



# Civil Resolution Tribunal

Date Issued: July 24, 2020

File: SC-2020-002786

Type: Small Claims

## Civil Resolution Tribunal

Indexed as: *Gimenez v. Two Hungry Painters and Son*, 2020 BCCRT 822

B E T W E E N :

DIEGO GIMENEZ

**APPLICANT**

A N D :

TWO HUNGRY PAINTERS AND SON

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kristin Gardner

## INTRODUCTION

1. This dispute is about a painting agreement. The applicant, Diego Gimenez, says that he hired the named respondent, Two Hungry Painters and Son (THPS), to paint his empty condo before he moved in. Mr. Gimenez says THPS did not complete the painting work and that the painting was defective.

2. Mr. Gimenez initially sought an order for THPS to complete the painting work according to their agreement. However, in his submissions he requests an order that THPS pay \$1,869 for the cost of a third-party painting company to complete the painting and fix the alleged deficiencies.
3. THPS denies any deficiencies in its work and says it completed the painting job it was contracted to do.
4. Mr. Gimenez is self-represented. THPS is represented by one of its partners, CW.

## **JURISDICTION AND PROCEDURE**

5. 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.
6. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties to this dispute call into question the credibility, or truthfulness, 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. I note the decision in *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.
7. 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.

8. 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.

## **ISSUE**

9. The issue in this dispute is whether THPS' painting work was defective, and if so, what remedy is appropriate.

## **EVIDENCE AND ANALYSIS**

10. In a civil claim such as this, the applicant Mr. Gimenez 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.

11. It is undisputed that in early March 2020, Mr. Gimenez contacted THPS to inquire about painting the walls of a condominium unit (condo) he had recently purchased. Mr. Gimenez and CW exchanged a series of emails on March 8, 2020. I find that this series of emails constitutes the agreement between Mr. Gimenez and THPS, as there was no other separate written contract between them. Based on these emails, I find that Mr. Gimenez and THPS agreed to the following:

- THPS was to paint only the condo's walls and THPS was aware that both the living room and spare bedroom had 20-foot-high ceilings.
- THPS would complete the job for the fixed price of \$1,100 plus GST.
- THPS would start at 6 a.m. on March 27 and complete the job that day.

12. Mr. Gimenez would pay a \$550 deposit on the morning of March 27.

13. The emails show that before they agreed on the price, Mr. Gimenez provided CW with 5 photos of the condo and the paint colours he wanted for each room, including the names and colour codes. I find that the photos show the 20-foot ceilings in the living room and the spare bedroom, as well as the colour of the walls that THPS would be painting over.
14. The following facts about what unfolded on March 27 are undisputed. Mr. Gimenez was not present while THPS was at his condo, but his wife was present some of the time. When THPS arrived on March 27 at 6 a.m. and viewed the condo, CW advised Mr. Gimenez's wife that THPS was increasing the price to \$1,300 plus GST, due to the high ceilings. Mr. Gimenez talked to CW on the phone to remind her that he had previously told her about the ceiling height and had provided photos. Nevertheless, in the end, Mr. Gimenez agreed to the \$200 price increase, and his wife paid THPS a \$650 deposit in cash that morning. The parties agree there was no discussion about how many paint coats THPS would apply to the walls before THPS started painting.
15. Mr. Gimenez says that his wife called him at about 1 p.m. on March 27 to tell him THPS was already finished painting and was packing up to leave. He says his wife was pointing out deficiencies to THPS, including paint drips and incomplete paint coverage. Mr. Gimenez says he spoke to CW on the phone and she advised that a third paint coat was required and THPS could return the next day to complete another coat for an additional \$500. Mr. Gimenez says he did not agree to CW's proposal and ended the conversation.
16. Mr. Gimenez says he paid the balance owing to THPS the following day. He says he asked CW again to paint a third coat and fix the deficiencies at no extra cost, but CW confirmed THPS would charge \$500 to apply another coat. THPS says it offered to do a few touch ups at no charge, but this did not happen. THPS does not dispute that it was paid for the work it completed on March 27.
17. Mr. Gimenez submits that THPS' work was defective. Where one party asserts defective work, that party, here the applicant Mr. Gimenez, has the burden of

proving the defects: see *Lund v. Appleford Building Company Ltd. et al.*, 2017 BCPC 91 at paragraph 124. I have reviewed the photos in evidence and find that they show inconsistent paint coverage with the old paint colour showing through in several areas, paint rips where tape was removed, visible brush strokes on the walls, paint drips, and paint on at least one outlet plate.

18. Mr. Gimenez obtained an estimate from a third-party painting company, Casanova Enterprises Inc. (Casanova), to fix the alleged deficiencies. I accept the observations of the deficiencies noted in the estimate, as they are consistent with what I observe in the photos showing THPS' work. The Casanova estimate recommends at least 1 more coat of paint on all walls, with 2 more coats for some areas where the original colour is still showing through. The estimate also includes prep work such as sanding and fixing drywall deficiencies in accordance with industry standards, touching up the trim where the original paint is showing at the tape line, and cleaning areas that were observed to have paint on them, including countertops, floors, cabinets, and plugs. The total of Casanova's estimate, including paint and materials, is \$1,869, which I find is reasonable.
19. Based on all the evidence, I find that THPS's paint job was not completed to a satisfactory standard. I find that the contract between THPS and Mr. Gimenez was a fixed price contract, and there was no provision to charge extra if more than 2 paint coats was required. Given it is undisputed that 2 coats was not enough to cover the original paint, I find THPS breached its agreement with Mr. Gimenez.
20. I turn to Mr. Gimenez's original requested remedy. An order for THPS to complete the paint job and fix the deficiencies is a form of injunctive relief. Even if section 118 of the CRTA permitted such an order for specific performance, I find it would be inappropriate because there could be a further dispute about whether its work was adequate, which would not bring finality to this dispute.
21. Mr. Gimenez argues instead that THPS should have to pay the amount of Casanova's estimate to remedy the deficiencies. However, I find it is more

appropriate to assess a refund of the amount Mr. Gimenez paid THPS, based on the extent of the deficiencies.

22. In his Dispute Notice, Mr. Gimenez claims he paid THPS \$1,385, including tax and the deposit. In his submissions, Mr. Gimenez says he paid a total of \$1,375. However, I note that the agreed price of \$1,300, plus GST, equals \$1,365. There is no explanation for these slight differences. It is undisputed that THPS did not provide Mr. Gimenez with an invoice or receipt. In the absence of further evidence, I find it is unlikely Mr. Gimenez paid more than the agreed price. Therefore, I find that Mr. Gimenez paid THPS \$1,365.
23. I find that the work to fix THPS' deficiencies will essentially require THPS' work to be completely redone. I accept that all walls will require prep and at least 1 more coat of paint, with some walls requiring 2 coats. Plus, there is additional cleanup work that THPS did not complete. Therefore, I find Mr. Gimenez is entitled to a full refund of the \$1,365 he paid THPS for the paint job.
24. The *Court Order Interest Act* applies to the CRT. Mr. Gimenez is entitled to pre-judgement interest on the \$1,365 from March 27, 2020, the date of the paint job, to the date of this decision. This equals \$7.38.
25. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find Mr. Gimenez is entitled to reimbursement of \$125 in CRT fees. Mr. Gimenez also claims \$50 for the Casanova estimate, and provided an invoice dated May 18, 2020 in support. I find the Casanova estimate was reasonably obtained for the purpose of this dispute and it was useful, so I allow the \$50 expense.

## **ORDERS**

26. Within 30 days of the date of this decision, I order the respondent, Two Hungry Painters and Son, to pay the applicant, Diego Gimenez, a total of \$1,547.38, broken down as follows:
  - a. \$1,365 in damages for breach of contract,
  - b. \$7.38 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$175, for \$125 in CRT fees and \$50 for dispute-related expenses.
27. Mr. Gimenez is entitled to post-judgment interest, as applicable.
28. 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.
29. 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.

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Kristin Gardner, Tribunal Member