



Civil Resolution Tribunal

Date Issued: May 29, 2020

File: SC-2019-008042

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Jhurry (dba Arc En Ciel Painting and Renovation) v. Dean*,
2020 BCCRT 594

B E T W E E N :

AKASHSING JHURRY (Doing Business As ARC EN CIEL PAINTING
AND RENOVATION)

APPLICANT

A N D :

ZENOBIA DEAN

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. This decision addresses the first of 2 related disputes, which are about a painting contract. I have written 2 separate decision for the disputes because, although the second dispute is essentially a counterclaim to this one, the named parties are not identical in the 2 disputes.
2. In this dispute, the applicant Akashing Jhurry (dba Arc En Ciel Painting and Renovation) says that the respondent, Zenobia Dean, did not pay the second installment for painting services. The applicant says that he agreed to fix any problems with his work at the end of the project, but the respondent refused to pay for work done to date until after the job was completed. He requests \$850 payment for the second installment. The applicant represents himself.
3. The respondent says that the applicant's work was defective and that he damaged parts of her kitchen. She says that she offered to pay him in full after he finished the work and cleaned up the paint splatters, but he refused. The respondent's husband filed the second dispute (SC-2020-000187) against the applicant for the kitchen damage he alleges the applicant caused. The respondent's husband represents her in this dispute.

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. In some respects,

this dispute amounts to a “he said, she said” scenario with both sides calling into question the credibility of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the 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 the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to 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.

ISSUE

8. The issue in this dispute is whether the applicant was entitled to the second instalment before fixing the deficiencies.

EVIDENCE AND ANALYSIS

9. In a civil dispute such as this, the applicant must prove his claim on a balance of probabilities.
10. I will not refer to all of the evidence or deal with each point raised in the parties’ submissions. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.
11. The parties’ written August 23, 2019 contract says that the applicant would paint the respondent’s kitchen for \$2,500. The applicant agreed to prepare the surfaces for

painting and then use two coats of paint. The contract stated that when the painting was completed the applicant agreed he would clean any paint drops and debris.

12. The contract specifically stated that the respondent would immediately pay a one third deposit. The contract shows the respondent paid \$800 at the time the contract was signed. The contract also stated that upon completion of the preparation and the first coat that the respondent would pay the second installment of \$850. The last \$850 was due “upon completion and satisfaction of the work.”
13. I note that the respondent submits that the applicant broke the agreement by brushing paint on the cabinets and not spraying them. The contract does not say that the cabinets would be sprayed, and the respondent did not bring this up in her Dispute Response filed at the outset of this proceeding. The respondent says she has text messages between her and the applicant but did not provide them. I find there is insufficient evidence that the applicant contracted to spray the cabinets and I do not accept that this was a term of the contract.
14. The applicant says that on September 23, 2019 he had completed two thirds of the work and so he asked the respondent for the \$850 second installment. He says at that time the respondent indicated that she had concerns about the work, including paint droppings and the newly painted kitchen cabinet doors were not closing properly. The applicant says that he told the respondent he would pay a colleague to fix the cabinet hinge setting issue and that he would clean up the paint droppings once the work was completed. He says that the paint is water based and easy to clean up.
15. I note that the respondent says that her husband was present for this meeting and the applicant was dealing with him. I find nothing turns on whether the respondent’s husband was present or not.
16. The applicant says that the respondent then refused to pay the second installment and said that she wanted to wait until the job was complete. The applicant says that this violated the contract’s terms, so he stopped work.

17. The respondent submits that the applicant's work was defective. She has provided pictures showing some of the work was not completed, there were paint drops on the kitchen faucet, countertop, ceiling and floor. The respondent also says that the applicant washed his paint brushes in the kitchen sink. The picture shows paint in the sink. The pictures also show that the cabinet doors do not line up when closed. The respondent agrees that the applicant said he would find somebody to fix the cabinet doors.
18. The respondent says that she and her husband told the applicant that they would not pay him until everything was completed and corrected.
19. I note that where defective work is alleged, the ultimate burden of proof is on the party asserting it. In other words, the respondent must prove on a balance of probabilities that the applicant breached the parties' contract: *Lund v. Appleford Building Company Ltd. et al*, 2017 BCPC 91.
20. The respondent can prove a breach of contract if she establishes that the applicant breached the standards expected of a competent painter. However, if the conduct in question is of a technical or scientific nature or otherwise outside the knowledge and experience of the ordinary person, then expert evidence of the standard of care, its content, and breach, will likely be necessary: *Bergen v. Guliker*, 2015 BCCA 283 at paragraph 119. This is because the standards of an industry are often outside of the knowledge or expertise of an ordinary person.
21. In this dispute, I find this means expert evidence is needed to determine whether the applicant's painting was performed to a standard expected of a reasonably competent worker. Specifically, the questions are whether the kind of paint used could easily be cleaned up at the end of the project and whether the cabinets' hinges could be adjusted so that they hung correctly. The respondent submits that she was concerned that the paint was not going to be successfully cleaned up and that the applicant was not going to fix the cabinet doors.

22. As noted, the respondent provided pictures of the paint droppings. The respondent has also provided a \$700 invoice which says it is for paint cleanup. The invoice is signed but there is no indication who the person is who did the cleanup or what specifically was done. The respondent says that the \$700 was paid to clean up paint on the kitchen faucet, cabinet doors, and floors. The applicant says that \$700 is an inflated price to pay for this work. There is no evidence from the person who did the cleanup besides the receipt.
23. I do not accept the receipt as expert evidence that the applicant's work was defective. The applicant acknowledges that there were paint droppings and the contract specifically says that the paint drops would be cleaned up at the end of the project. Also, the receipt corroborates that the paint drops could be cleaned up. Therefore, the evidence does not persuade me that the applicant's work was below industry standards because there were paint droppings which he was leaving until the end of the project to cleanup.
24. Further, both parties agree that the applicant said he would get somebody to make sure the cabinet doors hung correctly. The pictures do show that the painting work was incomplete but both parties agree that the applicant was only partially through the project. I find that this does not prove that the work would have been defective if the applicant was paid his second installment and then allowed to finish the project.
25. Therefore, I find that the respondent did not prove that the applicant's work was below the industry standard. I also find that the contract indicated that the applicant was to be paid the second installment and at the end of the project he was supposed to complete the work and do any cleanup to the respondent's satisfaction. The contract specifically says that the last and third instalment was due "upon completion and satisfaction of the work." I find that the applicant should have been given an opportunity to complete the work and remedy any deficiencies before the last payment was made, not before the second.

26. For these reasons, I find the respondent failed to meet her burden of proof that the applicant has breached the parties' contract. In other words, the respondent failed to prove that the applicant's work was deficient and not up to the required standard.
27. Therefore, I find that the respondent has to pay the applicant the \$850 second installment for the work he completed.
28. The *Court Order Interest Act* (COIA) applies to the tribunal. The applicant is entitled to pre-judgement interest on the \$850 installment due on September 23, 2019. This equals \$11.35.
29. 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. As the applicant was the successful party he is entitled to reimbursement of \$125 in tribunal fees. There were no dispute-related expenses claimed.

ORDERS

30. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of \$986.35, broken down as follows:
 - a. \$850.00 in debt for the painting services provided,
 - b. \$11.35 in pre-judgment interest under the COIA, and
 - c. \$125.00 in tribunal fees.
31. The applicant is entitled to post-judgment interest, as applicable.
32. 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.

33. 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.
34. 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.

Kathleen Mell, Tribunal Member