Civil Resolution Tribunal

Date Issued: August 17, 2021

File: SC-2020-008441

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Moss Development Inc. v. Milner*, 2021 BCCRT 900

B E T W E E N :

MOSS DEVELOPMENT INC.

APPLICANT

A N D :

GRAHAM MILNER and KATHLEEN WALSH

RESPONDENTS

A N D :

SHEILA LEONIE MARY ORCHISTON (Doing Business As
RARE EARTH WEDDING EVENT PRODUCTION)

RESPONDENT BY THIRD PARTY CLAIM

REASONS FOR DECISION

Tribunal Member: Chad McCarthy

INTRODUCTION

1. This dispute is about damage to a rented building. The respondents, and applicants by third party claim, Graham Milner and Kathleen Walsh, rented a building from the applicant, Moss Development Inc. (Moss), for their wedding. A window broke during the rental, and Moss claims the respondents owe $1,875.72 for window repairs under the rental contract.

2. The respondents hired the respondent by third party claim, Sheila Leonie Mary Orchiston (doing business as Rare Earth Wedding Event Production) to plan their wedding, and to provide staff and supervision at the event. The respondents say Mrs. Orchiston's staff placed a heater too close to the window, which broke it. The respondents say the broken window was Mrs. Orchiston's fault, and that she should pay any window repair costs. They also say Mrs. Orchiston is a Moss employee or agent. Mrs. Orchiston says a wedding guest likely knocked the heater into the window, so she owes nothing.

3. The respondents and Mrs. Orchiston are self-represented in this dispute. Moss is represented by its director.

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. Although the parties' submissions each call into question the credibility of

the other party in some respects, I find I can properly assess and weigh the written evidence and submissions before me, and that an oral hearing is not necessary in the interests of justice. In the decision *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always needed where credibility is in issue. Keeping in mind that the CRT's mandate includes proportional and speedy dispute resolution, I find I can fairly hear this dispute through written submissions.

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.

ISSUES

8. This issues in this dispute are:

    a. Are the respondents responsible to Moss for the window damage, and if so, do they owe Moss $1,875.72 or another amount for repairs?

    b. Is Mrs. Orchiston liable to the respondents for breaking the window, and if so, does she owe them $1,875.72 or another amount for repair costs?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, as the applicant Moss must prove its claims against the respondents on a balance of probabilities. The respondents must prove their third party claims against Mrs. Orchiston to the same standard. I have read all the parties' submitted material but refer only to the relevant evidence and arguments needed to explain my decision.

10. At the outset, I note that the respondents say Mrs. Orchiston is Moss' employee. A copy of a Moss web page in evidence, titled "About Us", contains Mrs. Orchiston's business biography. The respondents also say Mrs. Orchiston showed them the Moss rental building before they rented it, and handled most communications with Moss.

11. I find that the web page copy identifies Mrs. Orchiston as the owner and operator of a business called Rare Earth Weddings. Moss says that Mrs. Orchiston is one of its "preferred providers" of wedding planning services, but that Moss only has one employee, who is not Mrs. Orchiston. Moss says it does not employ Mrs. Orchiston or pay her when she manages wedding events at its building. There is no written wedding planning agreement between the respondents and Mrs. Orchiston in evidence. However, there is a rental agreement for the Moss building in evidence.

12. The rental agreement is clearly between the respondents and Moss, and Mrs. Orchiston is not a party to it. Correspondence in evidence shows that the respondents sent Moss' director the signed contract, and they do not deny paying Moss directly for the rental. Contrary to the respondents' submission, I find the evidence does not show that Mrs. Orchiston negotiated the rental agreement on behalf of Moss. So, I find that Mrs. Orchiston was not Moss' employee or agent. I find that the respondents entered into the building rental agreement with Moss, and that the respondents and Mrs. Orchiston entered into a separate, likely verbal, wedding planning agreement.

13. It is undisputed that staff engaged by Mrs. Orchiston provided setup, tear down, meal waiting, and other services for the wedding. During the dinner portion of the event, a window suddenly cracked with a loud noise. The respondents say Mrs. Orchiston's staff placed a moveable, pole-mounted, propane heater too close to the window, which cracked due to heat stress. Mrs. Orchiston says the damage was not due to heat, and that a wedding guest likely bumped the heater into the window. Moss says that the building rental agreement makes the respondents responsible for window damage regardless.

Are the respondents responsible for Moss' window repairs?

14. Paragraph E of the rental agreement said that the respondents would be charged for damage resulting from the misuse of the facility and equipment during the rental. The respondents deny that anyone misused the facility or equipment. Paragraph L said that the respondents are responsible for catering and any damage done by or through the caterer or its staff. Paragraph 2(3) said that the respondents are responsible for any damage, and that repair or cleaning costs would be withheld from the $500 damage deposit. Paragraph 3 required the respondents to carry general liability insurance covering property damage. Paragraph 6(B) said, "Failure to leave the premises in a responsible and undamaged condition will result in cost of repairs or cleaning being withheld from the damage deposit." I find nothing in the agreement limited the cost of repairs or cleaning to the amount of the damage deposit.

15. I find that the respondents are responsible under the rental agreement for any damage to the building that occurred during the rental period, regardless of whether the damage was caused by the respondents, their guests, or staff hired by the respondents or Mrs. Orchiston. It is undisputed that the window broke during the respondents' rental period, and that the break was likely caused either by heat stress or a physical blow, from a heater moved by wedding guests or Mrs. Orchiston's staff. So, I find that the respondents are responsible to Moss for the cost of repairing the window damage.

16. Moss submitted a Mid Island Glass Ltd. (Mid Island) repair invoice dated January 21, 2020. Mid Island is located in a different city than Moss' rental building. The invoice charged $324 for replacement glass, $240 for 3 hours of labour, $960 for 12 hours of travel time, and $100 for gas. The respondents object to the invoice because they obtained an estimate that quoted more for the glass repair, but less overall because there were no travel or gas charges. Further, a second January 21, 2020 Mid Island invoice in evidence shows that other work was also performed for Moss on the same date and on the same building, but charged nothing for travel or gas.

17. The respondents say they should not bear the full costs of travel and gas when Moss authorized other repairs on the same trip. I agree. I find that the respondents are only responsible for window damage-related costs, and that the travel and gas charges related to both damage repairs and other work. So, I find the respondents are only responsible for half of the invoiced travel and gas charges, which equals $530. I allow Moss' claim against the respondents for $1,148.70 in damages including GST.

18. Moss also claims an administrative fee equal to 10% of the window repair cost. Moss says it is standard industry practice to charge this fee for "staff time and administration for the glass replacement" as a direct out-of-pocket expense. However, the rental agreement does not provide for such a fee. Further, the evidence does not show that this fee is standard industry practice or how much time Moss' sole staff member spent administering the window repair. I find Moss is not entitled to this fee.

Is Mrs. Orchiston liable to the respondents for breaking the window?

19. Mrs. Orchiston emailed the respondents on December 4, 2019 that if the window broke because her staff placed the heater too close, and the damage was "heat impact" damage, she would cover the full amount of the resulting damages. Mrs. Orchiston says that according to several glass companies she contacted, the break was impact damage and not heat damage. Mrs. Orchiston says her staff were all indoors when the window broke, so they could not have struck the window. She also says guests moved items during the event, and suggests that guests might have moved the heater close to the window and knocked it over, causing the break.

20. The respondents say no one was near the heater or the window when it broke, and that Mrs. Orchiston's staff had moved the heater too close to the window. The respondents say that heat stress from the heater unevenly heating the window caused it to break.

21. First, I will consider what caused the window to break. It is undisputed that Mrs. Orchiston's staff were responsible for setting up the wedding venue, and that they initially placed outdoor propane heaters in the middle of a patio, away from the

windows. Photos in evidence show that during the event, probably to facilitate wedding photos, one heater was placed within a few inches of a window. The window broke after the heater was placed close to it. No one actually saw the window break, although there was a loud popping sound. No one saw anything strike the window.

22. The respondents submitted written witness statements from 6 different wedding guests. None of these witnesses reported seeing anyone near the window or heater when it broke, and 4 of them specifically said no one was near the window or heater.

23. In a May 11, 2021 statement, one of Mrs. Orchiston's staff members, ZB, said she saw a woman with a child stroller near the heater after the window broke, and that the heater was "still" swaying. ZB did not say when the swaying started or why. ZB said she asked the woman if she had knocked over the heater by accident, and the woman said no. ZB said she thought the heater was accidentally knocked over with the stroller, but she did not actually see that happen. She also said that this was all she could recollect "to the best of my ability with so much time having passed". I find ZB's allegation that a stroller knocked the heater over is speculative and poorly supported by any evidence, and I give it little weight.

24. Mrs. Orchiston says her staff "let me know they had seen the heater fall over." I give this statement no weight, as it is unsupported by the witness statements and other evidence, and contradicts several witness' statements. On balance, I prefer the 6 wedding guests' observations of whether anyone was near the window or heater shortly before the window broke, as their recollections are clear, specific, and largely consistent with each other. I find that no one was near the heater or window when it broke, and I find that nothing struck the window.

25. One of the witnesses, DS, said he has 2 Engineering degrees and knowledge of material properties including thermal stress, which none of the parties deny. DS said he immediately moved the heater away from the window after it broke. He said the window broke because of thermal stresses in the glass caused by the temperature difference between the heater and the cool surrounding air. I find that this statement qualifies as expert evidence under the CRT's rules, and is persuasive.

26. Mrs. Orchiston submitted correspondence from 4 glass companies and a fire professional about the broken window. The fire professional said he was not a glass expert. 3 of the glass companies provided no information about their qualifications as required under the CRT's rules, so I find their evidence does not qualify as expert evidence and I give it no weight. The remaining opinion was by RM Thorpe dba Arrowsmith Glass, whom I find qualifies as an expert by his stated 30 years of experience in the window industry. Mr. Thorpe inspected the broken window and said that the window was broken "with excessive contact by some object" and not heat. However, he did not explain why he ruled out heat damage.

27. I find none of the glass companies or the fire professional saw 2 photographs in evidence that were taken by a wedding guest shortly before the window broke. These photographs, taken from indoors, show a patio heater outdoors within inches of a window. The window glass immediately adjacent to the glowing heater shows very pronounced and obvious warping and distortion, visible in the reflected light of the room. Other areas of glass and other windows are free of any such distortions. I find these photographs persuasive. I find that ordinary knowledge and experience are sufficient to find that the window glass warping and distortions were likely caused by heat from the nearby heater.

28. Given my finding that nothing struck the window, the obvious, severe distortions in the window glass beside the heater before the window broke, and DS's opinion, I find that heat stress from the nearby heater caused the window to break.

29. Now the key question is, who placed the heater close to the window? I find the evidence shows Mrs. Orchiston's staff moved items on the patio prior to the window breaking, including positioning items next to the building's windows. Mrs. Orchiston says, and ZB agreed in her statement, that guests moved some items around during the event, without clarifying exactly what or when. Neither Mrs. Orchiston nor ZB's statement directly denied that Mrs. Orchiston's staff moved patio items, and they do not directly address the respondents' allegation that a staff member moved the heater near to the window. Other than ZB's statement, Mrs. Orchiston did not provide any

other staff statements denying that they moved the heater near to the window, and she did not say that she was unable to obtain such evidence. Further, it is undisputed that under the wedding planning agreement, Mrs. Orchiston's staff was responsible for positioning items such as furniture and heaters.

30. Having weighed all of the evidence before me, I find it more likely than not that a staff member of Mrs. Orchiston placed the heater near to the window, causing it to break.

31. I find it was reasonably foreseeable that placing a glowing hot heater near to a window could cause it to break. I find that by doing so, Mrs. Orchiston and her staff member breached the standard of care owed to the respondents, which was to avoid foreseeable damage to the rented building. Given Mrs. Orchiston's December 4, 2019 email to the respondents, I find she agreed that it would be negligent of a staff member to break the window by placing the heater close to it, and that Mrs. Orchiston would be responsible for any resulting damages. Under the test in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 3, I find Mrs. Orchiston is liable in negligence for the window damage. I allow the respondents' third party claim against Mrs. Orchiston, and find that she owes the respondents $1,148.70 in damages for window repairs.

CRT FEES, EXPENSES, AND INTEREST

32. The *Court Order Interest Act* (COIA) applies to the CRT. I find Moss is entitled to pre-judgment interest on the $1,148.70 owed by the respondents from February 18, 2020, the date of its cheque payment to Mid Island, until the date of this decision. This equals $14.07. I find the respondents are also entitled to $14.07 in pre-judgement interest on the $1,148.70 Mrs. Orchiston owes them.

33. 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. I find Moss was generally successful against the respondents, who must reimburse the $125 Moss paid in CRT fees. The respondents claim $200 from Moss for a contractor opinion expense, but were unsuccessful

against Moss. Further, the respondents did not adequately explain this expense or prove its value, so I decline to order it. No other expenses were claimed. The respondents were successful in their third party claim against Mrs. Orchiston, so I find she must reimburse the $75 they paid in CRT fees.

ORDERS

34. Within 60 days of the date of this order, I order the respondents to pay Moss a total of $1,287.77, broken down as follows:

    a. $1,148.70 in damages,

    b. $14.07 in pre-judgment interest under the COIA, and

    c. $125 in CRT fees.

35. Within 30 days of the date of this order, I order Mrs. Orchiston to pay the respondents a total of $1,237.77, broken down as follows:

    a. $1,148.70 in damages,

    b. $14.07 in pre-judgment interest under the COIA, and

    c. $75 in CRT fees.

36. The respondents and Moss are entitled to post-judgment interest, as applicable.

37. 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.

38. 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.

Chad McCarthy, Tribunal Member