



Civil Resolution Tribunal

Date Issued: January 20, 2020

File: SC-2019-006641

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Marks v. TM Tilemart Ltd.*, 2020 BCCRT 70

BETWEEN:

TERRANCE MARKS and JACINDA MARKS

APPLICANTS

AND:

TM TILEMART LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This dispute is about a residential bathroom tile installation.
2. The applicants Terrance Marks and Jacinda Marks says the respondent TM Tilemart Ltd. did unsatisfactory tiling work in their master bathroom. The applicants

claim a refund of the \$4,252.67 they paid the respondent to provide the tile, installation, debris removal and clean-up.

3. The respondent says that the tiling work was completed to an acceptable standard. The respondent also says the applicants failed to let it finish the job. The respondent agrees that, during the job, some debris and materials were left on site “pending retrieval”. The respondent asks that the dispute be dismissed.
4. The applicants represent themselves. The respondent is represented by business contact Jas Khangura.

JURISDICTION AND PROCEDURE

5. 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.
6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
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. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUE

9. The issue in this dispute is whether or to what extent the applicants are entitled to a refund for the respondent's allegedly unsatisfactory bathroom tile installation?

EVIDENCE AND ANALYSIS

10. In this civil claim, the applicants bear the burden of proof on a balance of probabilities. I have reviewed the evidence and submissions but only refer to them as I find necessary to provide context for my decision.
11. It is undisputed that the applicants hired the respondent to supply and install tile in their master bathroom. This dispute is about an allegation of unsatisfactory tile installation. When defective work is alleged, the burden of proof is on the party asserting the defects. Here the applicants must prove on a balance of probabilities that the respondent failed to properly complete the tiling work: *Lund v. Appleford Building Company Ltd. et al*, 2017 BCPC 91 at para 124.
12. On March 16, 2019, the applicants paid the respondent \$4,353.67 for materials and installation of tiles and hardware for their master bathroom.
13. On June 15, 2019, the respondent sent a worker, R, to the applicants' home to complete the tile job.
14. The applicants say the work was completed very poorly. Upon reviewing the photographs filed in evidence, I find that the work was not completed to a satisfactory standard. Given that the photographs reveal defects even to the ordinary person, I find that expert evidence from a tiler is not required for the applicants to prove their claims. My reasons follow.
15. On June 18, 2019, the applicants texted photographs of their concerns to Mr. Khanghura. The applicants also reported that mortar had been left in their garden, glass on their lawn, and debris in their driveway and street. I accept the applicants' uncontested evidence about the debris.

16. On June 20, 2019, Mr. Khanghura sent his senior tile installer to inspect the job. The applicants say the senior installer agreed that the tile was not properly installed. The respondent did not directly address this issue, submitting only that their work was done “to standard”.
17. Mr. Khanghura then sent R back to remove the tiles that were installed. It is uncontested and I find that, in the process of removal, R chipped and broke some tiles. As well, the underlying waterproofing membrane was damaged.
18. On July 3, 2019, the respondent sent more workers to try to install tiles properly. The applicants say this second installation was again unsatisfactory.
19. I find the applicants’ filed photos prove several defects in the respondent’s second attempted tile installation. Specifically, some tiles are not flush with other tiles on the same wall, the waterproofing membrane is not installed tight against the underlying drywall, some drywall is not covered by the waterproofing membrane and some installed tiles are broken.
20. The respondent submits that the tiling work was completed to an acceptable standard. However, the respondent did not file any evidence to support this submission. I prefer the applicants’ evidence on this point, due to the extensive photographic evidence establishing the defects.
21. I find that the second tile installation was unsatisfactory. Further, I find that the defects were prominent, leaving the applicants unable to use the tiled area until the tiling was redone.
22. Text messages sent by the applicants to the respondent at the time of the second installation prove that the workers again failed to tidy up the debris, including failing to use a tarp to ensure no debris, even after being asked to use a tarp.
23. The respondent agreed that the work site was left untidy but submitted that these items would be retrieved. I find that the respondent left debris at the work site and then failed to clean it up when asked to do so.

24. Mr. Khanghura then attended to inspect the site and offered to try to redo parts of this second installation.
25. The applicants decided to reject this offer, given the poor quality of the second installation and the length of time they had waited to have the job completed properly. I address this decision below.
26. On July 31, 2019, the applicants asked the respondent to stop work at their home. The applicants requested a full refund.
27. The applicants later had the master bathroom tiled by another tradesperson. Photographs reveal that this work resulted in a good quality tile installation. However, some of the tiles installed at this point were a different colour to those the respondent attempted to install.
28. The respondent submits that the applicants brought this claim only because they were unhappy with the look of the tiles they chose at first. I disagree. Given the documented deficiencies in the respondent's work, I find the change in tile colour is not relevant to the dispute.
29. The respondent submits that it did not get an opportunity to finish the tiling work for the applicants. I infer that the respondent is saying it would have completed the work satisfactorily, if given another chance. The question is whether the applicants were obliged to give the respondent another chance.
30. A fundamental breach of contract is where one party fails to perform a primary obligation under the contract, such that the other party is deprived of substantially the whole benefit of the agreement: *Gundersen v. Savoy*, 2012 BCSC 1047 at paragraphs 55 to 57. A fundamental breach of contract allows the innocent party to terminate the contract.
31. Both tile installation attempts were unsatisfactory. Because the defects were both functional and visual, the master bathroom could not be properly used. I find that the respondent breached a fundamental term of its agreement with the applicants

that it would install the tile to a satisfactory standard in exchange for money paid. I find that the applicants did not have to give the respondent a third change to fix the deficiencies, in the circumstances.

32. I find that the applicants were entitled to terminate the contract for a refund. Alternately, they are entitled to damages that would put them in the position they would have been in if the contract had been carried out as agreed: *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319 at paragraph 39. Given the entire job was defective and had to be totally redone, I find that the claimed refund of the price paid is a suitable remedy.
33. I order that the respondent refund the applicants the \$4,353.67 paid for the tiling work, within 30 days of this order.
34. The *Court Order Interest Act* applies to the tribunal. The applicants are entitled to pre-judgement interest on the \$4,353.67 from July 31, 2019, the date that the applicants asked the respondent to stop work, to the date this decision. This equals \$40.47.
35. 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 find the applicants are entitled to reimbursement of \$175 in tribunal fees. The applicants did not claim dispute-related expenses.

ORDERS

36. Within 30 days of the date of this order, I order the respondent to pay the applicants a total of \$4,569.14, broken down as follows:
 - a. \$4,353.67 as a refund of payment for the tiling job,
 - b. \$40.47 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$175 tribunal fees.

37. The applicants are entitled to post-judgment interest, as applicable.
38. 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.
39. 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