



Civil Resolution Tribunal

Date Issued: April 28, 2021

File: SC-2021-000342

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Heck v. Brevik*, 2021 BCCRT 447

BETWEEN:

DARCIE HECK and JERIME HECK

APPLICANTS

AND:

KRISTINE BREVIK

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This dispute is about a deposit for wedding photography services. The applicants, Darcie Heck and Jerime Heck, hired the respondent, Kristine Brevik, to take photos at their wedding. The Hecks paid a \$720 deposit as part of the total price. Due to COVID-19 pandemic-related restrictions, they later rescheduled the wedding, and

then cancelled the rescheduled ceremony. The Hecks claim a refund of the \$720 deposit.

2. Mrs. Brevik says the deposit was a fee to reserve her photography services, which she remained ready to provide. Mrs. Brevik says that under the parties' contract, the deposit is non-refundable in the event of a cancellation, so she owes nothing.
3. Mrs. Heck represents the applicants in this dispute. Mrs. Brevik is self-represented.

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. 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.
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. 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

8. The issue in this dispute is whether the parties' contract was frustrated, and if so, must Mrs. Brevik return the Hecks' \$720 deposit?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, as the applicants the Hecks must prove their claims on a balance of probabilities. I have read all the submitted evidence, but I refer only to the relevant evidence as needed to provide context for my decision.
10. The facts are largely undisputed. The Hecks decided to hold a "destination" wedding in BC although they live in a different province. In November 2019, they signed a contract with Mrs. Brevik for 6 hours of photography services at the April 14, 2020 BC wedding. The Hecks paid Mrs. Brevik the \$2,400 fee for her services in advance.
11. The contract said that the \$2,400 price included a required 30% deposit of \$720, which was "non-refundable or transferable" in the event of cancellation. In context and in light of the evidence before me, I find this meant that the deposit was both non-refundable and non-transferable if the Hecks cancelled the wedding. The contract also said that a signed agreement and the deposit fee were "required to reserve the date & time of your wedding."
12. When the COVID-19 pandemic struck BC in March 2020, the Hecks postponed the wedding to April 6, 2021. There is no dispute that pandemic-related travel and attendance restrictions meant that the Hecks were unable to have the size and type of "dream wedding" they had originally envisioned. The parties agreed that Mrs. Brevik would provide her photography services on the new wedding date, and would apply the Hecks' payment to that new date. The parties signed a new contract on March 20, 2020 for photography services on April 6, 2021, that was otherwise the same as the original contract.
13. In December 2020, the Hecks cancelled the April 6, 2021 wedding. Mrs. Brevik refunded the Hecks \$1,680, but retained the \$720 deposit.

14. The Hecks say that they understand weddings may “technically” still happen under COVID-19 restrictions, but they say such restrictions damper the whole reason for their wedding. The Hecks say that they were not comfortable paying for a wedding where there would likely be significant limits on the number of guests and bans on interprovincial travel, along with other potential drawbacks. They say that Mrs. Brevik had 4 months notice of the cancellation, so she has not incurred any expenses or missed any replacement work. The Hecks also say that Mrs. Brevik never “fulfilled” the contract because she never performed the agreed services. So, they say that Mrs. Brevik should refund the \$720 deposit.
15. However, the Hecks admit that the contract “clearly stated the deposit was non-refundable.” They say that the contract did not say what would happen if there was a worldwide pandemic, and that Mrs. Brevik failed to include a *force majeure* clause in the contract to address such a situation. A *force majeure* clause is a contract term that sets out what will happen if there is an unforeseeable event that affects a party’s contract performance. It is undisputed that there was no such clause in the contract. I find that the Hecks argue, essentially, that the contract was “frustrated” because it was impossible to perform in light of the cancelled wedding, so they should be relieved of their obligation to pay the non-refundable deposit.
16. In *Wilkie v. Jeong*, 2017 BCSC 2131, the BC Supreme Court said that the doctrine of frustration is meant to relieve a contracting party from its bargain by bringing the contract to an end. In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, the Supreme Court of Canada said that a contract is frustrated when an unforeseeable event makes a party’s performance of the contract something radically different from what the parties agreed to. *Wilkie* says the event must totally affect the nature, meaning, purpose, effect, and consequences of the contract, making it completely fruitless to perform, and not just inconvenient, more expensive, or involving greater hardship (at paragraphs 15 to 18).
17. I find that the parties’ contract was for 6 hours of photography services at an event that happened to be a wedding. The Hecks admit that they likely could have held the

April 6, 2021 wedding, although they say they expected future attendance limits and other restrictions to be in place on that date when they chose to cancel it 4 months earlier. Mrs. Brevik says, and the Hecks do not deny, that Mrs. Brevik could have provided the agreed photography services if the Hecks had not cancelled, and that COVID-19-related restrictions would not have prevented her from performing those tasks. I find that the contract did not provide for a deposit refund if the Hecks chose to cancel the wedding for a specific reason, such as pandemic-related limitations, or for no reason. On balance, I find that the COVID-19 pandemic did not make the photography contract impossible or fruitless to perform.

18. Importantly, I note that the parties entered into the contract for the April 6, 2021 wedding services on March 20, 2020, when they were aware of the COVID-19 pandemic and the possibility of related restrictions on gatherings and travel. The reason for signing the March 20, 2020 contract was because the Hecks had rescheduled the wedding due to such pandemic concerns. Yet, the parties did not agree to different cancellation terms, including in the case where pandemic restrictions affected the Hecks' wedding plans. I find that the pandemic was not an unforeseeable event when the parties signed the new contract on March 20, 2020. Overall, I find that the contract was not frustrated.
19. The Hecks also cite the principle of *contra proferentem*, under which ambiguous contract terms may be interpreted against the interests of the contract drafter, in this case Mrs. Brevik. The Hecks suggest that the absence of a *force majeure* clause allowing a deposit refund during a pandemic should be interpreted against Mrs. Brevik. However, I find that the absence of a *force majeure* term is not ambiguous, and that such a term was likely omitted on purpose. Further, it is undisputed that the Hecks could see there was no *force majeure* term when they signed the contract.
20. The Hecks also mention other contract terms that Mrs. Brevik allegedly uses in other types of contracts. I find the evidence fails to show that those alleged terms are part of the parties' signed photography contracts, or that Mrs. Brevik had a duty to include similar terms in the parties' contracts. As noted, the Hecks also argue that Mrs. Brevik

did not incur any expenses or losses from the cancellation, or forego any alternative work on the wedding date, but I find the contract does not say that the deposit may only be retained to cover proven, out-of-pocket losses or expenses.

21. Finally, the Hecks argue that it is unfair for Mrs. Brevik to keep the deposit, since the Hecks allegedly lost money by cancelling the wedding. I find there is no unfairness here. I find the Hecks agreed to the parties' contract on March 20, 2020 with knowledge of the COVID-19 pandemic. The Hecks admit that the contract said the deposit was non-refundable if they cancelled the wedding, and there were no exceptions in the contract for cancellations motivated by pandemic restrictions. I find that under the contract, Mrs. Brevik was permitted to retain the \$720 deposit because the Hecks cancelled the wedding. I dismiss the Hecks' claim.

CRT FEES AND EXPENSES

22. 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. Mrs. Brevik was successful but paid no CRT fees and claimed no CRT dispute-related expenses. So, I order no reimbursements.

ORDER

23. I dismiss the applicants' claims, and this dispute.

Chad McCarthy, Tribunal Member