Civil Resolution Tribunal

Date Issued: June 4, 2020

File: SC-2019-009328

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Donaldson v. Babcock*, 2020 BCCRT 622

B E T W E E N :

KEALY DONALDSON

APPLICANT

A N D :

GLENN BABCOCK

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This dispute is about alleged deficiencies in labour services on a renovation project.

2. The applicant, Kealy Donaldson, hired the respondent, Glenn Babcock, to work for her on a residential renovation. The applicant says that the respondent's work was deficient and claims $4,315 as the cost to fix the deficiencies.

3. The respondent says that he was not hired as an independent contractor and should not have to pay for fixing any deficiencies in the work he performed. In any event, he says his work was not deficient and he denies that some of the claimed deficiencies relate to his work.

4. The parties are both 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.

7. 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 British Columbia Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is an issue. Therefore, I decided to hear this dispute through written submissions.

8. 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.

9. 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

10. The issue in this dispute is whether there were deficiencies in the respondent's work, and if so, to what extent if any must the respondent compensate the applicant?

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.

12. It is undisputed that the applicant hired the respondent to help her with a renovation project. First, it is necessary to determine whether the respondent was hired as an employee or an independent contractor because different standards and legal liability attach to each.

13. The relevant factors to consider in determining whether a person is an independent contractor or employee are discussed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 and further in *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044. These factors include the level of control the employer has over the worker's activities, whether the worker provides his own equipment, whether the worker hires his own helpers, the degree of financial risk

taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his tasks. These factors are not exhaustive, and the relative weight of each factor depends on the facts and circumstances of each case. The central question is whether the worker is performing services as a person in business on their own account. If so, the person is more likely an independent contractor.

14. There was no written contract between the parties, and no evidence that the respondent agreed to work a certain number of hours, or that he was hired to perform a particular task. The respondent assisted with several tasks including painting, roofing, door installation, and siding installation, among others. The respondent submits that the applicant was the boss and that he performed tasks at the direction of the applicant. He says there were many people working on the house at the same time and that the applicant often switched him from task to task throughout the day so that he was not the only person responsible for any particular job.

15. The respondent kept track of the dates and hours he worked, and he provided three invoices in total to the applicant. There is no evidence that the applicant withheld statutory deductions. The respondent's invoices in evidence show that the respondent worked 100 hours over 18 days between May 15 and July 8, 2019. The invoices show only the hourly rate of pay, the dates, and number of hours worked each day, but they do not include any description of the respondent's work. I infer from the respondent's evidence that he was not working exclusively for the applicant during this period.

16. The applicant submits that the respondent was paid $45 per hour. However, based on the invoices, I find that the applicant paid the respondent $40 per hour worked. The respondent says that when he was hired, the applicant asked if he knew anyone else that could assist with the renovation. The respondent did refer two other people to assist, whose hours are reflected on the respondent's invoices. K was paid $20 per hour and M was paid $25 per hour. I infer from the evidence that

the applicant paid K and M directly and not through the respondent. The respondent submits that he was paid a higher hourly rate than the others because his truck and some of his tools were used. However, I note that the respondent was not expected to supply all required tools and the applicant supplied materials.

17. I find that the factors in favour of finding the respondent was an employee slightly outweigh the factors in favour of finding him an independent contractor. I place weight on the fact that the applicant directed the respondent's work, that the respondent was paid hourly, and that he did not have the chance of profit nor a risk of loss in performing the work. Therefore, I find that the respondent was the applicant's employee.

18. For an employer to recover damages from an employee for incompetent performance, something more than the employee's mere error, incompetence, or simple negligence is required: see *Kirby* at paragraph 376.

19. As noted above, the applicant alleges several deficiencies with the respondent's work. The applicant filed a document in evidence that set out the claimed deficiencies and estimated time required to fix each item at the rate of $40 per hour. There is no explanation of who prepared this document, but I infer that the amount claimed in the Dispute Notice was based on the estimated costs set out in this document.

20. The alleged deficiencies and estimated cost to fix each, include:

    a. exterior painting overspray ($480 in labour and $50 in materials),

    b. exterior siding installation that did not align with the other siding ($200 in labour and $25 in materials),

    c. installation of a cedar shake roof that lifted in places and was not capped or trimmed with flashing ($2,000 in labour and $300 in materials),

    d. installation of the front door in a temporary manner when it should have been installed permanently ($320 in labour), and

e. deciding to change the height of the skirt roof without consulting the crew installing the skirt roof, causing them extra work and requiring the relocation of dryer vent hole the respondent had installed ($640 in labour and $300 in materials).

21. The respondent denies it was even his work on some of the tasks for which the applicant is claiming deficiencies. Specifically, the respondent says that he installed only half of the cedar shake roof and the claimed deficiencies were located on the other half. He also says that he was not at all responsible for installing the skirt roof and while he did drill a dryer vent hole that required relocation, it was the applicant's decision to change the height of the skirt roof, not his.

22. With respect to the front door installation, the respondent says the applicant wanted the door installed for security reasons, but he advised her it could only be installed temporarily until completion of the inside framing. He says the applicant was aware the door would have to be installed permanently later.

23. With respect to the exterior siding installation, the respondent says he was following the applicant's direction and that she was holding the siding while the respondent nailed it in. He says he would have changed it at the time if she had told him it was incorrect.

24. The applicant chose not to make any reply submissions, nor did she provide any evidence that it was the applicant's work on these tasks that was deficient, such as documentation of his assigned tasks or statements from others working on the project. There were no photographs in evidence of these alleged deficiencies or invoices for the actual cost incurred to fix them.

25. I find that the applicant has not proven on a balance of probabilities that the respondent's work on the cedar shake roofing, front door installation, or siding installation were deficient, or that the respondent made any decision about the skirt roof that caused additional work or expense. Further, I find that the applicant has not proven any of these alleged deficiencies were caused by more than the

respondent's mere error or simple negligence and, therefore, she cannot claim damages for them against the respondent. I dismiss these claims, which comprise $3,785 of the applicant's total claim.

26. I turn now to the claim of exterior paint overspray, on which the majority of the applicant's evidence was focused.

Exterior painting overspray

27. The parties agree that the respondent used a spray gun to paint the house's exterior. The applicant says there was overspray on the pre-painted trim, window glass, cement, new cedar construction, and new water bibs. She provided photographs which show there was some overspray as claimed.

28. The applicant says the respondent told her he was a "journeyman" painter, which may go to the standard she expected of his painting skill. The respondent denies that he said he was a journeyman painter. There was no evidence submitted on this issue and I find the applicant's assertion insufficient to prove that the respondent held himself out as journeyman painter.

29. Further, I find that the respondent was not hired as a painting contractor. If he had been, I would expect he would have provided a quote for the cost of the job, which would include necessary cleanup, such as fixing any overspray that occurred. Rather, as discussed above, I find that the respondent was an employee.

30. The respondent says that he told the applicant that the trim would have to be touched up after the siding was sprayed and she agreed that was okay. He also says he did the painting properly and that there is always cleanup required, but that the applicant pulled him onto another job before he had the opportunity to do the cleanup. He ultimately quit the renovation project due to late payment of his invoices, which was before the applicant asked him to undertake the painting cleanup.

31. The applicant provided a letter from a painting contractor (PH) who said that the exterior painting on the house was "sub-par" due to major overspray. PH also suggested the person who did the painting either did not know how to use a paint sprayer or did not properly prepare the exterior before painting. I note that PH assumes a contractor did the painting and he relied on the applicant's assertion that the painter held himself out as a journeyman painter. Therefore, I find PH's comments unhelpful in determining the standard applicable to an employee.

32. On balance, while the respondent's painting may have fallen below the applicant's expectations, I find the applicant has not proven that the overspray amounted to more than the respondent's mere error, incompetence, or simple negligence. Therefore, because the respondent was her employee, the applicant cannot claim damages from him for the overspray.

33. Even if I had found the applicant could claim damages for the overspray against the respondent, I find the applicant has not proven she is entitled to the remedy she seeks. There was no evidence about how much time it would have taken to properly prepare the exterior to limit overspray, which I infer the applicant would have paid the respondent to undertake. I also find that the applicant would have paid the respondent his stated hourly rate to undertake the painting cleanup, had he continued working for the applicant. The cost to pay the respondent or someone else to do the painting cleanup is the same. Therefore, I find that the applicant has not proven she sustained any damage.

34. The applicant's claims are dismissed.

TRIBUNAL FEES AND EXPENSES

35. Given the applicant was unsuccessful in this dispute, in accordance with the CRTA and the tribunal rules, I find she is not entitled to reimbursement of tribunal fees.

36. 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 must reimburse the respondent $25 for paid tribunal fees.

ORDER

37. Within 21 days of this decision, I order the applicant to pay the respondent $25 in paid tribunal fees.

38. The respondent is entitled to post-judgment interest on the $25, as applicable.

39. I dismiss the applicant's claims.

40. 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.

41. 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.

Kristin Gardner, Tribunal Member