



Civil Resolution Tribunal

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File: SC-2019-009360

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Nott v. Mark Lundberg (dba Kit Construction & Roof Systems)*,
2020 BCCRT 273

B E T W E E N :

EDWARD NOTT and LOIS NOTT

APPLICANTS

A N D :

MARK LUNDBERG (Doing Business As KIT CONSTRUCTION &
ROOF SYSTEMS)

RESPONDENT

A N D :

EDWARD NOTT and LOIS NOTT

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. The applicants, Edward Nott and Lois Nott, hired the respondent, Mark Lundberg (Doing Business As Kit Construction & Roof Systems), to build a backyard pergola. The Notts say Mr. Lundberg abandoned the construction job, and that they had to hire another contractor to finish it. The Notts also claim Mr. Lundberg failed to properly wire LED lights in the structure. The Notts claim \$2,655.19, which they say is the cost to complete the installation of the pergola's stairs and live edge bar tops. They also claim \$1,600 to repair the LED lighting plus \$500 for an extra carving project Mr. Lundberg offered to do but did not complete.
2. Mr. Lundberg says he did not abandon the job and that the applicants refused his business access. Mr. Lundberg says he completed all invoiced work, and the stairs and slabs finishing were only left uninstalled because of a heated exchange with Mr. Nott that led to police involvement. Mr. Lundberg says he and his staff are not licensed electricians and the LED wiring was only a "perc" and not part of the parties' contract. So, Mr. Lundberg says he is not responsible for the repair. Mr. Lundberg also argues the extra carving project was at most a proposal that was not part of the parties' contract, and it is undisputed he was never paid anything for it.
3. In his counterclaim against the Notts, Mr. Lundberg claims \$1,875, though his breakdown totals \$1,790: \$500 for 2 men and 2 trucks to pick up his equipment from the Notts after the heated exchange, \$240 for tarps he says the Notts retained, plus \$1,050 for the balance under the pergola contract. The Notts say Mr. Lundberg picked up all his equipment and they are not responsible for his expenses in doing so. They also say they left the tarps for him. Given the job was not completed and the concerned raised in their claims, the Notts say they do not owe Mr. Lundberg anything.
4. The parties are each self-represented.

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. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me.
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, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

9. The issues in this dispute are:
 - a. Did Mr. Lundberg reasonably complete all work he was paid for?
 - b. Are the Notts entitled to \$500 compensation related to the extra carving project?
 - c. Is Mr. Lundberg entitled to compensation for his business' time spent picking up his materials or for tarps he did not pick up?

- d. Is Mr. Lundberg entitled to payment of \$1,050, as the balance of the parties' pergola agreement?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the Notts must prove their claim, on a balance of probabilities. Mr. Lundberg bears this burden on his counterclaim. I have only referenced the evidence and submissions as necessary to give context to my decision.
11. The parties agree that on August 14, 2019 the Notts hired Mr. Lundberg to build a pergola in their yard. On September 13, 2019, the parties agreed to a 2nd contract for Mr. Lundberg to build 2 "purlin" walls, stairs, and live edge slabs. I note the parties use various terms for the structure: pergola, pergotta, pergoda, and pagoda. Nothing turns on the difference and I will use the term pergola for ease of reference. The relevant contract details are discussed below.
12. Mr. Lundberg's August 14, 2019 quote was for him to build the Notts a 14' x 14' "tongue and groove" pergola "with 6 lighta" in the ceiling. Given other evidence, I find "lighta" was a typographical error and should have read "lights". Of the \$13,387.50 total quote, the construction and lights portion totaled \$6,750 plus GST without breakdown between those 2 items. I find this formed the parties' 1st contract. There is no indication about a timeline for completion.
13. Mr. Lundberg's September 13, 2019 quote was for \$4,851. The relevant portions of this quote are: 2 stair sections (\$1,000) and 2 live edge slabs (\$2,000), with GST to be added to those figures. Like the first quote, it required a 50% deposit, with "balance on completion". I find this formed the parties' 2nd contract. Again, there is no indication on the quote about a timeline or a completion date.
14. Mr. Lundberg says he invoiced a total of \$18,238.50, and between August 16 and September 19, 2019 the Notts paid a total of \$17,187. This leaves a \$1,051.50 balance, which I infer is the basis for Mr. Lundberg's \$1,050 counterclaim. I find the

evidence, including text messages, shows the Notts fully paid for all materials and that the \$1,050 counterclaim is for labour related to either the stairs or the live edge slabs. I say "either" because after September 20, Mr. Lundberg texted that he retained \$900 worth of "Ecopoxy" the Notts paid for finishing the live edge slabs, saying he applied it to what the Notts owed for the stairs.

15. Mr. Nott admits that on September 20 he became heated in a telephone call with Mr. Lundberg and on the evidence I find he swore at him. Mr. Lundberg alleges Mr. Nott also threatened him, which Mr. Nott denies. Mr. Lundberg says after he picked up his tools (with police assistance) he told Ms. Nott they would return the next day if Mr. Nott apologized, but he says Ms. Nott refused. The Notts deny this. The police report in evidence only refers to Mr. Nott swearing.
16. On balance, I am unable to prefer one party's version over the other, and so I find Mr. Lundberg has not proved Mr. Nott threatened him physically. I also find it unproven that Ms. Nott refused to have Mr. Nott provide an apology so that Mr. Lundberg could return.
17. Why the heated exchange? Mr. Nott says he was frustrated at Mr. Lundberg's excuses for delays. However, based on the evidence before me (including texts), I find the Notts have not proved Mr. Lundberg unreasonably delayed the project's progress. The project had no agreed timeline for completion, and September 20th was only 1 week after the parties entered the September 13th contract.
18. On balance, I find both parties bear equal responsibility for the working relationship coming to an end before the pergola project was completed. Mr. Lundberg reasonably refused to engage further in the conversation with Mr. Nott after Mr. Nott swore at him. However, Mr. Lundberg overreacted to the swearing, and in picking up his tools I find he reasonably signaled to the Notts that he considered the contract had ended. In other words, I find both parties breached their contracts, essentially at the same time. More on this below.

19. As of September 20, Mr. Lundberg had not yet installed the pergola's stairs nor had he finished and installed the slabs. Mr. Lundberg says there was about 6 hours of work left for him to do.

Did Mr. Lundberg reasonably complete the job – the live edge slabs and the stairs

20. The Notts' \$2,655.19 claim is for what they paid a third-party contractor, IM. IM's September 28, 2019 invoice is for: "gutter materials and downspouts, fasteners to attach stairs and live edge tops, removing of drawing on live edge top". There is no break-down per item. Further, the gutters and downspouts were not part of Mr. Lundberg's contract. IM's invoice sets out 26 hours at \$60 per hour plus 12 hours at \$35 per hour (\$1,980 total labour), plus \$548.75 in materials, plus GST. Based on IM's October 6, 2019 email, I infer his invoice item for attaching the live edge slabs included his taking 13/16" off each side of the live edge slabs to "make mitre right".

21. The Notts' issue with the live edge slab bar-tops is two-fold. One, they say the pergola was built 5/8" out of square and so the slabs had to be re-cut to fit properly in order to install them. Two, they say Mr. Lundberg's carving on one of the slabs was like a "cartoon" and so they had to have it removed.

22. I will deal with the slab carving first. I have reviewed the drawing or outline that I find the Notts had approved, along with a photo of Mr. Lundberg's carving. Art is by nature a subjective thing. Some may like the final product while others do not. Despite IM's comment that the drawing was "done poorly", I cannot agree with the Notts that Mr. Lundberg's carving is out of line with the drawing they approved. So, I find the Notts are not entitled to any compensation for slab resurfacing.

23. Next, the issue of the slabs not fitting. Given the September 20 exchange, the slab bar tops were left in the Notts' garage, and Mr. Lundberg did not install them in the pergola. The Notts submit that the 2 bar tops had been cut to fit around the structure support posts, which is consistent with Mr. Lundberg's description. However, the Notts say the slabs shrunk in their garage "during the drying period"

and so they had to be recut to fit into place. The Notts submit that if Mr. Lundberg “had set them in place, they could not have fallen the way they were cut”. I infer the Notts argue the shrinkage would not have mattered if the slabs had been installed. The Notts’ photo in evidence shows the slabs positioned in the pergola did not join to form a mitered edge in the pergola’s interior. I note this allegation is inconsistent with the Notts’ other allegation that the pergola being out of square caused the slabs not to fit. While IM’s email noted the pergola was out of square, he did not say that issue caused the slabs not to fit. Based on the evidence, I find nothing turns on the pergola being 5/8” out of square.

24. I find the Notts incurred some unspecified expense in having the slabs trimmed slightly to fit the pergola, after they had shrunk. However, I have found the parties bear equal responsibility for their contract ending. On balance, I find the Notts are not entitled to compensation for the slabs being re-cut.
25. Next, the stairs. Mr. Lundberg built the 2 stairs off-site and dropped them off at the Notts’ home in the morning of September 20. The only issue is that Mr. Lundberg had not installed them and so as noted the Notts hired IM to install them. They are two 14’ long stairs, single tread each.
26. I dismiss the Notts’ claim for the stairs’ installation. Their installation was not broken down in their \$2,655.19 claim that included items that were not part of Mr. Lundberg’s contract and items I find are not compensable. Further, as noted above I find the parties bear equal responsibility for their contract ending on September 20. I dismiss the Notts’ claims for \$2,655.19, which relate to the live edge slabs and the stairs. I address Mr. Lundberg’s \$1,050 counterclaim for payment under the contract below.

Did Mr. Lundberg reasonably complete the job – LED wiring

27. The Notts say they will have to pay another contractor to repair the LED wiring, which they say does not meet the Canadian Electrical Code. They also say the way

it was installed does not allow for removing 2 LED lights to make any repairs, without cutting holes in the pergola's ceiling.

28. I agree with Mr. Lundberg that the wiring of the lights was not included in the 1st or 2nd contracts. On its face, the 1st contract is only for the placement of 6 pot lights in holes. Mr. Nott's submission is that the contract "does not exclude required wiring" for the lights nor does it state the customer must provide the electrician to do the wiring. The fact that the wiring is not expressly excluded is not determinative. I find the more reasonable interpretation is that wiring was not expressly included and the surrounding circumstances do not lead me to find wiring was reasonably implied as an included item for the carpentry job.
29. However, Mr. Lundberg says he nonetheless installed the LED wiring as a 'perc', at Ms. Nott's request. The evidence shows Mr. Lundberg did take on the wiring aspect of the job. I find that by agreeing to take on this wiring work, Mr. Lundberg agreed to do it to the standard expected of a carpenter, as Mr. Nott is an electrician who knew and accepted that Mr. Lundberg and his staff were not electricians.
30. While the Notts say there are wiring issues, they provided no independent unbiased opinion about them. I cannot tell from the photos submitted that there are wiring issues, and I find this is a subject outside ordinary knowledge that requires expert opinion. Again, while I accept Mr. Nott is an electrician, he is not disinterested or neutral. I am not prepared to accept his submission alone as determinative that the wiring was faulty, bearing in mind I find the applicable standard was that of a carpenter doing the wiring, not an electrician. Further, the applicants provided no supporting evidence to support their \$1,600 claim for the wiring repair, such as a quote or invoice. I dismiss this claim.

Are the Notts entitled to \$500 compensation related to the extra carving project?

31. The Notts claim \$500 for a heart-shaped carving on a branch they say Mr. Lundberg offered to do. When the parties' relationship deteriorated on September 20, 2019 Mr. Lundberg undisputedly returned the branch and no carving was done.
32. It is also undisputed the proposed carving was not included in the parties' 2 contracts. There was no contract or payment made for the carving, nor any evidence that any payment was discussed. Even if Mr. Lundberg had "promised" to do the carving, which he denies, I find that promise was gratuitous and without consideration or payment by the Notts. For a contract or agreement to be enforceable, there must be consideration.
33. So, I find there was no enforceable agreement about the extra carving project and so no legal basis to find Mr. Lundberg responsible to pay the applicants \$500 for it. I dismiss this claim.

Mr. Lundberg's counterclaim for his time picking up materials and his tarps

34. First, Mr. Lundberg claims \$240 for tarps "left behind" at the Notts' property. I find the evidence shows Mr. Nott messaged Mr. Lundberg that his tarps were available for pick up, and there is a photo showing they were folded up under a vehicle.
35. Mr. Lundberg does not explain why he did not pick up these tarps, either on September 20 or after receiving Mr. Nott's message. In any event, Mr. Lundberg provided no supporting documentation to show the tarps are worth \$240, and I cannot agree this is their value based on the photos that show what appear to be 2 older or used tarps. Given the above, I dismiss this aspect of Mr. Lundberg's counterclaim.
36. Next, Mr. Lundberg claims \$500 for 2 men and 2 trucks to pick up his tools. I dismiss this claim also. Mr. Lundberg would have had to pick up his tools at the end of the project, regardless of the heated exchange. Plus, Mr. Lundberg provided no

evidence in support of this claim, such as why it required 2 men and 2 trucks, or any time sheets.

Is Mr. Lundberg entitled to payment of \$1,050, as the balance of the parties' pergola agreement?

37. Mr. Lundberg claims \$1,050 (though elsewhere this appears to be calculated as \$1,010, but nothing turns on the difference), as the balance he says is owed under the parties' 2 contracts. As noted above, I find the parties bear equal responsibility for the termination of their contract. Mr. Lundberg said that he had about 6 hours left of work to do. He does not say that he did work that he was not paid for, and instead points out he issued progress invoices along the way, as shown in the evidence.
38. I find Mr. Lundberg's counterclaim is for payment for the live edge slabs and for the stairs. In his evidence, he admits he retained about \$900 of "Ecopoxy" for the slabs' finish, as payment for the stairs. Yet, Mr. Lundberg never installed the stairs and as noted above the Notts paid someone else to do that. I have also found above the Notts incurred some unidentified expense in having the slabs re-cut because Mr. Lundberg had not installed them. I did not allow any compensation to the Notts for that expense. Bearing that in mind, I also do not allow Mr. Lundberg compensation for work I find he did not complete. I dismiss Mr. Lundberg's counterclaims.
39. I find the parties were equally unsuccessful. Under the CRTA and the tribunal's rules, I find the parties are not entitled to any reimbursement of tribunal fees or dispute-related expenses.

ORDER

40. I dismiss the applicants' claims, the respondent's counterclaims, and this dispute.

Shelley Lopez, Vice Chair