the supplemental agreement is contained in a December 28, 2017 letter written by the applicant's wife and addressed to Ms. Fan. Among other things, the letter states that the applicant would pay Segal the sum of $3,452.40 for "liquidation damage stated in the services agreement". Given this description alone, I am satisfied that this amount represented liquidated damages payable under the parties' agreement, and not a deposit as asserted by the applicant.

17. The letter was signed by the applicant's wife on behalf of the applicant. It shows carbon copies to Mr. Au, the applicant, and Mr. W. There are initials next to the names of Mr. Au and Mr. W. Ms. Fan did not initial or sign the letter. Mr. W provided an affidavit in which he states that he saw the parties sign the letter. I also note that the initials next to Mr. Au's name bear a similarity to his signature on the parties' original agreement. Although he denies having placed his initials on the letter, I find that it is more likely than not that he did.

18. However, the fact that the parties initialed this letter does not, by itself, establish that it amounted to an agreement that the applicant would receive a refund of all or part of the liquidated damages it paid. The letter says that Segal "agreed they would return the above said sum of money in proportionally and calculated as follow as (i) CAD 3,452.40/365 days x how many days left on the paragraph 4".

19. Based on the wording of the letter and given the nearly 4.5 years left in the term of the parties' agreement, it is not clear to me whether anything was intended to be returned to the applicant as a result of the calculation described above. Even if the

letter represents the results of a discussion between the parties, I cannot determine what the parties agreed to do. The letter was drafted on the applicant's behalf, and any ambiguity must be interpreted against him (see, for example, *Tully v. Haber*, 2016 BCCA 399).

20. I find that the applicant has not established that Segal agreed to give up its liquidated damages for no consideration, or that Mr. Au or Ms. Fan personally promised the return of all or part of the funds. In the alternative, even if I am incorrect about this conclusion, I am satisfied that the applicant has not proven that the calculation described in the letter would have resulted in a refund of the amount claimed. Accordingly, I dismiss the applicant's claim for a refund of $3,452.40.

21. 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. As the applicant was unsuccessful, I dismiss his claim for reimbursement of tribunal fees.

ORDER

22. The applicant's claims, and this dispute, are dismissed.

Lynn Scrivener, Tribunal Member