



Civil Resolution Tribunal

Date Issued: May 14, 2021

File: SC-2020-008857

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Norena v. Totl Building & Design Ltd.*, 2021 BCCRT 507

B E T W E E N :

RENE NORENA

APPLICANT

A N D :

TOTL BUILDING & DESIGN LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Roy Ho

INTRODUCTION

1. This dispute is about a cracked quartz countertop.
2. The respondent, Totl Building & Design Ltd. (TBDL), is a contractor that did renovation work for the applicant, Rene Norena. TBDL supplied and installed the countertop. The countertop was fabricated by PSW, who is not a party to this dispute.

3. Mr. Norena says that TBDL did not provide him with the countertop's care instructions and warranty terms and conditions (care information), and so it cracked when he used it. TBDL disagrees and says that it and the countertop installer told Mr. Norena about the care instructions and that the care instructions were also available online.
4. In addition, while not part of his dispute notice, Mr. Norena says that TBDL had a duty to oversee PSW's countertop fabrication work. Mr. Norena says that the countertop was fabricated improperly and so it cracked. TBDL did not address this allegation but says Mr. Norena provided the dimensions to PSW for fabrication.
5. Mr. Norena seeks a replacement countertop from the TBDL. TBDL seeks to have the Mr. Norena's claim dismissed.
6. Mr. Norena is self-represented. TBDL is represented by its owner, DK.

JURISDICTION AND PROCEDURE

7. 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.
8. 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.
9. 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.

10. 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

11. The issues in this dispute are:
 - a. Whether TBDL had duty to provide care information to Mr. Norena, and if so, what is the appropriate remedy?
 - b. Whether TBDL had a duty to supervise PSW, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, Mr. Norena must prove his claim 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. I note that TBDL chose not to submit any evidence despite having the opportunity to do so.
13. Mr. Norena essentially makes 2 negligence claims against TBDL. First, Mr. Norena alleges that TBDL had a duty to provide countertop care instructions to him but failed to do so. Second, Mr. Norena says that TBDL failed to supervise PSW's countertop fabrication work. To prove his claims in negligence, Mr. Norena must show on a balance of probabilities, that (1) TBDL owed a duty of care, (2) TBDL failed to meet the reasonable standard of care, (3) Mr. Norena sustained damage, and (4) TBDL's failure caused the claimed damage (see *Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27). I turn next to Mr. Norena's 2 negligence claims against TBDL.

Issue 1: Duty to Provide Care Information

14. Mr. Norena says that if TBDL provided him the care information, he would not have placed a hot pan on the countertop causing “thermal shock that would crack the material and void my guarantee”. However, I find I do not need to address whether TBDL failed to provide adequate care instructions to Mr. Norena because the evidence shows Mr. Norena abandoned this allegation. In Mr. Norena’s submissions, he says that there is no evidence of “thermal shock”, which I agree. Other than Mr. Norena’s tacit acceptance of “thermal shock” in his dispute notice, he has provided no evidence to support this theory. Instead, Mr. Norena provided evidence of an alternate cause for the crack. Namely, Mr. Norena alleges that it was PSW’s fabrication error that caused the crack. In Mr. Norena’s reply submissions, he says that “it is clear that the crack was caused by poor manufacturing of the countertop by...[PSW]”. From Mr. Norena’s own evidence and submissions, he has accepted that the crack was not caused by TBDL’s alleged failure to provide care information. For this reason, I dismiss Mr. Norena’s first negligence claim against TBDL.

Issue 2: Duty to Supervise PSW

15. This leads Mr. Norena to his second negligence claim against TBDL. Mr. Norena says that because of the alleged negligent countertop fabrication, TBDL had a duty to oversee PSW’s fabrication work was to “code”. Mr. Norena says that TBDL failed to do so. I note that PSW is not a party to this dispute, so I make no findings about whether PSW was negligent. TBDL did not directly address this second allegation but says that it was Mr. Norena’s designer that gave the countertop dimensions to PSW for fabrication. I infer from this statement that TBDL means it is not responsible for how PSW fabricated the table. I agree with TBDL. I find that TBDL did not have a duty to oversee PSW’s work given the nature of their relationship with each other.

16. Generally, an employer can be vicariously responsible for its employee’s conduct, whereas with certain exceptions, a party is not held responsible for the negligence of an independent contractor they reasonably hired to do work. The relevant factors to consider in deciding whether a person is an independent contractor or employee are

discussed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 and further in *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044. These factors include the level of control the employer has over the worker's activities, whether the worker has their own equipment, whether the worker hires their own helpers, the degree of financial risk of the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of their tasks. These factors are not exhaustive, and the relative weight of each factor depends on the facts and circumstances of each case. The central question is whether the worker is performing services as a person in business on their own account. If so, the person is more likely an independent contractor.

17. I find PSW was an independent contractor rather than TBDL's employee. I base my finding on the TBDL's invoice which includes the kitchen work estimate. The estimate says, "SUPPLY & INSTALL CABINETRY AND QUARTZ COUNTERTOPS". The invoice and estimate do not say that TBDL fabricated the countertop but that it was only supplying and installing it. So, I infer from this that PSW had its own equipment to fabricate the tabletop. I also find that TBDL did not directly supervise how PSW conducted their work. I find this because of the fairly technical nature of the fabrication. I base my finding on the countertop's fabrication manual submitted into evidence. The manual sets out in detail the specifications and requirements for fabrication in millimeters and radius, amongst other things. My finding that PSW was an independent contractor is further supported by Mr. Norena's unchallenged submission that PSW was "hired" by the TBDL.
18. In *Lewis (Guardian ad litem of) v. British Columbia*, 1997 CanLII 304 (SCC), [1997] 3 SCR 1145, Madam Justice McLachlin's conclusion was that a court (or CRT, in this dispute) must examine the parties' relationship and ask whether it possesses elements that make it appropriate to hold a defendant liable for the negligence of its independent contractors. In *Lewis*, which involved highway maintenance, the analysis is on whether a duty can be delegated or whether it is non-delegable. Where there is a strict statutory duty to do a particular thing, then a party

cannot escape liability by delegating the job to an independent contractor. There is no relevant statutory duty in this dispute.

19. In the circumstances here, I find that the fabrication task is a delegable duty. So, I cannot conclude that TBDL can be held liable for the alleged negligence of their independent contractor, PSW. There is also no inherent harm or risk in the task, which are other factors discussed at paragraph 51 in *Lewis* that might give rise to a non-delegable duty.
20. The evidence before me supports a conclusion that TBDL reasonably hired PSW as an independent contractor to fabricate the countertop. I find TBDL did not have a duty to supervise the fabrication process or give specific instructions to PSW about how to complete it. For these reasons, I dismiss Mr. Norena's second negligence claim against TBDL.
21. In summary, I dismiss Mr. Norena's claims and this dispute.
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. As Mr. Norena was not successful, I do not order reimbursement of his paid tribunal fees. TBDL did not pay fees or claim expenses.

ORDER

23. I dismiss the Mr. Norena's claim and this dispute.

Roy Ho, Tribunal Member