



# Civil Resolution Tribunal

Date Issued: August 24, 2020

File: SC-2020-000470

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kilmer v. Noonan*, 2020 BCCRT 942

**BETWEEN:**

DAVID KILMER

**APPLICANT**

**AND:**

GREGORY NOONAN and VICKI NOONAN

**RESPONDENTS**

**AND:**

DAVID KILMER

**RESPONDENT BY COUNTERCLAIM**

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## **REASONS FOR DECISION**

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Tribunal Member:

Kathleen Mell

## **INTRODUCTION**

1. This dispute is about a painting services agreement. The applicant, David Kilmer, says that the respondents, Gregory Noonan and Vicki Noonan, hired him to paint their house's interior but then held back \$945 due on his final invoice. Mr. Kilmer says that Mr. Noonan alleged that the work was defective but refused to allow Mr. Kilmer to fix it. Mr. Kilmer represents himself.
2. The Noonans say that the painting was defective and not completed. Mr. Noonan says that he did not allow Mr. Kilmer to fix the work because Mr. Kilmer threatened him. In the counterclaim, Mr. Noonan claims \$5,000, which he says he will have to pay to repair Mr. Kilmer's work. The Noonans are represented by Mr. Noonan.
3. In response to the counterclaim, Mr. Kilmer says that there were only minor things wrong with his work and again that he was willing to fix them. Mr. Kilmer also says that he is not responsible for some of the damage Mr. Noonan claims.

## **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, email, or a combination of these. In some respects, this dispute amounts to a "he said, they said" scenario with both sides calling into question the credibility 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. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to 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 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**

8. The issues in this dispute are:
  - a. Did Mr. Kilmer properly perform the painting services contract and, if so, what is the appropriate remedy?
  - b. Are the Noonans entitled to \$5,000 to repair and complete the painting work?

## **EVIDENCE AND ANALYSIS**

9. In a civil dispute such as this, the applicant Mr. Kilmer must prove his claim on a balance of probabilities. However, the Noonans allege Mr. Kilmer's work was defective. Where one party asserts defective work, that party has the burden of proving the defects, see *Lund v. Appleford*, 2017 BCPC 91 at paragraph 124. The Noonans must also prove the counterclaim on a balance of probabilities. I will not refer to all of the evidence or deal with each point raised in the parties' submissions.

I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.

10. It is undisputed that the parties entered into a verbal agreement that Mr. Kilmer would paint the interior of the Noonans' house. The cost was set at \$9,000. The painting began in February 2019 but then was delayed as other work was done on the home. On December 7, 2019, Mr. Kilmer sent the Noonans a final invoice for \$3,870 which was to be the final payment. On December 14, 2019 the Noonans left a cheque at a paint store for Mr. Kilmer to pick up. The Noonans withheld \$945 from the final payment. Mr. Kilmer then followed up with a text on December 27<sup>th</sup> asking the Noonans to pay the invoice. Mr. Kilmer also said that he would come back for touch-ups.
11. On December 29, 2019, Mr. Noonan sent Mr. Kilmer a text saying that his friend, who is a painter, said that the painting work was "very well done." Mr. Noonan however also stated that the "the devil's in the details" which I infer means there were some details of the work he wanted fixed. Mr. Noonan said these should be easy to resolve. Then, at 2 o'clock in the morning on December 31, 2019, Mr. Noonan texted Mr. Kilmer saying that Mr. Kilmer's work was "pretty depressing." In his submissions Mr. Noonan says that the work up to December 7, 2019 was defective because Mr. Kilmer left an unsupervised employee to do the painting. Mr. Kilmer says that this other painter who helped on the project had 27 years' experience. I find that nothing turns on this as ultimately it is Mr. Kilmer who is responsible for the final product. In a later text to Mr. Kilmer on December 31, 2019, Mr. Noonan said that the touch-ups should be easily done in one day.
12. The parties agreed to do a final walkthrough of the property on December 31, 2019. The parties disagree about what happened during the walkthrough. It is relevant what specifically occurred because it is Mr. Noonan's position that he did not allow Mr. Kilmer to return to perform the touch-ups because he was afraid of him because of his behaviour during the walkthrough.

13. Mr. Kilmer says that when he arrived at the property there were little pieces of green tape everywhere showing what the Noonans wanted fixed. The Noonans say that there were 60 pieces of green tape on the first floor. Mr. Kilmer says that initially he thought Mr. Noonan was joking but then he realized that he was not, so Mr. Kilmer became upset. Mr. Kilmer admits that he called Mr. Noonan a profane name.
14. Mr. Noonan says that Mr. Kilmer did not only swear at him but that he also became physically aggressive and that he threatened him. In his counterclaim submissions, Mr. Noonan says that Mr. Kilmer became increasingly upset so Mr. Noonan told him that if he did not calm down, Mr. Noonan was going to call the police and then Mr. Kilmer attempted knock the cellphone out of Mr. Noonan's hand. Mr. Noonan says that Mr. Kilmer said he had a relative with the police which led Mr. Noonan to think that Mr. Kilmer would suffer no consequences if Mr. Noonan called the police.
15. Mr. Noonan says that Mr. Kilmer became even angrier after he failed to knock the phone out of his hand and then Mr. Kilmer raised his fist ready to strike him. Mr. Noonan says that Mr. Kilmer then said he was going to put a lien on Mr. Noonan's house. He says that Mr. Kilmer left the house and that Mr. Noonan was astonished because Mr. Kilmer immediately became civil and respectful when talking to M, who was also working on the house.
16. Mr. Noonan provided M's witness statement. M indicated that he did not see anything that happened inside, but that Mr. Kilmer came out and asked for his card and said that he wanted to give it to a contractor who did high end work not like Mr. Noonan who Mr. Kilmer again referred to using a profane name. M says that Mr. Noonan did not say anything, and Mr. Kilmer drove away. Mr. Noonan says that two days later he was still frightened, so he sent Mr. Kilmer two texts, which are in evidence, saying that he was going to report him to the police.
17. Mr. Kilmer denies that this is what happened. Mr. Kilmer admits he swore at Mr. Noonan and that he threatened to put a lien on his house. However, Mr. Kilmer says he did not try to knock the phone out of Mr. Noonan's hand or raise his fist.

18. Later on December 31, 2019, Mr. Noonan sent a text saying that before Mr. Noonan would pay the final amount Mr. Kilmer had to finish the underside of hearth base trim, finish outside mitre corners to the level of the base and stairwell trim. Mr. Noonan also said that Mr. Kilmer had to match the base and trim in texture. Mr. Noonan also said that Mr. Kilmer had to fix various “drips and runs.” Mr. Noonan again said that this should be done in a day.
19. Mr. Noonan also said in the text that he did not say that all the tape on the walls and trim were a problem. Mr. Noonan does not explain why the green tape was there if not to identify an issue. Mr. Noonan said in the text that Mr. Kilmer’s raising his fist and threatening him was out of line and inappropriate. He said if he did not hear from Mr. Kilmer in ten minutes, he was going to register a complaint with the police.
20. Mr. Noonan texted Mr. Kilmer again a bit later and said that calling him the profane name used was “just a lucky guess.” Mr. Noonan again told Mr. Kilmer to call him before he reached the detachment if Mr. Kilmer had calmed down otherwise Mr. Noonan said that he was going to file a report and find out who Mr. Kilmer’s brother-in-law was and “what threat he posed.”
21. Mr. Kilmer says he phoned Mr. Noonan back and apologized multiple times for swearing at him. Mr. Kilmer provided a witness statement from B who listened to the call on speaker phone. B stated that more than once Mr. Noonan swore at Mr. Kilmer and threatened in a profane way that he could cause Mr. Kilmer difficulty. B said that Mr. Kilmer continued to apologize and said that he wanted to finish the job. B confirmed Mr. Kilmer’s statement that Mr. Noonan agreed to allow Mr. Kilmer to come back on January 8, 2020 to perform the touch-ups. Mr. Kilmer sent Mr. Noonan a text later that day stating that he was glad that they got the matter sorted out and that he would be at Mr. Noonan’s house on January 8, 2020.
22. A few days after December 31, 2019, Mr. Noonan filed a criminal complaint against Mr. Kilmer. Mr. Kilmer was not charged but the police advised him to stay away from Mr. Noonan. Mr. Noonan texted Mr. Kilmer on January 3, 2010 saying that the police had told him not to contact Mr. Kilmer. Mr. Noonan does not explain why he

was contacting Mr. Kilmer when he was told not to do so. Mr. Kilmer's theory is that Mr. Noonan filed the complaint to get out of paying him the outstanding balance.

23. I do not accept Mr. Noonan's evidence as to what happened during the walkthrough and afterward. I note that M did not say that Mr. Noonan told him that Mr. Kilmer threatened him right after the alleged incident. I also do not find it believable that Mr. Kilmer was in the rage Mr. Noonan described but then immediately became civil when he walked out the door. Further, if Mr. Noonan was frightened of Mr. Kilmer it does not ring true that he would risk angering him by saying he was going to report him to the police and then give him two opportunities to try to stop him. Also, the tone of Mr. Noonan's texts does not sound like he is fearful. Rather, they indicate that Mr. Noonan was threatening Mr. Kilmer with going to the police in order to negotiate the things he wanted fixed.
24. I also find Mr. Kilmer's version of what happened during the December 31, 2019 phone call more credible. Mr. Noonan does not deny that this conversation occurred but says he did not offer Mr. Kilmer a chance to perform the touch-ups. I note that B heard the conversation and confirmed this was said. Also, Mr. Noonan had been texting Mr. Kilmer about wanting the painting issues fixed which is more consistent with arranging a time for Mr. Kilmer to perform the touch-ups. Finally, Mr. Kilmer sent a text confirming what was said and Mr. Noonan did not respond to it. I find that if Mr. Noonan did not agree to allow Mr. Kilmer to perform the final touch-ups on January 8, 2020 he would have responded to this text.
25. I also find the timing of Mr. Noonan's call to the police on January 2, 2020 negates his claim that he felt afraid of Mr. Kilmer. It does not make sense that he had a call with Mr. Kilmer and texted about what he wanted done on December 31<sup>st</sup> after the alleged threatening and then only decided on January 2<sup>nd</sup> that he was too frightened to allow Mr. Kilmer back in the house. I find that Mr. Noonan filed the police report to prevent Mr. Kilmer from being able to finish the touch-ups so Mr. Noonan would not have to pay the outstanding amount.

### ***Was the painting work defective?***

26. Mr. Noonan provided pictures that do show that there are areas that are not finished and there are some areas that show paint runs and painting over debris. However, these are all close-up pictures and I am unable to determine the overall quality of the paint job. I am also unable to determine how long it would take to complete the touch-ups.
27. Mr. Kilmer provided a detailed list indicating how long it would take him to touch-up the deficiencies in response to each of Mr. Noonan's pictures. He says he could fix them all within one day. He also notes that there is no proof that there was paint on the marble fireplace and he did not leave paint on the fireplace. He also says the paint on a door gasket was because somebody else closed the door before the paint was dry even though Mr. Kilmer warned Mr. Noonan not to do this. I find that Mr. Noonan has not proved that Mr. Kilmer left paint on the marble fireplace or that Mr. Kilmer was responsible for the paint on the gasket.
28. Mr. Noonan provided a letter from a home inspector, S, who had previously been a painter with a red seal designation. S stated that the work was not completed, and deficiencies were still present. He noted that some deficiencies were nit-picky but that there were enough legitimate deficiencies to cause concern. S also stated that if the deficiencies were addressed this would be a top quality job. It is apparent from the home inspector's letter that he was unaware that Mr. Kilmer had not been given the opportunity to perform the final touch-ups and fix the deficiencies. Therefore, I do not place weight on S's opinion who was evaluating the work as if it was the final product. S did not take into account that Mr. Kilmer had not been given the opportunity to complete the work.
29. Mr. Noonan provided an estimate from painting company P who stated that it would cost \$5,535 to "restore and repaint." P indicated that it was difficult to estimate but said it would take 120 hours at \$45 an hour. There is no explanation for why what Mr. Noonan estimated as being one day's work would now take 120 hours. I do not



place weight on this estimate as P did not set out what exactly had to be done and why it would take this long.

30. Mr. Noonan also provided an estimate from B who stated that to repaint and fix the deficiencies would cost \$4,500 in labour. Again, B did not itemize what had to be fixed, how many hours it would take, or why it would cost this much. I do not place weight on this evidence either. I also note that P and B did not list their qualifications, so I do not accept their opinions as expert evidence under the CRT rules.
31. Mr. Kilmer provided a letter from D, the drywaller who was working on Mr. Noonan's property. D stated that Mr. Noonan pointed out to him some painting issues which D described as "totally normal stuff that happens." D said the painting issues were an easy fix and it would take 1 person 8 hours to fix them. I note that this 8-hour estimate is the same as the timeframe discussed by Mr. Noonan in his texts and detailed in Mr. Kilmer's submissions. The bulk of the evidence, including evidence from Mr. Noonan, indicates that only 8 hours of touch-up work was necessary.
32. Therefore, based on the evidence, I find that Mr. Kilmer's work was not defective and he should have been granted the 8 hours to perform the final touch-ups as agreed to by Mr. Noonan in the phone call on December 31, 2019. Therefore, Mr. Noonan owes Mr. Kilmer the \$945 he withheld from the final payment because it was Mr. Noonan's fault that the work was not completed. Mr. Kilmer is also entitled to pre-judgement interest under the *Court Order Interest Act (COIA)* from the January 8, 2020 date the work should have been finished to the date of this decision. This amounts to \$9.48.
33. Based on the above, I dismiss Mr. Noonan's counterclaim. Mr. Noonan has not proved that he will have to pay \$5,000 to repair Mr. Kilmer's work. The painting estimates he relies on are vague and do not specify the work that needs to be done. Specifically, they do not set out why the work would take more than the 8 hours Mr. Kilmer detailed and Mr. Noonan himself suggested was the time needed to perform

the final touch-ups. Further, it was Mr. Noonan who unreasonably denied Mr. Kilmer an opportunity to perform the final touch-ups to complete the project.

34. Under section 49 of the CRTA and the CRT's 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. Mr. Kilmer was successful so the Noonans must reimburse him \$125 in tribunal fees. Mr. Kilmer did not make a claim for expenses. The Noonans were not successful, so they are not entitled to reimbursement of their tribunal fees. I also note that the Noonans are not entitled to the \$1,500 claimed for the house inspector's report. I note that even if the Noonan's had been successful, I would not have awarded this amount because the invoice shows the report only cost \$210.

## **ORDERS**

35. I dismiss the Noonans' counterclaim.
36. Within 30 days, the Noonans must pay Mr. Kilmer \$1,079.48, broken down as follows:
- a. \$945.00 in debt for the painting services,
  - b. \$9.48 in interest under the *COIA*, and
  - c. \$125.00 in tribunal fees.
37. Mr. Kilmer is entitled to post-judgment interest, as applicable.

38. 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 Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. 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.
39. 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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Kathleen Mell, Tribunal Member