Civil Resolution Tribunal

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File: SC-2020-000069

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *0955824 BC Ltd. dba Van Pro Disposal v. Walltek Storage Ltd.*, 2020 BCCRT 433

B E T W E E N :

0955824 BC LTD. DBA VAN PRO DISPOSAL

APPLICANT

A N D :

WALLTEK STORAGE LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about a waste disposal contract. The applicant, 0955824 BC Ltd. dba Van Pro Disposal, says the respondent, Walltek Storage Ltd., breached the contract by failing to pay for services and failing to cancel in accordance with the contract's terms. The applicant claims a total of $2,699.16: $1,649.20 as a "garbage service fee", $876.71 in liquidated damages, and $173.25 for bin removal, fuel surcharges, and GST.

2. In 2017, the applicant bought certain assets and contracts from Housewise Construction Ltd dba Segal Disposal (Segal), including the 5-year June 2013 contract at issue in this dispute. The respondent says when "the company changed" to the applicant's ownership, service became "horrible". The respondent says it cancelled the waste services over the phone but the applicant refused to pick up its bin.

3. The applicant is represented by a company manager, XF. The respondent is represented by an employee or principal, BM.

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. Bearing in mind the tribunal's mandate of proportional and speedy dispute resolution, I find I can fairly 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. 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.

8. I note the respondent says it wants the tribunal to "inquire" about the applicant's allegedly poor rating with the Better Business Bureau (BBB). It is not my role to make such inquiries. It was open to the respondent to submit relevant evidence. That said, it is unlikely other party's experiences with the applicant would be relevant to whether the applicant is entitled to its claimed debt and damages. I make no findings about the BBB issue.

ISSUE

9. The issue in this dispute is to what extent, if any, is the respondent obligated to pay the applicant for waste disposal services and liquidated damages.

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicant must prove its claim, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.

11. As referenced above, the respondent executed a 5-year agreement with Segal on June 12, 2013. While not clear from the evidence before me, based on the contract's terms I infer it automatically renewed on June 12, 2018, for another 5-year term.

12. The contract's relevant terms also included:

a. The monthly charge for 1 waste bin, 2 pick-ups per month, was $45. Bin removal was $150 each. Extra “lifts” were $45 each.

b. The agreement will be renewed for successive 5-year terms unless the customer gives Segal written notice by registered mail not more than 120 days and not less than 90 days before any renewal date (also known as a cancellation window).

c. Interest is payable at 24% per year on amounts overdue past 30 days.

d. Suspension of service due to slow or non-payment is not Segal’s termination of the agreement. The customer is responsible for payments during a suspension period.

e. If the customer purports to terminate the agreement before the term’s expiry, Segal can accept the purported termination and end the agreement, in which case the customer agrees to pay Segal liquidated damages, either the sum of the customer’s monthly billing for the most recent 9 months or the sum of the balance of the remaining term.

f. The agreement is legally binding on both Segal and the customer and their respective successors and permitted assigns.

g. Segal was entitled to assign the agreement at any time without the customer’s consent.

13. I accept that Segal assigned its accounts receivable to the applicant as of February 1, 2018, which is permitted by the contract as noted above. This is consistent with a December 20, 2017 letter signed by both Segal’s representative SA and by XF for the applicant.

14. I turn to the relevant chronology.

15. On December 18, 2018, the applicant emailed that it was suspending the respondent’s account due to lack of payment, although at the same time the applicant offered a “half month discount in December 2018” as an incentive for the

respondent to pay. In submissions, the applicant however says it offered a “month free”. There is no explanation for the discrepancy.

16. On April 24, 2019, BM emailed the applicant that on the respondent’s behalf he had been requesting termination since February 2018 by phone, due to service concerns. BM’s email added that he had emailed again requesting termination in November and December 2018, and again in February 2019.

17. The difficulty for the respondent is that his telephone calls and emails requesting termination did not comply with the contract’s requirement that the respondent customer terminate by registered mail, within the cancellation window. The respondent does not suggest it ever sent a termination notice by registered mail, as required by the contract. However, that is not the end of the matter.

18. First, I accept the respondent’s evidence that in 2018 the applicant only picked up the respondent’s waste 3 times in 3 months. My reasons follow.

19. The applicant submitted a brief affidavit of AWY, sworn February 28, 2020. AWY said they were the applicant’s driver. AWY swore that from July 1, 2012, Segal (and later the applicant) serviced the respondent “on time and follows the schedule”, which AWY said was twice per month. AWY does not explain how they can recall every twice-monthly service for this one customer, dating back to 2012, nor did AWY provide any supporting documentation such as contemporaneous customer records or trip sheets. Further, the respondent’s waste contract started in 2013, not 2012. Given these concerns, I place no weight on AWY’s evidence.

20. The applicant provided a February 11, 2020 affidavit from BD, who also said they were “the driver” for the applicant. BD’s affidavit is virtually identical to AWY’s, and similarly had no supporting documentation. For the same reasons as above, I place no weight on BD’s affidavit.

21. There are no emails or other written record in evidence, such as contemporaneous pick-up trip sheets or similar documents, in response to the respondent’s December 20, 2018 express complaint and submission that the applicant had only provided 3

pick-ups in 3 months. The applicant bears the burden of proof in this dispute and I find it is in the best position to prove that it provided twice-monthly service as agreed, rather than the respondent proving no service was provided. I find the applicant has not met that burden.

22. On balance, I find it more likely than not that the applicant only provided 3 waste pick-ups in a 3 month period, rather than 2 pick-ups per month as required under the agreement.

23. The question then becomes whether the applicant's service was so poor such that it can be said the applicant fundamentally breached the parties' contract first.

24. As set out in *Super Save Disposal Inc. v. 315363 B.C. Ltd*., 2019 BCCRT 190, a non-binding tribunal decision that I find persuasive, not every breach of a contract is a fundamental breach. Where a party fails to fulfill a primary obligation of a contract in a way that deprives the other party of substantially the whole benefit of the contract, it is a fundamental breach. See *Hunter Engineering Co. v. Syncrude Canada Ltd*., 1989 CanLII 129 (SCC). Put another way, a fundamental breach is a breach that destroys the whole purpose of the contract and makes further performance of the contract impossible. See *Bhullar v. Dhanani*, 2008 BCSC 1202.

25. Whether a breach of contract is a fundamental breach matters because there are different remedies available to the wronged party. For most breaches of contract, the wronged party can claim against the other party for damages arising from the breach. For a fundamental breach, the wronged party can terminate the contract immediately. If the wronged party terminates the contract because of a fundamental breach, they do not have to perform any further terms of the contract. See *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA).

26. Applied to this case, if the applicant fundamentally breached the contract, the respondent was entitled to terminate the contract and be relieved from any further performance of the contract. Because the applicant's monetary claims are all based

on the contract, the applicant would not receive any money if it fundamentally breached the contract.

27. The respondent essentially submits that the applicant's failure to pick up the garbage was a fundamental breach because the heart of the contract is regular garbage pickup. I agree.

28. The test for whether a breach of contract is a fundamental breach is an objective test. That means that I must assess the nature of the breaches from the perspective of a reasonable person in the respondent's position. I find that a reasonable person would consider the contract to be completely undermined because the applicant repeatedly failed to pick up the garbage, and ultimately only picked it up 50% of the time over a 3-month period. In the *Super Save* decision cited above where the tribunal member found there was no fundamental breach, the waste hauler had only missed garbage pick-up for 5 days. That is not the case here. I find the applicant fundamentally breached the waste disposal contract and so I find the respondent is not bound by its terms. On that basis, I dismiss the applicant's claims.

29. Even if I had not found the applicant had fundamentally breached the parties' contract, I would dismiss the applicant's claims. While the applicant makes separate claims for specific dollar amounts, the only supporting evidence provided is a February 29, 2020 statement of account. In the statement, it says the respondent owes $2,928.65 as of January 12, 2020, with all but $44.18 owing after September 1, 2018.

30. However, the applicant did not submit copies of any invoices. From the statement, for the most part I cannot tell what the outstanding balances were for. I also cannot reconcile the $2,928.65 balance on the statement of account to the applicant's claimed compensation. Further, the applicant does not adequately explain the dates it provided service for which the respondent allegedly did not pay. The applicant does not adequately explain the period of time for which it claims liquidated damages, other than to say it claims for 9 months for a total of $876.71. Overall, on balance I find the applicant's claimed damages unproven.

31. Given my conclusions above, I find the applicant's claims must be dismissed.

32. Under section 49 of the CRTA and tribunal rules, as the applicant was unsuccessful I find it is not entitled to be reimbursed for tribunal fees or dispute-related expenses. The successful respondent did not pay any fees or claim expenses.

ORDER

33. I order the applicant's claims and this dispute dismissed.

Shelley Lopez, Vice Chair