Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *0955824 B.C. Ltd. dba Van Pro Disposal v. PKP Enterprises Inc.*, 2021 BCCRT 935

B E T W E E N :

0955824 B.C. LTD. DBA VAN PRO DISPOSAL

APPLICANT

A N D :

PKP ENTERPRISES INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Roy Ho

INTRODUCTION

1. This dispute is about a waste disposal contract. The applicant, 0955824 B.C. Ltd. dba Van Pro Disposal (Van Pro), provided waste disposal services to the respondent, PKP Enterprises Inc. (PKP). Van Pro says that PKP breached their contract by failing to make payments on time and cancelling the contract before the term's end. Van Pro

claims $2,350.35 in unpaid invoices, $2,257.04 in liquidated damages, and $315 for garbage bin removal.

2. PKP says it does not owe Van Pro anything because Van Pro had not provided services, and it was Van Pro that terminated the contract. Further, PKP says that the contract is unenforceable because there is a force majeure clause, which addresses the parties' obligations if something unexpected happens. I discuss this further below.

3. Van Pro is represented by a business contact. PKP is represented by a lawyer, Zachery Pringle.

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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, 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.

Late Evidence

8. Van Pro submitted late evidence of email correspondence with PKP. The respondent relies on this evidence in its submissions. Consistent with the CRT's mandate that includes flexibility, I find the evidence relevant to this dispute and allow it.

ISSUES

9. The issues in this dispute are:

    a. Is Van Pro entitled to $2,350.35 for unpaid services?

    b. Is Van Pro entitled to liquidated damages, and if so, how much?

    c. Is Van Pro entitled to a $315 bin removal fee?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicant Van Pro must prove its 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.

11. On October 24, 2012, PKP signed a contract with Housewise Construction dba Segal Disposal (Segal) for waste disposal. It is undisputed that the contract's term was for 5 years, which expired on February 1, 2018.

12. The other relevant terms of the contract are:

a. The agreement will renew automatically for a 5-year term, unless PKP provides written notice by registered mail before the renewal date.

b. PKP and Segal can renegotiate any part of the agreement even if the effect is to extend the term (negotiation clause).

c. If PKP tries to terminate the agreement before the term's expiry, Segal can accept the termination. PKP then agrees to pay liquidated damages according to a specified formula.

d. If PKP is in default of a contractual term, Segal may terminate the agreement without notice and take possession of its equipment. Segal may then pursue all remedies available to it or take such steps or actions it deems appropriate in the circumstance.

e. Neither party will be liable for its failure or delay in contractual performance due to contingencies beyond its reasonable control, "including but not limited to, strikes, riots, fires, contamination, restricted access, statutory holidays, landfill closures, and acts of God" (force majeure clause).

f. Segal is entitled to assign the contract at any time without PKP's consent.

g. If Segal suspends service due to slow or nonpayment, PKP is still responsible for monthly payments under the agreement during the suspension period (payment clause).

13. Segal undisputedly assigned its contract with PKP to Van Pro on December 15, 2017.

14. Neither party filed in evidence a signed renewal contract or written termination notice, so I find according to the contractual terms, the contract automatically renewed on February 1, 2018 for a 5-year term, ending on January 31, 2023.

15. Van Pro suggests I should favour its evidence because it has provided sworn affidavits, while PKP only provided a signed statement. However, contrary to Van Pro's assertion, all its affidavits are unsworn. I find that Van Pro's affidavits are also signed statements, so I give all statements equal weight.

16. Van Pro says that it provided disposal services to PKP from April to August 2020, which PKP refused to pay. As a result, in August 2020, Van Pro suspended PKP's disposal services and continued to charge PKP under the payment clause.

17. PKP denies that Van Pro provided services from May to July 2020. PKP says Van Pro had verbally agreed in March 2020 to suspend services at no charge due to the COVID-19 pandemic. PKP says that service was not to resume until it notified Van Pro that PKP had reopened. Van Pro denies that such a verbal agreement existed.

18. In addition, Van Pro says that it is entitled to liquidated damages because PKP terminated the contract early. Conversely, PKP says that it was Van Pro that terminated the contract.

Unpaid services

19. Van Pro says that PKP has an outstanding account totalling $2,350.35. According to the balance statement in evidence, this amount consists of:

    a. An undisputed outstanding balance of $14.70 from February 29, 2020,

    b. A partially paid April 1, 2020 invoice ($87.83 outstanding),

    c. 4 months of service at a monthly rate of $250.78 (May, June, July, and August 2020),

    d. 2 months of suspension payments at a monthly rate of $263.32 (October and November 2020),

    e. 1 month of suspension payment at a rate of $301.12 (December 2020),

    f. 1 month of suspension payment at a rate of $272.45 (January 2021), and

    g. 2 finance charges of varying amounts.

20. PKP says that it does not need to pay Van Pro from May to July 2020 because service had not resumed under the verbal agreement. PKP also disputes the 4 suspension payments because the payments violated the verbal agreement. Otherwise, PKP

does not dispute the outstanding balances, the August 2020 disposal service, the rate increases, and the 2 finance charges. I therefore find that these charges are valid and only address the charges that PKP disputes.

21. So, did the parties have a verbal agreement? I find that they did. Van Pro's evidence and submissions show a verbal agreement made between the parties about suspending PKP's service at no charge starting in April 2020. I find that the parties verbally amended the contract under the negotiation clause so that the payment clause temporarily did not apply. However, on balance, I agree with Van Pro that PKP ended the verbal agreement on April 14, 2020 and resumed service for the following reasons.

22. First, PKP undisputedly called Van Pro for garbage pick-up on April 14, 2020. Van Pro then emailed PKP to confirm that service had resumed unless PKP notified it otherwise, which PKP did not. While PKP explains its call for service was to pick up residual March garbage, I do not accept this. Van Pro's records show that it had performed a pick-up on April 1, 2020. The next pick-up was on April 27, 2020 following PKP's service request. Further, PKP inexplicably paid $162.95 for the April service, which I find supports that PKP intended for disposal services to resume.

23. Van Pro also submitted in evidence its driver's statement and logs evidencing disposal pick-ups at PKP. I accept this evidence because the logs included all pick-ups that Van Pro's driver completed for the relevant months. The logs show that PKP's pick-ups were recorded at various times in between the other pick-ups. So, I am satisfied that Van Pro had performed disposal services for PKP from May to July 2020. For these reasons, I find PKP resumed service in April 2020.

24. Second, Van Pro undisputedly invoiced PKP from May to August 2020 without objection from PKP. Included with each invoice is a note that service had resumed on April 14, 2020. PKP has provided no explanation or evidence contesting these invoices and Van Pro resuming service. For this reason, I find that PKP had implicitly agreed to resume service.

25. Third, while PKP suggests that Van Pro had picked-up empty bins, Van Pro submitted a photo of PKP's bin filled with garbage during a May 2020 pick-up. I find that PKP's bins were not empty. I find this shows that Van Pro had provided disposal services to PKP from May to July 2020.

26. As for the suspension payments, PKP says that Van Pro cannot unilaterally suspend service because it breached the verbal agreement. I disagree. I find that once PKP ended the verbal agreement and resumed service the payment clause also resumed. The payment clause clearly permitted Van Pro to suspend service due to nonpayment and continue charging PKP. So, I find that PKP must pay Van Pro $2,350.35 for the outstanding disposal services and the suspension charges.

Force Majeure

27. As noted, the contract contained a force majeure clause. A force majeure is an unforeseeable situation that prevents a party from fulfilling a contract.

28. PKP says that the force majeure clause applies because it was unable to earn income due to the COVID-19 public health orders and restrictions. PKP says it is discharged from contractual performance due to the "non-availability of markets". PKP relies on *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited,* 1975 CanLII 170 (SCC) where the Supreme Court of Canada found that the "non-availability of markets" is a discharging condition if the party relying on the clause had no control over the event. However, I find this case distinguishable. In *Atlantic Paper Stock Ltd.*, the parties specifically contracted for the "non-availability of markets" as a force majeure event, whereas here, PKP and Van Pro had not. Therefore, I find that PKP cannot rely on the "non-availability of markets" as a force majeure event.

29. In any event, as I have found that PKP resumed disposal service in April 2020, I find that the force majeure clause does not apply here. So, I find PKP must pay Van Pro's invoices.

Liquidated damages and bin removal

30. Van Pro seeks $2,257.04 in liquidated damages from PKP. Van Pro calculates the liquidated damages based on 9 months of its 2021 monthly service rate of $238.84, plus GST, which I find is according to the contractual formula.

31. The parties' contract states that if the customer (PKP) tries to terminate the agreement before the expiration of its term, Segal (now, Van Pro) can accept the customer's purported termination and terminate the agreement, in which case the customer must pay liquidated damages.

32. The parties disagree about who terminated the contract. Van Pro says PKP terminated the contract, while PKP says that it was Van Pro who had terminated the contract when it unilaterally removed its bins. PKP says that Van Pro is not entitled to liquidated damages because it terminated the contract.

33. Van Pro submitted a statement from XF and AY. XF says that on January 12, 2021, PKP terminated Van Pro's services by phone and asked for bin removal. AY says that the next day, PKP also notified them about terminating services by phone. PKP denies ever speaking with XF or AY about cancelling disposal services. However, on balance, I accept XF's and AF's statements because I find that this is what likely happened. It is undisputed that PKP promised to pay Van Pro by January 11, 2021 but failed to do so. I find it probable and likely for the parties to discuss payment the days following the expiration of PKP's payment deadline. For this reason, I am satisfied that PKP had spoken with XF and AY and terminated the contract with Van Pro. So, I find PKP must pay Van Pro $2,572.04 in liquidated damages and the $315 bin removal fee under the contract.

34. Last, PKP says Van Pro could have mitigated its losses by using PKP's bins at another facility. However, the courts have made it clear that liquidated damages are a contractual pre-estimate of expected losses had the contract been fulfilled. Mitigation would only be a factor if it is shown that the liquidated damages clause is

unenforceable (see *Northwest Waste Solutions Inc. v. Yue Rong Guan,* 2012 BCPC 499 (CanLII) at paragraph 27). As I have found that the liquidation clause is enforceable, I find that mitigation does not apply.

INTEREST, CRT FEES AND DISPUTE-RELATED FEES

35. Van Pro claims 24% contractual interest on $2,665.35 for unpaid invoices ($2,350.35 in unpaid service and $315 for bin removal). The parties' contract says interest will be payable by PKP at a rate of 2% per month or 24% per year on amounts that are more than 30 days overdue. PKP argues the parties had not agreed to a contractual interest rate because Van Pro's invoices showed a higher interest rate, and its statements showed no interest rate at all. However, contrary to PKP's assertion, I find the parties agreed to the contract's interest rate, which governs here. Therefore, I find that Van Pro is entitled to 24% annual interest on its unpaid invoices, calculated to the date of the decision. This equals $844.73, or a total of $3,510.08.

36. However, combined with the $2,257.04 liquidated damages award, Van Pro's total claim amount including contractual interest equals $5,767.12. The CRT's small claims monetary limit is $5,000, and that limit includes both a principal debt and contractual interest (but exclusive of *Court Order Interest Act* (COIA) interest, CRT fees, and dispute-related expenses). So, I find that Van Pro is entitled to the maximum monetary award of $5,000, which includes the liquidated damages and contractual interest on the $2,665.35.

37. As for interest on the liquidated damages, I find the parties' agreement about interest only applied to monthly charges, not liquidated damages. So, I find that Van Pro is entitled to pre-judgement interest under the COIA on the $2,257.04 from January 12, 2021, the contract termination date, to the date of this decision. This equals $6.27.

38. 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 see no reason in this case not to follow that general rule. As Van Pro was successful, I order PKP to reimburse Van Pro $175 of its CRT fees.

Van Pro also claimed $30 in dispute-related expenses for PKP's corporate registry search, which I find is reasonable. So, I order that PKP pay Van Pro for this amount.

ORDERS

39. Within 30 days of the date of this order, I order PKP to pay Van Pro a total of $5,211.27, broken down as follows:

    a. $5,000 in debt, contractual interest, and liquidated damages,

    b. $6.27 in pre-judgment interest on the liquidated damages under the *Court Order Interest Act*, and

    c. $205, for $175 in CRT fees and $30 for dispute-related expenses.

40. Van Pro is entitled to post-judgment interest, as applicable.

41. 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.

42. 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.

Roy Ho, Tribunal Member