



Civil Resolution Tribunal

Date of Original Decision: September 25, 2019

Date of Amended Decision: October 30, 2019

File: SC-2019-004221

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Piccone Holdings Ltd v. Rutherford et al*, 2019 BCCRT 1130

BETWEEN:

PICCONE HOLDINGS LTD

APPLICANT

AND:

~~TERRENCE~~ TERRENCE RUTHERFORD and ANNA RUTHERFORD

RESPONDENTS

AMENDED REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about an unpaid invoice for the removal of a fence and construction of a new cedar fence. The applicant, Piccone Holdings Ltd, says the respondents, ~~Terrence~~Terrence Rutherford and Anna Rutherford, owe \$3,664.ⁱ The respondents

filed similar Dispute Responses and say that there is no enforceable contract between the parties because they never agreed upon key terms prior to work being started.

2. The applicant is represented by Francesco Piccone, whom I infer is an employee or principal. Mr. Rutherford and Mrs. Rutherford are represented by an articling student, Molly Li.

JURISDICTION AND PROCEDURE

3. 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.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the 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 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.
5. 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.

6. 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

7. Is there an enforceable contract between the parties for fence construction, and if so, is the applicant entitled to payment of \$3,664 for its outstanding invoice?

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
9. Mr. Rutherford was introduced to Mr. Piccone in July 2017. Mr. Rutherford advised that he wished to have his south side fence removed and a new fence installed. The parties did not discuss price at the time. Mr. Piccone began work by dismantling the fence on July 4, 2017. Due to ill health, Mr. Rutherford was unable to monitor construction closely.
10. On July 12, 2017, the respondents provided the applicant a \$2,500 advance so that the applicant could purchase building materials.
11. On July 14, 2017, the respondents received invoice #201705 from the applicant for a total of \$3,072.84. At some point later, they received invoice #201708 for \$4,085.61, to replace the previous invoice. The second invoice includes time spent on July 14, 2017, which the applicant had earlier decided not to charge for. Both invoices reflect a credit for the \$2,500 deposit paid on July 12, 2017.

12. Mrs. Rutherford paid invoice #201708 by cheque. However, the next day Mr. Rutherford inspected the work and found it poorly done and incomplete. He issued a stop payment on the cheque.
13. I will first consider the respondents' submission that there is no enforceable contract between the parties. The respondents say that Mr. Piccone charged Mr. Rutherford through his company rather than himself personally. They submit that if they had known in advance, they would have requested a detailed estimate before proceeding. The respondents also say that the parties did not discuss or agree upon key issues and as such, the applicant's claim should be dismissed. The respondents cited *Hersley v. EMRlogic Systems Inc.*, 2010 BCPC 339, in support of their position. The respondents also say that Ms. Rutherford had limited involvement in this dispute and the claim against her in should be dismissed.
14. I find that the applicant and Mr. Rutherford have an enforceable contract. However, I find that there is no contract between the applicant and Ms. Rutherford. My reasons follow.
15. I will first consider the identity of the parties. The applicant provided two invoices dated July 14, 2018. The invoices identify the applicant as the billing party and are marked to Mr. Rutherford's attention. There is no indication in the submissions or evidence that Mr. Piccone said in advance that he would bill the respondents through the applicant.
16. Where a seller's identity is a significant to the formation of a contract, the failure to disclose the seller's identity makes a contract void or voidable for mistake: *Shimoyama v. Frizzell*, 2011 BCSC 446 at paragraph 30. Mr. Rutherford says that had he known the applicant was the seller, he would have requested more information before proceeding with the fence. However, he did not explain why he would have acted differently. There is also no dispute that Mr. Piccone spoke to Mr. Rutherford about the fence and was subsequently directly involved in the work. There was therefore no confusion over who would actually construct the fence. I

therefore do not find the parties' agreement void or voidable due to the seller's identity.

17. However, I find it clear from the invoices and the evidence and submissions that Mrs. Rutherford's was not a party to any agreement with the applicant. She was not involved in the initial discussions with Mr. Piccone and her role was limited to assisting Mr. Rutherford.
18. I dismiss the applicant's claims against Mrs. Rutherford.
19. I next consider the price of the work. It is undisputed that the parties did not discuss in advance or during construction how much the fence would cost or how the final cost would be calculated.
20. When parties have a contract for goods and services, clearly intended to be paid for, but have failed to specify the price, they may be presumed to have intended a reasonable price. In such cases the courts may imply a contractual term to pay a reasonable price: *Hugh's Contracting Ltd. v. Stevens*, 2015 BCCA 491 at paragraph 26. The respondents initially paid for the fence until putting a stop payment on their cheque. It is clear that the fence was not a gift. I therefore find it appropriate to imply a term that Mr. Rutherford would pay a reasonable price for the applicant's work. I shall discuss the price in detail below.
21. A third key issue is the scope of the work. The respondents submit that there was no clear agreement about what was to be done. I find that the parties agreed on the most important aspects of what was to be done: the applicant would remove the old fence and build a new one. While lacking in detail, I find this is sufficient for the basis of a contract.
22. Based on the above-mentioned evidence and submissions, I find that the applicant and Mr. Rutherford entered in an enforceable agreement for the fence construction. I must now determine what is a reasonable price for the work.

23. As noted above, the applicant provided two different invoices for the same work. The applicant claims for the second invoice #201708, which provides a subtotal of \$6,164.61. This amount is based on \$60 per hour for 39 hours of Mr. Piccone's time (\$2,340 in total) and \$45 for 22 hours for his helper (\$990 in total). It also includes \$1,775.27 for materials, \$765.79 as a handling fee, and \$293.55 as GST. With the \$2,500 deposit accounted for, this leaves \$3,664.61 owing.
24. Mr. Rutherford identifies the following issues with the new fence and provided photos:
- a. The applicant replaced only 42 feet of fencing and ignored a 16-foot-long section that was in underbrush.
 - b. The applicant placed support posts in the neighbor's yard to hold up the fence, when instead it should have been freestanding.
 - c. Save for one post, the fence posts were not replaced and only realigned.
 - d. The fence had a gap underneath it that animals could move through.
 - e. The applicant cut a wire on a temperature sensor on the neighbor's side of the fence. The sensor had to be replaced by the respondents.
25. In contrast, the applicant says he was instructed to start building from the third section of the existing fence. Other features were not discussed.
26. As noted above, I find that the applicant and Mr. Rutherford left many details of the fence unsettled. This is supported by the lack of any quote outlining the work prior to construction, the fact that Mr. Rutherford was too ill to monitor construction of the fence, and the respondents' submission that the scope of work was unclear.
27. The only clearly agreed-upon work was that the old fence would be removed, and a new fence would be built. I therefore focus upon other factors in determining the price, including the actual work done, costs incurred by the applicant, and any estimates obtained: *Hugh's Contracting Ltd.* at paragraph 33.

28. The applicant says his bill is reasonable for the following reasons:
- a. He discounted his time by not charging hours for two hours on July 13.
 - b. A large portion of his bill went to out of pocket costs of \$3,342.89.
 - c. The work was unexpectedly difficult. He had to jackhammer away the pre-existing cement at the base of misaligned posts and pour new cement plus deal with a hornet infestation.
29. The applicant supported his submissions with a spreadsheet and other documents, including receipts for building materials totaling over \$1,600. I place significant weight upon the applicant's submissions given the details provided, especially with regard to his incurred costs.
30. The respondents say the price is not reasonable and provided a December 17, 2015 estimate for work done on a neighboring property. The total quote is \$10,224.90 for a much larger project. It estimates \$2,968 to replace 92 feet of fencing on the south side of the neighbor's property. This fence is next to the respondents' property on the north side. The estimate notes delivery and pickup costs of \$175 and demolition costs of \$875 for the entire project, which are not included in the \$2,968 amount.
31. I find the applicant largely proved its case as it provided a breakdown of labour costs, the tasks done each day, and other costs incurred, with supporting documents. I find it is entitled to \$3,160.61.
32. I reach that amount by starting with the amount owing under invoice #201708 (\$3,664.61). As documented on the spreadsheet, the applicant originally intended to discount this bill by not charging for any work done on July 14, 2017 (\$504). I find the applicant is entitled to \$3,160.61 as he referred to this as being "fair", and I find this to be the best measure of a reasonable price.
33. I acknowledge that the applicant's invoice appears high when compared to the December 17, 2015 estimate for the other property. However, I find that estimate to

be of limited assistance as it is dated and is not an estimate of the actual fence at issue. For example, it is unclear if this estimate includes the removal and installation of any cement bases, as was the case here.

34. In summary, I find the applicant is entitled to payment of \$3,160.61 from Mr. Rutherford. The applicant is entitled to pre-judgment interest under the *Court Order Interest Act* (COIA) from the applicant's July 14, 2017 invoice date, which equals \$97.53.

35. I dismiss the applicant's remaining claims, including all claims against Mrs. Rutherford.

TRIBUNAL FEES AND DISPUTE-RELATED EXPENSES

36. Under section 49 of the CRTA, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable expenses related to the dispute resolution process. I see no reason in this case to deviate from the general rule.

37. The applicant was largely successful in this dispute. I therefore award the applicant \$175 for reimbursement of tribunal fees. The parties did not claim for any specific dispute-related expense.

ORDERS

38. I order the respondent, ~~Terrence~~Terence Rutherford, to pay the applicant a total of \$3,433.14, broken down as follows:ⁱⁱ

- a. \$3,160.61 in debt,
- b. \$97.53 in pre-judgment interest under the COIA, calculated from July 14, 2017, and
- c. \$175 in tribunal fees.

39. The applicant is entitled to post-judgment interest under the COIA as applicable.
40. The applicant's remaining claims, including all claims against Ms. Rutherford, are dismissed.
41. 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.
42. 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.

David Jiang, Tribunal Member

Amendment Notes

ⁱ Style of cause and paragraph 1 corrected for inadvertent typographical error at party request.

ⁱⁱ Paragraph 38 corrected for inadvertent typographical error at party request.