



Civil Resolution Tribunal

Date Issued: March 22, 2021

File: SC-2020-007022

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Carlson v. Hayward dba Hayward Contracting*, 2021 BCCRT 317

B E T W E E N :

ERIC VICTOR CARLSON

APPLICANT

A N D :

GARNET HAYWARD (Doing Business As HAYWARD
CONTRACTING)

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This dispute is about an agreement for construction work. The applicant, Eric Victor Carlson, hired the respondent, Garnet Hayward (doing business as Hayward Contracting), to do the footings and foundation for a shed he was building on his

property. Mr. Carlson says that Mr. Hayward removed excavated material from his property without his permission and did not complete the project. Mr. Carlson asks for an order that Mr. Hayward pay him the \$4,000 he says it will cost to replace the excavated material and finish the project. Mr. Hayward denies that he is responsible for Mr. Carlson's claims.

2. The parties are self-represented.

JURISDICTION AND PROCEDURE

3. 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.
4. 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. 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.
5. 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.
6. 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

7. The issues in this dispute are:
 - a. Whether the parties' agreement contemplated the removal and replacement of material from the excavation site,
 - b. Whether Mr. Carlson is entitled to damages for the material removed from the excavation site, and
 - c. Whether Mr. Carlson is entitled to damages for site cleanup.

EVIDENCE AND ANALYSIS

8. In a civil proceeding like this, applicants must prove their claims on a balance of probabilities. Both parties provided submissions and Mr. Carlson provided evidence in support of his position. Mr. Hayward did not provide evidence despite having the opportunity to do so. I have read all the information provided by the parties but will refer to only what is necessary to provide context for my decision.
9. Mr. Hayward prepared an August 11, 2020 proposal for the work on Mr. Carlson's property. The \$10,500 scope of work included preparing for excavation, compacting the area for a slab, forming and pouring footings, and forming and pouring a slab. The proposal contemplated that Mr. Hayward would arrange for third parties to supply the excavation and concrete, and Mr. Carlson would pay those third parties directly. I infer that the anticipated costs of the third parties' invoices were included in the total cost of the proposal.
10. Mr. Carlson accepted Mr. Hayward's proposal. Before the work started, Mr. Hayward says there was a negative interaction with Mr. Carlson about an unspecified issue. Mr. Hayward says that issue was resolved and work proceeded.
11. Mr. Hayward arranged for the third party to perform the excavation on August 18, 2020. The third party took away most of the material from the excavated hole, but some material remained on Mr. Carlson's property. Mr. Hayward then constructed the

forms, which Mr. Carlson says were approved by a building inspector on August 19, 2020.

12. Later that day, a disagreement arose about whether the material that was removed from the property would have been appropriate to use as fill around the footings and whether Mr. Carlson had given permission for it to be removed from his property. Mr. Hayward says that, as a result of this second negative interaction, he decided that he could not work with Mr. Carlson. Mr. Hayward and his employees left the jobsite and did not complete the project. Mr. Carlson says that he and Mr. Hayward had discussions, but did not comment on the interactions Mr. Hayward described as negative.
13. The evidence before me suggests that Mr. Carlson paid the third party's invoice for the excavation work, which included the charges for removing and dumping the excavated material. Mr. Hayward says, and Mr. Carlson does not dispute, that he was not paid for his work on the project. Mr. Hayward did not file a counterclaim in this proceeding. Mr. Hayward says his work was valued at approximately \$1,800. I note that this estimate is consistent with the breakdown of work costs (minus amounts paid to the excavation contractor) in the proposal. Mr. Carlson did not comment on this number or deny that he received some value from Mr. Hayward's work. His position is that he suffered damages as a result of Mr. Hayward's actions.
14. Mr. Carlson says he had to arrange for new material to be delivered to his property at a cost of \$1,662.11. He also says that residual material from the excavation has contaminated his lawn and vegetable garden, but has not been able to get a quote for the work he says will be required to restore these areas to their original state. I infer that the remaining \$2,337.90 of Mr. Carlson's \$4,000 claim is for the anticipated cost of this work.
15. Mr. Hayward says, and Mr. Carlson denies, that there were unspecified verbal modifications to the parties' agreement as set out in the proposal. While the parties may have had discussions about the scope of work, I find that it is more likely that not that the written terms of the proposal represented the parties' agreement. The

proposal provided for a “basic soil move excavate for foundation, backfill and compact for slab” [reproduced as written]. It stated that Mr. Hayward would be responsible for “misc supplies and rebar” but did not address what material would be used to backfill the excavated site or who would pay for it. It is not clear to me how the parties could determine whether the excavated material was suitable for or backfilling without knowing its composition or, in turn, whether additional material would be required for this purpose. I find that the parties’ agreement did not include the cost of any new material that would be required for backfilling.

16. The parties’ agreement did include the moving of the excavated soil, which is what occurred. The agreement did not discuss the possible storage of the excavated material. I find that, based on what is before me, the evidence does not establish whether there was room to store all of the excavated material while still leaving room to build the forms and foundation.
17. Mr. Carlson’s claim that Mr. Hayward removed the excavated material from his property without permission flows from his belief that he could have used the excavated material for backfill. Mr. Carlson submits that his building inspector told him that she was “impressed” with the material and that “it certainly could be reused for all back filling”. He says that the excavated material was suitable to complete the job.
18. Mr. Hayward disagrees, and says that the soil that was removed from Mr. Carlson’s property was not suitable for back filling as gravel is required under a slab. According to Mr. Hayward, there was some sandy material at the bottom of the excavation area that was suitable for use later in the project, and this was not removed from the property. Mr. Hayward suggests that this may be the material the building inspector saw and commented on. However, Mr. Hayward questions whether a building inspector is qualified to give an opinion about fill material.
19. I find that the question of whether the excavated material could have been used for backfilling is a matter outside of the knowledge of an ordinary person, and must be answered with reference to expert evidence (*Bergen v. Guliker*, 2015 BCCA 283).

20. Mr. Carlson's submissions suggest that he was trying to get a soil analysis, but this is not included in the evidence. Even if there was an analysis, it is not clear to me how this could establish the composition of the material that was removed from the site. There is no statement from the building inspector setting out her views about the excavated material. Without such a statement, I am unable to consider whether a building inspector would meet the qualifications of an expert as set out in CRT rule 8.3. In any event, given that the building inspector did not attend the site until the day after the excavation, it is not clear to me how she could comment on the suitability of the material that was removed.
21. Based on the evidence before me, I find that Mr. Carlson has not established that he could have used the excavated material for backfilling had it not been removed from his property. Given this conclusion, and my finding that new backfilling material was not included in the parties' agreement, I find that Mr. Carlson is not entitled to reimbursement of the \$1,662.11 he spent on fill material and delivery.
22. The next consideration is Mr. Carlson's claim that Mr. Hayward contaminated his yard with excavated material. He provided a September 2020 photo that shows dirt and rocks over a what he says is his lawn and vegetable garden. The photo is difficult to view due to the presence of shade from a structure over a large portion of the area. No images of the pre-excavation site were provided for comparison, and it is not clear whether other contractors were on the site between Mr. Hayward's work and the time the photo was taken.
23. The proposal did not state that there would be any remediation of the areas around the excavation site and I find that this was not included in Mr. Hayward's scope of work in the parties' agreement. Even if it was, as discussed above, Mr. Carlson does not have a quote for the work he says is necessary in his yard. Without this evidence, I would not make an order for the damages he claims, even if I had come to a different conclusion about Mr. Hayward's responsibility for site clean-up. Keeping in mind that Mr. Carlson bears the burden of proof, I also dismiss this claim.

24. 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 Mr. Carlson was not successful, I dismiss his claim for reimbursement of CRT fees and dispute-related expenses.

ORDER

25. I dismiss Mr. Carlson's claims and this dispute.

Lynn Scrivener, Tribunal Member