Civil Resolution Tribunal

Date Issued: August 9, 2019

File: SC-2019-001688

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Vogel v. Meiklejohn*, 2019 BCCRT 954

B E T W E E N :

TIMOTHY VOGEL

APPLICANT

A N D :

KEN MEIKLEJOHN

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. The applicant, Timothy Vogel, hired the respondent, Ken Meiklejohn, to fabricate and install a vinyl curtain door on a boatshed, for a total of $2,866.50. The applicant says the respondent never completed the work. The applicant claims a refund of the $1,433.25 deposit he paid the respondent.

2. The respondent denies the applicant's claim. He says the applicant cancelled the contract and forfeited his deposit. The respondent also says he depleted about $1,000 of the deposit through his preliminary work "pricing out an alternative system".

3. The parties are each 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* (CRTA). 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, he 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.

6. 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.

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

    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

9. The issue in this dispute is to what extent, if any, is the applicant is entitled to a refund of his $1,433.25 deposit.

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicant bears the burden of proving his claims on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

11. As a preliminary issue, the February 15, 2018 signed contract in evidence says it is between the applicant and Ancient Mariner Industries Ltd. However, according to BC Registry Services records, Ancient Mariner Industries Ltd. dissolved on September 26, 2017 for failure to file records. The respondent is listed as the Director and President of the company.

12. The applicant says the respondent knew the company was dissolved when they entered into the contract. The applicant says the respondent held himself out as an agent for a company that did not exist and personally signed the contract. He

argues that I should find the respondent personally liable for failing to fulfill the contract and order the respondent to reimburse his $1,433.25 deposit.

13. Under section 344 of the *Business Corporations Act*, when a company is dissolved for failure to file, the company ceases to exist for any purpose. I find this means that at the time the parties signed the contract, Ancient Mariner Industries Ltd. was no longer in existence.

14. The evidence shows the applicant communicated directly with the respondent, who agreed to fabricate the curtain. It shows that the applicant paid the respondent a deposit of $1,433.25 by e-transfer on February 16, 2018, and that the respondent accepted payment. On the balance of the evidence, I find the respondent entered into the contract in his personal capacity, either mistakenly using company letterhead or doing business as Ancient Mariner Industries Ltd. Either way, I find the sole parties to the contract were the applicant and the respondent.

15. The applicant says the parties agreed that the respondent would provide a sketch for approval and install the curtain by mid-March. The respondent does not dispute that these were the agreed terms of the contract.

16. The applicant submitted a series of emails between himself and the respondent. I find these emails show that after entering into the contract, the applicant followed up several times on the status of the work. The emails show the respondent responded but provided no status update for a least 4 months.

17. The applicant says that on June 14, 2018, the respondent provided him with a revised quote of $8,825 to complete the work. The applicant says the quote failed to explain the increase. The revised quote is not in evidence. The applicant says he spoke to the respondent that same day. The applicant says that he “warned” the respondent that he was in breach of his original contract as he had received nothing to date. He says he gave him the option to either complete the job as originally quoted, or return the deposit so he could hire someone else. However, the applicant

says he made it clear that he did not want to cancel the contract. The applicant does not say whether the respondent agreed to continue with the work or not.

18. The applicant says that after this June conversation the respondent stopped responding to him altogether. He says he "followed up constantly" with the respondent and received no response to his phone calls or emails. I have no documents from either party showing further efforts to communicate. However, I accept the applicant's version of events because the respondent does not say otherwise and agrees that they "lost contact".

19. On December 18, 2018, the applicant says he notified the respondent by email that he was in breach of contract and demanded his deposit. I do not have a copy of this email. However, it is undisputed that the respondent refused to refund the deposit, which is the subject of this dispute. It is also undisputed that the respondent had provided neither a sketch nor the curtain by this time, which was about 9 months after the agreed mid-March completion date.

20. The respondent provided little evidence in response to the applicant's claims. He says that the applicant wanted more coverage in the rear and sides of the shed and that the respondent had priced out an alternative system. The respondent did not explain whether the added coverage was the reason for increasing his price to $8,835. The respondent explains that the applicant never cancelled the "previous order" or advised him to proceed. The respondent says he lost contact with the applicant, and then, the applicant "cancelled".

21. I find the parties had no agreement about a higher priced or alternative system. I find the agreed terms of the curtain contract were that the respondent would provide a sketch and fabricate and install a vinyl curtain within about 30 days for a total price $2,866.50. I find the respondent failed to do that.

22. The respondent agrees that he never provided a sketch. He says this is because the applicant's boatshed was similar to another customer's shed. I infer he means that he had an appropriate sketch from a different job. However, his explanation

does not explain why failed to provide a copy of a sketch to the applicant. It is undisputed that 10 months after the parties entered into the curtain contract, the respondent never provided a sketch and never fabricated the curtain.

23. I find the respondent breached the contract when he failed to perform the curtain contract within 30 days or at all.

24. The respondent's position is that the applicant forfeited the deposit on the curtain contract when he cancelled the order. He relies on a non-refundable clause in the February 15, 2018 contract mentioned above. Since the respondent breached the contract, I find the respondent cannot rely on the non-refundable clause to withhold the deposit.

25. Based on the respondent's breach, I find the respondent is liable for damages for the non-performance of the contract.

26. Damages for the breach of contract are intended to put the applicant in the same position that he would have been in had the contract been carried out by both parties (see *Water's Edge Resort v. Canada (Attorney General),* 2015 BCCA 219 at para. 39). The applicant has not claimed any losses other than his deposit. Therefore, subject to any setoff, I find the applicant is entitled to damages in the amount of his deposit.

27. As mentioned, the respondent says it cost him about $1,000 to price out an alternative system. When it comes to a set off, the burden of proof shifts to the respondent. The respondent provided no evidence, such as timesheets or sketches of the alternative system, to establish the work he performed or the value of the work. He also did not prove the applicant asked for such pricing. I find that the respondent has not established that he is entitled to a set-off.

28. As a result of the respondent's breach of the parties' contract, I find that the respondent must refund the applicant the $1,433.25 deposit.

29. Unless there is agreement about interest between the parties, the *Court Order Interest Act* (COIA) provides that a set rate of interest is added to a monetary award. I find the parties had no agreement about interest. I find the applicant is entitled to interest under COIA, calculated from February 16, 2018.

30. Under section 49 of the CRTA, 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 the applicant is entitled to reimbursement of $125 in tribunal fees. The applicant claimed no dispute-related expenses.

ORDERS

31. Within 30 days of the date of this decision, I order the respondent to pay the applicant a total of $1,591.75, broken down as follows:

    a. $1,433.25 in debt,

    b. $33.50 in pre-judgment interest under the COIA, calculated from February 16, 2018, and

    c. $125 in tribunal fees.

32. The applicant is entitled to post-judgment interest, as applicable under the under the COIA.

33. Under section 48 of the CRTA, 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.

34. Under section 58.1 of the CRTA, 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