Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Adams dba Think Outside v. Klean Industries Inc*., 2020 BCCRT 575

B E T W E E N :

BEN ADAMS (Doing Business As THINK OUTSIDE)

APPLICANT

A N D :

KLEAN INDUSTRIES INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Richard McAndrew

INTRODUCTION

1. This dispute is about payment for internet marketing services. The applicant Ben Adams, doing business as Think Outside, says the respondent, Klean Industries Inc., owes $1,575 for unpaid services from April 2019.

2. The respondent denies the applicant's claims. The respondent says the applicant breached the contract by failing to attend a business meeting. The respondent also argues that the parties ended the contract on March 28, 2019. The respondent argues they do not owe the applicant any amount for April 2019 because the applicant did not perform any contractual services.

3. The applicant is self-represented. The respondent is represented by a business representative.

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, or a combination of these. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the tribunal's mandate of proportional and speedy dispute resolution, I decided 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.

ISSUES

8. The issues in this dispute are:

    a. Does the respondent owe the applicant a debt under the contract? If so, how much?

    b. Does the respondent owe the applicant contractual interest on the balance owed? If so, how much?

    c. Must the applicant reimburse the respondent's legal fees of $750?

EVIDENCE AND ANALYSIS

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

10. It is undisputed that the parties signed a contract on November 30, 2018 for internet marketing services starting on January 1, 2019. The respondent agreed to pay the applicant $1,500 per month for these services.

11. It is undisputed that the applicant sent an April 1, 2019 invoice for $1,500 for management services, plus GST, totaling $1,575. The invoice said the payment was due on May 1, 2019. It is undisputed that respondent did not pay this invoice.

12. It is also undisputed that the contract says interest on unpaid invoices will be charged at the rate of 26.824% per year.

Was the respondent entitled to end the contract because the applicant fundamentally breached it?

13. The respondent argues that the contract ended on March 28, 2019 because the applicant breached it.

14. When a party fails to perform a primary obligation of a contract in a way that deprives the other party of substantially the whole benefit of the contract, it is called a fundamental breach. (See *Hunter Engineering Co. v. Syncrude Canada Ltd*., 1989 CanLII 129 (SCC)). 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.)

15. 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 damages against the other party for a breach of contract. For a fundamental breach, the wronged party can end 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).)

16. Applied to this case, if the applicant fundamentally breached the contract, the respondent could end the contract without further responsibility to the applicant. Because the applicant's claim is based on the contract, the applicant would not receive any money if he fundamentally breached the contract.

17. The respondent argues the applicant breached the agreement by not attending a business meeting on March 26, 2019 (meeting). The respondent says this justified ending the contract.

18. Contrary to the respondent's submission, the applicant says he was not aware of the meeting. In particular, the applicant says he did not receive the respondent's March 25, 2019 email scheduling the March 26, 2019 meeting. There is no dispute the applicant's email address was correctly used and that the parties exchanged multiple emails before the March 26, 2019 meeting.

19. The applicant did not explain why he did not receive an email addressed to him. In the absence of an explanation, I find the applicant received the respondent's March 25, 2019 email as addressed and the applicant was aware of the March 26, 2019 meeting.

20. The respondent argues that the applicant's failure to attend the meeting breached the contract. The respondent says the meeting was important because the respondent's web development team were discussing the website's re-design. The respondent says this directly related to the applicant's contractual responsibility to manage the respondent's internet marketing services.

21. The contract says the applicant will provide digital marketing services for the respondent. The contract says this includes managing the respondent's paid internet search services and providing digital marketing recommendations. I find that this includes the obligation to attend meetings to discuss website development plans.

22. I am satisfied that the applicant breached the contract by failing to attend the meeting. I now need to determine whether the applicant's failure to attend the meeting was a fundamental breach of the contract. I find that it was not.

23. 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 breach from the perspective of a reasonable person in the respondent's position. I find that a reasonable person would not consider the contract to be completely undermined because the applicant failed to attend the March 26, 2019 meeting.

24. I am not satisfied that a person in the respondent's position could reasonably say that the respondent lost the entire benefit of the contract because the applicant did not attend the meeting. While I accept that the meeting was an important event related to the respondent's internet marketing services, the respondent did not provide any evidence showing that the parties could not be exchange the

information discussed at the meeting through other means such as telephone calls, emails or a further meeting.

25. Also, after the missed meeting, I find that the applicant made efforts to continue providing their internet management services. I find that the applicant sent the respondent an April 9, 2019 email asking for an update of the respondent's marketing plans. I also find that the respondent continued displaying the respondent's paid internet search advertisements in April 2019. I find that the applicant was willing to continue to perform the contract's terms and I find that it was reasonably possible for the parties to continue with the contract.

26. Therefore, I find that the applicant's failure to attend the March 26, 2019 meeting was not a fundamental breach of the contract.

Did the respondent provide sufficient notice to end the contract on March 28, 2019?

27. The respondent says they emailed the applicant a notice to end the contract on March 28, 2019. Theemail said they were putting their marketing campaign on hold until their website was redone.

28. The applicant says that he did not receive the March 28, 2019 email. However, the email shows that it was addressed to the applicant. The applicant did not provide any evidence why the email was not received as addressed. For the same reasons stated above, I find that the applicant received the March 28, 2019 email from the respondent.

29. Although I find that the applicant received the March 28, 2019 email, I am not satisfied that this email was sufficient notice to end the contract. The email did not say that the respondent was ending the contract. It merely said that the respondent was putting the contract on hold.

30. In addition, both parties continued to treat the contract as ongoing after delivery of the March 28, 2019 email. I find that the applicant emailed an invoice on April 1,

2019. In addition, I find that the applicant sent the respondent a further email on April 9, 2019 asking about the status of the respondent's website update and marketing plans. I find that these emails showed that the applicant thought the contract was still ongoing.

31. In addition, I find that the respondent let the applicant continue working on the contract throughout April 2019 without clarifying that the contract was terminated. It is undisputed that the respondent did not communicate with the applicant again until April 27, 2019.

32. In light of the parties' overall conduct from March 28, 2019 to the end of April 2019, I do not find that the March 28, 2019 email was an effective notice to contract. The email's wording was vague and the parties did not treat the contract as ended.

33. For the above reasons, I find that the respondent's March 28, 2019 email did not end the contract.

34. However, even if the March 28, 2019 email had been a sufficient notice to end the contract, I find that the notice would not have ended the contract until April 30, 2019 anyway.

35. I find that the contract does not have an end date or any terms explaining how the contract will end. The respondent argues that, in the absence of any contractual terms, they can end the contract with reasonable notice. The respondent refers to the BC Supreme Court decision in *Hendry v. Graycrest Resort Ltd.*, 2000 BCSC 1855 (CanLII). In *Hendry* the court held that a continuous contract could be ended with reasonable notice. The court considered the length and type of relationship between the parties and time needed to change plans. I agree that the reasoning in *Hendry* applies.

36. The respondent argues that the March 28, 2019 email was reasonable notice to end the contract in the circumstances because this was a brief commercial relationship with a month-to-month contract.

37. Based on the relatively short commercial relationship, I find that short notice consisting of one billing cycle would be appropriate. Since the applicant billed the respondent on a monthly billing cycle, I find that the appropriate length of notice to end the contract would be one month. Since the respondent sent their email on March 28, 2019, I find that the effective end date of the contract would have been April 30, 2019.

38. For the above reasons, I find that the respondent did not provide proper notice to end the contract before April 30, 2019.

Did the applicant perform the contract in April 2019?

39. The respondent argues that they do not owe the applicant any debt for services in April 2019 because the applicant stopped performing his contractual services. The applicant says he continued managing the respondent's internet marketing campaign until the end of April 2019.

40. The applicant provided an invoice from a search engine service showing that the respondent's paid advertisements were being displayed in April 2019. The applicant also provided a performance report showing the results of the internet marketing campaign for April 2019.

41. Althought the respondent argues that the applicant did not provide any updates, reports, or recommendations in April 2019, as noted above, I find that the respondent did not respond to the applicant's April 9, 0219 email until April 27, 2019. I do not it unreasonable for the applicant to wait for the respondent's reply before making further marketing recommendations in April 2019.

42. The respondent also says the internet marketing campaign was automated and continued to run in April 2019 without any management services provided by the applicant. However, the respondent has not provided any evidence to support this claim.

43. Based on reports and invoices provided by the applicant, I am satisfied that the applicant continued to operate the internet marketing campaign in April 2019.

44. I find that the respondent owes the applicant $1,575.00 in debt for unpaid services provided in April 2019.

45. I find that under the contract's terms the parties agreed to an annual interest rate of 26.824%. I find that the applicant is entitled to 26.824% as of May 1, 2019, the date the debt was due, to the date of this decision. This equals $452.57.

46. 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. I find the applicant is entitled to reimbursement of $125 in tribunal fees.

47. The respondent also requested reimbursement of $750 of legal fees. The tribunal rules only provide for reimbursement of legal fees in extraordinary circumstances. As the respondent was unsuccessful, and as I am not persuaded that these are extraordinary circumstances, I dismiss the respondent's claim for reimbursement of legal fees.

ORDERS

48. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of $2,152.57, broken down as follows:

    a. $1,575 in debt,

    b. $452.57 in contractual pre-judgment interest, and

    c. $125 in tribunal fees.

49. The applicant is entitled to post-judgment interest, as applicable. The respondent's claim for dispute-related expenses is dismissed.

50. 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 a Ministerial Order 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.

51. 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.

Richard McAndrew, Tribunal Member