



Civil Resolution Tribunal

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File: SC-2019-008724

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Misty Fiorentino (dba Wheels of Media) v. Max Agha (dba Shadezone)*,
2020 BCCRT 501

B E T W E E N :

MISTY FIORENTINO (Doing Business As WHEELS OF MEDIA)

APPLICANT

A N D :

MAX AGHA (Doing Business As SHADEZONE)

RESPONDENT

A N D :

MISTY FIORENTINO (Doing Business As WHEELS OF MEDIA)

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about alleged breaches of contract arising from the development of a business website. The applicant and respondent by counterclaim is Misty Fiorentino (doing business as Wheels of Media). The respondent and applicant by counterclaim is Max Agha (doing business as Shadezone).
2. Ms. Fiorentino agreed to develop a website and provide search engine optimization services for Mr. Agha. Ms. Fiorentino says Mr. Agha's conduct forced her to cancel their agreement. She seeks \$2,205 for search engine optimization services that she would have delivered if the parties' agreement remained. Mr. Agha says he should not pay because Ms. Fiorentino never completed the website or delivered search engine optimization services.
3. Mr. Agha counterclaims for \$939.75, plus GST, which is the amount he paid Ms. Fiorentino for the website development part of their agreement. Mr. Agha says Ms. Fiorentino breached their agreement by failing to a) provide a working website within 2 weeks of hiring her, b) register 2 website domains, and c) design and provide business cards. Ms. Fiorentino denies agreeing to or breaching such terms.
4. The parties are 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. Some of the

evidence in this dispute amounts to a “she said, he said” scenario. The credibility of interested 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. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. 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 that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the tribunal’s process and found that oral hearings are not necessarily required where credibility is an issue.

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.

ISSUES

9. The issues in this dispute are as follows:
 - a. Did Mr. Agha repudiate the parties’ contract, and if so, what remedies are appropriate?
 - b. Did Ms. Fiorentino breach any contract terms, and if so, what remedies are appropriate?

EVIDENCE AND ANALYSIS

10. Ms. Fiorentino bears the burden of proof, on a balance of probabilities, to prove her claim. Similarly, Mr. Agha bears the burden of proof, on a balance of probabilities, to prove his counterclaim. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
11. The parties disagree on a number of key facts. Mr. Agha did not provide any evidence though he had the opportunity to do so. For the reasons that follow, I find that Ms. Fiorentino's evidence supports her version of events and her legal position in both her claim and the counterclaim.
12. I will begin with the largely undisputed facts. In September 2019, Mr. Agha hired Ms. Fiorentino to develop a website for his business and provide search engine optimization services. The parties documented their agreement in a September 12, 2019 written contract (contract) and a separate September 12, 2019 work order (work order). I find that both documents are binding as they are signed and consistent with each other.
13. The contract and work order say that Mr. Agha agreed to pay \$939.75 for the website and \$2,205 for search engine optimization. The website fee was due immediately, whereas the search engine optimization fees would be paid in 4 installments of \$551.25 every 3 months, starting from October 1, 2019 and ending on July 1, 2020.
14. Mr. Agha paid the \$939.75 website fee. Ms. Fiorentino provided an invoice to Mr. Agha for the first optimization installment fee on September 27, 2019, but Mr. Agha ultimately did not pay it or any of the other installment fees.
15. Around mid-September 2019 Ms. Fiorentino discussed designing a business logo for Mr. Agha and producing business cards. The parties exchanged some text messages and an email about this but did not document any agreement.

16. Ms. Fiorentino began working on the website and provided draft website designs in mid-October 2019. The parties' relationship broken down shortly after, which I discuss directly below.

Issue #1. Did Mr. Agha repudiate the parties' contract, and if so, what remedies are appropriate?

17. Termination by repudiation occurs when a party shows an intention not to be bound by the agreement and the innocent party accepts this repudiation, bringing the agreement to an end. Similarly, a breach of a fundamentally important obligation may also be a repudiation as it amounts to a refusal to perform. See, for example, *Kuo v. Kuo*, 2017 BCCA 245 and *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2007 BCCA 88 at paragraph 109.

18. The contract discusses termination, or cancellation, of the agreement. Section 8.1 says, "Notice. Either party can cancel this contract at any time". However, the contract does not provide any particular method for cancellation or explain what is meant by notice.

19. For the reasons that follow, I find the test from *Kuo* applicable in the circumstances. I find that Mr. Agha repudiated the parties' agreement as his words and actions showed an intention not to be bound. I find that Ms. Fiorentino, as the innocent party, accepted the repudiation and cancelled, or terminated, the parties' agreement under section 8.1.

20. In a series of October 21, 2019 text messages, Mr. Agha showed he no longer wished to work with Ms. Fiorentino. He wrote he had still not received a final website from Ms. Fiorentino and expressed frustration at her requests for further information. He wrote that he would not "bother texting anymore" as things were not "going anywhere". He said he would be in touch with a legal advisor to "take care of the rest". In the days leading up to his text message, Mr. Agha's actions also showed he repudiated the agreement. On October 17, 2019, Mr. Agha removed Ms. Fiorentino as his "Google My Business" manager, which interfered with Ms.

Fiorentino's ability to do search engine optimization work. Mr. Agha also failed to pay the September 27, 2019 invoice for search engine optimization, which was due on October 1, 2019. Under section 4.3 of the contract, Mr. Agha agreed to make this payment when it became due.

21. I find that Ms. Fiorentino, as the innocent party, accepted Mr. Agha's repudiation. On October 23, 2019, she emailed Mr. Agha to say that the contract had been cancelled. She also sent an invoice for the search engine optimization fees of \$2,205. Mr. Agha replied that he would not pay because she did not provide him a working website or any search engine optimization services.
22. In his counterclaim, Mr. Agha essentially argues that he is the innocent party. He says Ms. Fiorentino agreed to deliver a working website within 2 weeks of being hired. Ms. Fiorentino denies ever agreeing to such terms.
23. Section 9.1 of the contract says the contract and the work order contain the entire contract between the parties. I place little weight on Mr. Agha's submission because it differs from the contract and work order. Section 5.1 states that Ms. Fiorentino agreed to complete the website within 60 days of the parties' September 12, 2019 contract, for an ultimate deadline of November 11, 2019. There is no wording to indicate she agreed to provide a working website before then.
24. Section 4.7 says Ms. Fiorentino agreed to provide Mr. Agha only a first draft for a new website by October 15, 2019. It is undisputed that Ms. Fiorentino provided 2 drafts by that date and a third draft on October 16 or 17, 2019. She also provided sample pages for each draft (including text, photos, and links). The parties' text messages of October 11 and 12, 2019 show Mr. Agha reviewed the second draft and said it was "more like what we want". Based on the sample pages and text messages, I find that Ms. Fiorentino complied with section 4.7.
25. Mr. Agha also says Ms. Fiorentino breached their agreement by failing to register 2 domain names for his website. I disagree, as the contract and work order are silent on this issue. Ms. Fiorentino says that, outside of their written agreement, she

agreed to register domain names for Mr. Agha, but only after the website was finished. She says that Mr. Agha abandoned this agreement by registering a domain name himself on October 18, 2019. Ms. Fiorentino provided a website registration document that supports her version of events. Given the evidence and submissions, I am not satisfied Ms. Fiorentino breached any obligation to register domain names for Mr. Agha.

26. I will address the counterclaim below. Having determined that Ms. Fiorentino cancelled the contract and that she was the innocent party, the next issue is what remedies are appropriate. Section 8.1 says that in the event of a cancellation, the parties should refer to section 4.8 or 8.3. The contract does not say how to determine which section applies but I find nothing turns on this. Both sections state Mr. Agha must pay the full remaining balance owed on the work order, being \$2,205.
27. Mr. Agha says he should not pay this amount for 2 reasons. First, he says Ms. Fiorentino did not do any search engine optimization work. I disagree, as Ms. Fiorentino says that she optimized the web pages as she worked on them. Ms. Fiorentino provided screenshots showing such work, including a written summary used by search engines for website indexing.
28. Second, Mr. Agha says that the search engine optimization services were part of a separate contract that was contingent on Ms. Fiorentino completing the website first. I disagree with this as well. The contract and work order payment schedule show that Mr. Agha agreed to pay search engine optimization fees while the website was being developed, rather than when it was complete. As noted above, the first search engine optimization installment was due on October 1, 2019. Ms. Fiorentino did not have an obligation to provide a working website by then.
29. In any event, sections 4.8 and 8.3 show that the amount payable for cancellation is not based on the search engine optimization work actually done but on Ms. Fiorentino's expected income stream under the contract. I find sections 4.8 and 8.3 to be clauses for liquidated damage, which is a contractual pre-estimate of

damages suffered by a party in the event of a breach of contract. Numerous cases show these clauses are enforceable in more onerous circumstances than these. See, for example, the tribunal decision of *Super Save Disposal Inc. v. Qurban et al*, 2019 BCCRT 144 at paragraphs 24 and 25. Although not binding, I find the Vice Chair's comments applicable. As Ms. Fiorentino did not breach the contract, I conclude that Ms. Fiorentino did not need to complete the search engine optimization work in order to be entitled to liquidated damages of \$2,205.

30. I note that Ms. Fiorentino says Mr. Agha breached a number of other contract terms. She says Mr. Agha breached section 3.4 by failing to respond to communications within 48 hours. She also says Mr. Agha breached section 4.6 by failing to provide all content (specifically photos and ad copy) within 5 days of signing the agreement. On the evidence before me I am not satisfied Mr. Agha breached either term 3.4 or 4.6. The evidence of the parties' correspondence was limited and neither party showed what Mr. Agha provided to Ms. Fiorentino. However, this does not affect my finding that Ms. Fiorentino is entitled to liquidated damages of \$2,205.

31. The *Court Order Interest Act* applies to the tribunal. Ms. Fiorentino is entitled to pre-judgement interest on the \$2,205 from October 23, 2019, the date of cancellation, to the date of this decision. This equals \$23.32.

Issue #2. Did Ms. Fiorentino breach the parties' contract, and if so, what is the appropriate remedy?

32. As noted above, Mr. Agha says Ms. Fiorentino breached her agreement to provide a working website within 2 weeks of being hired and register 2 domain names. He counterclaims for \$939.75 plus GST, being what he paid for website development fees.

33. I have already decided that Ms. Fiorentino did not breach any such terms or agreements. Further, section 4.4 of the contract also says that all funds paid to Ms.

Fiorentino are non-refundable. Given my findings and the wording of section 4.4, I dismiss Mr. Agha's claim for the return of the website development fee.

34. Mr. Agha also says Ms. Fiorentino breached their agreement to design and provide business cards. Ms. Fiorentino disagrees. She says the parties discussed Mr. Agha purchasing a business logo from Ms. Fiorentino for \$175, with the business cards added as a bonus. However, she says Mr. Agha decided to use a logo design from someone else.
35. I find the evidence supports Ms. Fiorentino's version of events. A series of texts and an email in September 2019 show Ms. Fiorentino provided design logos to Mr. Agha for approval. She asked him to approve the fifth design so that business cards could be printed, but he never did so.
36. In summary, I find Ms. Fiorentino did not breach any agreement with Mr. Agha. I dismiss Mr. Agha's counterclaim.

TRIBUNAL FEES AND EXPENSES

37. 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.
38. Ms. Fiorentino is the successful party in both her claim and the counterclaim. I find she is entitled to reimbursement of \$125 in tribunal fees. She did not claim any dispute-related expenses, so I do not order any. I dismiss Mr. Agha's claim for tribunal fees.

ORDERS

39. Within 14 days of the date of this order, I order the Mr. Agha to pay Ms. Fiorentino a total of \$2,353.32, broken down as follows:

- a. \$2,205.00 as liquidated damages,
- b. \$23.32 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$125.00 in tribunal fees.

40. Ms. Fiorentino is entitled to post-judgment interest, as applicable.

41. I dismiss Mr. Agha's counterclaims.

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. The Minister of Public Safety and Solicitor General has issued Ministerial Order No. M086 under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The tribunal can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the tribunal will not have this ability. A party should contact the tribunal as soon as possible if they want to ask the tribunal to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

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.

David Jiang, Tribunal Member

