



Civil Resolution Tribunal

Date Issued: April 20, 2021

File: SC-2020-008078

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Tang v. Ge*, 2021 BCCRT 404

BETWEEN:

NICHOLAS TANG and ANGELA HARDBATTLE

APPLICANTS

AND:

JUN GE

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Leah Volkers

INTRODUCTION

1. This dispute is about a retaining wall. The applicants Nicholas Tang and Angela Hardbattle are neighbours of the respondent Jun Ge. The applicants say Ms. Ge verbally agreed to pay half the cost of installing a new retaining wall between their properties. The applicants say that shortly after the work started, Ms. Ge changed her mind and refused to pay.

2. The applicants claim \$2,320.50 for half the retaining wall's cost. They also claim \$133.50 for soil and \$132.85 for additional wood and stain they say was required after Ms. Ge refused to pay and the retaining wall was moved to avoid trespassing.
3. Ms. Ge says she never agreed to contribute to the cost of a new retaining wall. She asks that I dismiss the applicants' claims.
4. The parties are all self-represented.

JURISDICTION AND PROCEDURE

5. 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.
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. In some respects, both parties in this dispute call into question the credibility, or truthfulness, of the other. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. 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. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.

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.

ISSUE

9. The issue in this dispute is whether Ms. Ge agreed to pay for half the cost of the new retaining wall, and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.
11. Prior to this dispute, the parties' backyards were divided by a fence and retaining wall. It is undisputed that the fence and retaining wall were located on Ms. Ge's property. The applicants' property is lower in elevation than Ms. Ge's property.
12. Mr. Tang says that in June 2020, he spoke with Ms. Ge about her fence post, which he says was rotten and falling over. It is undisputed that Ms. Ge gave Mr. Tang permission to enter her backyard to investigate and replace the rotten fence post. When Mr. Tang was in Ms. Ge's backyard, he discovered the retaining wall supporting Ms. Ge's property was degraded and he thought a new retaining wall was required. Mr. Tang says Ms. Ge verbally agreed to split the cost of the new retaining wall. Ms. Ge disputes this.

13. Ms. Ge says the original retaining wall was only six years old and did not need to be replaced. Ms. Ge says only one fence post needed replacement, which she agreed to.
14. Mr. Tang submitted evidence from a Holzworth Property Services' (Holzworth) employee, FL, and from Bayon Renovations' (Bayon) owner, CR. Both are contractors Mr. Tang contacted for quotes to replace the original retaining wall. I find that FL and CR are contractors qualified to provide expert evidence about the state of the original retaining wall when they viewed it. I accept their opinions that the original retaining wall was deteriorating and showed signs of failure. Ms. Ge did not provide contrary evidence from a tradesperson or expert. Based on this evidence, I find it more likely than not that the original retaining wall required replacement.
15. The parties disagree about whether Mr. Tang replaced the original retaining wall. Ms. Ge says Mr. Tang removed the original retaining wall but then had a contractor, Bayon, replace the applicants' old garden bed with a new block garden bed. Ms. Ge says she should not have to pay for the applicants' new block garden bed. I will discuss this further below.
16. Ms. Ge further says that, by removing the original retaining wall Mr. Tang left her fence with no support underneath. Ms. Ge says the applicants should pay to return her fence to its former condition. However, because Ms. Ge did not counterclaim, I decline to address her request to have her fence returned to its former condition.

What was the parties' agreement about the retaining wall?

17. The parties did not have a written contract. Mr. Tang says that they had a verbal contract. A verbal contract is enforceable like a written contract, but it is harder to prove. The burden is on the applicants to prove that the parties had a verbal agreement.
18. Mr. Tang says he provided Ms. Ge with two quotes for the new retaining wall on August 14, 2020. Ms. Ge disputes this and says she received nothing until September

14, 2020. Mr. Tang submitted in evidence a July 22, 2020 quote from Bayon and a July 30, 2020 quote from Holzworth. I will discuss this further below.

19. It is undisputed that Mr. Tang met with Ms. Ge on August 23, 2020 for about 2 hours with the assistance of FC, who I infer was Mr. Tang's acquaintance. Mr. Tang says they discussed the new retaining wall and reviewed the quotes, with FC translating. Mr. Tang says that during the discussion, Ms. Ge agreed to pay for half the retaining wall based on the Bayon quote. Ms. Ge disputes this. She says Mr. Tang tried to persuade her to agree to replace the retaining wall. Ms. Ge says she did not have any quotes and did not agree to pay for half the retaining wall at that time. Ms. Ge says her friend and neighbour, QL, was in Ms. Ge's home and heard the conversation.
20. Of note, Ms. Ge says at the end of the August 23, 2020 discussion, FC told her that Mr. Tang would provide Ms. Ge with "better quotes". I find Ms. Ge's submissions about the August 23, 2020 discussion are inconsistent with her submissions that the retaining wall did not require replacement and she was not provided with any quotes. I find it unlikely that Ms. Ge would have participated in a 2-hour discussion with Mr. Tang if she disagreed the retaining wall needed replacement and had no quotes to review. I also find it unlikely that Ms. Tang would have offered to provide Ms. Ge with "better quotes" if Ms. Ge had no quotes to begin with, as she claims. I find Ms. Ge's evidence on the quotes unreliable and I prefer the applicants' evidence. I find that Mr. Tang provided Ms. Ge with both quotes on August 14, 2020.
21. Mr. Tang submitted a statement from FC. FC says that Ms. Ge agreed to pay for half the cost of the retaining wall during the August 23, 2020 discussion with Mr. Tang. FC says Mr. Tang left his number in case Ms. Ge needed to contact him.
22. Ms. Ge submitted a contrary statement from her friend and neighbour QL, who says she overheard the August 23, 2020 discussion while taking care of Ms. Ge's daughter inside Ms. Ge's home. QL says that Ms. Ge emphasized that the fence and retaining wall were not broken and only one fence post needed to be replaced, but Mr. Tang

insisted on immediate repair. QL says Ms. Ge never agreed to pay for half the cost of the retaining wall.

23. It is undisputed that the discussion occurred outside Ms. Ge's home. QL says that she was inside the playroom with Ms. Ge's daughter during the discussion, and "near the door". Mr. Tang disputes this. He says that Ms. Ge was feeding her daughter during the discussion, and he never saw QL. He also says QL is not one of their neighbours. FC says that the only people present for the discussion were Ms. Ge, Ms. Ge's daughter, Mr. Tang, and herself. On balance, I find it unlikely that QL overheard the entire discussion, or any of it, as claimed. I place little weight on QL's statement because QL did not directly participate in the discussion and neither Mr. Tang nor FC saw QL.
24. On the other hand, given that Ms. Ge does not dispute that FC directly participated in the discussion, and translated it, I place more weight on FC's statement. I find FC's statement supports Mr. Tang's position that Ms. Ge agreed to pay for half the retaining wall during the August 23, 2020 discussion.
25. On September 9, 2020, Mr. Tang says he spoke to Ms. Ge to confirm that work would start on September 15, 2020 based on the Bayon quote as discussed on August 23, 2020. Ms. Ge's submissions were silent on this alleged discussion. However, as discussed further below, I accept Mr. Tang's version of events.
26. On September 14, 2020, the parties agree that Mr. Tang gave Ms. Ge a copy of the Bayon contract. Mr. Tang says he again advised Ms. Ge that work would start the next day but Ms. Ge denies this. Mr. Tang says Ms. Ge "did not object and seemed agreeable." Ms. Ge says Mr. Tang wanted her to sign the quotation, but she refused.
27. It is undisputed that work started on September 15, 2020. Mr. Tang says he went over that morning to inform Ms. Ge that work had started. He says she again raised no objections or concerns. Ms. Ge disputes this. She says she came home after taking her daughter to school and found the retaining wall had been "forcibly demolished" without her knowledge or permission.

28. Mr. Tang says Ms. Ge came over with a different translator and objected to the work being done. By that point, the retaining wall had been demolished. Mr. Tang says Ms. Ge wanted the work explained again but he refused, because they had already addressed it and reached an agreement. The parties agree that Ms. Ge then stated that she would not pay for half the cost of the retaining wall.
29. Once Ms. Ge advised she would not pay, Mr. Tang asked Bayon to stop work on Ms. Ge's property. He says the retaining wall design was changed to be built entirely on the applicants' property.
30. Mr. Tang also provided text messages with FC and Bayon's owner in evidence. The text messages include an August 23, 2020 text message from Mr. Tang to Bayon's owner confirming Ms. Ge agreed to pay for half the retaining wall, and a September 15, 2020 text message chain with FC where Mr. Tang advised that Ms. Ge had changed her mind and refused to pay.

Credibility

31. To resolve this dispute, I must decide whose evidence is more credible. Credibility is about whether a person is being fully truthful in their evidence. It is a well-established legal principle that as part of assessing credibility, a court or tribunal must assess a story based on whether it is in harmony with what a practical and informed person would consider to be reasonably likely.
32. Mr. Tang's version of events is supported by FC's statement and by his conduct after the August 23, 2020 discussion with Ms. Ge. My finding that the retaining wall required repair also supports Mr. Tang's version of events, and I give this significant weight. I find it unlikely that Mr. Tang would have carried on as he did between August 23, 2020 and September 15, 2020 if the retaining wall did not require replacement and Ms. Ge had refused to pay for half the retaining wall from the outset on that basis, as she claims. The text messages to Bayon and FC also support Mr. Tang's version of events.

33. I find Ms. Ge's version of events does not have the ring of truth. Her submissions do not accord with my finding that the retaining wall required replacement and my finding that she received quotes from Mr. Tang well before the work commenced. For these reasons, I find Mr. Tang's version of events more credible than Ms. Ge's and I find it more likely than not that Ms. Ge agreed to pay half the cost of the retaining wall during the August 23, 2020 discussion.
34. As stated in *Kuo v. Kuo*, 2017 BCCA 245, unless an agreement is terminated, parties must fulfill their obligations. Termination by repudiation occurs when a party shows an intention not to be bound by the agreement and the other party accepts this repudiation.
35. I find Ms. Ge repudiated the contract when she advised Mr. Tang she would not pay for half the retaining wall on September 15, 2020, after the work had started.

What is the appropriate remedy?

36. The remedy for repudiation depends on the response of the non-repudiating party (here, the applicants). As the non-repudiating party, the applicants had two options: (1) treat the contract as still in force and sue for damages or performance or both, or (2) accept the repudiation, terminate the contract, and discharge the parties from future obligations (see *Kuo v. Kuo*, 2016 BCSC 767 at paragraphs 31 and 32).
37. I find the applicants did not accept Ms. Ge's repudiation. Given that the original retaining wall had already been removed when Ms. Ge repudiated the contract, I find that the applicants had no choice but to treat the contract as still in force, continue with the retaining wall replacement, and sue for damages. On September 16, 2020, Mr. Tang, along with FC, tried to provide a "letter of intent" to Ms. Ge. The letter was submitted in evidence and confirmed that the applicants intended to complete the retaining wall and would seek to recover costs from Ms. Ge. Mr. Tang explained the letter to Ms. Ge and tried to leave it with her by placing it on her doorstep, but she kicked it out onto her porch. Ms. Ge admits she refused to accept the letter and kicked it away.

38. Damages for breach of contract are intended to place an innocent party in the position they would have been in if the contract had been carried out as agreed (see *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319 at paragraph 39).
39. As noted above, Ms. Ge says the applicants did not replace the retaining wall. I do not accept this submission and I find the retaining wall was replaced. Mr. Tang says the original plan had been to install a new wall of concrete blocks in place of the original retaining wall on Ms. Ge's property. Mr. Tang says that after Ms. Ge refused to pay for half the retaining wall, the row of concrete blocks was not installed in that location, as originally planned. Mr. Tang says Bayon would have had to trespass on Ms. Ge's property in order to so.
40. Instead, Mr. Tang says Bayon recommended building up the pre-existing raised garden bed to the height of Ms. Ge's property and extending it further into the applicants' yard in order to structurally support Ms. Ge's yard. The retaining wall composed of concrete blocks was then installed on the garden bed's outer edge.
41. I find the retaining wall that Bayon installed was substantially similar to the one originally planned, but in a different location. I accept Mr. Tang's submissions that the retaining wall design was modified to avoid trespassing on Ms. Ge's property. I also accept that the new design continued to provide support for Ms. Ge's yard. Mr. Tang submitted Bayon's invoice for the work in evidence. The Bayon invoice indicates that the project was for "retaining wall repair". Under description, it says "replace existing wood retaining wall with segmented concrete blocks". Mr. Tang also submitted photographs of the backyard before, during, and after the work was completed. I find the photographs show that Bayon built a new concrete retaining wall, retaining a raised garden bed that extends from the edge of the parties' shared property line into the applicants' backyard. The applicants' have not claimed for any loss arising from building the retaining wall entirely on their own property.
42. The applicants claim \$2,320.50 for half the cost of the new retaining wall. Mr. Tang submitted a September 21, 2020 invoice from Bayon for \$4,641. He also submitted a statement from Bayon's owner that confirms the applicants paid the invoice in full.

43. Ms. Ge does not dispute the total amount of the invoice. However, as noted above, she says that the work was for the applicants' new garden bed. I have addressed this in part, above. I find the garden bed was part of the original retaining wall design. I accept that the modified retaining wall resulted in the applicants' pre-existing raised garden bed being raised up further, with the concrete blocks placed in front of the garden bed, rather than behind it on Ms. Ge's property. In any event, the modification of the retaining wall after Ms. Ge repudiated the contract did not change its overall cost. The invoiced amount is the same as the quote provided to Ms. Ge before she repudiated the parties' agreement. I find that the invoice accurately reflects the cost of the new retaining wall. I find the applicants are entitled to payment of \$2,320.50 from Ms. Ge for half the cost of the retaining wall.
44. The applicants claim \$133.50 for additional soil required to raise their garden bed for the modified retaining wall because that alteration was made necessary after Ms. Ge refused to pay. I find that the applicants are entitled to this \$133.50, based on the invoice submitted in evidence.
45. The applicants also claim \$132.85 for wood and stain to create privacy panels. While Mr. Tang provided evidence of the privacy panel costs, I find the applicants did not prove that they required the privacy panels due to modified retaining wall. I find they are not entitled to the \$132.85.
46. The *Court Order Interest Act* applies to the CRT. The applicants are entitled to pre-judgment interest on the September 21, 2020 invoices for the retaining wall and additional soil, to the date of this decision. This equals \$6.40.
47. 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 applicants are entitled to reimbursement of \$125 in CRT fees. The applicants have not claimed any dispute-related expenses, and so I award none.

ORDERS

48. Within 30 days of the date of this order, I order Ms. Ge to pay Mr. Tang and Mrs. Hardbattle, a total of \$2,585.40 broken down as follows:
- a. \$2,320.50 as reimbursement for half the cost of the retaining wall,
 - b. \$133.50 for additional soil,
 - c. \$6.40 in pre-judgment interest under the *Court Order Interest Act*, and
 - d. \$125 in CRT fees.
49. The applicants are entitled to post-judgment interest, as applicable.
50. 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.

51. 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.

Leah Volkens, Tribunal Member