



Civil Resolution Tribunal

Date Issued: June 24, 2020

File: SC-2020-001265

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *0955824 BC Ltd. dba Van Pro Disposal v. New Millenium
Tire Centre Ltd., 2020 BCCRT 700*

BETWEEN:

0955824 BC LTD. DBA VAN PRO DISPOSAL

APPLICANT

AND:

NEW MILLENIUM TIRE CENTRE LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Richard McAndrew

INTRODUCTION

1. This dispute is about a waste disposal contract. The applicant, 0955824 BC Ltd. dba Van Pro Disposal (Van Pro), says the respondent, New Millenium Tire Centre Ltd. (New Millenium), breached the contract by failing to pay for waste disposal services and by improperly canceling the contract. Van Pro claims a total of

\$2,857.97, consisting of \$1,319.48 for waste disposal fees and \$1,538.49 in liquidated damages, bin removal and fuel surcharges.

2. New Millenium says Van Pro did not regularly pick up their waste on time. New Millenium says it cancelled the waste services in person in July 2019 but Van Pro refused to pick up its bin.
3. The parties are represented by business representatives.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT 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 CRT 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 CRT's mandate of proportional and speedy dispute resolution, I decided I can fairly hear this dispute through written submissions.
6. The CRT 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 CRT 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 CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUES

8. The issues in this dispute are:
 - a. Did New Millenium properly end the contract in July 2019? If not, does New Millenium owe Van Pro liquidated damages?
 - b. Does New Millenium owe a debt to Van Pro for unpaid waste disposal services and fees?

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, Van Pro must prove its claim, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
10. New Millenium entered a 3-year agreement with Housewise Construction Ltd. dba Segal Disposal (Segal) on June 10, 2013. Van Pro says the contract automatically renewed on June 10, 2016, for a 5-year term.
11. The contract's relevant terms included:
 - a. The monthly charge for 1 waste bin, 2 pickups per month, was \$70. Bin removal was \$150.
 - b. The agreement would renew for successive 5-year terms unless the customer gives Segal written notice by registered mail not more than 120 days and not less than 90 days before any renewal date (also known as a cancellation window).
 - c. Interest is payable at 24% per year on amounts overdue past 30 days.

- d. Suspension of service due to slow or non-payment is not Segal's termination of the agreement. The customer is responsible for payments during a suspension period.
 - e. If the customer tries to end the agreement before the term's expiry, Segal can accept the termination of the agreement, in which case the customer agrees to pay Segal liquidated damages, either the sum of the customer's monthly billing for the most recent 9 months or the sum of the balance of the remaining term.
 - f. The agreement is legally binding on both Segal and the customer and their respective successors and permitted assigns.
 - g. Segal could assign the agreement at any time without the customer's consent.
12. New Millenium says Van Pro altered the renewal terms of the contact after the parties signed it. However, upon comparing both parties' copies of the contract, the only difference I noted was highlighting which I do not find significant. As such, I find that Van Pro did not alter the contact and New Millenium is bound by the terms of the written agreement, including the renewal terms.
13. I accept that Segal assigned this contract to Van Pro as of February 1, 2018, which the contract permits. The December 20, 2017 letter signed by Segal and Van Pro confirms the assignment.

Did New Millenium properly end the contract?

14. New Millenium says Van Pro did not provide timely garbage disposal services. Although the contract requires 2 waste pickups per month, New Millenium says they had to remind Van Pro every two weeks to collect the waste and they were always late. New Millenium says that Van Pro would often not even pick up waste once a month. New Millenium provided a June 18, 2019 email complaining about Van Pro's service.

15. New Millenium says they met with Van Pro in-person in July 2019 and told them they were ending the contract. They also told Van Pro to remove their garbage bin. I accept this undisputed submission. However, the difficulty for New Millenium is that an in-person notification does not comply with the contract's requirement that Van Pro's customers terminate the contract by registered mail, within the cancellation window. New Millenium does not suggest it ever sent a termination notice by registered mail, as required by the contract. However, that is not the end of the matter.
16. I accept New Millenium's evidence Van Pro did not provide regular and timely waste removal services in 2019. My reasons follow.
17. Van Pro submitted brief, similar affidavits from AWY and BD, drivers and XF, director. Each of these affidavits say Van Pro serviced New Millenium twice per month "on time and follows the schedule." However, they do not explain how they can recall every twice-monthly service for New Millenium, nor did they provide any supporting documentation such as contemporaneous customer records or trip sheets. Furthermore, these statements that Van Pro regularly serviced New Millenium on time and on schedule are inconsistent with Van Pro's own submission that they intentionally slowed service to compel payment. Given these concerns, I place no weight on the affidavits of AWY, BD and XF.
18. There are no emails or other written record in evidence, such as contemporaneous pickup trip sheets or similar documents, in response to New Millenium's complaint that Van Pro had failed to provide regular, timely service. Van Pro bears the burden of proof in this dispute and I find it is in the best position to prove that it provided twice-monthly service as agreed, rather than New Millenium proving that Van Pro did not. I find Van Pro has not met that burden.
19. On balance, I find it more likely than not, that Van Pro did not provide regular and timely waste pickups 2 times per month as required under the contract.

20. Van Pro argues that it did not breach the contract because the contract permitted service delays for nonpayment. I disagree. The contract refers to service suspensions for non-payment but there is no provision permitting Van Pro to slow their service for non-payment. Service suspension differs from slow service. I find that service suspension is a temporary stopping of service while slow service is a continuation of service, but not performed timely. I find that the contract does not permit Van Pro to provide slow service to compel payment.
21. I find that Van Pro breached the contract by providing irregular and untimely service. The question then becomes whether Van Pro's service was so poor that Van Pro fundamentally breached the contract.
22. As set out in *Super Save Disposal Inc. v. 315363 B.C. Ltd.*, 2019 BCCRT 190, a non-binding CRT 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)). Put another way, 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).
23. 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 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)).
24. Applied to this case, if Van Pro fundamentally breached the contract, New Millenium could end the contract and not have any further responsibility under the contract.

25. New Millenium essentially submits that Van Pro's failure to pick up the garbage was a fundamental breach because the heart of the contract is regular garbage pickup. I agree.

26. 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 breaches from the perspective of a reasonable person in New Millenium's position. I find that a reasonable person would consider the contract to be completely undermined because Van Pro repeatedly failed to timely pick up the waste. In *Super Save*, the CRT member found there was no fundamental breach because the waste hauler had only missed garbage pickup for 5 days. That is not the case here. As noted, I find that Van Pro routinely provided irregular and untimely waste disposal services.
27. I have also considered the Vice Chair's decision in *0955824 BC Ltd. dba Van Pro Disposal v. Walltek Storage Ltd.*, 2020 BCCRT 433, another waste disposal dispute involving Van Pro. In *Walltek*, the Vice Chair found that a comparable service history of 3 waste disposal pick-ups over a 3 month period was a fundamental breach of a similar waste disposal contract. While the decision in *Walltek* is not binding on me, I find the Vice Chair's analysis persuasive and I apply it here.
28. For the above reasons, I find Van Pro fundamentally breached the waste disposal contract. This allowed New Millenium to end the contract, which they did in July 2019. I find New Millenium was not bound by the contractual term that required cancellation by registered mail. As such, New Millenium is not responsible for performing the contract after July 2019. This means that New Millenium does not owe any damages to Van Pro for claims arising after New Millenium cancelled the contract in July 2019.

Does New Millenium owe a debt to Van Pro for unpaid services?

29. Van Pro also asks for payment of unpaid invoices for services performed before New Millenium canceled the contract in July 2019. I note that Van Pro did not provide copies of unpaid invoices which are normally expected when a party seeks compensation for unpaid invoices. However, I find that Van Pro's statement of account adequately describes Van Pro's service charges and New Millenium's payment history.

30. Van Pro's statement of account shows that New Millenium made a payment of \$595.71 on July 11, 2019 leaving an outstanding balance of \$429.54 in July 2019.
31. New Millenium says they are not responsible for the \$429.54 balance. New Millenium says that when they made the payment in July 2019, a Van Pro representative agreed to reduce the amount owed to adjust for waste collections that Van Pro missed. New Millenium says that Van Pro accepted their July 2019 payment as payment in full.
32. However, there is no supporting evidence proving that Van Pro agreed to these alleged deductions. Further, New Millenium did not identify the representative who allegedly agreed to this reduction on Van Pro's behalf. Accordingly, I am not satisfied that Van Pro agreed to accept the July 19, 2019 payment as full satisfaction of the unpaid invoices.
33. I have also considered whether the outstanding balance owed by New Millenium should be reduced because Van Pro did not provide regular, timely waste disposal services. Such a reduction is called a set-off. When considering a set-off, the burden of proof shifts to New Millenium to prove that Van Pro's poor service reduced the benefit that New Millenium expected to receive from the agreement. I find that New Millenium has not done so.
34. As stated above, I find that Van Pro has not provided regular, timely waste disposal which amounted to a fundamental breach of the contract. However, to receive a set-off, New Millenium needs to prove the amount of a set-off they are entitled to. I find that New Millenium has not provided evidence showing the specific garbage collections that were missed or late to prove the set-off amount they should receive. As such, I find that New Millenium is not entitled to a set-off from the unpaid balance owed of \$429.54 as of July 2019.
35. Accordingly, I find that New Millenium owes Van Pro \$429.54. As stated above, I find that New Millenium is not responsible for any compensation after the contract was cancelled in July 2019.

36. On the debt of \$429.54, I find New Millenium must pay Van Pro contractual interest at the rate of 24% per year, calculated from July 11, 2019, the date of New Millenium's final payment, to the date of this decision. This equals \$98.57.
37. Under section 49 of the CRTA and CRT rules, the CRT 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. Since Van Pro was partially successful, I find that Van Pro is entitled a reimbursement of one-half of the CRT fees, being \$62.50.

ORDERS

38. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of \$590.61, broken down as follows:
 - a. \$429.54 in debt for waste disposal service,
 - b. \$98.57 in pre-judgment contractual interest at 24%, and
 - c. \$62.50 in CRT fees.
39. Van Pro is entitled to post-judgment interest, as applicable.
40. Under section 48 of the CRTA, the CRT 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 CRT'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 CRT can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the CRT will not have this ability. A party should contact the CRT as soon as possible if they want to ask the CRT 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 CRT's order can be enforced through the Provincial Court of British Columbia. A CRT 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 CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Richard McAndrew Tribunal Member