



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Brahim Jounh (dba Gateway2Morocco) v. Rozenshteyn*, 2020 BCCRT
1175

B E T W E E N :

BRAHIM JOUNH (Doing Business As GATEWAY2MOROCCO)

APPLICANT

A N D :

EUGENE ROZENSHTEYN

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This dispute is about a vacation tour that did not take place due to a border closure during the COVID-19 pandemic.

2. The applicant, Brahim Jounh (Doing Business As Gateway2Morocco), sold a private tour of Morocco to the respondent, Eugene Rozenshteyn. Mr. Jounh says Mr. Rozenshteyn cancelled the tour with less than 30 days' notice, so the tour was 100% non-refundable. Despite this, Mr. Jounh gave Mr. Rozenshteyn a partial refund. Mr. Rozenshteyn later had the remaining charges on his credit cards reversed. Mr. Jounh says Mr. Rozenshteyn should pay the reversed amounts, which were in US dollars but exceed the \$5,000 Civil Resolution Tribunal (CRT) small claims limit. As Mr. Jounh claims \$5,000, I find he has abandoned any amount over \$5,000.
3. Mr. Rozenshteyn says the claim should be dismissed. He says Mr. Jounh's cancellation policy did not apply because he did not cancel the tour – rather, the Moroccan government cancelled all flights into the country, making it impossible to perform the tour.
4. Each party is self-represented in this dispute.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the 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.

ISSUE

9. The issue in this dispute is whether Mr. Rozenshteyn is responsible for any of the cost of the Moroccan tour that did not take place.

EVIDENCE AND ANALYSIS

10. As the applicant in this civil dispute, Mr. Jounh must prove his claim on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.
11. Mr. Jounh identifies himself as a travel agent. He operated as Gateway2Morocco with a business address in Vancouver, BC. Mr. Rozenshteyn resides in the United States, so the parties communicated by phone and email.
12. On June 18, 2019, Mr. Rozenshteyn emailed Mr. Jounh about a private tour in Morocco for 3 people in late March 2020. After exchanging several emails about trip details and pricing, the parties agreed on a price of \$7,500. On June 28, 2019, Mr. Rozenshteyn paid a 50% deposit of \$3,750 USD, plus a \$112.50 USD credit card processing fee using Mastercard.
13. On February 9, 2020, Mr. Rozenshteyn made another payment of \$3,862.50 using American Express. The total paid was \$7,725 USD. The tour was scheduled to depart on March 21, 2020.

14. On March 15, 2020, Mr. Rozenshteyn emailed Mr. Jounh to advise that Morocco had closed all borders to international visitors. The parties discussed options, which I return to below.

Was the contract frustrated?

15. Mr. Jounh says he had clients who completed a tour in Morocco on March 28, 2020, and left the country with no issues. However, he provided no supporting evidence or details. Mr. Rozenshteyn provided a March 15, 2020 notice from the US Consulate General in Morocco. It said Morocco had announced the closure of all international travel into and out of Morocco. Mr. Rozenshteyn also provided confirmation that his flights, booked independently, were cancelled by the carrier. Based on this evidence, I find that Morocco closed its borders and Mr. Rozenshteyn's flights were cancelled. I therefore find that the tour could not be performed as scheduled.
16. The tour itinerary and invoice included terms and conditions. Mr. Rozenshteyn does not dispute that the terms and conditions applied to his tour booking and were binding on him.
17. There is nothing in the terms and conditions about what will happen in the event that Morocco closed its borders and denied entry into the country. It is undisputed the parties' contract did not contain a "force majeure" clause, which is where the parties agree about what will happen in the event of unforeseen circumstances (such as the COVID-19 pandemic) preventing either party from fulfilling a contract. In the absence of such a clause, the common law doctrine of frustration of contract may apply.
18. Neither party argued that the contract was frustrated, but both hinted at it in their submissions. A contract is frustrated if its performance is rendered impossible or impracticable by an unforeseeable event for which neither party was at fault (see *Wilkie v. Jeong*, 2017 BCSC 2131). While I find the decision of the Moroccan government to close its borders was such an event, I find it was still possible for the contract to be performed on a future date. This is shown by Mr. Rozenshteyn's willingness to accept a voucher for the full amount paid and to rebook the same tour

with the “same guides, drivers and hotels next year.” I find the parties’ contract was not frustrated by Morocco’s border closure.

Which party breached the contract?

19. Mr. Jounh maintains that the tour was non-refundable. In essence, he argues that Mr. Rozenshteyn breached the contract by not paying.
20. The terms and conditions included a cancellation policy. The cancellation policy provided for partial refunds depending on the length of notice provided. It said cancellations of confirmed bookings less than 30 days before departure are “subject to loss of 100% of program price.” Mr. Rozenshteyn says he did not cancel the tour and therefore argues that the cancellation policy does not apply.
21. The cancellation policy is written in the passive voice, so it not clear if it applied to cancellation by the customer, the travel agent, or any other person or circumstance. However, I find the most reasonable interpretation of the policy is that it applied to cancellation by the customer, not cancellation in any event. It would be nonsensical if, for example, the travel agent could cancel the tour at the last minute and the customer would be liable for the full price of tour. To the extent that there is ambiguity in the cancellation policy, the principle known as *contra proferentem* addresses how to resolve the ambiguity (*Horne Coupar v. Velletta & Company*, 2010 BCSC 483). That principle says an ambiguity must be resolved against the party who drafted the contract, in this case Mr. Jounh. This means the ambiguity must be resolved in favour of Mr. Rozenshteyn. I therefore find the cancellation policy applied only to cancellation by the customer. I find it did not apply to failure to provide the tour for any reason other than cancellation by the customer. As I found above that the tour could not be performed because Morocco’s borders were closed, it follows that the cancellation policy did not apply here because Mr. Rozenshteyn did not cancel the tour. Therefore, Mr. Rozenshteyn did not breach the parties’ contract by failing to pay for the tour that did not happen.

22. As noted above, the parties discussed postponing the tour. However, Mr. Jounh would not agree to provide a 100% voucher to rebook the same tour in the future. Instead, he offered Mr. Rozenshteyn 2 options: a voucher for 75% of the cost toward a future tour, or a 50% refund, less a cancellation fee. I find that by refusing to offer a full credit for a future tour, Mr. Jounh was expressing an unwillingness to carry out his side of the bargain. I find Mr. Jounh breached the parties' contract.

Did the partial refund foreclose other possible remedies?

23. Mr. Rozenshteyn accepted the 50% refund of \$3,450 USD, which Mr. Jounh issued as a refund to Mr. Rozenshteyn's American Express. Mr. Rozenshteyn later initiated disputes with his credit card issuers, and ultimately obtained a full refund. The reasons, if any, for those refund decisions are not before me, and I find the refunds are not determinative of Mr. Rozenshteyn's entitlement to the money.

24. Mr. Jounh says he thought his 50% refund "completely closed [Mr. Rozenshteyn's] case]. I infer that he argues that by accepting the 50% refund, Mr. Rozenshteyn agreed not to pursue other remedies, such as contacting his credit card issuer about a refund. On review of the evidence, I find that Mr. Rozenshteyn did not agree not to pursue other remedies. The parties did not say anything in their emails demonstrating an intention that the 50% refund was a full and final settlement of their dispute. To the contrary, Mr. Rozenshteyn indicated he would be following up through the insurance provided by his credit card providers.

25. Mr. Jounh also says Mr. Rozenshteyn should have had trip cancellation insurance and should have made a claim with his insurer. I find this does not assist Mr. Rozenshteyn, as the fact that one party may have had or not had insurance does not determine responsibility for payment between the 2 parties. Rather, it is the parties' contract that governs.

Evidence of loss

26. I have found above that Mr. Rozenshteyn is not liable to Mr. Jounh. However, even if Mr. Rozenshteyn were liable for breach of contract, I would find Mr. Jounh's alleged losses unproven.
27. Mr. Jounh provided a copy of an invoice from a travel agency in Morocco, Agoudal Travel (Agoudal), for \$6,525 USD. The invoice says it has been paid. However, I find the invoice insufficient to prove his loss. Mr. Jounh provided no independent confirmation of payment, such as a bank or credit card statement. He did not explain his relationship with Agoudal. I note the terms and conditions in the parties' itinerary and invoice said that after paying the deposit, Mr. Rozenshteyn had the option of paying the remaining 50% balance in cash "directly to our team" on arrival in Morocco. This suggests Mr. Jounh may not be entirely independent from Agoudal.
28. Mr. Jounh did not provide a copy of his contract with Agoudal or the terms and conditions governing the invoice and refunds. He did not say whether or not he has received or attempted to obtain a full or partial refund from Agoudal. If Mr. Jounh has not been compensated by Agoudal for the tour that did not happen, he may have a claim against Agoudal, but not against Mr. Rozenshteyn.
29. I note the *Travel Industry Regulation* under the *Business Practices and Consumer Protection Act* says a person may apply for compensation from the travel assurance fund if they have suffered a loss as a result of paying a contributor for travel services that were not provided. Contributors to the fund can also apply if they received money from a customer eligible to apply for compensation, although claims must be filed within 6 months of the date of loss.
30. As Mr. Jounh was unsuccessful in this dispute, I dismiss his claim for reimbursement of tribunal fees. Neither party claimed dispute-related expenses.

ORDER

31. I dismiss Mr. Jounh's claims and this dispute.

Micah Carmody, Tribunal Member