Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Doug Pitman (dba DRG Construction) v. Marlin Roofing,* 2020 BCCRT 1063

B E T W E E N :

DOUG PITMAN (Doing Business As DRG CONSTRUCTION) and Colleen Legzdins

APPLICANTS

A N D :

MARLIN ROOFING and LINDA CULL, PARTNER

RESPONDENTS

A N D :

DOUG PITMAN (Doing Business As DRG CONSTRUCTION)

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about roofing work done on a home owned by the applicant Colleen Legzdins. Ms. Legzdins' brother, the applicant Doug Pitman (Doing Business As DRG Construction), acted as the general contractor for the home's construction. The applicants say the respondent Marlin Roofing (Marlin) did insufficient work that "did not meet building code". Mr. Pitman and Ms. Legzdins claim $2,251.69 for roofing repairs, plus dispute-related expenses.

2. Marlin and the respondent, Linda Cull, Partner, says Marlin's work met the required code and regulations for roofing work. Ms. Cull says she is a Marlin partner, along with Marshall Cull who is not a party to this dispute.

3. Marlin and Ms. Cull counterclaim against Mr. Pitman for $5,000, for unpaid work and compensation for their alleged loss of opportunity while expected at Mr. Pitman's job, plus $250 for time spent in dealing with this matter. Ms. Legzdins is not a party to the counterclaim.

4. Mr. Pitman represents himself and Ms. Legzdins. Ms. Cull represents herself and Marlin.

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 the

circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me.

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, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

9. The issues in this dispute are:

    a. Did Marlin complete the roofing job professionally and as required under the roofing contract?

    b. To what extent, if any, are Mr. Pitman or Ms. Legzdins entitled to damages for allegedly deficient work?

    c. To what extent, if any, are Marlin or Ms. Cull entitled to payment of $5,000 from Mr. Pitman for the roofing job and lost opportunity?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicants Mr. Pitman and Ms. Legzdins bear the burden of proof, on a balance of probabilities. Marlin and Ms. Cull bear this same burden on their counterclaim. I have only referenced the evidence and submissions as necessary to give context to my decision.

Background

11. In June 2019, Ms. Legzdins hired Marlin to install a roof on the new house her brother Mr. Pitman was building for her. Mr. Pitman acted as the general contractor for the construction.

12. Mr. Pitman says Marlin did "not meet building code on any work they did". In contrast, Marlin and Ms. Cull say their work was done professionally and they should be paid. As discussed further below, a significant issue is whether Ms. Legzdins' roof was a "low slope" type.

13. Mr. Pitman, Marlin, and Ms. Cull agree to the following facts:

    a. Ms. Legzdins and Mr. Pitman accepted Marlin's $10,959.63 estimate for the total roofing job.

    b. Ms. Legzdins paid a $5,479 deposit to Marlin and Ms. Cull. I find this cheque (made payable to "Marlin Roofing" only) cleared by June 27, 2019, and nothing turns on the exact clearing date.

    c. Mr. Cull began roofing on Friday, June 28, 2019.

    d. Mr. Pitman told Mr. Cull to wait until July 2, 2019 to work, as Mr. Pitman and Ms. Legzdins did not want to disturb their neighbours over a long weekend.

    e. Mr. Cull returned to resume work on Tuesday, July 2, and Mr. Pitman asked him to leave and not return.

14. Based on the above, I find Mr. Cull only worked on the site on Friday, June 28, 2019 for a few hours, which is not disputed and is consistent with Ms. Cull's submission that Mr. Cull worked on the job "a few hours total". While Ms. Cull submits Mr. Cull "started work" on July 2 and was told not to continue, I find any work Mr. Cull did that day, if any, would have been minimal.

15. I accept Ms. Cull's submission that before Marlin started, some roof areas had been done by someone else, which Mr. Pitman did not specifically dispute although he says the problem areas are the ones Marlin worked on.

Mr. Pitman's claims against Marlin and Ms. Cull

16. It is undisputed that Mr. Pitman did not contract with or pay Marlin, Ms. Legzdins did. So, I find Mr. Pitman has no claim against Marlin or Ms. Cull as Mr. Pitman has not shown he personally incurred any roof-related expenses or suffered any loss. While the applicants in one handwritten document claim $700 for "lost income and time", there is no evidence as to which applicant lost this $700, and no evidence to support the alleged lost wages. Further, under the CRT's rules, there is generally no compensation for "time spent" on a dispute, and I see no reason to deviate from that practice here. So, I dismiss Mr. Pitman's claims. I turn then to Ms. Legzdins' claims.

Ms. Legzdins' claim for $2,251.69, based on allegedly defective work

17. The evidence shows Mr. Cull was Marlin's worker on the job site, and as noted only worked a few hours total, which I have found were largely if not entirely worked on June 28. Mr. Pitman says he asked Mr. Cull to leave on July 2 because he had determined Mr. Cull had failed to waterproof the building "to code".

18. Next, Mr. Pitman denies Mr. Cull ever redid a roof section, as Ms. Cull alleges. On balance, I find the evidence before me does not support a conclusion that Mr. Cull redid anything, given Ms. Cull's admission Mr. Cull worked on the job a few hours at most.

19. The photos in evidence show the house has multiple roof peaks, with corresponding valleys. A central issue in this dispute is whether the roof was a "low slope" or not, as if it was, then certain steps and eave protection were admittedly required. Mr. Pitman says it is a low slope roof, whereas Ms. Cull says it was not. I cannot tell from my own review of the photos any particular slope, and in particular I cannot tell if the roof has a 4:12 slope or less. More on the roof slope issue below.

20. So, was Marlin's work defective? I turn to the applicable law.

21. First, the burden of proof is on the party alleging the work was defective (here, Mr. Pitman and Ms. Legzdins) (see *Lund v. Appleford Building Company Ltd. et al*, 2017 BCPC 91 at paragraph 124).

22. Second, I find the issue of whether Marlin completed its roofing work to the required professional standard is outside ordinary knowledge and so it requires expert evidence (see *Bergen v. Guliker*, 2015 BCCA 283). CRT rules 8.3(2) and (3) require an expert to set out their qualifications and it is up to me as the CRT member to decide if the person is qualified to give the opinion they offer. CRT rule 8.3(7) says that an expert giving evidence does so to assist the CRT and is not to advocate for any side or party to the dispute.

23. Third, Mr. Pitman says he has been doing construction work for over 45 years and has "done at least 30 roofs". However, I find Mr. Pitman, as an applicant and Ms. Legzdins' brother, is not sufficiently independent or objective such that I could accept his opinion as expert evidence under the CRT's rules.

24. Some photos in evidence show a roof area that does not have waterproofing material covering plywood right to the edge or up a wall. Other photos show what appears to be a different roof area that has the waterproofing right to the edge and up a wall. I cannot tell from the photos if the roofed area is above or adjacent to a living space, which the parties submit is relevant to the level of waterproofing protection that must be done. Most importantly, there is nothing in the photos that is obviously defective based on my ordinary knowledge.

25. On balance, I am unable to conclude based on my own review of the photos that Marlin's work was defective. As noted, I find expert opinion is required.

26. I turn then to the opinions submitted by Mr. Pitman. First, there is a series of screenshots of a text message from a "Michael" with "Wizard Roofing". Michael wrote he had been in the roofing industry for 10 years and owns a roofing business in the Okanagan. Michael wrote he had been asked to "look at these photos" and

point out things “that might be wrong”. Michael gave an opinion about various photos in evidence, noting in some photos roofing underlay does not cover the deck completely, and in others it does not go up the wall as it should. Michael also noted that nails were fastened through a flange rather than in pre-drilled holes, and in some areas the roofing underlayment has an insufficient overlap. Michael did not expressly address whether the roof was low slope or not.

27. In response, Ms. Cull submits that some of the photos show an area done by someone else before Mr. Cull arrived on site, and others reflected areas that Mr. Cull simply did not have a chance to finish. Ms. Cull also questions Michael’s qualifications.

28. As noted above, the CRT has flexibility in accepting evidence. On balance, I accept Michael’s evidence as expert evidence under the CRT’s rules, even though his last name and business address was not provided as would normally be expected. In any event, nothing turns on it because I find Michael’s evidence does not prove Marlin was negligent. I say this because it is undisputed another roofer did work before Mr. Cull, apparently in another roof area. Mr. Pitman also does not specifically dispute that other photos, which Michael says show a too-short overlap, are of an area that Mr. Cull did not have a chance to complete in the few hours he worked on the job. Finally, as noted, Michael does not address the roof’s slope and does not specifically say whether extra protection was required, although his observations of what was required appear consistent with the second expert report Mr. Pitman provided, discussed below. On balance, I place little weight on Michael’s opinion in the circumstances.

29. Mr. Pitman also submitted a “roof observation report” from Dan Morris, owner of KM Roofing & Sheet Metal (KMR). KMR said that Mr. Pitman asked it “in June and July of 2019” to observe the installation done to date by Marlin and to submit an estimate for KMR to install the remaining roof, which would include removal of the existing installation done by Marlin as numerous deficiencies were noted. KMR’s report found:

a. The errors all began with the improper installation of the underlayment membrane, which is installed first to the wood substrate.

b. As per IKO Industries, who manufacture the shingles, all “low slope” applications require specified eave protection.

c. KMR says the roof in question is a low slope roof with pitch less than 1:4, and so it requires extra eave protection, plus 2 layers of underlayment.

d. Marlin improperly cut through the underlayment paper along the hips when attempting to trim shingles.

e. Marlin improperly nailed through the plastic vents, when the vent says not to do so.

f. Marlin’s work is contrary to the *BC Building Code* and Roofing Contractors Association of BC.

30. I accept Mr. Morris is a qualified expert on roofing, which Ms. Cull does not particularly dispute. KMR’s report appears to assume that all roofing work it observed was done by Marlin, but I have found that was not the case. Ms. Cull also submits that the prior roofer nailed through the plastic vents, and I find Mr. Pitman has not proved his assertion that Marlin did it.

31. However, on balance I do find it more likely that the roof is less than 4:12 and thus a low slope roof that required extra eave protection, meaning 2 layers of underlayment. Ms. Cull admits that Mr. Cull did not do this.

32. So, I find that Marlin’s roofing work was deficient. Given I find Marlin failed to properly affix the correct waterproofing before shingling, I find Ms. Legzdins reasonably incurred an expense to strip the work that Marlin did.

Ms. Legzdins' Damages

33. I note the applicants' claim on its face was for $3,500. However, this included the $700 "lost time" claim that I have dismissed above, and an estimate of CRT fees, an expert report, which I discuss separately below. I note there is no suggestion that Ms. Legzdins claims for lost time due to this dispute.

34. For the roofing work claim, the applicants' handwritten calculation in evidence sets out what is "owing from Marlin", which totals $2,251.69. Given the applicants do not claim a refund of the entire $5,479 deposit, I find they accept there was some value to the materials and labour provided by Marlin. Mr. Pitman's handwritten calculation of the $2,251.69 "owing" is:

> $5,479 deposit (error in calculation page showing it as $5,470) - $4,451.34 (roofing materials Marlin bought from Pacific Roof Centre Inc.) = $1,027.66 "left over".
>
> To the $1,027.66, Mr. Pitman adds $1,224.03, made up of $495 for labour to strip Marlin's work (11 hours at $45 per hour), $46 dumping fee, and $713.03 in materials he says were "ruined", leaving $2,251.69 "owing" by Marlin.

35. Ms. Cull submits that Marlin bought additional roofing materials, apart from those from Pacific Roof Centre Inc. However, she did not provide any details or invoices, other than to say Marlin's total materials expense was $5,573.12. In the absence of supporting evidence, I find it unnecessary to consider Marlin's alleged additional and unspecified expenses.

36. KMR wrote that it removed the existing shingles installed by Marlin, but there is no invoice in evidence for KMR's work and KMR does not detail how long it took. Aside from denying Marlin's work was deficient, Ms. Cull submits $45 is an unreasonable rate for stripping roofing material. In the absence of an invoice for KMR's work, I find $45 per hour is unreasonable. Mr. Pitman does not explain why it took 11 hours to strip work that took Mr. Cull only a "few hours" to do. There is also no invoice for

dumping. So, on a judgment basis, I allow only $200 for labour to strip Marlin's work.

37. Ms. Cull does not deny that removed materials installed by Mr. Cull would be unsalvageable. On a judgment basis, I accept that $713.03 is a reasonable amount for the ruined materials.

38. So, I find Ms. Legzdins is entitled to reimbursement of $1,940.69 ($1,027.66 + $200 + $713.03).

39. I note that, based on the evidence before me, Marlin is a partnership and not an incorporated entity. It is undisputed that Ms. Cull is a Marlin partner, along with Marshall Cull who did the roofing work.

40. Section 11 of the *Partnership Act* (PA) says that each partner is liable for a partnership's debts and obligations. Section 12 of the PA says that a partnership is liable for the acts or omissions of any of its partners acting in the ordinary course of business. So, I find Ms. Cull and Marlin are jointly and severally liable for the claim.

41. The *Court Order Interest Act* (COIA) applies to the CRT. Ms. Legzdins is entitled to pre-judgment COIA interest on the $1,940.69, from June 27, 2019 to the date of this decision. This equals $40.34.

Marlin and Ms. Cull's $5,000 claim for work done and lost opportunity

42. Marlin and Ms. Cull claim $5,000, which they say is for "estimating, materials delivery and installation of materials" and compensation for Mr. Cull's unavailability to source other work will expected at the Mr. Pitman job.

43. First, I have found Marlin's work was deficient such that it required at least some removal and re-installation. The analysis above shows Marlin retains over half of the $5,479 deposit paid by Ms. Legzdins. Bearing in mind Ms. Cull's admission Mr. Cull worked on the job "a few hours" at most, I find Mr. Cull is not entitled to any further payment for labour or materials.

44. Second, even if I had found Marlin was not negligent, I find Ms. Cull has not proved Marlin lost any opportunity for work during the alleged 8-day period Marlin had committed to Ms. Legzdins' job. Ms. Cull submitted no evidence to support a claim for lost opportunity, such as evidence of job offers that Marlin had to refuse.

45. Third, Marlin and Ms. Cull's claim is against Mr. Pitman only. Even if I had found Marlin was entitled to further payment, it would flow from its contract with Ms. Legzdins, not Mr. Pitman. So, I would have dismissed Marlin and Ms. Cull's claims on this basis in any event. In summary, I dismiss Marlin and Ms. Cull's counterclaim.

46. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to the recovery of their CRT fees and reasonable dispute-related expenses. Marlin and Ms. Cull were unsuccessful and so I dismiss their claim for CRT fees and expenses. I find Ms. Legzdins was substantially successful and so I find she is entitled to reimbursement of $175 in paid CRT fees. The applicants claim $330.44 for "expert report, courier and photocopying" but provided no related invoices. So, I dismiss this claim.

ORDERS

47. Within 21 days of this decision, I order Marlin and Ms. Cull to pay Ms. Legzdins a total of $2,156.03, broken down as follows:

    a. $1,940.69 in damages,

    b. $40.34 in pre-judgment COIA interest,

    c. $175 in CRT fees.

48. Ms. Legzdins is entitled to post-judgment interest, as applicable.

49. Mr. Pitman's claims are dismissed. Marlin and Ms. Cull's counterclaim is dismissed.

50. 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.

51. 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.

Shelley Lopez, Vice Chair