



Civil Resolution Tribunal

Date Issued: August 28, 2020

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Fu v. Note Photography*, 2020 BCCRT 963

BETWEEN:

JUN WEI FU and XIAOFEI WANG

APPLICANTS

AND:

NOTE PHOTOGRAPHY and MARIEL NELMS, Partner

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. This dispute is about the cancellation of a contract for wedding photography services. The applicants, Jun Wei Fu and Xiaofei Wang, say that the respondents,

Note Photography and Mariel Nelms, Partner, refused to provide the photography services because of COVID-19 concerns. The applicants claim the \$1,909 deposit they say the respondents refused to refund after failing to complete the contract. The applicants also say that the contract does not satisfy the requirements of the British Columbia *Business Practices and Consumer Protection Act* (BPCPA), so they are entitled to cancel the contract and receive a full refund. Mr. Fu represents the applicants.

2. The respondents say that the applicants cancelled the contract and then when the applicants decided to reschedule, they did not agree to the respondents' new COVID-19 policies. The respondents also say that the contract satisfied the requirements of the BPCPA, so the applicants were not entitled to cancel the contract. Ms. Nelms represents the respondents.

JURISDICTION AND PROCEDURE

3. 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.
4. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
5. 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.

6. 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

7. The issues in this dispute are:
 - a. Did the applicants or the respondents cancel the contract?
 - b. If the applicants cancelled the contract, were they entitled to do so under the BPCPA?
 - c. What is the appropriate remedy?

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, the applicants must prove their case 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.
9. Most of the evidence is undisputed and the real issue is how certain emails between the parties should be interpreted. The parties entered into a contract on May 14, 2019 for the respondents to photograph the applicants' wedding on April 19, 2020. The contract indicated that it was between the applicants and Ms. Nelms and her husband who were "acting as Note Photography." The applicants signed up for a full day photography package. The contract indicated that there would be four locations where the applicants wanted pictures taken. The wedding venue was listed. The second was to be a wedding dinner restaurant location. The other two locations were to be determined.
10. The contract contained a cancellation clause stating that if the applicants cancelled

the event the respondents would refund all the money paid except for the retainer fee. The contract also noted that if the applicants needed to change the date then they had to release the reserved date and all money paid would be transferred to the new date under a new contract if the respondents were available on the new date.

11. The contract also stated that if the respondents were unable to fulfill the contract due to unforeseen circumstances such as illness, injury, a death in the photographer's family, casualty, act of God, or any other cause beyond the control of the photographer, a full refund including the retainer fee would be issued to the applicants at "first available notice." The cancellation clause also stated that the photographer would use their best efforts to secure a replacement photographer of equal or similar qualifications and that all parties had to agree.
12. The applicants paid the \$1,909 deposit, which the contract calls the retainer fee, on May 20, 2019. The parties met in person on October 7, 2019 to discuss the specifics of the wedding day. The applicants then returned overseas which was where they were living at the time.
13. On October 23, 2019, the applicants sent the respondents the wedding day schedule. The schedule indicated that the respondents were to photograph Ms. Wang in her family home in the morning. There would then be a tea ceremony in the same location. After this, the wedding party would travel to the wedding venue. The evidence is unclear but suggests the wedding ceremony would be outside, but that part of the ceremony was scheduled to be inside and pictures were to be taken of the wedding party, family portraits, and guests. The respondents would then follow the group to a dinner banquet which was scheduled to be indoors. The applicants say that the overwhelming majority of their scheduled events were going to take place indoors. The respondents do not dispute this.
14. Originally the applicants were planning on having 100 guests. Then concerns about COVID-19 arose. On March 14, 2020, the applicants emailed the respondents and noted that they had guests coming from multiple locations overseas and wanted to

confirm that the respondents were still available to perform the photography services. The respondents replied by email the next day that they were still planning on performing their photographic services, but the respondents reminded the applicants of the contract's cancellation clauses summarized above. The respondents stated that there was a ban on events over 250 people but because the applicants' wedding was smaller, they were not affected by this.

15. On March 16, 2020, the applicants emailed the respondents saying that they understood that the provincial government put in a restriction on gatherings over 50 people and the federal government brought in a travel ban against all foreigners. The applicants said that these measures resulted in the cancellation of their wedding. They said that because of the circumstances they were requesting the respondents waive the cancellation policy and refund their deposit.
16. The respondents did not reply and confirm that they accepted this as a cancellation of the contract. Rather, the respondents stated by email on the same day that they were sorry that the applicants "were thinking of rescheduling or cancelling altogether." The respondents stated that they wanted to work with the applicants to figure out what the next steps would be. They suggested rescheduling and again referred to the contract and that the applicants would have to release the scheduled contract date of April 19, 2020 and choose a new date, but that if the applicants cancelled altogether, they would lose their deposit. The respondents said that they hoped that the applicants would apply the deposit to a rescheduled date.
17. On April 7, 2020, the applicants emailed the respondents and stated that they changed where the wedding dinner would be and that the wedding would go ahead on April 19, 2020. They asked the respondents to confirm they were available. The respondents replied the same day expressing surprise that the applicants had managed to overcome the barriers to the wedding given the COVID-19 pandemic and the restrictions but said that they were still available. The respondents indicated that they had incorporated all the federal and provincial health guidelines into how they were operating their business.

18. The parties then had a phone call and emails were exchanged. The respondents indicated that they were reluctant to perform the photography services. They stressed that safety and health guidelines needed to be followed. On April 8, 2020 the respondents referred the applicants to their website for their new COVID-19 policy. On April 9, 2020 the respondents stated they felt moving forward with the wedding was risky and they were concerned about liability. They again referred the applicants to their new policy which stated that the respondents would no longer shoot indoors and would only take photos in large, open and secluded outdoor areas. The policy also stated that the respondents would only use camera lenses that allowed them to take pictures from a 2-meter distance. The respondents referred to the applicants' wedding as a dangerous event.
19. The applicants submit that they limited their wedding to under 50 people as required by the provincial guidelines and that they worked out these issues with their other vendors to meet the requirements under the health and safety guidelines. There is an April 9, 2020 email to the respondents which confirms that the applicants stated that they were abiding by the guidelines including limiting the number of guests.
20. The respondents told the applicants that they could not photograph their wedding unless they agreed to their new COVID-19 policy. The respondents also say that the applicants cancelled their contract on March 16, 2020. I infer from this the respondents mean that any new agreement would be subject to the respondents' new COVID-19 policy because it would be a new contract.
21. I do not accept the respondents' argument that the applicants cancelled the original contract. The respondents said that they understood that the applicants were thinking about cancelling or rescheduling their wedding. They also noted that the applicants had to release the scheduled date if they wanted to reschedule, which indicates that they were still holding the date for the applicants. The applicants never told them to release the date. Therefore, I do not find that this was a rescheduling of the wedding to occur on the very same date. Additionally, the

respondents specifically told the applicants that they were still available to complete the original contract.

22. The question then becomes whether the respondents were entitled to impose their new COVID-19 policy on the applicants. I find that they were not. The parties were legally required to abide by the provincial and federal laws implemented to deal with the COVID-19 pandemic. As noted, the applicants submit that they changed their wedding plans to comply, including limiting the number of guests. The respondents requested that the applicants go further and allow them to take all their pictures outside in a secluded open area. These were not the terms of the contract and were in excess of what was dictated by the government's health and safety guidelines. When the applicants did not agree to have all their photos taken in this manner, the respondents refused to take the pictures.
23. I find that the respondents refused to complete the terms of the contract and they cannot rely upon the government health and safety measures imposed because of COVID-19 to justify the cancellation. I acknowledge the respondents' reasons for making the cautious decision that they no longer wanted to provide the photographic services. However, they are not entitled to keep the applicants' deposit when there is no legal justification for the respondents deciding not to complete the contract because they unilaterally decided that they wanted all pictures to be taken outside. Therefore, the applicants are entitled to their \$1,909 deposit back.
24. Because I have decided that the applicants are entitled to their deposit back, I do not need to address whether the applicants were entitled to cancel the contract under the BCPCA.
25. 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 CRT fees and reasonable dispute-related expenses. The respondents say that the applicants are not entitled to CRT fees, expenses, or interest because the contract limits the respondents' liability. The contract does not specifically address what occurs after a party is

successful in a claim against the respondents. Further, the respondents cannot preemptively contract out of the rules of the CRT process. Therefore, I find that the applicants were successful and they are entitled to reimbursement of their \$125 CRT fees.

26. The applicants are also entitled to the \$31.50 they spent on a name application to determine if Note Photography was an available name or if it was already used as a business. The applicants say that they were forced to do this as Ms. Nelms refused to reveal the legal status of Note Photography as a business. Ms. Nelms does not deny that she did not provide this information to the applicants. Therefore, I find the applicants are entitled to this expense. Additionally, the applicants are entitled to pre-judgment interest under the *Court Order Interest Act* (COIA) on the \$1,909.00 deposit from the April 9, 2020 date the respondents cancelled the agreement until the date of this decision. This amounts to \$9.85.

27. Ms. Nelms submits that she and her husband are a “spousal partnership” but that Note Photography is not a registered company. The CRT performed a Registry search which confirmed this. Accordingly, I make no order against Note Photography. I also make no order against Ms. Nelms’ husband as he was not named as a party. Therefore, the following orders are only against Ms. Nelms.

ORDERS

28. Within 30 days, Ms. Nelms must pay the applicants \$2,075.35, broken down as follows:

- a. \$1,909.00 in debt for the deposit,
- b. \$9.85 in pre-judgment interest under the COIA,
- c. \$31.50 in dispute-related expenses, and
- d. \$125.00 in CRT fees.

29. The applicants are also entitled to post-judgment interest as applicable.
30. 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.
31. 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.

Kathleen Mell, Tribunal Member