Civil Resolution Tribunal

Date Issued: September 26, 2019

File: SC-2019-002836

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *McNamara et al v. Ace Excavating Ltd.*, 2019 BCCRT 1134

B E T W E E N :

David McNamara and VANCOUVER CONCRETE CUTTING & CORING INC.

APPLICANTS

A N D :

ACE EXCAVATING LTD.

RESPONDENT

A N D :

David McNamara and VANCOUVER CONCRETE CUTTING & CORING INC.

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. This is dispute is about payment for concrete coring services.

2. The applicant Vancouver Concrete Cutting & Coring Inc. (Vancouver Concrete) performed concrete coring services for the respondent Ace Excavating Ltd. (Ace) but was not paid. Vancouver Concrete was named as Vancouver Concrete Cutting & Coring Inc in the Dispute Notice, but as Vancouver Concrete Cutting & Coring Inc. in the counterclaim Dispute Notice. I have amended the style of cause to reflect the addition of the punctuation.

3. Vancouver Concrete says it obtained written authorization from Ace's site supervisor, at the time of coring, when the concrete was discovered to be several inches thicker than anticipated when the job was discussed by phone. Vancouver Concrete claims $4,328.63 for concrete coring work performed on April 6, and 12, 2018.

4. In its counterclaim, Ace says it only authorized $2,400 of coring work, plus tax. Ace says Vancouver Concrete is overcharging for the coring work. Ace a says it only owes the authorized amount of $2,400 plus 5% GST ($2,520) for the invoice. After applying a VISA payment of $2,454.38 Ace says it already made, Ace agrees to pay the remaining $65.62.

5. Vancouver Concrete says the $2,454.38 payment was for work it did for Ace in March, 2018. David McNamara represents himself and Vancouver Concrete. Ace is represented by organization contact Brian Mildenberger.

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* (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.

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, 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.

ISSUES

11. The issues in this dispute are:

a. whether Ace must pay Vancouver Concrete $4,328.63 for concrete coring services, and

b. on the counterclaim, whether Ace ought to be credited for a $2,454.38 payment it made, such that it only owes Vancouver Concrete $65.62, or whether that payment was for an earlier job.

EVIDENCE AND ANALYSIS

12. In this civil claim, Vancouver Concrete bears the burden of proof on a balance of probabilities. In the counterclaim, Ace bears that same burden. I only refer to the evidence and submissions below as I find necessary to provide context for my decision.

13. Since there are no claims brought by David McNamara personally, as distinct from in his role with Vancouver Concrete, I find that Vancouver Concrete is the only properly named applicant. I dismiss the claims brought by and against Mr. McNamara personally.

14. Mr. Mildenberger says Vancouver Concrete gave him a verbal quote of $800 per core, but then proceeded to do coring work on April 6 and 12, 2018 without him approving a higher cost. Mr. Mildenberger offered no evidence, aside from his own assertion, proving this limited authorization.

15. Vancouver Concrete does not agree with this account of events. Vancouver Concrete says that in a phone call to schedule the April 6 work, Ace said it had 3 cores of 24-inch diameter by 8-inch-thick concrete that needed to be drilled.

16. However, on April 6, 2018, at the site, Vancouver Concrete found the concrete was thicker than Ace had advised, being 15 inches rather than 8 inches thick. Vancouver Concrete then told the site supervisor, A, that the coring would be more expensive because of the actual thickness. A signed off on a Work Order authorizing the coring.

17. On April 12, 2018, Vancouver Concrete returned to the site and the depths of the holes needed were, again, greater than what had been discussed by phone. Vancouver Concrete told A that there would be an additional charge for the increased concrete thickness. Again, A signed off on a Work Order authorizing the work.

18. Ace filed no evidence, other than Mr. Mildenberger's own statements in submissions. Ace did not file any statement from its site supervisor, A.

19. Later, Vancouver Concrete billed Ace $4,328.63. Mr. Mildenberger says no supporting documentation was ever supplied to him for the overcharge, despite his requests. Based on the Work Orders and invoices filed in evidence, discussed below, I reject Mr. Mildenberger's contention that he was not given any details about these charges.

20. Mr. Mildenberger says he also paid $2,454.38 by credit card, which he believes was a further overcharge by Vancouver Concrete. For reasons explained below, I disagree.

21. I prefer Vancouver Concrete's version of events because it is consistent with the Work Orders and invoices prepared at the time that were filed in evidence. On the other hand, Ace's assertion that it did not authorize the coring work at the price charged is inconsistent with the documentary evidence.

22. I find that:

    a. On March 21, 2018, A signed a Work Order for drilling 1 16-inch core and 1 8-inch core for a total of $1,787.50.

    b. On March 22, 2018, an Ace representative signed a Work Order for filling 1 18-inch, 3-inch deep item of road work, and 1 32-inch 5-inch deep cut, for $550.

    c. On April 6, 2018, an Ace representative signed a Work Order for 1 24-inch core, for a cost of $1,515.

d. On April 12, 2018, an Ace representative signed a Work Order for 2 24-inch cores, with the note “core as required”. The work completed was 2-24 inch cores, one 19 ½ inches deep and one 10 ½ inches deep, at a total cost of $2,607.50.

e. After each job was completed, Vancouver Concrete provided Ace with detailed invoices, which I find are consistent with the signed Work Orders.

f. The invoice for April 6 and 12, 2018 totals $4,328.63.

23. Ace submits that the Work Orders have information added after they were signed by the site supervisor. I agree, and Vancouver Concrete concedes, that certain notations are routinely added to the Work Order after the original is given to the client. Based on the Work Orders, I find that the scope of work was discussed by Vancouver Concrete with Ace’s site supervisor, though a precise figure could not be placed on the cost at the time of authorization. Then the Work Order was discussed and signed. Once the work was performed, someone filled in the specific details under a section of the Work Order titled “Work Performed” and consolidated the billable charges. This makes sense, since Vancouver Concrete could not predict, at the outset, the precise number of hours a job would take or whether standby time would be required, for example. For this reason, I do not find the addition of information impacts Vancouver Concrete’s credibility.

24. The invoices describe the work completed and, I find, were appropriately billed to Ace. I find that Ace must pay Vancouver Concrete $4,328.63 for the work completed on April 6 and 12, 2018.

25. Turning to the counterclaim, it was uncontested, and I find, that Ace paid $2,454.38 in either April or May 2018. I find that Vancouver Concrete’s invoices for the work it completed March 21 and 22, 2018 add to this total. I find that the $2,454.38 payment was appropriately applied to Vancouver Concrete’s March 2018 invoices, leaving the April 2018 work unpaid.

26. I dismiss Ace’s counterclaim.

27. The *Court Order Interest Act* applies to the tribunal. Vancouver Concrete is entitled to pre-judgement interest on the $4,328.63 from May 12, 2018, 30 days after the invoice was issued, to the date of this decision. This equals $100.96.

28. 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 Vancouver Concrete is entitled to reimbursement of $175 in tribunal fees. Vancouver Concrete did not claim dispute-related expenses.

ORDERS

29. Within 30 days of the date of this order, I order Ace to pay Vancouver Concrete a total of $4,604.59, broken down as follows:

    a. $4,328.63 in payment of the invoice for April 2018 concrete coring services,

    b. $100.96 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175 tribunal fees.

30. Vancouver Concrete is entitled to post-judgment interest, as applicable. I dismiss Ace's counterclaim. I dismiss David McNamara's claims.

31. 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.

32. 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.

Julie K. Gibson, Tribunal Member