Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Neves Software Inc. v. 411 Local Search Corp.*, 2019 BCCRT 1280

B E T W E E N :

NEVES SOFTWARE INC.

APPLICANT

A N D :

411 LOCAL SEARCH CORP.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. The applicant, Neves Software Inc., hired the respondent, 411 Local Search Corp., to direct internet traffic to the applicant's website. The applicant says that the respondent failed to do so. The applicant claims $2,486.40 as a refund of the respondent's services, plus $2,000 in punitive damages.

2. The respondent says that it performed the services that the applicant paid for, and that it does not guarantee results. The respondent asks that I dismiss the applicant's claims.

3. The applicant is represented by a director, Phillip Neves. The respondent is represented by an employee.

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. In some respects, both parties of this dispute call into question the credibility, or truthfulness, of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I therefore decided to hear this dispute through written submissions.

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 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

8. The issues in this dispute are:

    a. Is the applicant bound by the terms and conditions on the respondent's website?

    b. Did the respondent breach the parties' contract?

    c. If so, what remedy is appropriate?

    d. Does the respondent's behaviour justify an award of punitive damages?

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant must prove its case on a balance of probabilities. I have read all the parties' evidence and submissions but I will only refer to what is necessary to explain and give context to my decision.

10. On March 6, 2019, the respondent's sales staff phoned Mr. Neves. During that call, Mr. Neves purchased a "reputation management service". The respondent sent the applicant an email the same day, confirming that the applicant had hired the respondent for 3 months at a rate of $149 per month plus GST. The email referred to "terms and conditions", but it does not appear that there was a link or attachment to those terms and conditions. I address whether the applicant is bound by the terms and conditions on the respondent's website below.

11. Another of the respondent's sales staff (VS) phoned Mr. Neves on March 12, 2019. The recording of that phone call is in evidence. After discussing the nature of the applicant's business, VS told Mr. Neves that the applicant needed search engine marketing services that would increase traffic to his website through paid media campaigns. VS said that it was "almost definite" that the applicant could get 6 new clients per month and, later, said that he "can almost guarantee it". VS also said that his other clients got 2,000 "clicks", or visitors, per month. Mr. Neves agreed to purchase a 3-month package that cost $640 plus GST per month, with an additional set-up fee of $150 plus GST. Mr. Neves asked about cancelling the reputation management service, but VS said that this was not possible.

12. The applicant says that the first advertisement was supposed to go live on March 25, 2019. The applicant saw no increase in traffic, so Mr. Neves emailed his representative the same day. According to the applicant, he emailed his representative several times over the following weeks and never got a response. Because the applicant needed traffic, Mr. Neves started using Google Ads on his own, which he says resulted in significant increases in visitors to the applicant's website.

13. The applicant says that a new representative phoned him on April 21, 2019. The respondent says that this call took place on April 17, 2019, but I find that the exact date does not matter. The parties provide roughly the same description of the call. The applicant demanded a refund, which the respondent did not provide. Mr. Neves says that the representative told him to turn off Google Ads because he was "competing with himself", which the applicant did. Then, the applicant agreed to give the respondent more time.

14. On May 10, 2019, after seeing no results, the applicant provided the respondent with the list of keywords he had successfully used with Google Ads. The respondent said that it would use the keywords in an advertising campaign. The applicant says that it again saw no increase in traffic. So, the applicant restarted its Google Ads campaign shortly after this email.

15. The parties' contract expired on June 24, 2019. According to the final report generated by the respondent, its efforts generated a total of 61 clicks. According to the respondent's records, the applicant paid a total of $2,642.85 between March 2016 and June 2016. Of that amount, $2,173.50 was for lead generation services and $469.35 was for reputation management services.

16. The applicant provided a report from Google, which shows that the applicant spent $396.10 between March 1, 2019 and July 12, 2019, on Google Ads, generating 2,501 clicks.

17. The applicant also provided a report of its website traffic for January 1 to June 30, 2019, which shows a low baseline of traffic with significant spikes at various times in April, May and June. There is no discernable increase in traffic in late March, when the respondent's campaign started. Further, the spikes in early April and mid-May are consistent with the applicant's evidence that he used Google Ads at these times.

Is the applicant bound by the terms and conditions on the respondent's website?

18. The respondent provided its "Advertiser terms and conditions" from its website. These terms and conditions include a term that the respondent does not guarantee or warrant results, including click through rates. The terms and conditions also include a term that limit liability. While terms and conditions on a website can form part of a contract in certain circumstances, the burden is on the respondent to prove that it reasonably brought the terms and conditions to the applicant's attention before the parties entered into a contract. See my recent decision *Smart Technologies Consultants Ltd. v. Dysys Media Solutions Inc.*, 2019 BCCRT 1181.

19. The respondent says that it is unable to confirm whether the same terms and conditions were on its website at the time the applicant first hired the respondent. Further, the parties entered into a contract before the respondent sent an email mentioning its terms and conditions. There is no evidence that the applicant viewed

or was directed to view the respondent's website before hiring the respondent. I find that the respondent has not proven that the terms and conditions form part of the parties' contract.

20. Therefore, there is no written contract between the parties.

Did the respondent breach the parties' contract for lead generation services?

21. I find that the terms of the parties' verbal contract for lead generation services are contained in Mr. Neves and VS's March 12, 2019 conversation.

22. The applicant says that VS "guaranteed" a significant traffic increase, including "thousands of clicks" per week. Based on the recording of the March 12, 2019 phone call, I find that VS expressed extreme confidence but stopped short of providing a guarantee. VS said that he had other clients receive thousands of clicks but did not guarantee a similar result for the applicant. Also, most of their discussion was about the number of new clients that the applicant needed every month, not the number of clicks. I find that it is unreasonable for the applicant to have interpreted VS's statements as guaranteeing clients since the respondent's product is intended to direct visitors to the applicant's website. The respondent has no control over whether those visitors become clients.

23. That said, in contracts for professional services, there is generally an implied term that the professional will perform the work to a reasonably competent level. Applied to this dispute, I find that there was an implied term of the parties' contract that the respondent would provide reasonably competent lead generation services.

24. The respondent did not provide any evidence to dispute the applicant's claims that the respondent did not perform the work required by the contract. The respondent did not provide any evidence at all about the services it provided, other than simply asserting that it did what it contracted to do. The respondent is a national corporation and the respondent's representative in this dispute appears to be from

its in-house legal department. With that, I find that the respondent was aware, or should have been aware, of its obligation under tribunal rule 8.1 to provide all relevant evidence, whether it helps the respondent's case or not. Tribunal staff also tell parties that they must provide all relevant evidence. I find that evidence about the respondent's efforts was relevant and should have been easily available to the respondent.

25. While the burden is on the applicant to prove its claims, in the circumstances of this dispute, I find that it is appropriate to draw an adverse inference against the respondent for its failure to provide this evidence. I find that if the respondent had evidence to support its assertion that it performed its obligations under the contract to a reasonable standard, the respondent would have provided it.

26. The respondent's own reports show that it did not drive a meaningful amount of traffic to the applicant's website. The respondent says that the reason it did not direct much traffic to the applicant's website was because of the "niche" nature of the applicant's business. However, the applicant's success using Google Ads contradicts this assertion. I find it significant that the respondent failed to direct a meaningful amount of traffic to the applicant's website even after the applicant provided keywords that had a demonstrated track record of success.

27. For these reasons, I find that the respondent breached the parties' contract by failing to provide reasonably competent lead generation services.

Did the respondent breach the parties' contract for reputation management services?

28. Unlike the contract for lead generation services, the respondent's March 6, 2019 email forms a written contract for the reputation management services. However, the written contract does not describe what the respondent must do. That part of the contract was verbal, and the conversation between the parties is not in evidence.

29. The applicant's submissions focus on the lead generation services. Regarding the reputation management services, the applicant says that it never needed this service, based on the nature of its business. In other words, the applicant wants a refund because the respondent should not have sold it this service. The applicant says that it does not believe that the respondent performed a valuable service under this contract. However, there is no evidence that the respondent misled the applicant about the nature of the reputation management services, or that it did not perform those services. Also, the applicant purchased the lead management services after being told that the respondent could not refund the reputation management service.

30. I am not satisfied that the applicant has established that the respondent breached any part of their contract for reputation management services.

31. Therefore, I order the respondent to refund the amount that the applicant paid for lead generation services, which was $2,173.50. I do not order a refund for the reputation management services.

32. The applicant refers to various legal doctrines, such frustration and the tort of deceit. The applicant also refers to the federal *Competition Act* and the *Business Practices and Consumer Protection Act*. As I understand these arguments, they relate only to the lead generation services, not the reputation management services. Given my findings, above, I find that I do not need to address these arguments.

Punitive Damages

33. As mentioned above, the applicant claims $2,000 in punitive damages. In *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 SCR 1085, the Supreme Court of Canada said that the purpose of punitive damages is to punish extreme conduct that is worthy of condemnation. The Court also said that punitive damages may only be awarded to punish harsh, vindictive, reprehensible or malicious behaviour. Given those constraints, awards of punitive damages are rare.

34. The applicant says that the respondent made false or misleading representations, and fraudulently failed to perform any services under the parties' contract. The applicant relies on the fact that the respondent has an "F" rating with the Better Business Bureau, which the applicant says suggests that it is consistently misleading or defrauding its customers. The applicant says that a refund alone would be a "drop in the bucket" for the respondent and would not deter or punish the respondent for its business practices.

35. In effect, the applicant asks me to infer that the respondent lied about the services it would provide. While the evidence supports an inference that the respondent did not provide reasonably competent service, it does not support a conclusion of fraud or any other reprehensible conduct. I dismiss the applicant's claim for punitive damages.

36. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgement interest on the following payments:

    a. March 12, 2019: $829.50

    b. April 14, 2019: $672.00

    c. May 14, 2019: $672.00

37. Based on the above payment dates, I find that the applicant is entitled to $25.00 in pre-judgment interest.

38. 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. Even though the applicant was not successful in its punitive damages claim, I find that it was successful on the main issues in dispute. I order the respondent to reimburse the applicant its $175 in tribunal fees. The applicant did not claim any dispute-related expenses.

ORDERS

39. Within 14 days of the date of this order, I order the respondent to pay the applicant a total of $2,373.50, broken down as follows:

    a. $2,173.50 as a refund for lead management services,

    b. $25.00 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175.00 in tribunal fees.

40. I dismiss the applicant's remaining claims.

41. The applicant is entitled to post-judgment interest, as applicable.

42. 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.

43. 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.

Eric Regehr, Tribunal Member