



Civil Resolution Tribunal

Date Issued: May 7, 2021

File: SC-2020-009670

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Morgan v. Barnett Photography*, 2021 BCCRT 485

B E T W E E N :

GLORIA MORGAN

APPLICANT

A N D :

BARNETT PHOTOGRAPHY and JOSHUA BARNETT

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about a deposit for wedding photography services. The applicant, Gloria Morgan, hired the respondent partnership, Barnett Photography (BP), to take photos at her wedding. Ms. Morgan paid a \$1,500 deposit as part of the total price.

Due to the COVID-19 pandemic, Ms. Morgan rescheduled her wedding, but then later cancelled the rescheduled ceremony. Ms. Morgan claims a refund of the \$1,500 deposit.

2. The individual respondent, Joshua Barnett, is one of BP's partners. The respondents say that the deposit was a retainer to reserve the date in their calendar. The respondents say that under the parties' contract, the deposit is non-refundable in the event of a cancellation, so they owe Ms. Morgan nothing.
3. Ms. Morgan is self-represented. Mr. Barnett represents both himself and BP.

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, 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.
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 Ms. Morgan is entitled to the return of the \$1,500 deposit, either because of the contract's terms or because the contract was frustrated.

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, the applicant Ms. Morgan must prove her claims on a balance of probabilities. While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
10. The facts are largely undisputed. Ms. Morgan planned to hold a "destination" wedding in the BC Okanagan. On February 3, 2020, she signed a contract with BP for 8 hours of photography services at her September 19, 2020 wedding. The total package price for the photography services was \$3,150. Ms. Morgan paid BP a \$1,500 deposit on February 4, 2020, and the \$1,650 balance on February 6, 2020.
11. The front page of the parties' contract stated a non-refundable retainer of 50% was due upon signing the agreement as a retainer for the date. The contract's second page contained a cancellation policy. It stated that a 50% retainer/security deposit was due with the signed contract, and in the event of cancellation, the paid security deposit was non-refundable. It also said the security deposit was liquidated damages for a breach of contract by the client (Ms. Morgan).
12. In July 2020, due to the ongoing COVID-19 pandemic, Ms. Morgan postponed her wedding until September 18, 2021. BP advised Ms. Morgan in a July 24, 2020 email that while it was prepared to reschedule the event date without any financial penalty, deposit refunds were not possible. The parties agreed that BP would provide

photography services on the new 2021 wedding date, and BP would apply Ms. Morgan's entire payment to the new date. There is no evidence before me that the parties signed a new contract.

13. On November 8, 2020, Ms. Morgan cancelled the September 18, 2021 wedding all together. BP refunded Ms. Morgan \$1,650, but retained the \$1,500 deposit.
14. Ms. Morgan acknowledges that the contract states the deposit is non-refundable. However, she argues there is no contractual term about acts of nature such as a global pandemic. I infer that she means the contract did not contain a *force majeure* clause, which is a term that sets out what will happen in the event of unforeseeable circumstances. It is undisputed that there was no such clause in the contract.
15. In the absence of a *force majeure* clause, the common law doctrine of frustration may apply to relieve parties from their contractual obligations. A contract is frustrated when an unforeseeable event occurs and makes performance of the contract something radically different from what the parties originally agreed: see *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at paragraph 53. The event must make it truly pointless to continue to perform the terms of the contract, not just inconvenient, undesirable, or because there is increased hardship or expense for one or both parties: *Wilkie v. Jeong*, 2017 BCSC 2131.
16. Here, Ms. Morgan says if it had not been for the continuing pandemic, she likely would not have cancelled her wedding (or the contract with BP). However, Ms. Morgan says that in addition to the pandemic, she and her family experienced other personal tragedies that contributed to the decision to cancel the September 2021 wedding. I note that in a November 22, 2020 email to BP, Ms. Morgan stated that for reasons unrelated to the pandemic certain guests were now unable to attend a destination wedding and "many other personal factors" made it impossible to achieve her dreams of having a wedding. On the evidence before me, I find Ms. Morgan has not established that the pandemic was the reason she cancelled her wedding and her contract with BP.

17. However, even if the pandemic was the primary reason Ms. Morgan cancelled her wedding, I find she has not proven the pandemic made the parties' contract something radically different from what the parties agreed to or completely fruitless to perform. The parties' contract was for 8 hours of photography services. It is undisputed that BP was prepared to fulfil its contractual obligations to provide those services, either on the original wedding date or the rescheduled date. Further, Ms. Morgan admits that BP offered to travel to a different location at no additional cost, or to apply the \$1,500 deposit towards a further rescheduled wedding date or other family photography, all of which Ms. Morgan declined.
18. While Ms. Morgan may have felt some uncertainty about how long pandemic-related gathering and travel restrictions would be in place, I am not satisfied on the evidence that the pandemic made her contract with BP impossible or impractical to perform. I find that the contract was not frustrated, so the contract's cancellation policy applies.
19. Ms. Morgan mentions that BP uses the terms "retainer" and "deposit" interchangeably in the contract and throughout its correspondence with her. I find nothing turns on the use of these different terms, as I find it created no ambiguity as to whether 50% of the purchase price was non-refundable.
20. Ms. Morgan also argues that the contract refers to the deposit being liquidated damages, but that \$1,500 is disproportionate to any damages BP may have suffered. She says she gave BP 10 months' notice of the cancellation, which should be enough time to rebook the date.
21. Liquidated damages clauses may be onerous, but they are normally enforceable unless they are shown to be a penalty and not a genuine pre-estimate of loss: see *Wilkie v Jeong* at paragraph 60. I note that the CRT does not have jurisdiction to provide relief against penalties or forfeiture of deposits under section 24 of the *Law and Equity Act*. However, even if I had the ability to do so, I would find that the deposit here is a genuine pre-estimate of loss. I find that one of the primary benefits of the parties' contract was to reserve the wedding date in BP's calendar. This reservation meant BP was unable to book other work on that date.

22. In summary, it is undisputed that Ms. Morgan cancelled her wedding. The parties' contract says in the event of cancellation, the paid deposit is non-refundable. Therefore, I find BP was entitled to keep the \$1,500 deposit. I dismiss Ms. Morgan's claim for a refund. Given this conclusion, I do not need to address Mr. Barnett's personal liability.
23. I acknowledge that in addition to its offers to apply Ms. Morgan's deposit to other services, BP also offered to provide Ms. Morgan with a partial refund of the paid deposit if BP was able to book services for another client on Ms. Morgan's wedding date. Given Ms. Morgan declined all offers and proceeded with this dispute, I find BP is not bound by its earlier offers.
24. 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. The respondents were successful but paid no CRT fees and claimed no dispute-related expenses. So, I make no order.

ORDER

25. I dismiss Ms. Morgan's claims, and this dispute.

Kristin Gardner, Tribunal Member