Civil Resolution Tribunal

Date Issued: September 2, 2020

File: SC-2020-002354

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Clayton's Beauty Center Ltd v. Rogers Media Inc.*, 2020 BCCRT 981

B E T W E E N :

CLAYTON'S BEAUTY CENTER LTD

APPLICANT

A N D :

ROGERS MEDIA INC.

RESPONDENT

A N D :

CLAYTON'S BEAUTY CENTER LTD

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. This dispute is about radio advertising services.

2. The respondent, Rogers Media Inc. (Rogers), agreed to provide radio advertising services to the applicant, Clayton's Beauty Center Ltd (Clayton) in 2 separate contracts. Clayton says Rogers breached the first contract by not playing the agreed upon number of ads and breached the second contract by cancelling it. Clayton claims $5,000 in damages for breach of both contracts.

3. Rogers says it played the number of ads agreed to in the first contract. It says it was entitled to cancel the second contract as Clayton failed to pay its invoices, as required. Rogers counterclaims $5,313 for unpaid invoices.

4. Clayton is represented by Damy Tan, an owner. Rogers is represented by JW, an employee.

JURISDICTION AND PROCEDURE

5. These are the CRT's formal written reasons. 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. 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.

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 tribunal considers appropriate.

9. Clayton says Rogers hired a collection company to recover $5,313 on unpaid invoices. Clayton asks for an order stopping the collection agencey. As a preliminary matter, I find the CRT does not have the authority to make such an order in its small claims jurisdiction, as the collection agency is not a party to this dispute. So, the CRT cannot order the collection agency to stop attempting to collect money from Clayton for Rogers' unpaid invoices.

10. As a preliminary matter, Rogers has abandoned the amount of its counterclaim above $5,000 to fall within the CRT's small claims monetary limit.

ISSUES

11. The issues in this dispute are:

    a. Did Rogers breach the first contract by failing to play the agreed upon ads or cancelling the contract?

    b. Must Clayton pay Rogers' invoices for the first contract and, if so, in what amount?

    c. Did Rogers breach the second contract by cancelling it?

    d. If Rogers breached either contract what is the appropriate remedy?

    e. Must Clayton pay Rogers' invoice for the second contract and, if so, in what amount?

EVIDENCE AND ANALYSIS

12. In a civil claim such as this one Clayton must prove its claim on a balance of probabilities. Rogers must prove its counterclaim on a balance of probabilities. I have reviewed all submissions and evidence provided, but I will only refer to that which explains and gives context to my decision.

13. The parties agree that Rogers and Clayton entered into a 52-week agreement for radio ads on December 7, 2018. Neither party provided a copy of the agreement. The parties also agree that the contract was amended in August 2019.

14. The parties agree that they entered into a second 52-week agreement for radio ads, starting in January 2020.

Did Rogers breach the first contract?

15. Clayton says Rogers agreed to play 7 paid ads and 7 bonus ads per week, between August 22 and December 26, 2019. It provides an August 22, 2019 email from Rogers' agent, WL. Based on that email, I find Rogers agreed to play 7 paid ads and 7 bonus ads for $332 per week, on a weekly basis, between August 26 and December 26, 2019.

16. Rogers does not dispute the weekly cost of $332 or that it agreed to play 7 paid ads per week. In its response to Clayton's claim, Rogers says it agreed to play 7 bonus ads per week, at the best available times. In its counterclaim Rogers says it agreed to play the bonus ads, only if time was available. I find these two positions inconsistent. Rogers provided no supporting evidence, such as further emails, a statement of WL, or any written contract between Rogers and Clayton from August 2019 to show that the parties agreed to bonus ads only if time was available.

17. Clayton provided a December 5, 2019 email from WL. WL wrote that the 7 bonus ads were only played if time was available and were not guaranteed. However, I find that was not what WL offered in her August 22, 2019 email and not what Clayton agreed to.

18. Both parties provided copies of Rogers' September to December monthly invoices, which include a list of all the dates and times Clayton ads were played. Based on these invoices I find 7 bonus ads were played during the weeks of August 26 and September 1, 2019. Those ads were categorized as "moveable within contract dates". Starting on September 9, 2019, the bonus ads were categorized as "pre-emptible spot" when played or "credited" $0 for an "oversold pre-emptible spot" when not played. The change in September 9, 2019 is not consistent with Rogers' submissions or WL's December 5, 2019 email. If the bonus ads were only provided when and if free time was available, I would expect all free ads would be categorized "pre-emptible" rather than "moveable within contract dates". Further, I would not expect Clayton to be credited for the times the bonus ads were not played.

19. In a December 9, 2019 email Rogers' sales manager, TG, offered to play all the ads Clayton "missed" in September, October, and November 2019 during the latter part of December 2019. Based on this email, I find Rogers knew it had failed to play Clayton's bonus ads as agreed to in the first contract.

20. I do not accept Rogers' position that they agreed to provide bonus ads only if time was available.

21. There is no dispute that Rogers played the agreed upon 7 paid ads per week. However, Clayton says Rogers did not play the agreed upon 7 bonus ads per week. Based on Rogers' invoices, I find Rogers played a total of 19 bonus ads in the 15 weeks between August 26, 2019 and December 8, 2019. So, I find Rogers breached its first contract with Clayton by not playing 86 of the 105 bonus ads it agreed to play. I will address the appropriate remedy below.

22. Clayton says Rogers also breached the first contract by continuing to charge Clayton for advertising until December 8, 2019. I find WL, as Rogers' agent, agreed to cancel Clayton's contract in her December 5, 2019 email. However, I find Rogers and Clayton agreed to weekly terms in the August 22, 2019 email. So, I find it reasonable that Rogers cancelled the ads at the end of the week, on Sunday

December 8, 2019. I find Rogers did not breach the contract by ending the agreement on December 8, 2019 rather than December 5, 2019.

Must Clayton pay Rogers' invoices for the first contract?

23. Based on Rogers' invoices and Ms. Tan's credit card statements, I find Rogers charged Ms. Tan's credit card a total of $4,395.50 as follows:

    - September 29, 2019 invoice for $1,690.50, charged on October 2, 2019,
    - October 27, 2019 invoice for $1,352.40, charged on November 4, 2019, and
    - November 24, 2019 invoice for $1,352.40, charged on December 3, 2019.

24. Rogers invoiced Clayton a further $676.20 on its December 8, 2019 invoice. It is undisputed Clayton did not pay the December 8, 2019 invoice.

25. Clayton acknowledges that it disputed the credit card payments with its bank on December 13, 2019. I find the bank reversed the charges and refunded Clayton $4,395.50 sometime prior to December 17, 2019. So, in total, Clayton has failed to pay Rogers $5,071.50 on the first contract.

26. I do not accept that Clayton did not receive Rogers' invoices. I find the invoices and Ms. Tan's credit card statements are both directed to the same address identified as Clayton's address on the Dispute Notice. Further, WL emailed Clayton a copy of the November 2019 invoice in her December 5, 2019 email. On balance, I find Clayton received, and was aware of, Rogers' invoices.

27. Clayton says it should not have to pay the invoices because Rogers breached the contract. While I agree that Rogers breached the contract, I find it did play the paid radio ads it agreed to. Further, I find Rogers substantially remedied its breach by playing the missing bonus ads in December 2019. Based on Rogers' list of December ads, submitted by Clayton, I find Rogers played Clayton's ad 72 times between December 16 and 29, 2019, during prime time, at no cost to Clayton. While this leaves 14 bonus ads still missing, and while the ads were not played at the

times agreed to, Rogers did provide a substantial portion of what was agreed to in the contract. I find Clayton must pay for the advertising services it received, less its remedy for breach of contract.

Did Rogers breach the second contract?

28. It is undisputed that the parties agreed to a second contract, around January 7, 2020. Again, neither party gave the CRT a copy of the contract. Based on emails between Ms. Tan and TG in December 2019, I find Rogers agreed to play 7 paid ads and 7 guaranteed bonus ads per week, during certain time slots, starting on January 13, 2020.

29. Based on TG's January 17, 2020 email I find Rogers ended the second contract because Clayton reversed its payments of Rogers' earlier invoices for the first contract.

30. I find it was an implied term of both contracts that Clayton would pay Rogers' invoices. By disputing the credit card charges and effectively reversing its payments to Rogers, Clayton failed to pay Rogers and breached the contract. On balance, I find Rogers was entitled to end the second contract because Clayton failed to pay Rogers' outstanding invoices.

31. Even if I had found Rogers breached the second contract by ending it, I find Clayton has not proven any damages resulting from the end of the second contract. Clayton has not shown that the loss of the advertising contract caused them loss of business, or that they had to pay any higher amount to advertise somewhere else.

Must Clayton pay Rogers' invoice for the second contract?

32. Clayton says it should not have to pay Rogers' January 2020 invoice because Rogers ended the second contract. As noted above, I find Clayton still has to pay for the advertising services it received.

33. According to Rogers' January 26, 2020 invoice, Rogers played 11 paid ads and 1 bonus ad between January 13 and 17, 2020. Rogers charged Clayton $23 per paid

ad, for a total of $241.50 including tax. Based on the evidence before me, it is unclear what Clayton agreed to pay Rogers for the January 2020 ad campaign. However, as Clayton has not disputed the amount of Rogers' January 26, 2020 invoice, I find Rogers is entitled to payment of the $241.50 as claimed.

What is the appropriate remedy for Rogers' breach of contract?

1. In addition to saying it should not have to pay Rogers' invoices, Clayton claims $5,000 in damages for breach of contract. Clayton does not explain how it determined the $5,000 figure. Damages for breach of contract are meant to put the innocent person in the same position as if the contract had been performed (see *Water's Edge Resort v. Canada (Attorney General)*, 2015 BCCA 319 at paragraph 39).

34. Clayton did not provide any evidence, or submissions, about any business losses it experienced because of Rogers' failure to play the number of bonus ads agreed to.

35. I find Clayton is entitled to a reimbursement of the value of the remaining 14 missing bonus ads. I also find Clayton is entitled to some remedy for Rogers' failure to play the bonus ads on a weekly basis over the course of 3 months, as agreed to. On a judgment basis, I award Clayton $664 for Rogers' breach of contract, which is the equivalent of 2 weeks' worth of advertising services.

36. In summary, I find Clayton must pay Rogers a total of $5,313.20 for the 2019 and 2020 invoices, less $664 Clayton is entitled to for the missing and late bonus ads. So, I find Clayton must pay Rogers $4,649.20 in this dispute.

37. The *Court Order Interest Act* applies to the CRT. Rogers is entitled to pre-judgement interest on the $4,649.20 from January 26, 2020, the date of the Rogers' last invoice, to the date of this decision. This equals $42.66.

38. 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. As Clayton was only partially successful and Rogers was

substantially successful in this dispute, I find Rogers is entitled to reimbursement of half of its CRT fees, at $87.50 and Clayton is not entitled to reimbursement of any fees. I Neither party claimed reimbursement of any dispute-related expenses.

ORDERS

39. Within 30 days of the date of this order, I order Clayton to pay Rogers a total of $4,779.36, broken down as follows:

    a. $4,649.20 as payment for unpaid invoices,

    b. $42.66 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $87.50 in CRT fees.

40. Rogers is entitled to post-judgment interest, as applicable.

41. The parties' remaining claims are dismissed.

42. 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.

43. 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.

Sherelle Goodwin, Tribunal Member