Civil Resolution Tribunal

Date Issued: May 29, 2020

File: SC-2020-000214

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *0955824 B.C. Ltd. dba Van Pro Disposal v. 1128986 B.C. Ltd.*, 2020 BCCRT 597

B E T W E E N :

0955824 B.C. LTD. DBA VAN PRO DISPOSAL

APPLICANT

A N D :

1128986 B.C. LTD.

RESPONDENT

A N D :

0955824 B.C. LTD. DBA VAN PRO DISPOSAL

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. This dispute is about a waste disposal contract. The applicant, 0955284 B.C. Ltd. dba Van Pro Disposal (Van Pro), says the respondent, 1128986 B.C. Ltd. (1128986) failed to pay for services and failed to cancel in accordance with the contract's terms.

2. Van Pro claims $4,999.43, broken down as $538.60 for garbage service fees and GST, $4,204.00 in liquidated damages, and $256.83 for bin removal, fuel and environmental levy fees.

3. In 2017, Van Pro bought certain assets and contracts from Segal Disposal (Segal), including a 5-year June 3, 2015 contract for waste removal services between Segal and Pizza Garden. Then, in 2018, 1128986 bought Pizza Garden. 1128986 says it did not sign any new contract with Van Pro for waste disposal services. 1128986 says its principal, AS, agreed to have Van Pro provide waste services by telephone only. Van Pro disagrees, saying that 1128986 signed a new contract in October 2017, through manager NE.

4. 1128986 says it is not bound by the terms of any contract with Van Pro and could cancel on 30 days' notice under a verbal agreement. 1128986 asks me to dismiss the dispute.

5. 1128986 also says that Van Pro's service became poor, including failing to pick up waste on time. 1128986 phoned to cancel waste services but Van Pro repeatedly refused to pick up its bins.

6. 1128986 counterclaims, saying that Van Pro provided failed to remove its bins for 4 months. 1228969 says Van Pro owes it $1,200 for space rental. 1228969 also claims $3,800 in damages because it says the bins blocked parking for its pizza delivery drivers, leading to a loss of business.

7. Van Pro says the contract entitled it to place bins in the parking lot. Van Pro asks that I dismiss the counterclaim.

8. Van Pro is represented by manager WA. 1128986 is represented by its principal AS.

JURISDICTION AND PROCEDURE

9. 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.

10. 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, he said" scenario with both sides calling into question the credibility of the other. Credibility of 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.

11. 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. In *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the court recognized that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.

12. 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.

13. 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

14. The issues in this dispute are:

    a. to what extent, if any, must 1128986 pay Van Pro for claimed waste disposal services and liquidated damages, and

    b. in the counterclaim, to what extent, if any, must Van Pro pay 1128986 the claimed $1,200 for space rental and $3,800 in damages for loss of business?

EVIDENCE AND ANALYSIS

15. In this civil claim, the applicant Van Pro bears the burden of proof on a balance of probabilities. 1128986 bears this same burden in its counterclaim. I have reviewed the evidence and submissions but refer to them only as I find necessary to explain my decision.

16. On June 3, 2015, La Fontana Pizzeria also known as Pizza Garden signed a waste disposal contract (the 2015 contract) with Segal, for a 5-year term unless terminated by Pizza Garden by registered mail to Segal delivered between 90 and 120 days before the term's end (cancellation window).

17. The 2015 contract included a term allowing Segal to assign it to another company, and that the 2015 contract was binding on both Segal and Pizza Garden's successors and assigns. In the 2015 contract Segal agreed to pick up waste weekly.

18. On August 15, 2017, 1128986 bought the business assets of Pizza Garden and started to carry on business there.

19. On October 27, 2017, Van Pro says NE, as manager at 1128986, signed a contract (the 2017 contract) with Segal Disposal for weekly waste removal services at the Pizza Garden location.

20. Van Pro relies on evidence from its salesperson who prepared the 2017 contract, AWY, who originally worked for Segal and then became a Van Pro employee. AWY says he met with NE and that NE signed the 2017 contract.

21. I find that the 2017 contract is not valid. I say this because NE contests the validity of his signature, and the 2017 contract identifies the customer signatory only with N's first name, without any surname. I also find that NE's signature on his submitted statement does not match that on the 2017 contract. As well, AS is identified as the customer contact on page 1 of the 2017 contract, but Van Pro argues that NE, not AS, signed page 2. Finally, 1128986's name appears to have been added to the 2017 contract after a strikethrough of another company name on page 1. On balance, I find that Van Pro has not proven that the contract properly identified 1128986 or its authorized signatory on the 2017 contract, and that the contract is therefore invalid.

22. Having said that, I find that the 2015 contract applies to Van Pro and 1128986, because there was no evidence before me that it was ever cancelled. I find that it renewed on June 3, 2020, for a further 5-year term set to end June 3, 2025 unless cancelled in writing, by registered mail, within the cancellation window.

23. I find that 1128986 never sent a registered mail letter to cancel the 2015 contract. So, I find that 1128986 did not cancel the 2015 contract as required by its terms.

24. The next question is whether 1128986 must pay liquidated damages under the 2015 contract, or whether Van Pro fundamentally breached the 2015 contract by failing to provide the required waste removal service.

25. I return to the relevant chronology. In early 2018, the 2015 contract was assigned to Van Pro.

26. According to the statements of account filed in evidence by Van Pro, 1128986 paid its accounts owing to a zero balance as of April 9, 2019. I find that, up to that point, 1128986 paid its invoices.

27. On June 1, 2019, 1128986's owner asked Van Pro to remove their bins from its property.

28. I find that AS complained that Van Pro's service was poor, including picking up waste late. I find that AS tried to cancel the service by telephone and email on several occasions, including by emails sent in May, June and August 2019. In those emails, AS asked Van Pro to remove their bins.

29. Van Pro says it issued a $5,019.83 invoice, broken down as $231.00 for bin removal, $4,313.23 in liquidated damages and $475.60 for waste removal services for May 2019. Van Pro did not file the invoice itself in evidence. As well, these amounts are not consistent with Van Pro's claimed amounts. Van Pro did not explain the difference. 1128986 paid only $475.60. As a result, AWY, who was Van Pro's driver in early June 2019, refused to remove the bins and left. AWY did not explain why he left the bins behind despite 1128986 paying more than the bin removal fee.

30. I note that Van Pro also claims $538.60 in debt for garbage service fees and $256.83 for bin removal, fuel and environmental levy fees it says were unpaid. Looking at the statements of account, I find that debts in these amounts are not proven, particularly as payments were current up to April 9, 2019 and the numbers after that date do not add to the claimed amounts.

31. 1128986 says, and I find, that Van Pro stopped providing waste removal services entirely as of June 2019 but continued to bill for those services until September 2019.

32. On September 20, 2019, 1128986 emailed Van Pro noting that its failure to remove the bins was causing disruption to 1128986's pizza business.

33. Van Pro has the burden of proving that it provided the waste removal services required under the 2015 contract. However, aside from providing a brief statement from AWY that Segal provided "good service", and submitting printed statements of account, Van Pro provided no proof that it provided service after it assumed Segal's waste disposal obligations. Van Pro failed to provide invoices that it issued to 1128986. 1128986 filed a few invoices from Van Pro, for months when it says service was not provided at all. Given that 1128986's evidence that service was poor, I find that Van Pro failed to provide the agreed waste removal services under the 2015 contract at all in May, June, July, August and September 2019, but continued to charge 1128986 for it.

34. The question then becomes whether Van Pro's service was so poor such that it can be said the applicant fundamentally breached the parties' contract first. For the reasons below I find that Van Pro fundamentally breached the parties' 2015 contract.

35. Below, I have adopted the Vice Chair's analysis in *0955824 BC Ltd. dba Van Pro Disposal v. Walltek Storage Ltd.*, 2020 BCCRT 433, which I find applicable though it is not binding on me.

36. 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), and *Bhullar v. Dhanani*, 2008 BCSC 1202.

37. 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).

38. Applied to this case, if Van Pro fundamentally breached the contract, 1128986 was entitled to terminate the contract and be relieved from any further performance of it. Because Van Pro's monetary claims are all based on the contract, it would not receive any money if it fundamentally breached the contract.

39. 1128986 essentially submits that 1128986's failure to pick up the garbage was a fundamental breach because the heart of the contract is regular, weekly garbage pickup. I agree.

40. The account statements show that 1128986 paid its accounts so that the account balance was $0 as of April 9, 2019. However, those same statements also show a "past due" amount of $5,019.83 that was charged to the account in June 2019 as liquidated damages. Because I have found that the clauses in the 2015 contract do not apply, and that Van Pro failed to provide satisfactory service from May 2019 onward and failed to pick up its bins despite 1128986 paying its bin removal fee, I find that the $5,019.83 charge, which is made up of liquidated damages and other service charges, are invalid.

41. I find that Van Pro fundamentally breached the 2015 contract and that 1128986 does not owe the claimed amounts.

42. I dismiss Van Pro's claims.

43. Turning to the counterclaim, I find that 1128986 did not prove that the bins being left at its premises caused the claimed $3,800 loss of business damages. For example, 1228968 did not file any customer complaints, sales logs or accounting information to prove a loss of business, despite being informed by the tribunal case manager that relevant information to support its counterclaim needed to be uploaded through the tribunal portal.

44. I also dismiss 1128986's counterclaim for $1,200 for leaving the bins in the space without permission. While I accept 1228986's evidence that the bins were in the space for 4 months after the cancellation, it did not prove that $1,200 was an appropriate measure of damages. I dismiss the counterclaim.

45. 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. Each party succeeded either in the claim or counterclaim. I order that they each bear their own tribunal fees and dispute-related expenses.

ORDER

46. I dismiss the claims and counterclaims, and this dispute.

47. 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.

48. 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.

Julie K. Gibson, Tribunal Member