Civil Resolution Tribunal

Date Issued: October 13, 2020

File: SC-2020-002724

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Grant v. Waters*, 2020 BCCRT 1148

B E T W E E N :

MEGHAN GRANT

APPLICANT

A N D :

NICHOLAS WATERS and TOQUE DELICATESSEN INC. (Doing Business As TOQUE CATERING)

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This dispute is about the return of a deposit. The applicant, Meghan Grant, says she hired the respondents, Toque Delicatessen Inc. (doing business as Toque Catering) (Toque) and Nicholas Waters, to provide catering for her May 30, 2020 wedding,

which could not proceed due to the COVID-19 pandemic. Ms. Grant says that Toque returned a portion of the deposit she had paid but has refused to provide her with a full refund. Ms. Grant asks for an order that Toque pay her the remaining $1,902.20.

2. Mr. Waters and Toque say that Ms. Grant has received a refund according to the contract's terms, and deny that she is entitled to any more money.

3. Ms. Grant is self-represented. Mr. Waters represents himself and Toque.

JURISDICTION AND PROCEDURE

4. 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.

5. 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.

6. 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.

7. 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

8. The issues in this dispute are:

    a. Whether the pandemic made the parties' contract impossible to perform, and

    b. Whether Ms. Grant is entitled to a refund of the remainder of her deposit.

EVIDENCE AND ANALYSIS

9. At the outset, I will address Mr. Waters' status as a party to this dispute. The evidence shows that Mr. Waters is one of Toque's directors and that he was identified as the "salesperson" in the contact. The contact was between Ms. Grant and Toque as a corporate entity. Mr. Waters himself was not a party to the contract and there is no indication that he agreed to act in a personal capacity. I also note that there are no allegations about Mr. Waters personally as distinct from his role as Toque's representative. Therefore, I find that Mr. Waters is not responsible for Ms. Grant's claims. I dismiss Ms. Grant's claims against Mr. Waters personally, and will consider only Toque's responsibility for the return of the deposit.

10. In a civil dispute like this, an applicant bears the burden of proof on a balance of probabilities. The parties provided evidence and submissions in support of their positions. While I have considered all of this information, I will refer to only what is necessary to provide context to my decision.

11. On December 16, 2019, the parties entered into a Contract for Service to provide catering for Ms. Grant's May 30, 2020 wedding. The contract identified an anticipated buffet service and an estimated guest count of 100 people. The contract stated that the menu and guest count would be finalized 30 days prior to the event, and the number of guests could not be reduced after that date.

12. The contract provided for Toque to charge cancellation fees on a sliding scale depending on the cancellation date. For cancellations between 31 and 90 days before the event, the cancellation fee was set at 25% of the event's total estimated cost. The

contract also contained a “force majeure” clause, which is a clause that addresses unforeseeable events. This clause stated that either party could terminate the contract if it became illegal or impossible to perform “due to acts of God, war, terrorist act, disaster, strikes, civil disorder, or other comparable unforeseen emergency”.

13. Ms. Grant and a family member made 3 payments to Toque for a total deposit of $4,009.61.

14. In early 2020, the parties became aware of COVID-19 and the possibility that it may impact the scheduled wedding. On March 16, 2020, Ms. Grant and Toque exchanged email messages that discussed their mutual hope that the wedding could proceed and they also discussed the contract’s cancellation policy. Ms. Grant stated that she was not cancelling the contract, but wanted to be prepared for possible disruptions. On that same day, British Columbia’s Provincial Health Officer issued a Class Order under the *Public Health Act* to prohibit gatherings of more than 50 people.

15. On March 19, 2020, Ms. Grant emailed Toque that her view was that the Class Order made the contract impossible to perform as contemplated by the force majeure clause. She asked for the return of her full deposit. Toque disagreed that the contract was impossible to perform, and noted that the event could be held with less than 50 people. Toque also offered rescheduling options, which Ms. Grant did not accept. Ms. Grant reiterated that she was not cancelling the contract, but said that it simply could not be completed.

16. A subsequent telephone call did not result in an agreement about how to proceed. Ms. Grant maintained her position that the event could not happen. As such, Ms. Grant did not provide a guest count or menu selection at least 30 days before the event date as required by the contract.

17. On May 28, 2020, Toque emailed Ms. Grant to advise that it would return her deposit minus the cancellation fee. Toque stated that it did not consider that the force majeure clause applied because “it is to [sic] vague”. Toque advised Ms. Grant that it was

attempting to recover funds from its insurance and, if successful, it would return the remainder of her deposit.

18. In June of 2020, Toque provided Ms. Grant a $2,107.42 refund, which reflected the amount of her deposit minus the cancellation fee. It is apparent that Toque considered that Ms. Grant's March 2020 communications to be a cancellation within the 31 to 90-day window. As noted, Ms. Grant seeks the return of the remaining $1,902.20.

19. The parties made submissions about the pandemic's impact on Toque's income and the possible availability of government assistance programs or funds from insurance. I find these factors are not relevant to my analysis. Ms. Grant's possible entitlement to the return of her remaining deposit is determined by the terms of the parties' contract. Further, the fact that Ms. Grant received deposit refunds from other wedding vendors is not determinative.

20. The parties agreed to the force majeure clause when they made their contract. Although she discussed the force majeure clause in her communications with Toque, Ms. Grant does not mention this clause in her submissions. Instead, she submits that the contract was frustrated. Toque's position is that the force majeure clause did not apply as it did not specifically include epidemics, and the contract could have been performed.

21. I turn to the applicable law. A contract is frustrated if its performance is rendered impossible or impracticable by an event that its parties did not reasonably contemplate. However, a contract cannot be frustrated by an event that is the subject of a force majeure clause as that was an event within the parties' contemplation (see *Interfor v. MacKenzie Sawmill Ltd.*, 2020 BCSC 416 at paragraph 43).

22. Although the contract cited specific examples of events that would result in the termination of the contract, such as strikes and war, it also stated that the termination could result from a "comparable unforeseen emergency". It would have been open to Toque to include (or for the parties to negotiate) more restrictive wording, but this did not occur. I find that the parties reasonably contemplated that some other form of

emergency external to themselves and outside of their control could prevent them from completing their respective obligations under the contract. In this case and based on the contract's specific wording, I am satisfied that the public health emergency created by the pandemic falls within the scope of a "comparable unforeseen emergency".

23. The next consideration is whether the comparable unforeseen emergency of the pandemic made the contract illegal or impossible to perform. As noted in a "Force Majeure Facts" document provided by Toque, the Supreme Court of Canada has held that, in the context of a force majeure clause, the unexpected event must result in a "change so radical as to strike at the root of the contract" (see *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co. Ltd.*, 1975 CanLII 170 (SCC), [1976] 1 S.C.R. 580 at 583). Therefore, the question is whether the impact of the pandemic and public health orders struck at the root of the parties' contract for catering services.

24. Previous CRT decisions have found that the pandemic and associated public health orders do not radically change a contract from the parties' original agreements (see *Bal v. Infinite Entertainment Sound and Lighting Inc.*, 2020 BCCRT 865 and *Van Hoepen v. Chilliwack Golf and Country Club Holdings Ltd.*, 2020 BCCRT 1048). While these decisions provide helpful guidance, they are not binding upon me. I will consider the specific terms of the parties' contract in my analysis.

25. There is no dispute that the Class Order prohibited gatherings of the size Ms. Grant envisioned for her wedding, but that smaller gatherings were permitted. The parties disagree about whether a buffet would have been permissible under the public health guidance in place at the time. Based on the evidence before me, this is not entirely clear. However, I find that the gathering's size and manner of service were not specific terms of the contract.

26. As noted, the contract was for an estimated guest count of 100 people, subject to confirmation 30 days before the date of the event. The contract stated that the number of the "firm guarantee of attendance" was the number on which the payment would be based. The contract stated that the menu selection was to be finalized 30 days

before the event and included information about other service style options. I find that the wording did not restrict changes in menu or service style before the 30-day deadline. Therefore, at the time the parties formed the contract, the number of guests or manner and service had not been determined. Accordingly, these items were details to be finalized rather than fundamental terms in the contract.

27. I acknowledge Ms. Grant's position that a reduction in her guest count is a radical change to the terms of the contract. However, I find that the purpose of the contract, being the provision of catering services, was not affected. Evidence from Toque's website confirms that it continued to operate within the requirements of the applicable public health orders, and email messages show that it was willing to provide catering services to Ms. Grant, subject to the 50-person limit. Based on the evidence before me, I find that Toque remained able and willing to provide catering services under the contract.

28. While Ms. Grant did not intend to have a smaller event, I find that this requirement did not strike at the root of the contract or amount to a radical change to the terms of the parties' agreement. Therefore, the contract was not illegal or impossible to perform, and it could not be terminated by the force majeure clause.

29. Even if I am incorrect about whether the pandemic would fall within the scope of the force majeure clause, I find that the contract would not have been frustrated. For a contract to be frustrated, it is not enough for there to be hardship, inconvenience or material loss. There must be a radical change in the nature of a fundamental contractual obligation that makes the contract impossible to perform (see *Wilkie v. Jeong*, 2017 BCSC 2131 at paragraphs 16 to 18). Given my determination that the contract was not impossible to perform, I find that it was not frustrated.

30. As the contract was not illegal or impossible to perform, it remained binding on the parties. I find that Ms. Grant's decision not to proceed with the event amounted to a cancellation. As she has received a refund of her deposit under the cancellation terms included in the contract, I find that she is not entitled to a refund of the remaining $1,902.20. Accordingly, I dismiss Ms. Grant's claim.

31. Under section 49 of the CRTA and CRT rules, the CRT generally will order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As Ms. Grant was not successful, I dismiss her claim for reimbursement of CRT fees.

32. Toque asked for compensation for its time spent on the dispute and the costs of its lawyer. Rule 9.4(3) states that, except in extraordinary cases, the CRT will not order one party to pay to another party fees charged by a lawyer or other representative in a small claims dispute. As Toque did not provide any documentation to prove that it incurred any legal expenses, it is not necessary for me to consider whether it is entitled to reimbursement. Consistent with rule 9.4(3), the CRT generally does not award parties expenses for their time spent on a dispute. Accordingly, I dismiss Toque's claim for compensation for its time.

ORDER

33. I dismiss Toque's claim for dispute-related expenses.

34. I dismiss Ms. Grant's claims and this dispute.

Lynn Scrivener, Tribunal Member