



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mulvihill v. Cranbrook Agencies Holdings Inc.*, 2021 BCCRT 754

B E T W E E N :

BROCK MULVIHILL

APPLICANT

A N D :

CRANBROOK AGENCIES HOLDINGS INC.

RESPONDENT

A N D :

BROCK MULVIHILL

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about a commission and property management services. The applicant, Brock Mulvihill, says the respondent real estate brokerage, Cranbrook Agencies Holdings Inc., which does business as Realty Executive Kootenay (REK), owes him \$3,524.95 for an August 2020 strata management commission.
2. REK says Mr. Mulvihill failed to fulfill his financial reporting responsibilities under the *Real Estate Services Act* (RESA), as required under the parties' contract. REK counterclaims for \$5,000, for the expenses it says it incurred due to Mr. Mulvihill's alleged compliance failures and says those expenses also justify it not paying the commission. Mr. Mulvihill says REK failed to provide adequate oversight as required under RESA and denies responsibility for the expenses.
3. Mr. Mulvihill is self-represented. REK is represented by Pat Elynuik, a partner.

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). 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 parties to a dispute that will likely continue after the dispute resolution 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. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find I can fairly hear this dispute based on the submitted evidence and through written submissions.
6. Under section 42 of the CRTA, 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, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.
8. I note Mr. Mulvihill alleges REK provided false information to the CRT and says it should be held accountable under CRTA section 92. Section 92 says it is an offence to provide false or misleading information. The CRT has no jurisdiction to impose fines or a conviction under section 92. I have considered the parties' evidence and submissions and where relevant address the weight I give them below.

ISSUES

9. The issues in this dispute are:
 - a. Does REK owe Mr. Mulvihill \$3,524.95 in commission for August 2020?
 - b. Did Mr. Mulvihill breach his contract with REK and fail to fulfil financial reporting responsibilities, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

10. In a civil claim like this one, as the applicant Mr. Mulvihill has the burden of proving his claim, on a balance of probabilities. REK has the same burden in its counterclaim. I have only referenced below what I find is necessary to give context to my decision.
11. Mr. Mulvihill started working for REK as a newly licensed strata property manager in December 2017 and stopped on August 31, 2020. The undisputed evidence is that he worked for REK as an independent contractor rather than an employee.

Mr. Mulvihill's \$3,524.95 claim for August 2020 commission

12. Mr. Mulvihill signed a strata and property management services agreement in December 2017 and a first addendum in July 2018. I find the terms of both agreements are binding on the parties.
13. It is undisputed, and REK's own evidence shows, Mr. Mulvihill earned a \$4,768.15 commission in August 2020.
14. Mr. Mulvihill claims only \$3,524.95 for the August 2020 commission. This is because he deducted \$1,243.20 for July and August 2020 bookkeeping invoices that were \$621.60 each. Mr. Mulvihill does not explain why he deducted these, but I infer it was because he accepted they were bookkeeping expenses for which he was responsible.
15. REK's defence is that Mr. Mulvihill owes various amounts under the parties' contract, which it says are a set-off against the commission. I address Mr. Mulvihill's alleged obligations below in discussing REK's counterclaim. Given the above and that the commission amount itself is undisputed, I find REK owes Mr. Mulvihill the claimed \$3,524.95 for the August 2020 commission.
16. As discussed below, REK says Mr. Mulvihill owes \$9,978.95 for accounting-related expenses. So, REK argues it is entitled to set-off the entire \$3,524.95 and also claim \$5,000 in its counterclaim, all based on Mr. Mulvihill's bookkeeping responsibilities under the parties' contract. I disagree. I find this would amount to inappropriate claim splitting and would be inconsistent with the CRT's \$5,000 monetary limit in its small claims jurisdiction. I find REK is limited to a maximum total of \$5,000 in damages and set-offs, to the extent it proves Mr. Mulvihill breached the parties' contract. In other words, REK's total counterclaim plus any allowed setoffs for Mr. Mulvihill's alleged accounting responsibilities cannot exceed \$5,000. So, I allow Mr. Mulvihill's claim as his commission amount is not disputed and I address REK's \$5,000 counterclaim below.

REK's \$5,000 counterclaim for breach of contract

17. At the outset, I will address Mr. Mulvihill's argument that REK agreed that once he cleared up the "BM" account REK would pay the August 2020 commission. I infer Mr. Mulvihill also argues that this alleged settlement precludes any counterclaim. He relies on REK's co-owner's August 6, 2020 email that said, in part, once the BM matter is resolved, "we will both get paid". I already found above that Mr. Mulvihill is entitled to the August 2020 commission as claimed. I find the August 6 email does not amount to a binding agreement that REK would not pursue Mr. Mulvihill for any damages as detailed in its counterclaim.
18. I turn then to REK's allegations that Mr. Mulvihill failed to manage the brokerage's accounts properly. As a real estate brokerage, REK and Mr. Mulvihill are regulated by the Real Estate Council of BC (RECBC), as provided for under the RESA. The evidence shows REK had some issues with their financial audits in 2018 and 2019. Mr. Mulvihill says this was due to REK's inadequate leadership.
19. In contrast, REK says its claimed expenses are Mr. Mulvihill's responsibility as per the parties' contract that included a requirement he comply with the RESA. REK also says it did not approve certain expenses and so those expenses are Mr. Mulvihill's responsibility. I find there is insufficient evidence before me on which I could conclude Mr. Mulvihill breached the parties' contract by making financial reporting or accounting errors. However, as discussed below, I find the bulk of the expenses at issue are Mr. Mulvihill's responsibility because he contractually agreed to be responsible for bookkeeping expenses for properties he managed.
20. The parties signed their first contract on December 19, 2017. They signed an addendum on July 12, 2018, to provide for Mr. Mulvihill's appointment as Manager of Strata and Property Management Services along with increased compensation for that role. The addendum required Mr. Mulvihill to be responsible for oversight and management of all strata and property managers.

21. Clause 4 of the parties' December 19, 2017 contract says Mr. Mulvihill will, among other things, comply with the RESA and be responsible for his own expenses including "bookkeeping". Clause 15 says REK will reimburse Mr. Mulvihill only for those out of pocket expenses that REK approved in advance.
22. Clause 28 says Mr. Mulvihill will indemnify REK for any expenses it incurs as a result of Mr. Mulvihill's performance. Clause 14 says that if Mr. Mulvihill does not pay any required amount when due, REK can deduct it from any amounts owing to Mr. Mulvihill. REK relies on clause 14 for its refusal to pay the August 2020 commission.
23. Mr. Mulvihill says between January 2019 and March 2019 REK had no managing broker in place, contrary to the RESA requirements. Mr. Mulvihill says when he took over accounts from a departing broker those accounts already had major problems but REK decided Mr. Mulvihill was at fault. I accept there were various personnel changes, which is undisputed. However, nothing turns on this. What matters in this dispute is Mr. Mulvihill's obligations under the parties' contract.
24. Mr. Mulvihill says he did the best he could, but because managing brokers were allegedly not actively involved in REK as required under the RESA there were "recurring audit trouble/multiple exemptions, ultimately costing the brokerages additional money at year end".
25. Ultimately, I have no jurisdiction to penalize REK for any failure to comply with the RESA. My jurisdiction is over the parties' contracts. As set out at paragraph 55 of *Yang v. Re/Max Commercial Realty Associates (482258 BC Ltd.)*, 2016 BCSC 2147, any complaints Mr. Mulvihill has against REK for alleged professional misconduct under the RESA must be directed to the RECBC.
26. Mr. Mulvihill submitted an April 20, 2021 witness statement from CO, who worked for REK from September 2017 to January 1, 2020, in varying positions including office manager. CO said nearly every agent and employee left REK under threats of charges by REK. I place no weight on CO's evidence about REK's treatment and

agreements with other staff, because I find that irrelevant to Mr. Mulvihill's obligations. While CO alleges REK's attempt to charge Mr. Mulvihill for various "business expenses" was unfair, I place no weight on that opinion because CO is not a qualified strata management expert.

27. Mr. Mulvihill also submitted an email from Mark Clark, REK's managing broker. Mr. Clark wrote that to his knowledge "the brokerage" is responsible for submitting accountant reports, audits, and keep records, as required by RECBC. I find nothing turns on this, as this dispute is about Mr. Mulvihill's contractual obligations to REK, and in particular to pay for bookkeeping expenses. Again, I find it unproven that REK did anything to unreasonably cause those expenses to be incurred.
28. Mr. Mulvihill submitted expert qualifications for a Philip Jones, another broker/agent. However, Mr. Mulvihill submitted no opinion from Mr. Jones for me to consider. Mr. Mulvihill also submitted three letters of reference, attesting to Mr. Mulvihill's experience and positive work ethic. I find these unhelpful in assessing the parties' contractual obligations.
29. On the evidence before me, I find it unproven that REK breached the parties' contract in terms of providing oversight or having a licensed managing broker in place as required by the RESA section 6. In any event, nothing in the RESA says that a brokerage cannot contract with a broker like Mr. Mulvihill to hold him responsible for bookkeeping expenses.
30. I turn to REK's claimed damages.
31. REK says Mr. Mulvihill owes \$5,210, but as noted has limited its counterclaim to the CRT's small claims limit of \$5,000. However, REK's claimed expenses total \$9,978.95, and as referenced above it says it should be able to offset or not pay Mr. Mulvihill's \$4,768.15 August 2020 commission and also have Mr. Mulvihill pay REK \$5,000 in damages. I disagree, and have addressed the CRT's \$5,000 monetary limit above.

32. In its evidence, REK provides the following breakdown, largely based on Mr. Mulvihill's contractual agreement to pay for bookkeeping. I note the totals below add up to \$10,008.95, which is \$30 more than the \$9,978.95 they elsewhere argue. However, given my ultimate conclusion that REK's claim is limited to the \$5,000 limit, nothing turns on the discrepancy.
- a. *\$393.75 for "HG invoice #48970"*. This is an August 31, 2020 invoice from Hryciuk Gallinger (HG) for accountant/bookkeeping services. REK paid the invoice and claims reimbursement from Mr. Mulvihill, saying it never pre-authorized the bookkeeping expense.
 - b. *\$1,243.20 for Paper Goat's bookkeeping invoices #1900 and #1901* (\$621.60 each). REK says Mr. Mulvihill failed to pay these expenses and so REK did. REK says that because they are bookkeeping expenses, under the parties' contract Mr. Mulvihill is responsible for them. I find REK has been compensated for this above, in that Mr. Mulvihill's commission award reflects a deduction for these 2 invoices.
 - c. *\$467 for "excessive CIBC Banking Fees"*, which REK says Mr. Mulvihill agreed to cover.
 - d. *\$1,113 for professional bookkeeping services for December 2019*. To reach this total, REK adds \$987 and \$126 for December 2019. REK says under the parties' agreement Mr. Mulvihill agreed to be responsible for bookkeeping.
 - e. *\$6,426 for professional bookkeeping services for August 2020*, \$2,268 is for the "PM" trust account.
 - f. *\$366 bookkeeping expense for September 24, 2020*, but REK did not mention this in the "final statement" that it proposed to Mr. Mulvihill in the fall 2020 in an effort to resolve matters.
33. I dismiss REK's claim for excessive CIBC banking fees. In evidence is a "final statement" signed by REK's managing broker on October 22, 2020, that identified

these excessive CIBC fees as totalling \$467. However, in other evidence REK says the excessive fees are \$141.32 and \$551.74 for September and October 2019. Elsewhere, REK says again the total is \$467 and it does not explain the inconsistencies. Further, REK provided no evidence in support, including banking statements it said it had, and no supporting evidence that the fees were incurred because of Mr. Mulvihill's performance. I am not satisfied these third party charges are Mr. Mulvihill's responsibility under the parties' contract and I do not allow them.

34. Given the parties' contractual terms, I find Mr. Mulvihill is liable for REK's proven bookkeeping expenses during his tenure with REK. I find this includes the \$393.75 HG invoice dated August 31, 2020. I do not need to decide if the invoice related to correcting an error made by Mr. Mulvihill, as REK alleges.
35. I also find Mr. Mulvihill owes REK \$987 for December 2019 bookkeeping fees, which Mr. Mulvihill argues were incurred to "find the surplus" in a trust account. While it may be the issue dates back to a former managing broker's tenure, the fees were incurred during Mr. Mulvihill's contract that required him to be responsible for bookkeeping. However, I dismiss the \$126 REK later argues is also owing, as I find REK has not sufficiently explained why it earlier concluded in its "final statement" that Mr. Mulvihill did not owe it.
36. I turn then to the largest aspect of REK's counterclaim, the August 2020 bookkeeping services. Part of this is based on a \$2,268 invoice that Mr. Mulvihill essentially argues covers a financial review dating back 2 years, and that this was not his responsibility. In contrast, REK says that this invoice related to a CIBC account that only Mr. Mulvihill managed.
37. On balance, I find Mr. Mulvihill is responsible under the parties' contract for the \$2,268. I say this because, again, I find Mr. Mulvihill agreed to be responsible for bookkeeping expenses, oversight and management.
38. I turn then to the final \$4,158 REK says Mr. Mulvihill owes for August 2020 bookkeeping services. This is based on an August 19, 2020 invoice for the same

amount, which REK has undisputedly paid. The invoice describes 99 hours for “bookkeeping services”, and “data entry” for September 2018 to August 2019, “owner payout & commission review” and “client communication”. I find this \$4,158 invoice is essentially bookkeeping that Mr. Mulvihill must pay under the contract.

39. Finally, I do not allow the \$336 invoice dated September 24, 2020. While I accept it was for bookkeeping, the invoice was issued after Mr. Mulvihill’s departure and I am not satisfied he is responsible for the associated work.

Conclusion, interest, and fees

40. I allow REK’s counterclaim for \$5,000. As noted above, I also allow Mr. Mulvihill’s claim for \$3,524.95. So, I find Mr. Mulvihill must pay REK \$1,475.50 (\$5,000-\$3,524.95).
41. The *Court Order Interest Act* (COIA) applies to the CRT. I find REK is entitled to pre-judgment interest on the \$1,475.05, calculated from August 31, 2020 (Mr. Mulvihill’s departure date) to the date of this decision. This interest equals \$5.68.
42. Under section 49 of the CRTA and the CRT’s rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. Both parties were successful in their claims so I make no order for fee reimbursement. Neither party claimed dispute-related expenses, so I order none.

ORDERS

43. Within 30 days of this decision, I order Mr. Mulvihill to pay REK a total of \$1,480.73 broken down as follows:
- a. \$1,475.05 in damages, and
 - b. \$5.68 in pre-judgment interest under the COIA.
44. REK is entitled to post-judgment interest, as applicable. I dismiss the balance of the parties’ remaining claims.

45. 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 in effect until 90 days after June 30, 2021, which is the date of the end of the state of emergency declared on March 18, 2020, 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.
46. 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.

Shelley Lopez, Vice Chair