Civil Resolution Tribunal

Date Issued: April 30, 2021

File: SC-2020-007802

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Siemens (dba Canadian Hymn Sing) v. Siemens*, 2021 BCCRT 455

B E T W E E N :

JILL SIEMENS (Doing Business As CANADIAN HYMN SING)

APPLICANT

A N D :

ROSEMARY SIEMENS

RESPONDENT

AND:

JILL SIEMENS (Doing Business As CANADIAN HYMN SING)

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. The claim and counterclaim flow from a cancelled concert. The applicant (and respondent by counterclaim), Jill Siemens (Doing Business As Canadian Hymn Sing), and the respondent (and applicant by counterclaim), Rosemary Siemens, share the same last name but are not related. For the sake of clarity, and meaning no disrespect, I will refer to the parties by their first names.

2. Jill entered into a contract with Rosemary for her to perform at a concert that Jill was organizing. Jill says she had to cancel the concert due to the COVID-19 pandemic, but that Rosemary refused to return the $2,000 deposit. Jill asks for an order that Rosemary reimburse the $2,000.

3. Rosemary admits that she received the $2,000 deposit, but denies that she is required to return it to Jill. By counterclaim, Rosemary asks for an order that Jill pay her $1,858.04 for what she says is owing under the parties' contract.

4. The parties are 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. Here, I find that I am able to properly 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.

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. As part of the CRT's process, parties are instructed to provide all the evidence, arguments and information about their claims that they want a tribunal member to consider. Here, both parties provided evidence and detailed submissions in support of their positions. One of the documents submitted by Rosemary (a January 31, 2020 email Jill sent to Rosemary and others) was in an inaccessible format, so I asked her to re-submit the document. To ensure procedural fairness, Jill had an opportunity to provide a comment, which she did on April 12, 2021. Rosemary responded on April 14, 2021, and Jill provided a final reply on April 15, 2021.

10. Jill's final reply reiterated what had been provided previously and did not contain new information. Rosemary asked for an opportunity to provide a further arguments and new evidence, but I declined this request. The opportunity to provide additional submissions was limited to the previously inaccessible document containing the January 31, 2020 email, and each party took advantage of that opportunity. I find that no new claims or arguments were raised by the re-submitted document. I am satisfied that each party was aware of, and had the opportunity to reply to, the other's claims and that each party was also aware of the need to provide evidence to prove their own claims. Therefore, I find the requirement for procedural fairness has been met and there is no need to re-open the evidence and submissions to remedy a breach. That said, as I discuss below, my decision does not turn on the January 31, 2020 email or associated submissions.

ISSUES

11. The issues in this dispute are:

    a. Whether the parties had a binding contract,

    b. Whether Rosemary must return the $2,000 deposit to Jill, and

    c. In the counterclaim, whether Jill must pay $1,858.04 to Rosemary.

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this, an applicant (whether for a claim or counterclaim) 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.

13. The parties and Rosemary's artist representative, DP, communicated by telephone and emails about Rosemary's intended performance at the concert Jill was organizing. The parties disagree about the extent and content of the telephone calls. Although both parties submitted copies of emails with their evidence, it is not clear whether these messages represent their entire correspondence.

14. On December 9, 2019, DP emailed Jill a copy of a contract that was described as Rosemary's standard performance agreement. The contract, which was already signed by DP on Rosemary's behalf, set out a required payment of $3,300 plus GST (which equals $3,465), in addition to payment for 1 hotel room for 2 nights, for Rosemary's performance at a March 1, 2020 concert. The contract stated "Artist to be paid in full regardless of inclement weather" and set out a deadline for the payment of the "deposit" (the first half of the performance fee) and instructions for the payment of the "guarantee" (the second half of the performance fee).

15. Jill made some minor handwritten changes to the contract about the venue and other details. She made more significant changes that involved compensation and cancellation. Rosemary's version of the agreement stated that she would receive

100% of merchandise sales, but Jill changed this to 90%. After the statement that Rosemary would be paid in full, Jill added “except for act of God – fire, lightning, cancellation beyond Presenters control”. The addition did not say anything about whether the deposit would be returned or retained if an “act of God” occurred. Jill signed the agreement on January 15, 2020 and sent it back to DP.

16. Rosemary says Jill altered the contract unilaterally. Jill and DP disagree about whether they discussed any changes to the contract before Jill signed it, but there is no dispute that there is no version of the contract where DP or Rosemary initialed or otherwise indicated their agreement to Jill’s changes.

17. The parties proceeded with their respective arrangements for the concert, including the payment of the $2,000 deposit. Each side apparently believed that their version of the agreement was in effect. While both parties acknowledged that the “no cancellation” clause meant that Rosemary would be paid in full, Jill believed that this was subject to the “act of God” clause she had added.

18. The original concert date did not happen due to an illness in Jill’s family. The parties agreed to re-schedule the concert to March 29, 2020.

19. In early March, concerns about COVID-19 were increasing. Jill says that she heard from her ticket sellers that many purchasers would not be attending, and some of the other scheduled performers told her that they would not be coming.

20. Jill cancelled the March 29 concert on March 13, 2020. Jill and DP exchanged emails about the financial arrangements. DP stated that the agreement did not allow for cancellation, but Jill took the position that the pandemic was an “act of God” that voided any fees or deposits. The parties were not able to come to an agreement about whether Jill owed Rosemary money, or whether Rosemary was required to return the $2,000 deposit.

21. Jill says the cancellation was due to the pandemic and associated public health requirements and that all other performers have returned their deposits to her. Rosemary says that Jill cancelled the concert due to low ticket sales, not because of

the pandemic. The fact that other concert participants returned their deposits to Jill is not relevant to her dealings with Rosemary. The parties' obligations to each other depend on the particular terms of their agreement.

22. The existence of a binding and enforceable contract requires an objective, rather than subjective, intention (*Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at paragraph 35). The test is whether the parties have indicated to an objective reasonable bystander their intention to contract and the terms of that contract (see *Berthin v. Berthin*, 2016 BCCA 104 at paragraph 46). The test has also been articulated as being whether a reasonable person in one party's situation would have believed and understood that the other party was consenting to the identical term (see *Salminen v. Garvie,* 2011 BCSC 339 at paragraph 27).

23. In determining intention, I may consider not only the written agreement, but also the surrounding circumstances and actions (see *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99 at paragraph 17).

24. Neither Rosemary nor DP deny that they received the version of the agreement with Jill's handwritten changes. Both submit that the changes were not binding as they did not initial them. However, there is no indication that either DP or Rosemary communicated with Jill about the fact that Rosemary did not agree to her changes. It appears that they said nothing and proceeded to prepare for the concert, including agreeing to a postponement due to reasons beyond Jill's control.

25. In these circumstances, I find that an objective reasonable bystander would believe that the parties had an agreement that incorporated Jill's changes. Such a bystander would have expected an expression of disagreement if Rosemary did not consent to Jill's proposed terms in the agreement she signed, and proceeding with the concert was indicative of an intention to be bound by them. On this basis, I find that the parties had a binding, enforceable contract that included Jill's terms.

26. The next consideration is whether Jill can rely on the "act of God" clause. This type of clause, which addresses unforeseeable events, may also be referred to as a force

majeure clause. As noted above, this clause would allow Jill to avoid paying Rosemary's full fee in limited circumstances, including "cancellation beyond Presenters control".

27. Jill's position is that she had to cancel the concert on March 13, 2020 due to advice from public health authorities. On that date, the province issued a media bulletin that advised residents to "consider taking additional social distancing measures". It included a recommendation that people cancel or postpone any events with more than 250 attendees. Jill says she had sold more than 250 tickets to the concert by that point.

28. Although Jill describes this bulletin as a directive, I find that the provincial government's recommendation was not equivalent to a public health order prohibiting gatherings and it did not require the concert to be cancelled. Similarly, there is no indication that the concert's venue required the cancellation.

29. While it may not have been advisable to proceed, I find that, as of March 13, the pandemic-related measures in place did not require Jill to cancel the concert. Therefore, her decision to cancel the concert was something that was within her control. I find the force majeure clause did not apply and did not permit Jill to cancel the parties' contract. The fact that the provincial government subsequently imposed a public health order that prohibited large gatherings does not alter my analysis of what the parties' contractual obligations were to each other when the concert was cancelled.

30. I have also considered whether the doctrine of frustration applies. For a contract to be frustrated, it is not enough for there to be hardship, inconvenience or material loss. There must be a radical change in the nature of a fundamental contractual obligation that makes the contract impossible to perform (see *Wilkie v. Jeong*, 2017 BCSC 2131 at paragraphs 16 to 18).

31. Previous CRT decisions have found that the pandemic and associated public health orders did not, in the parties' particular circumstances, radically change a contract

from the parties' original agreements (see *Bal v. Infinite Entertainment Sound and Lighting Inc.*, 2020 BCCRT 865 and *Van Hoepen v. Chilliwack Golf and Country Club Holdings Ltd.*, 2020 BCCRT 1048). These decisions are not binding upon me, but I find that they provide helpful guidance.

32. Although Jill says she had sold more than 250 tickets, she did not provide evidence to establish the number of ticket holders and other participants in the concert. No matter the number of attendees, I have determined that, at the time Jill made the decision to cancel the concert, an event with more than 250 people was not prohibited by the province.

33. I acknowledge Jill's statements that some ticket holders and performers had told her they would not attend the concert before she made the decision to cancel it. While it may not have been an ideal situation or the concert Jill had envisioned, I find that the concert could have proceeded. At the time the concert was cancelled, Jill's contract with Rosemary was not impossible to perform. So, the parties' fundamental contractual obligations to each other remained in force.

34. I find that the force majeure clause did not apply and the contract was not frustrated.

35. Turning to the claims and counterclaims, Jill asks for the return of the $2,000 from Rosemary. Rosemary asks for the payment of an additional $1,858.04 from Jill. Rosemary says that $1,732.50 of her claim is the remainder of the performance fee and $125.54 is for non-refundable plane tickets that went unused when the first concert date was postponed.

36. Given my conclusions above, I find that Jill breached the parties' agreement by cancelling the concert. I find that the parties' agreement did not require Rosemary to return the deposit in the event of cancellation. As noted above, the payment representing the second half of the performance fee was described as a guarantee in the parties' agreement, presumably to guarantee Rosemary's availability for the concert and to prevent her from booking other work. In the circumstances, I find that

the effect of the "no cancellation" clause was that Rosemary would receive her performance fee in full. Therefore, Jill is not entitled to the return of the $2,000 deposit.

37. As noted, the performance fee in the parties' agreement was $3,465 (inclusive of tax). Although the agreement said that the deposit would be 50% of this amount, or $1,732.50, Jill paid Rosemary a deposit of $2,000. Therefore, $1,465 of the fee is outstanding. I find that, based on the parties' agreement that Rosemary be paid in full, Rosemary is entitled to this amount.

38. The claim for the unused plane tickets is not contemplated in the parties' agreement, which required the payment of hotel costs but not airfare. Emails between the parties show that they discussed the possibility of Jill reimbursing Rosemary for her costs associated with the postponed concert. However, the evidence before me does not establish that the parties agreed that Jill would pay Rosemary a particular amount or that the plane tickets were non-refundable. Therefore, I find that Rosemary has not proven that she is entitled to reimbursement of the amount she claims.

39. In summary, Rosemary is entitled to the remaining $1,465 owing to her under the parties' agreement. This payment was due on the day of the concert, being March 29, 2020, and I find that Rosemary is also entitled to pre-judgment interest on this amount under the *Court Order Interest Act*. This equals $12.81.

40. 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. Given the circumstances and the parties' divided success, I find that it would be appropriate for each party to bear their own expenses, and I make no order for reimbursement.

ORDERS

41. Within 30 days of the date of this order, I order Jill to pay Rosemary a total of $1,477.81, broken down as follows:

    a. $1,465 in debt under the parties' agreement, and

b. $12.81 in pre-judgment interest under the *Court Order Interest Act*.

42. Rosemary is also entitled to post-judgment interest under the *Court Order Interest Act*.

43. The remainder of the claims and counterclaims made by Jill and Rosemary are dismissed.

44. 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.

45. 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.

Lynn Scrivener, Tribunal Member