Civil Resolution Tribunal

Date Issued: June 4, 2021

File: SC-2021-000233

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Fox v. Carnrite dba Woven Architecture and Design*, 2021 BCCRT 614

B E T W E E N :

KARI FOX and KEVIN CLACKSON

APPLICANTS

A N D :

JULIAN PAUL CARNRITE (Doing Business As WOVEN ARCHITECTURE AND DESIGN)

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This dispute flows from a contract for architectural services. The applicants, Kari Fox and Kevin Clackson, contracted with the respondent, Julian Paul Carnrite, doing business as Woven Architecture and Design, to provide services for the design and

construction of a home. The applicants say that they paid a $5,000 retainer as part of the contract, but that Mr. Carnrite refused to return it when they terminated the contract. They ask for an order that Mr. Carnrite pay them $5,000. Mr. Carnrite admits that he received the $5,000, but says that the terms of the contract do not require him to return it to the applicants.

2. The parties are self-represented.

JURISDICTION AND PROCEDURE

3. 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.

4. 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.

5. 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.

6. 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

7. The issue in this dispute is whether Mr. Carnrite must return the $5,000 retainer to Ms. Fox and Mr. Clackson.

EVIDENCE AND ANALYSIS

8. 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.

9. The parties agree that entered into a contract on June 24, 2020. The contract provided that Mr. Carnrite would provide design and construction services in 3 phases, and that that he would charge $130 per hour for his time, plus tax and disbursements.

10. The contract set out Mr. Carnrite's practice of requesting "a retainer to begin work on the project" which would be "set aside and applied to monthly invoices over the course of the project". The parties agree that the applicants paid a $5,000 retainer on July 14, 2020, although Mr. Carnrite notes that this payment did not arrive with the signed contract as required.

11. Between July 2 and December 1, 2020, Mr. Carnrite worked on the first phase of the project and issued monthly invoices. The applicants paid the July through November invoices, although not always on time.

12. It is undisputed that the parties had a disagreement about the December 1 invoice and that the applicants did not pay that invoice. In a December 16, 2020 telephone conversation, the applicants advised Mr. Carnrite that they wished to terminate their contract. They provided the written notice of termination required by the contract in a December 28, 2020 letter. In that letter, the applicants also requested a refund of the $5,000 retainer, less the $238.88 amount of the December 1 invoice, for a total of $4,761.12. They have not received a refund of the retainer.

13. Mr. Carnrite suggests that the applicants did not have “just cause” to terminate the contract and used the disagreement about the invoice as a “strategy” to take his design work and have a third party complete the project at a lower cost. The applicants deny this, and say that Mr. Carnrite did not produce anything of value that they could have taken to a third party. As Mr. Carnrite did not file a counterclaim seeking any damages for the alleged misuse of his work product, I will not address this further.

14. The parties’ contract did not restrict the circumstances in which the applicants could terminate it. It stated that the applicants could terminate the contract with written notice, after which Mr. Carnrite would “perform no further services”. Upon termination, Mr. Carnrite was entitled to “be paid for all services performed and reimbursable expenses incurred to the date of termination”. The contract did not address what would happen to the retainer in the event of termination.

15. The applicants’ position is that they entered into an hourly contract for services, and that the contract did not allow for damages or guarantee Mr. Carnrite a particular amount of money. They say that they are entitled to the return of the retainer. Although the applicants claimed the entire $5,000 in their Dispute Notice, in their submissions they asked for the $5,000, less the amount of the outstanding invoice.

16. Mr. Carnrite says that the retainer is to ensure that he is available to provide services over the course of a project. According to Mr. Carnrite, it is usual for him to not apply the retainer to invoices incurred at the beginning of a project. He says he declined other work during the time he was working with the applicants, and had to seek new work after they terminated the contract. Mr. Carnrite suggests that the amount of the retainer returned on termination should be based on the amount of money that has been paid as compared to the overall fees involved with the project. He states that the applicants paid him less than 10% of the anticipated total fees for the project, but his submissions do not identify a particular amount that he says should be returned.

17. In effect, the applicants say the retainer was an advance against future payments while Mr. Carnrite says that it was a form of guarantee. The courts treat guarantees

and payments differently. In *Scott v. Butterfield*, 1951 CanLII 296 (BCSC) at p. 343, cited in *375186 B.C. Ltd. v. Coquitlam Enterprises Ltd.*, 1997 CanLII 1678 (BCSC) at paragraph 29, the British Columbia Supreme Court distinguished between a deposit to guarantee performance and an instalment payment, and said that a guarantee could be retained if the contract was not performed.

18. When interpreting the contract, I must consider the plain and ordinary meaning of its words within the context of the whole agreement rather than the meaning of each provision standing alone (see the discussion of the principles of contractual interpretation in *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489 at paragraphs 19 – 22).

19. The parties' agreement, which Mr. Carnrite drafted, did not say that the retainer would be non-refundable or set out circumstances in which it could be forfeited as damages. The only identified purpose for the retainer was to be "applied to monthly invoices".

20. Given the ordinary meaning of the words "applied to monthly invoices", and in the absence of wording in either the retainer or termination clauses about a guarantee or the forfeit of all or a percentage of the retainer if the contract was not performed completely, I find that the retainer was an advance against future payments. The fact that Mr. Carnrite did not apply the retainer funds to the initial invoices does not change my conclusion. As the retainer was not paid to guarantee the performance of the contract, I find the applicants are entitled to its return.

21. That said, Mr. Carnrite is entitled to the compensation set out in the termination clause of the parties' agreement. The applicants admit that the $238.88 charged in the December 1 invoice has not been paid, and I find that Mr. Carnrite is entitled to payment of that amount. Based on the evidence before me, there is no indication that Mr. Carnrite worked any time or incurred any disbursements after the December 1 invoice was issued such that there would be additional amounts owing to him. Subtracting the $238.88 from the $5,000 retainer leaves a balance of $4,761.12, which I order Mr. Carnrite to return to the applicants.

22. The applicants are also entitled to pre-judgment interest under the *Court Order Interest Act*. Calculated from the December 28, 2020 written notice of termination, this equals $9.31.

23. Under section 49 of the CRTA and CRT rules, the CRT generally will 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 $175 in CRT fees. The applicants did not claim dispute-related expenses.

ORDERS

24. Within 30 days of the date of this decision, I order Mr. Carnrite to pay Ms. Fox and Mr. Clackson a total of $4,945.43, broken down as follows:

    a. $4,761.12 in debt as reimbursement of the retainer,

    b. $9.31 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175 for CRT fees.

25. The applicants are entitled to post-judgment interest, as applicable.

26. 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.

27. 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