



Civil Resolution Tribunal

Date Issued: September 15, 2020

File: SC-2020-002387

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Tomlinson v. Martwig*, 2020 BCCRT 1034

BETWEEN:

EILEEN TOMLINSON and CATHIE TOMLINSON

APPLICANTS

AND:

KELLY MARTWIG and GARHEN AVALOKITESHVARA

RESPONDENTS

AND:

EILEEN TOMLINSON and CATHIE TOMLINSON

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This dispute is about the purchase and sale of a health food store's inventory.
2. The applicants Eileen and Cathie Tomlinson say the respondents Kelly Martwig and Garhen Avalokiteshvara purchased the inventory and equipment of Grassroots Health Hut (Grassroots). As part of the purchase, Ms. Martwig paid \$20,000 up front, and promised to pay \$5,000 for inventory 236 days after the purchase. The Tomlinsons say Ms. Martwig failed to pay the \$5,000.
3. Mr. Avalokiteshvara and Ms. Martwig agree that they offered to purchase the Grassroots inventory. They say the Tomlinsons failed to provide a full "actionable inventory print out". As a result, Mr. Avalokiteshvara and Ms. Martwig say they spent significant time reviewing all inventory. During this time, they say they identified \$3,000 in expired inventory.
4. Ms. Martwig also counterclaims, saying that the inventory included \$2,900 in expired herbs and spices, a reference to the same expired inventory noted in her Dispute Response.
5. The Tomlinsons say they removed all unwanted inventory before the purchase. The Tomlinsons also say they provided an inventory list at closing. They agree that a more detailed inventory list could not be provided due to computer limitations. However, the Tomlinsons say a more detailed inventory list was not a condition of the sale. The Tomlinsons ask me to dismiss the counterclaim.
6. Ms. Eileen Tomlinson represents the applicants. Mr. Avalokiteshvara represents himself and Ms. Martwig.

JURISDICTION AND PROCEDURE

7. 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.

8. 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.
9. 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.
10. 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.
11. The Tomlinsons amended their Dispute Notice to add Mr. Avalokiteshvara as a respondent, but without including factual allegations against him in it. Because Mr. Avalokiteshvara submitted a Dispute Response saying that he bought the Grassroots inventory with Ms. Martwig, I find that the Dispute Notice allegations apply to him as a respondent. I consider Mr. Avalokiteshvara's role further below.

ISSUES

12. The issues in this dispute are:
 - a. Whether the Tomlinsons are entitled to be paid the \$5,000 as promised by Ms. Martwig and Mr. Avalokiteshvara, or
 - b. Whether that amount should be set-off or subject to a counterclaim for expired or improperly stored inventory.

EVIDENCE AND ANALYSIS

13. As applicants the Tomlinsons bear the burden of proof on a balance of probabilities in this civil claim. In the counterclaim, Ms. Martwig bears that same burden. I have reviewed the evidence and submissions but refer to them only as I find necessary to explain my decision.
14. The parties agree to the following facts:
 - a. In May 2019, Ms. Martwig and Mr. Avalokiteshvara agreed to purchase inventory and equipment from the Tomlinsons' store, Grassroots.
 - b. The Tomlinsons offered to sell Ms. Martwig and Mr. Avalokiteshvara the point of sale (POS) system as part of the sale. Ms. Martwig and Mr. Avalokiteshvara declined.
 - c. The parties agreed that any inventory that Ms. Martwig and Mr. Avalokiteshvara did not want would be removed from the premises and the POS system.
 - d. As part of the sale, Ms. Martwig and Mr. Avalokiteshvara purchased some herbs and spices from the Tomlinsons.
 - e. Ms. Martwig and Mr. Avalokiteshvara agreed to pay the Tomlinsons \$5,000, being the balance owing on the sale, on or before January 15, 2020.
 - f. Neither Ms. Martwig nor Mr. Avalokiteshvara made the \$5,000 payment.
15. The parties disagree about:
 - a. Whether and to what extent the herbs and spices were expired or close to expiring at the time of the sale, and
 - b. Whether and to what extent the Tomlinsons are entitled to the final \$5,000 payment.

16. The May 11, 2019 written agreement for the sale of inventory and equipment from Grassroots (Agreement) was signed by Ms. Martwig on her own behalf and by Eileen Tomlinson, on behalf of the Tomlinsons. Despite the parties' agreement that Mr. Avalokiteshvara agreed to purchase the inventory with Ms. Martwig, I find that the Agreement proves she was the sole purchaser. I therefore dismiss the dispute against Mr. Avalokiteshvara.
17. Under the Agreement, Ms. Martwig agreed to buy the Grassroots inventory and equipment for \$20,000 payable on Friday May 24, 2019, plus a remaining amount for inventory as of May 24, 2019 at 5:00 p.m., at a cost to be agreed by the parties. The parties agreed that the remaining inventory would be determined through the ACE POS program, "at cost", to be paid on or before January 15, 2020.
18. Any inventory that Ms. Martwig did not want would be physically removed from the premises.
19. The hard copy of the Agreement includes a handwritten note that, after the upfront payment of \$20,000, the balance owing by January 15, 2020 was agreed at \$5,022.16. It is undisputed that the handwritten note was signed by Ms. Eileen Tomlinson and Ms. Martwig.
20. The Tomlinsons provided a Departmental Inventory document (Departmental Inventory) which I find was printed on May 24, 2019 at 4:13 p.m. The Departmental Inventory lists amounts of herbs and spices, but not expiry dates. The Departmental Inventory bears a handwritten note that the agreed price is \$5,022.16 due January 15, 2020. I find this note was also signed by Ms. Martwig and Ms. Eileen Tomlinson.
21. Because the handwritten notes on the Agreement and the Departmental Inventory were both signed by both Ms. Eileen Tomlinson and Ms. Martwig, I find that, as of May 24, 2019 at 5:00 p.m., Ms. Martwig agreed to pay \$5,022.16 for the remaining inventory, by January 15, 2020.
22. On January 15, 2020 at 6:34 p.m., Ms. Martwig emailed the Tomlinsons to say that about 1/3rd of the herbs and 1/2 of the spices, valued at \$6,600, were improperly

stored or expired. Ms. Martwig mentioned another \$400 in other products she said were expired. This \$7,000 valuation differs substantially from Mr. Martwig's \$2,900 counterclaim.

23. I have found that Ms. Martwig reached an agreement with the Tomlinsons about the amount that would be paid for the inventory. Then, more than 7 months later, Ms. Martwig raised an objection to the valuation of the inventory. I find that the delay in raising the issue suggests that the inventory was as expected.
24. Ms. Martwig provided a photograph with 4 bottles of product labelled as \$35.95 and expiring in February 2019. I cannot tell what the product is, nor whether they were part of the Grassroots inventory. I therefore place no weight on this evidence. It is also unclear how Ms. Martwig reaches her counterclaim figure, given the limited evidence on price of the alleged expired product.
25. Ms. Martwig also submitted a typewritten list of product codes for items they say were expired, without prices. I cannot tell what the listed products are. Although Ms. Martwig submitted that this document was evidence from her herb supplier, the undated note is authored by Ms. Martwig and Mr. Avalokiteshvara. I therefore place no weight on it.
26. Ms. Martwig also provided photographs that she says show herbs that were not stored properly, because there is no "gasket seal" on the jars. I find that an expert opinion would be needed to determine whether the herbs were improperly stored, as it is a matter outside ordinary knowledge: *Bergen v. Guliker*, 2015 BCCA 283 at paragraph 119. Because there is no such opinion before me, I find that Ms. Martwig has not established that the herbs were improperly stored. I find that the evidence does not establish that the inventory was either expired or improperly stored.
27. Ms. Martwig also submits that she incurred \$1,200 in labour costs at \$20 per hour for 60 hours of "unnecessary" work reviewing the inventory to determine what was expired. Based on the evidence before me, I find that this review process would have been necessary for Ms. Martwig as a new owner in any event.

28. Between May 11, 2019 when the Agreement was signed and May 24, 2019 when the inventory price was negotiated, Ms. Martwig had an opportunity to satisfy herself about the inventory's value. Ms. Martwig could have checked expiry dates and storage methods. I find that she did not do so.
29. Ms. Martwig submits that she repeatedly asked for a more detailed inventory, but it was not provided. The documentary evidence does not bear this out. As well, I find that Ms. Martwig agreed to rely on the Detailed Inventory and did not impose a further inventory requirement as a precondition to the inventory price agreement.
30. Ms. Martwig says the goods were not durable for a reasonable period as required by the *Sale of Goods Act*, section 18(c). I find she has not proven that the inventory was expired or wrongly stored as she submits.
31. Since Ms. Martwig has not proved that the inventory was expired or damaged, there is no need for me to consider set-off. Similarly, I dismiss the counterclaim because the damaged inventory is not proven.
32. Ms. Martwig agreed to pay \$5,022.16 for the inventory as assessed at May 24, 2019. I find that Ms. Martwig must pay the \$5,000 claimed by the Tomlinsons in this dispute, which is also the CRT's monetary jurisdiction limit for small claims.
33. The *Court Order Interest Act* applies to the CRT. The Tomlinsons are entitled to pre-judgement interest on the \$5,000 from January 15, 2020, the date the inventory payment was due, to the date of this decision. This equals \$65.45.
34. The Tomlinsons waived their claim to dispute-related expenses or CRT fees. I therefore make no order for these items.

ORDERS

35. Within 30 days of the date of this order, I order Kelly Martwig to pay Eileen and Cathie Tomlinson a total of \$5,065.45, broken down as follows:

- a. \$5,000 owing for the inventory purchased, and
 - b. \$65.45 in pre-judgment interest under the *Court Order Interest Act*.
36. Eileen and Cathie Tomlinson are entitled to post-judgment interest, as applicable.
37. I dismiss the dispute against Mr. Avalokiteshvara.
38. I dismiss Ms. Martwig's counterclaim.
39. 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.
40. 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.

Julie K. Gibson, Tribunal Member

