



# Civil Resolution Tribunal

Date Issued: September 28, 2020

File: SC-2020-002818

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Fleetham v. Ekodwell Developments Inc.*, 2020 BCCRT 1087

BETWEEN:

KEVIN FLEETHAM

**APPLICANT**

AND:

EKODWELL DEVELOPMENTS INC.

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kristin Gardner

## INTRODUCTION

1. This dispute is about payment for concrete work. The respondent, Ekodwell Developments Inc. (Ekodwell), hired the applicant, Kevin Fleetham, to complete various concrete work on its new home construction.

2. Mr. Fleetham says Ekodwell has not paid him for some of the work he performed. He claims \$2,990.52 for an unpaid invoice.
3. Ekodwell says that Mr. Fleetham's work was deficient and he has done nothing to repair the deficiencies. Ekodwell says it should not have to pay Mr. Fleetham anything because the cost of fixing his work will be more than the amount allegedly owed. Ekodwell also says that Mr. Fleetham overcharged for his work.
4. Mr. Fleetham is self-represented. Ekodwell is represented by an owner, BF.

## **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. 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 CRT considers appropriate.

9. I note that Ekodwell made submissions about alleged defamatory comments Mr. Fleetham has made about Ekodwell on the internet. Ekodwell did not file a counterclaim about these allegations. In any event, as set out in section 119(a) of the CRTA, the CRT does not have jurisdiction over claims for defamation. So, I make no findings about Ekodwell's defamation allegations.

## **ISSUES**

10. The issues in this dispute are:
- a. Did Mr. Fleetham overcharge Ekodwell for his concrete work?
  - b. Was Mr. Fleetham's work deficient?
  - c. Is Ekodwell entitled to any set-off of the amount owing to Mr. Fleetham due to allegedly deficient work and, if so, how much?

## **EVIDENCE AND ANALYSIS**

11. In a civil claim such as this, the applicant Mr. Fleetham bears the burden of proof on a balance of probabilities. I have only referenced the evidence and submissions to the extent necessary to explain my decision.

### ***Did Mr. Fleetham overcharge Ekodwell for his concrete service?***

12. Ekodwell hired Mr. Fleetham to do various concrete work for it on a residential property, starting in July 2019. Ekodwell says that Mr. Fleetham first completed a flatwork concrete driveway and front entry, and it found Mr. Fleetham's invoice charging \$1.00 per square foot to be reasonable. I infer that based on the reasonableness of the first invoice, Ekodwell then hired Mr. Fleetham for other concrete work. However, I have no evidence before me that the parties had any discussion or made any agreement about Mr. Fleetham's rate or the estimated cost for the other work Mr. Fleetham was hired to complete before he started.

13. It is undisputed that on September 30 and October 2, 2019, Mr. Fleetham and 3 other concrete finishers that he employed, poured, placed, vibrated, and finished concrete patios, landings, sidewalks, a breezeway, and stairs for Ekodwell.
14. Mr. Fleetham's October 10, 2019 invoice shows that he charged Ekodwell \$2,990.52 for this work, which is the amount of Mr. Fleetham's claim. The invoice is broken down as follows:
- \$1,011 (1,011 square feet at \$1.00 per square foot) for the flatwork: patios, landings, breezeway, and sidewalks.
  - \$1,616 (202 at \$8.00 per linear foot) for the stairs.
  - \$142 (142 at \$1.00 per linear foot) for saw cuts.
  - \$221.52 for GST.
15. Ekodwell does not dispute that Mr. Fleetham completed the claimed work or that it has not paid Mr. Fleetham's invoice. Ekodwell also does not particularly dispute Mr. Fleetham's charge for the saw cuts on the invoice. However, Ekodwell says that Mr. Fleetham overcharged for finishing the stairs because his rate is well above the \$3.25 to \$6.25 per linear foot "going rate" for concrete finishing. Ekodwell says that because Mr. Fleetham's previous flatwork rate was reasonable, it did not anticipate that he would charge more than industry standard for stair finishing.
16. On the evidence before me, I find that the parties did not have a specific agreement about Mr. Fleetham's rate for stair finishing before he started the work. So, there is no enforceable contract for Mr. Fleetham's stair finishing rate. When contracting parties have agreed to provide goods or services that were clearly intended to be paid for, but they have not provided for the terms of payment, a contractual term to pay a reasonable price can be implied: see *Hugh's Contracting Ltd. v. Stevens*, 2015 BCCA 491 at paragraph 26. Here, I find it is appropriate to imply such a term in the parties' contract and to value Mr. Fleetham's work on a *quantum meruit* basis, which is a legal term meaning a reasonable sum of money for the work performed.

17. Ekodwell submitted evidence from 2 other concrete finishers, one showing a rate of \$3.25 per linear foot for stair finishing and the other quoting \$6.25 per linear foot. Ekodwell says that these rates come from well-regarded companies in the area, which Mr. Fleetham did not dispute.
18. Mr. Fleetham submitted an invoice that he prepared for another client showing he charged his \$8.00 per linear foot rate. He argues that while other concrete finishers might charge less for stair finishing, his rate for flatwork is lower, so the price for stairs when also pouring a sidewalk, which are typically done together, works out about the same. However, Mr. Fleetham did not provide any evidence to support his submission that the companies Ekodwell provided quotes from charge more for flatwork. He also did not provide any evidence to show that his \$8.00 per linear foot for stair finishing was within the industry standard.
19. Considering the evidence before me, on balance, I find that \$6.25 per linear foot is a reasonable rate for Mr. Fleetham's concrete stair finishing. Given it is undisputed that Mr. Fleetham completed 202 linear feet of stair work, I find that he is entitled to be paid \$1,262.50 plus GST for the stairs, subject to any deductions for deficiencies as discussed below.
20. Ekodwell also says that the flatwork finishing Mr. Fleetham did was only 940 square feet, not the 1,011 square feet stated on the invoice. Mr. Fleetham did not provide any evidence or submissions in response to this allegation. Mr. Fleetham bears the burden of proving the amount reflected in his invoice is owing. In the absence of any evidence to the contrary, I find that Mr. Fleetham is entitled to charge for only the undisputed 940 square feet of flatwork at Mr. Fleetham's rate of \$1.00 per square foot.
21. In conclusion, I find that Ekodwell owes Mr. Fleetham \$940 for the flatwork, \$1,262.50 for the stairs, and \$142 for saw cuts, plus GST, for a total of \$2,461.73. Again, this amount is subject to any reduction for deficiencies, as discussed below.

***Was Mr. Fleetham's work deficient?***

22. Ekodwell did not file a counterclaim against Mr. Fleetham for his allegedly deficient work. In the absence of a counterclaim, only if the claimed set-off arose from the same course of dealings between the parties and engaged the same issues requiring resolution in the dispute, would it be reasonable to consider a set-off: see *Dhothar v. Atwal*, 2009 BCSC 1203.
23. While Ekodwell raises issues with Mr. Fleetham's previous work on Ekodwell's driveway, I find such alleged deficiencies are not sufficiently connected to the work Mr. Fleetham claims for in his October 10, 2019 invoice to warrant considering a set-off in the absence of a counterclaim. Therefore, I consider only the alleged deficiencies relating to Mr. Fleetham's stair finishing, which in any event, appears to be Ekodwell's main complaint about Mr. Fleetham's work.
24. It is undisputed that Ekodwell provided the stairway forms, into which Mr. Fleetham poured and finished the concrete. BF says that he and others from Ekodwell met with Mr. Fleetham before September 30 to show him with a level that the form risers gave each step a  $\frac{1}{4}$  inch slope from back to front (positive slope) so that water would drain off the steps, which Mr. Fleetham does not particularly dispute. Ekodwell says it is a concrete finisher's obligation to ensure there is slope on the forms and that Mr. Fleetham indicated he was satisfied with the slope Ekodwell showed him.
25. Ekodwell submitted measurements taken at the left side, middle, and right side of each completed stair tread. These undisputed measurements show that nearly every stair has a negative rather than positive slope, and the slope on most of the treads is inconsistent from side to side. Ekodwell says that as a result of the incorrect slope, water pools on the stairs and freezes in cold weather, which I find is supported by the photographs of the stairs in evidence.

26. Mr. Fleetham does not dispute that the stairs have a negative slope but says that Ekodwell's form work was faulty, and it was not within his scope of work to go over all the carpenter's form work before pouring the concrete.
27. When deficiencies are alleged, the burden of proof is on the party alleging the work was defective: see *Lund v. Appleford Building Company Ltd. et al.*, 2017 BCPC 91 at paragraph 124. If the work was deficient, it amounts to a breach of contract. Often, an allegation of deficient work is based on a claim that the work's quality fell below the required professional standard, which requires expert evidence to prove if the subject matter is outside ordinary knowledge: see *Bergen v. Guliker*, 2015 BCCA 283. However, for the following reasons, I find that expert evidence is unnecessary to prove that Mr. Fleetham breached his contract with Ekodwell for completing the concrete stairs.
28. Here, I find that Ekodwell and Mr. Fleetham had a specific agreement about the stairs' slope before Mr. Fleetham started the job. Mr. Fleetham does not dispute that Ekodwell discussed with him its desired positive slope for the stair treads, that he had the opportunity to inspect the forms, and that he agreed to proceed on the basis that the stair treads would have a positive slope. Mr. Fleetham also does not dispute that the completed stairs had a negative slope. Therefore, even if Mr. Fleetham's concrete work met the industry standard, I find that he breached his agreement with Ekodwell.
29. While Mr. Fleetham says that Ekodwell's forms were not built properly to achieve a positive slope, I find that given his agreement to produce a positive slope, it was within his scope of work to review the carpenter's form work before pouring the concrete, to ensure he could produce the agreed result. In any event, Mr. Fleetham submitted no evidence to support his submission that Ekodwell constructed improper forms to cause the stairs' negative slope. So, I find Ekodwell is entitled to a deduction for the stair slope deficiency.
30. Further, even if I had not found there was a specific agreement on the stairs' slope, I would have found that Mr. Fleetham breached the contract by failing to complete

the concrete stairs in a professional manner and to a reasonable standard. I say this based on an expert opinion of Danny Hay submitted by Ekodwell.

31. Mr. Hay's July 3, 2020 letter says he is the director of a design, renovation and building firm. Mr. Hay wrote that he has over 24 years' experience in the construction industry, many of which he spent specializing in concrete forming and finishing. Given his experience and noting that Mr. Fleetham did not object to Mr. Hay's qualifications, I accept Mr. Hay's evidence as expert evidence under the CRT's rules.
32. Mr. Hay wrote that he personally inspected the concrete finishing Mr. Fleetham did and he found it to be substandard. Mr. Hay said it was evident the concrete finisher did not follow the layout lines that the carpenters had set out, causing the concrete to be too low at several points. He said the result is both visually abrasive and a safety concern.
33. Apart from his own submissions, Mr. Fleetham provided no evidence to show that his work met the required industry standard. Therefore, based on Mr. Hay's evidence, I find that Ekodwell has met its burden to prove Mr. Fleetham's stair finishing work fell below the required professional standard and was, therefore, deficient.

***Set-off amount***

34. Given my finding that Mr. Fleetham's work was deficient, I turn then to the appropriate set-off amount to apply to Mr. Fleetham's invoice.
35. Ekodwell says it will cost more for it to fix the stairs than Mr. Fleetham charged to construct them. Mr. Hay recommended either resurfacing the stair treads and risers to address the elevation issues or completely removing the stairs and having them replaced.
36. Ekodwell submitted a \$20,000 plus tax quote from one concrete company to remove the existing stairs, reform and pour them again. Ekodwell also submitted a



quote from another concrete company to have the stairs ground and re-sloped for \$9,750 plus tax. However, Ekodwell acknowledges in its submissions that the most cost-effective method it found to fix the stairs is to apply an epoxy coating onto the stair treads. Ekodwell says that it received a \$5,971.25 plus tax quote for this remedy but did not submit the quote in evidence. While ordinarily I would require a supporting invoice, given this quote is less than the submitted quotes in evidence, I accept that \$5,971.25 is a reasonable cost to fix the stairs.

37. Mr. Fleetham submits that Ekodwell has been using the stairs as Mr. Fleetham constructed them for almost a full year, which Ekodwell does not dispute. I infer that Mr. Fleetham is suggesting that because Ekodwell has used the stairs, they are not sufficiently deficient to warrant a set-off. However, I find the stairs pose a safety hazard, particularly in the winter, and Ekodwell is entitled to be compensated to fix the deficiencies regardless of whether the stairs have been used.
38. On balance, I find the most appropriate measure of damages is to set-off Mr. Fleetham's invoice by the amount of Ekodwell's lowest quoted option to fix the deficiencies, which is \$5,971.25. Therefore, I find that Ekodwell has proved a set-off that exceeds the \$2,461.73 I found is owing to Mr. Fleetham.
39. In summary, I find that with the applicable set-off that I find Ekodwell has proved, Mr. Fleetham has not proved he is owed any money. I therefore dismiss Mr. Fleetham's claims and this dispute.
40. 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. I find Mr. Fleetham was unsuccessful, so is not entitled to reimbursement of his CRT fees. Ekodwell did not pay any fees and neither party claimed any dispute-related expenses.

## **ORDER**

41. I dismiss Mr. Fleetham's claims and this dispute.

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Kristin Gardner, Tribunal Member