Civil Resolution Tribunal

Date Issued: March 5, 2021

File: SC-2020-005665

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *0955824 BC Ltd. dba Van Pro Disposal v. Kooner Marble & Granite Ltd.*, 2021 BCCRT 249

B E T W E E N :

0955824 BC LTD. DBA VAN PRO DISPOSAL

APPLICANT

A N D :

KOONER MARBLE & GRANITE LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. The applicant, 0955824 BC Ltd. dba Van Pro Disposal (Van Pro), is a waste disposal company. Van Pro claims that the respondent, Kooner Marble & Granite Ltd.

(Kooner), breached their contract by refusing to pay Van Pro's invoices. Van Pro claims $612.12 in unpaid invoices, $173.25 for removing the garbage bin, $3,528 in liquidated damages, and contractual interest of 26.82% per year.

2. The parties' contract was "on demand", meaning that there was no scheduled waste disposal service. Kooner says that it paid Van Pro every time Van Pro picked up garbage. Kooner says it had stopped paying because it had not asked Van Pro to pick up its garbage in a long time. Kooner also says that when Van Pro picked up its bin, it dumped the garbage in the bin onto Kooner's property.

3. Van Pro is represented by an employee. Kooner is represented by its principal, Parmjit Singh.

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). Section 2 of the CRTA states that 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 the dispute's parties that will likely continue after the CRT process has ended.

5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties of this dispute call into question the credibility, or truthfulness, of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.

6. Section 42 of the CRTA says 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. Section 11(1)(a)(i) of the CRTA says that the CRT may refuse to resolve a claim if, among other things, it would be more appropriate for another legally binding process.

8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money or to do or stop doing something. The tribunal's order may include any terms or conditions the CRT considers appropriate.

ISSUES

9. The issues in this dispute are:

    a. Did Kooner agree to the contract's terms?

    b. How much, if anything, does Kooner owe Van Pro under the parties' contract?

    c. Does the CRT have jurisdiction to consider whether the liquidated damages clause in the parties' contract is an unenforceable penalty?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, Van Pro as the applicant must prove its case on a balance of probabilities. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

11. On December 26, 2016, Ms. Singh signed a contract with Housewise Construction Ltd. dba Segal Disposal (Segal) for waste disposal. Segal provided Kooner with a hooklift bin. The relevant terms of the contract are:

    - Kooner will pay $30 per month for a bin rental and $220 per garbage pickup, plus a 5% fuel surcharge and a 5% environmental fee.

- Kooner will pay $150 to remove the bin.
- The contract's term was 5 years.
- Unpaid invoices would be charged interest of 2% per month after 30 days.
- If Kooner is in default of any terms and conditions, Segal may terminate the contract and claim liquidated damages, which would be calculated as 12 times the rental fee and 12 garbage pickup fees.

12. As mentioned above, there was no set schedule for pickups. Rather, Kooner would contact Van Pro when its bin was full. On that point, the contract also included a handwritten term that said: "Customer minimum asks for 8 services every year, otherwise he pay the balance" (reproduced as written). While somewhat unclear, I find that this term meant that Kooner agreed to pay for a minimum of 8 pickups per year, even if it did not use that many.

13. Ms. Singh admits signing the contract but says that the Segal representative did not explain it. She says that she did not understand that it was a contract. I address this issue below.

14. In December 2017, Segal assigned the contract to Van Pro, as it was entitled to do under the contract.

15. It is undisputed that Kooner's last call for a pickup was in May 2019. It is also undisputed that Kooner's last payment was on June 1, 2019. Van Pro continued to charge Kooner the $30 monthly binrental fee until May 1, 2020. On July 22, 2020, Van Pro charged to remove the bin. Van Pro says that it removed the bin in June 2020.

16. Kooner alleges that in early 2020, Van Pro broke into Kooner's property, dumped the garbage in the bin at the time, and left with the bin. Kooner does not say exactly when this happened. Van Pro denies the allegation. Kooner provided a handwritten statement that it says was signed by 4 tenants. The tenants are not named. The

statement generally supports Kooner's allegation about the bin being dumped, although again it does not say exactly when this happened. I place little weight on this statement because it is unclear whether they all actually witnessed the alleged event. I also find that it is an unreliable account of each party's memory because they all signed the same document.

17. Kooner also provided an undated photo of debris on the ground, which appears to be mostly construction waste. It is not clear from the photo where it was taken. I find that the tenants' statement and the photo do not prove that Van Pro dumped Kooner's garbage on the ground when it took the bin.

Did Kooner agree to the contract's terms?

18. Kooner says that it did not understand that the document Ms. Singh signed was a contract. Kooner says that it may have been because Ms. Singh does not speak or read English well. Kooner does not dispute that Ms. Singh signed the contract.

19. In general, a signature is persuasive evidence that a person intended to enter into a contract. I do not accept Kooner's evidence that a language barrier prevented Ms. Singh from understanding that she was signing a contract. Ms. Singh participated in this CRT dispute in English without apparent difficulty, including by making written submissions. Kooner's contract with a previous waste disposal company is also in evidence, which shows Ms. Singh's signature. For these reasons, I find that Ms. Singh knew she was signing a contract on Kooner's behalf. I find that Kooner is bound by its terms.

Van Pro's Debt Claim

20. Van Pro claims a total of $785.37 in debt, broken down as $614.12 for unpaid fees and $173.25 to remove the bin.

21. The unpaid fees consist of 2 pickups and 13 months of bin rental. The 2 pickups were charged in May and June, 2019. The account statement that Van Pro relies on starts on April 29, 2019. As of that date, the statement shows that Kooner had a credit of

$229.50 on its account, for reasons that are not explained. Kooner did not dispute this, so I accept that it had a credit on its account, perhaps because Kooner paid for a pickup before Van Pro charged it to Kooner's account. Kooner also made a $328 payment on June 1, 2019, which as noted above was its final payment.

22. Van Pro charged $250 for each pickup, plus a $33.80 fuel surcharge and $33.80 environmental levy. Van Pro does not explain why it charged $250 for the pickups, not $220 as set out in the contract. While the contract allows for Van Pro to raise its prices in certain situations, Van Pro does not say when or why it did so. So, I find that Van Pro has only proven that it is entitled to the $220 for each of the 2 bin pickups.

23. Van Pro also does not explain why it charged $33.80 for the fuel surcharge and environmental levy, which are significantly more than the 5% set out in the contract. I find that Van Pro is only entitled to a 5% environmental levy and fuel surcharge, which is $11 each.

24. As for the $30 monthly bin rental fee, the contract says that Kooner must pay this amount regardless of whether it has any pickups or not. So, I find that Van Pro was entitled to charge $30 per month for as long as the bin was on site. I find that Van Pro removed the bin in June 2020, because Kooner does not specifically dispute the date and does not provide clear evidence to the contrary. I find that Van Pro is entitled to monthly rental fee from May 2019 through June 2020, which equals $390 plus GST.

25. I find that Van Pro is also entitled to the $150 bin removal fee, plus GST, as set out in the contract. Van Pro also charged a $15 fuel surcharge, which again is more than the 5% allowed by the contract. I find that Van Pro is entitled to a $7.50 fuel surcharge for the bin removal.

26. In summary, I find that Van Pro is entitled to $525.58 in debt for the 2 pickups, bin removal, and monthly bin rental, including GST.

27. The parties' contract says that Kooner must pay 2% monthly interest on amounts that are more than 30 days overdue. The contract does not set out an annual interest rate. Section 4 of the federal *Interest Act* says that when an interest rate is expressed as

a rate for a period of less than a year, and the contract does not say what the equivalent annual rate is, the maximum allowable interest is 5%. Therefore, I find that Van Pro is only entitled to 5% annual interest, not 26.82% as claimed. Applied to Kooner's debt, this equals $21.74.

Van Pro's Liquidated Damages Claim

28. Turning to liquidated damages, Van Pro claims $3,528, which is 12 months of the bin rental, 12 pickups at $250 each, plus GST. This is more than the 8 annual pickups that the contract guaranteed Van Pro.

29. I asked the parties for submissions about whether the liquidated damages clause was a genuine pre-estimate of damages or a penalty. If it is a penalty, it is not enforceable if it would be oppressive or unconscionable to enforce it. I note that the CRT has enforced many liquidated damages clauses in waste disposal contracts based on the binding court decision *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc.*, 2014 BCSC 690. The liquidated damages clause in this dispute is different from the typical clause found in waste disposal contracts, including the clause in *Tristar*, because it could provide Van Pro with more than Van Pro would have received if the contract had been performed. This suggests that it could be a penalty.

30. The court in *Tristar* said that if a liquidated damages clause is an oppressive penalty, the court may relieve the party from the penalty under section 24 of the *Law and Equity Act* (LEA). Section 24 of the LEA specifically gives the "court" the power to relieve a person from a penalty. The CRT is not a court, so it cannot make an order under this provision.

31. I find that there is no common law remedy to address contractual penalty clauses. Rather, I find that the only way to provide a remedy for a penalty clause is under section 24 of the LEA. See *Liu v. Coal Harbour Properties Partnership*, BCCA 385, at paragraphs 23 and 24. Based on the above, I find that the CRT does not have jurisdiction to relieve Kooner from the liquidated damages clause if it is an oppressive penalty. Only a court can do that.

32. As mentioned above, section 11(1)(a)(i) of the CRTA says that the CRT may refuse to resolve a claim if it would be more appropriate for another legally binding process. I find that the court would be more appropriate for the liquidated damages claim because the court can address the issue of whether it is a genuine pre-estimate of damages or a penalty.

33. In making this decision, I do not intend to comment on whether or not the court would likely enforce the liquidated damages clause. Rather, I have refused to resolve this claim without making any findings about this issue.

34. 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. Van Pro was partially successful in its debt claim so I find that it is entitled to reimbursement of half of their $200 in CRT fees, which is $100. Van Pro did not claim any dispute-related expenses. Kooner did not claim any dispute-related expenses or pay any CRT fees.

ORDERS

35. Within 30 days of the date of this order, I order Kooner to pay Van Pro a total of $647.32, broken down as follows:

    a. $525.58 in debt,

    b. $21.74 in interest, and

    c. $100 in CRT fees.

36. Van Pro is entitled to post-judgment interest, as applicable.

37. I refuse to resolve Van Pro's claim for liquidated damages under section 11(1)(a)(i) of the CRTA.

38. 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.

39. 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.

Eric Regehr, Tribunal Member