



Civil Resolution Tribunal

Date Issued: March 10, 2021

File: SC-2020-007113

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Clarke v. Torres*, 2021 BCCRT 274

BETWEEN:

JENNIFER CLARKE and ALDRED CLARKE

APPLICANTS

AND:

LUIS TORRES

RESPONDENT

AND:

JENNIFER CLARKE and ALDRED CLARKE

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about a deck railing installation.
2. The applicants and respondents by counterclaim, Jennifer Clarke and Aldred Clarke, hired the respondent and applicant by counterclaim, Luis Torres, to install a railing on their residential deck and stairs. The Clarkes say Mr. Torres' work was of poor quality and did not pass inspection. They say they paid Mr. Torres a \$6,000 deposit and should not have to pay the contract balance. The Clarkes seek a full refund of what they paid, but have limited their claim to \$5,000, which is the small claims monetary limit for the Civil Resolution Tribunal (CRT). They also seek an order that Mr. Torres stop coming onto their property.
3. Mr. Torres says he completed the job and he should be fully paid for his work under the contract. He says the railing only partially failed inspection and he fixed the deficiencies. Mr. Torres counterclaims for \$4,914.40, as the outstanding balance for his work.
4. The applicants are represented by Mrs. Clarke. Mr. Torres is self-represented.

JURISDICTION AND PROCEDURE

5. These are the CRT's formal written reasons. 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.
6. 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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me, and I find that there are no significant issues

of credibility or other reasons that might require an oral hearing. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

7. 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.
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. The Clarkes withdrew their request for an order that Mr. Torres stop attending at their property, so I will not address it, other than to say the CRT does not have jurisdiction to grant such an order.
10. I also note that Mr. Torres submitted evidence late. I find that the Clarkes were not prejudiced by the late evidence because they had an opportunity to review and respond to it. So, I have allowed Mr. Torres' late evidence and have considered that evidence in my decision.

ISSUES

11. The issues in this dispute are:
 - a. Whether the Clarkes are entitled to reimbursement of \$5,000 for the deposit they paid to Mr. Torres for the deck railing installation, and
 - b. Whether Mr. Torres is entitled to payment of \$4,914.40, the amount he says is outstanding on his invoice for completed work.

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, the Clarkes must prove their claims on a balance of probabilities. Mr. Torres must prove his counterclaim to the same standard. I have considered all the parties' evidence and submissions but refer only to what is necessary to explain my decision.
13. It is undisputed that Mr. Torres contracted with the Clarkes to install a deck railing at their new residence before they moved in. Mr. Torres provided a copy of a June 14, 2020 Work Order/Invoice (work order), which I find comprises the parties' written agreement. It sets out a description of the deck railing to be installed for a cost of \$8,670, as well as installation of a gate for \$500 and stair railing for \$975. There are handwritten notations beside the gate and stair railing totals, reducing their cost to \$250 and \$500, respectively. The work order also applies a \$400 discount, which Mr. Torres says Mrs. Clarke negotiated. There is pre-printed box of terms on the bottom of the work order, one of which requires a 50% deposit and the balance owing on completion. The work order states that Mrs. Clarke paid a \$6,000 deposit, and the total owing on completion is \$3,471, including GST.
14. Mrs. Clarke also filed a copy of a September 19, 2020 Work Order/Invoice (final invoice), which I infer Mr. Torres delivered upon completion of the work. While the final invoice's subtotal is the same as it is on the work order, Mr. Torres says he forgot to include PST on his original work order. So, after a paid \$6,000 deposit, the total owing on the final invoice is \$4,150.40, including taxes.
15. Mrs. Clarke says that Mr. Torres told her when they entered their agreement that the job would likely take 3 to 4 days. Mrs. Clarke says Mr. Torres repeatedly requested extensions to complete the job. Mr. Torres argues that some delays were the result of accommodating the Clarkes' schedule. Either way, I find the work order does not include any terms about how long the job was expected to take or about a specific completion date.

16. The evidence shows that due to Mrs. Clarke's concerns about the delays, she sent Mr. Torres an August 7, 2020 email, requesting a \$3,000 refund of her paid deposit, noting she had paid more than the required 50%. In her email, Mrs. Clarke stated she would pay the balance owing under their contract so long as the job was completed by August 11, 2020, failing which she would request her entire deposit refunded.
17. I find that Mr. Torres did not refund Mrs. Clarke the requested \$3,000, but that he did complete the railing installation. Mrs. Clarke says that city building inspectors did an inspection on August 15, 2020, which she says failed because the railing attachment to the house was incomplete. Mrs. Clarke says the inspector pointed out several other deficiencies with the deck railing, as well as aesthetic deficiencies, which did not impact the inspection results. The city inspection report is not before me, though I note Mr. Torres says he spoke with the city inspector himself and does not dispute that the deck railing received a "partial fail".
18. The parties filed copies of some of their text messages after the failed inspection. I find from the text messages that the Clarkes advised Mr. Torres about some of the deficiencies identified during the inspection and requested he fix them. I also find Mr. Torres returned to do some further work on the railing at the end of August, but that the repair work was not completed. The Clarkes applied for CRT dispute resolution on September 14, 2020.
19. The evidence shows that Mr. Torres' employees returned to the Clarkes' still vacant residence on September 18, 2020, to try and attach the railing to the house. The text messages in evidence show that Mrs. Clarke advised Mr. Torres she did not want anyone on her property without prior notice. The Clarkes then advised Mr. Torres not to do any further work on the railings pending the outcome of this CRT dispute.

Are the Clarkes entitled to reimbursement of their paid deposit?

20. The Clarkes say Mr. Torres promised a professionally installed deck railing, but the deck was not installed to a professional standard, is unsafe, and must be completely removed and replaced. I find there is an implied warranty in all construction contracts

that the work will be carried out in a reasonably competent and professional manner: see *A.A.A. Aluminum Products Ltd. v. Grafos*, 2015 BCSC 2128.

21. In support of their position, the Clarkes produced a report from James Tillapaugh of Bloodhound Home Inspectors Ltd. Mr. Tillapaugh is a licensed home inspector, and his report states he was hired to review the Clarkes' railing system on December 19, 2020. The report consists of several photographs of the deck railing with descriptions of what is shown in each photograph. Mr. Tillapaugh concludes that due to either inaccurate initial measurements or sloppy installation, or both, the railing system is imbalanced, poorly centered, and out of "vertical plumb" (not straight). Mr. Tillapaugh said there are several safety issues with the deck railing, including: guard posts that lack lateral support, openings greater than the recommended 4 inches, glass panels that are poorly supported or loose, and several missing fasteners. He also notes the railing was installed against a gutter downspout (damaging the downspout), a bottom railing is bent, and large sections of the railing paint is flaking off.
22. Mrs. Clarke also provided 2 statements from other professionals who inspected the deck railing. The first is a December 9, 2020 email from Jon Innes. Mr. Innes said he has worked as an estimator and railing installer for over 20 years, and that Mrs. Clarke asked him to look at the railing work Mr. Torres completed. He said that in his opinion the mounting plates used were too small, he observed missing fasteners, a bent bottom rail, large areas of flaking paint, corner posts not plumb, and inconsistent glass spacing between the posts. Mr. Innes said the work was unsatisfactory and the railing needs replacement.
23. The second statement is a handwritten statement from Johnathon Faulkner. Mr. Faulkner said he has worked as a carpenter "in the business" for over 15 years and works for Upbeat Renovations. From Mrs. Clarke's submissions, I infer Upbeat Renovations is Mr. Faulkner's own general contracting business. Mr. Faulkner said the deck railing Mr. Torres installed is unacceptable due to bends and kinks in the metal from it being forced into place, exposed screw ends, sharp edges, loose parts, peeling paint, and the gate had difficulty closing.

24. In response, Mr. Torres says he fixed the railing installation concerns the city inspector had identified, and the railing then passed inspection, before Mr. Tillapaugh prepared his report. On that basis, Mr. Torres suggests the deck railing may have been tampered with or damaged since he completed his work. However, Mr. Torres did not explain what issues he says he fixed after the failed inspection. He also did not specifically identify any of Mr. Tillapaugh's, Mr. Innes', or Mr. Faulkner's observations about the railing deficiencies that were not the result of his work. On balance, I find there is insufficient evidence to support Mr. Torres' allegations that anyone tampered with his railing work.
25. Mr. Torres also argues that the deck railing ultimately passed the city's re-inspection, which should be preferred over the submitted private inspections. However, I do not have either the failed or the passed home inspection reports before me. Further, even if Mr. Torres' work passed a city inspection, I find that is not necessarily determinative of whether his work was completed in a professional and competent manner, and other expert evidence may be relevant.
26. Noting that Mr. Torres did not specifically dispute the qualifications of Mr. Tillapaugh, Mr. Innes, or Mr. Faulkner to provide expert evidence, I find each of their statements qualify as expert reports under CRT rule 8.3. Based on these reports, I accept that Mr. Torres did not install the deck railing in a reasonably professional and competent manner, which is contrary to the implied warranty in the parties' agreement. I find that the reports and photographs in evidence establish that the railing will have to be completely dismantled, remeasured, and rebuilt. So, I find the Clarkes have received no benefit from Mr. Torres' work. Therefore, I find the Clarkes are entitled to the return of their paid deck railing deposit.
27. As noted, the Clarkes paid a \$6,000 deposit, but they have explicitly limited their claim to the CRT's \$5,000 small claims monetary limit. So, I order Mr. Torres to pay the Clarkes \$5,000.
28. Given my conclusion above, I dismiss Mr. Torres' counterclaim for the outstanding balance on his final invoice.

29. I find it unnecessary to address the return of the railing materials to Mr. Torres because he did not seek their return, and I find it is likely they are largely not re-useable due to the bent metal and peeling paint.
30. The *Court Order Interest Act* applies to the CRT. The Clarkes are entitled to pre-judgment interest on the \$5,000 from September 14, 2020, the date the Dispute Notice was issued, to the date of this decision. This equals \$10.94.
31. 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 see no reason in this case not to follow that general rule. I find the Clarkes are entitled to reimbursement of \$175 in CRT fees. In their argument, the Clarkes submit that Mr. Tillapaugh's report cost \$250. However, the Clarkes did not make a formal claim for dispute-related expenses, nor did they submit an invoice or other evidence of the report's cost. So, I decline to award anything for dispute-related expenses. As Mr. Torres was not successful, I dismiss his claim for CRT fees.

ORDERS

32. Within 30 days of the date of this decision, I order the respondent and applicant by counterclaim, Luis Torres, to pay the applicants and respondents by counterclaim, Jennifer Clarke and Aldred Clarke, a total of \$5,185.94, broken down as follows:
 - a. \$5,000 in damages for a refund of money paid for a railing installation,
 - b. \$10.94 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$175 in CRT fees.
33. The Clarkes are entitled to post-judgment interest, as applicable.
34. Mr. Torres' counterclaims are dismissed.

35. 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.
36. 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.

Kristin Gardner, Tribunal Member