



Civil Resolution Tribunal

Date Issued: June 4, 2020

File: SC-2019-008119

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Sunnymead Construction Ltd. v. Diamond MGD*, 2020 BCCRT 623

B E T W E E N :

SUNNYMEAD CONSTRUCTION LTD.

APPLICANT

A N D :

DIAMOND MGD

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sherelle Goodwin

INTRODUCTION

1. This dispute is about residential construction.
2. The applicant, Sunnymead Construction Ltd, hired the respondent, Diamond MGD, to install glass and steel railings at a residential construction project. The applicant says the respondent's product, and work, is deficient. The applicant asks that the

respondent be ordered to fix or replace defective glass panels and a stainless steel handrail, which the applicant values at \$4,600.

3. In an associated dispute the respondent claims the homeowner damaged the respondent's iPad during a meeting about the railings. That dispute is the subject of a separate decision.
4. The respondent denies any deficiencies and asks for the claim to be dismissed.
5. The applicant is represented by an owner or principal, as is the respondent.

JURISDICTION AND PROCEDURE

6. 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.
7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
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.

ISSUES

10. The issues in this dispute are:
 - a. whether the respondent's product and/ or work is deficient, and
 - b. if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicant must prove their claim on a balance of probabilities. Although I have read all the evidence and submissions provided to the tribunal, I will only refer to that which is needed to explain my decision. I note that the respondent did not provide any evidence to the tribunal, despite being given the opportunity to do so.
12. The applicant is a general contractor. It says it hired the respondent sub-contractor to produce and install custom glass panels and stainless steel railings in a custom home in May 2019 for \$57,702.06. The respondent does not dispute these facts and I find that the two parties entered into this agreement.
13. Construction contracts, such as this one, contain implied terms about the quality of work to be performed (see *Morgan and Gaiga v. Pacific Coast Floor Covering Inc.*, 2018 BCPC 236, citing *Pavestone v. Kuentzel*, 2013 NSSC 199). I find that it is an implied term of this agreement that the materials be of proper quality, the work performed in a good and professional manner, and that the finished work be fit for its intended purpose.
14. The applicant says the respondent completed the installation on May 10, 2019. The applicant inspected the respondent's work and found the following deficiencies:
 - a. bubbles in the glass panels,
 - b. one panel $\frac{3}{4}$ " shorter than the others,

- c. panels not lined up top to bottom, or side to side,
 - d. a loose clamp that fell off and resulted in a loose glass panel,
 - e. handrail brackets installed in the wrong direction, and
 - f. holes in the railings, which could cause injury.
15. The burden is on the applicant to prove these alleged deficiencies (see *Lund v. Appleford Building Company Ltd et al*, 2017 BCPC 91).
16. The respondent says the applicant's claim must fail as it did not notify the respondent of any deficiencies within 30 days of installation. The parties' agreement was not provided to the tribunal. There is no evidence before me showing that the parties agreed to make any claim for deficiencies within 30 days. I find the applicants are not out of time to make their claim against the respondents.
17. The respondent denies any deficiencies and says that an independent engineer and a city inspector inspected and approved the railings and found no deficiencies. The applicant says the purpose of those inspections was safety, and not construction deficiencies. As the inspection results were not submitted as evidence, I cannot determine whether the inspectors considered deficiencies or not. I do not accept this argument.
18. In the applicant's photos submitted into evidence, there is one small bubble in one glass panel. The respondent acknowledges the bubble and says the applicant's representative approved the installation of the bubbled glass in a text message, even though the respondent provided the option of waiting for a replacement panel. The applicant did not dispute this, although it was provided an opportunity to address the issue in further submissions. I find that the applicant's representative approved the installation of the bubbled glass and therefore the bubbled glass is not a deficiency.

19. In the applicant's photos the bottom glass panel on the stair railing is approximately $\frac{3}{4}$ " shorter than the others. The bottom of the that glass panel is visibly higher than the panel beside it.
20. The parties agree that the applicant approved on-site templates of the shape, size and layout of each panel. There is no evidence that the applicant approved a template in which the bottom glass panel is visibly shorter than the next glass panel. I do not find that the template approval process relieves the respondent of liability for any deficiencies in the glass panels. I find the bottom glass panel is not the correct size or shape and is thus deficient.
21. I also find the respondent's installation of the handrail brackets is deficient. Based on the applicant's photos, the brackets are not aligned and appear to be at random and obviously different angles. I find the mismatched angles of the handrail brackets result in a random and awkward appearance to the glass and steel railing system on the stairs. I find this is not the intended purpose of a glass stair railing system and is thus deficient.
22. The applicant says the glass panels are misaligned and loose and therefore unsafe. The applicant says that, because of the misalignment a bracket between 2 panels of glass has fallen off, further loosening the glass panels. The photos in evidence show the fallen bracket, but do not show any visible misalignment between the glass panels. Whether the glass and steel railing system, as installed in this home, is safe or unsafe is not is a matter that is not within ordinary knowledge. I find the safety of the product and work is a technical matter which requires expert evidence (see *Bergen v. Guliker*, 2015 BCCA 283). I do not find the glass panels are misaligned. I find the applicant has failed to prove that the glass panels are unsafe.
23. Further, I find the applicant has failed to prove the stainless steel handrail is unsafe. The applicant's photos show one continuous stainless steel handrail attached to the glass panels along the stairway. A few small holes are visible in one close up photo of the underside of the handrail. The holes look like drill holes, they are very small, with smooth edges and no obvious rough areas. I am not persuaded that the holes

would cause injury to anyone using the handrail. Further, the holes are on the underside of the railing and are not obvious in the overall photos of the stairway. The applicant has failed to prove the stainless steel handrail itself is deficient.

24. In summary, I find the respondent deficient in installing a pane of glass shorter than the others, and in installing the handrail brackets at visibly different angles. The applicant's remaining allegations of deficient work fail.
25. What is the appropriate remedy?
26. The applicant asks that the respondent replace the deficient glass panels and stainless steel handrail.
27. Under section 118 of the CRTA, the tribunal may order specific performance of an agreement relating to personal property or services. It is unclear whether the parties' agreement for services includes fixing deficiencies. Therefore, there is a question as to whether the tribunal has the legal authority to order the respondent to fix any deficiencies in this dispute. Even if the tribunal has the authority to make that order, I find it would not be an appropriate order in this dispute, for the reasons set out below.
28. Firstly, the tribunal will not generally order specific performance of a contract when monetary compensation will suffice. In this dispute, I find a monetary remedy will suffice, as it will allow the applicant to pay someone else to repair the respondent's deficiencies.
29. Secondly, the respondent alleges that the homeowner damaged the respondent's company iPad when he became angry with the respondent's employee. This is the subject of the associated dispute between the respondent and the homeowner. Given this allegation, I find it would be inappropriate to order the respondent, or its employees, to go to the home again.
30. I decline to order the respondents to replace and repair the identified deficiencies. I find that a monetary remedy is a more appropriate remedy.

31. The applicant says another contractor quoted \$4,600 to replace the defective glass panels and stainless steel handrail. It also says the respondent charged \$15,600 for the stair handrail, and that 2/3 of the handrail needs to be fixed. Yet, the applicants did not provide either the quote or the respondent's invoice to the tribunal.
32. I find that awarding the full cost of the \$4,600 quote would overcompensate the applicants, as the applicants have not proven all the deficiencies claimed. I find that only one glass panel is deficient. Further, I find the handrail installation, but not the handrail itself, is deficient. The applicant has not proven that 2/3 of the handrail needs to be fixed. However, I find that some compensation is warranted, given the deficiencies I have found. On a judgment basis, I find \$1,500 is an appropriate remedy to replace one deficient glass panel and repair the deficient handrail bracket installation.
33. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to prejudgment interest on the \$1,500 from May 12, 2019, the date the applicant first asked the respondents to fix the work, to the date of this decision. This equals \$32.13.
34. 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. As the applicant was partially successful in this case, I find the applicant is entitled to reimbursement of part of its tribunal fees, in the amount \$75.

ORDERS

35. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of \$1,607.13, broken down as follows:
 - a. \$1,500 for work and product deficiencies,
 - b. \$32.13 in pre-judgment interest under the *Court Order Interest Act*, and

c. \$75 in tribunal fees.

36. The applicant is entitled to post-judgment interest, as applicable.
37. 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.
38. 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.

Sherelle Goodwin, Tribunal Member