Civil Resolution Tribunal

Date Issued: September 16, 2021

File: SC-2020-008325

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *WB Babysitting Whistler Ltd. v. Henriques*, 2021 BCCRT 1003

B E T W E E N :

WB BABYSITTING WHISTLER LTD.

APPLICANT

A N D :

WAYNE HENRIQUES

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Richard McAndrew

INTRODUCTION

1. This dispute is about software development services. The applicant, WB Babysitting Whistler Ltd. (WB), paid the respondent, Wayne Henriques, $6,000 to develop online scheduling software for its business. WB claims a refund because Mr. Henriques allegedly had not completed the project in over a year, rather than completing it in 3 months as WB says was agreed. WB claims $5,000 to bring its claim within the Civil

Resolution Tribunal's (CRT) $5,000 monetary limit for small claims disputes. In doing so, I find that WB has abandoned any amount exceeding the $5,000 limit.

2. Mr. Henriques denies this claim. He says that the parties agreed to increase the project's scope which extended the time needed to complete it. Mr. Henriques also says that WB is not entitled to a refund because it used portions of his work product after the contract was terminated.

3. WB is represented by Tara Hickey, WB's owner. Mr. Henriques is self-represented.

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. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the CRT's mandate of proportional and speedy dispute resolution, I decided 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.

Re-submitted evidence

8. Mr. Henriques submitted a description of an online link to a video file as evidence which I am unable to access, but re-submitted the file at my request through CRT staff. WB was provided an opportunity to provide submissions relating to this file. Since WB had an opportunity to respond, I find that it was not prejudiced by the re-submission of this file and I allow and have considered this evidence in my decision below.

Late submissions

9. Mr. Henriques provided a late submission and WB provided a response. I find that both parties' submissions are relevant and I find that WB was not prejudiced by Mr. Henriques' late submission because it had an opportunity to respond. So, I have allowed the late submissions and I have considered them in my decision.

ISSUES

10. The issues in this dispute are:

    a. Is WB entitled to a $5,000 refund from Mr. Henriques because he allegedly failed to timely complete his website development work?

    b. Is Mr. Henriques entitled to a set-off from the deposit for his work? If so, how much?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, as the applicant WB must prove its 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.

Breach of contract

12. Mr. Henriques sent WB an email on October 22, 2018 offering to perform website development services to automate WB's appointment booking system. Mr. Henriques offered a $100 hourly rate. Mr. Henriques says, and WB does not dispute, that he estimated that the project would cost approximately $12,000 with a $6,000 deposit. Mr. Henriques also offered a 50% billing rate if WB agreed to let Mr. Henriques reuse the website code in future projects. Mr. Henriques estimated that the project would cost approximately $6,000, with a $3,000 deposit, if WB agreed to the 50% billing option.

13. It is undisputed that WB hired Mr. Henriques and sent him a $3,000 deposit on December 3, 2018. In a May 16, 2019 email, WB says that it agreed to start with the 50% billing rate option. Based on this email, and because the $3,000 deposit is consistent with the 50% billing option, I find that the parties initially agreed to the 50% billing option. So, I find that the Mr. Henriques agreed to prepare WB's website scheduling application at the rate of $50 per hour.

14. WB says that Mr. Henriques originally said the project would be finished in 3 months. Mr. Henriques says that he estimated that the project would take 3 weeks. However, since the project was later modified as discussed below, I do not find this discrepancy relevant.

15. Mr. Henriques sent multiple emails saying that the project was delayed by personal matters and development complications, Mr. Henriques demonstrated a working model of his website application to WB on April 30, 2019. Mr. Henriques provided a video showing the demonstration which appears to show a website appointment booking system. Mr. Henriques says that the original design goals were met at this time. WB acknowledges that the product looked great in the demonstration. However, WB says that the product still had multiple glitches and was not streamlined. WB says that Mr. Henriques said that he needed 2 more weeks of work to complete the product. Since Mr. Henriques did not dispute this submission, I accept it as accurate.

16. Mr. Henriques sent WB an invoice on May 1, 2019 but neither party provided a copy. I infer that this invoice exceeded $12,000 because WB complained in a May 16, 2019 email that Mr. Henriques should have notified it when the billing exceeded the $12,000 originally quoted.

17. Mr. Henriques sent WB a May 7, 2019 email saying that the total cost will likely be approximately $70,000 by the time the project was finished. However, Mr. Henriques said that he was willing to deliver the product for the $6,000 originally quoted but he wanted WB to pay the remaining $3,000 released since he is close to delivery. I find that this email is consistent with WB's submission that the project was not completed on April 30, 2019 when Mr. Henriques demonstrated it.

18. WB sent Mr. Henriques a May 16, 2019 email saying that, although they agreed to start the project at the 50% billing rate, it no longer agreed to this billing arrangement. WB says it wanted to pay the full billing rate and retain exclusive rights to the website code. Mr. Henriques replied on May 22, 2019 saying that either the full billing rate or the 50% billing rate was acceptable to him.

19. WB sent $3,000 to Mr. Henriques on May 27, 2019. Although the parties' emails are not entirely consistent, on balance I find that WB accepted Mr. Henriques' offer to complete the project for a fixed price of $6,000 by paying the additional $3,000. I find that this became a binding contract modification.

20. Although I accept WB's undisputed submission that Mr. Henriques said that the project would be completed in 2 weeks after the May 2019 modification, there is no evidence before me that this was an agreed contract term rather than an estimate. So, I find that the parties did not have an agreed completion date. In the absence of an agreement, I find that it is an implied term that Mr. Henriques would complete the project in a reasonable time.

21. Mr. Henriques says that the project was delayed because the parties agreed to increase the project's scope and develop mobile phone applications in May 2019. In contrast, WB stated in a May 16, 2019 email that it did not believe that the project's

scope significantly changed. However, I find it unnecessary to determine whether the project's scope increased because, as stated above, I find that Mr. Henriques estimated that the project would be completed within 2 weeks regardless.

22. WB sent Mr. Henriques an email on August 19, 2019 complaining that the project was not finished. On November 19, 2019, WB notified Mr. Henriques that it was ending the project and it requested a refund. I find that the contract ended at this time without being completed.

23. Mr. Henriques replied on November 19, 2019, saying that he was willing to provide a refund but he needed time to do so. However, Mr. Henriques did not provide a refund and now refuses to do so.

24. WB says that Mr. Henriques breached the contract by failing to timely finish the project. As discussed above, in the absence of an agreed completion date, I find that Mr. Henriques was required to complete the project in a reasonable period of time. I find that Mr. Henriques did not do so. I reach this conclusion because I find that, based on Mr. Henriques' estimate, both parties reasonably expected that the project would be completed within 2 weeks when the contract was modified in May 2019. Mr. Henriques says that he worked on the project diligently but the work was complex and required a lot of work. However, based on the parties expectation that the project would be completed within 2 week of the May 2019 modification, I find that Mr. Henriques' failure to complete the project approximately 6 months later was an unreasonably long delay and a breach of the contract.

25. Next, I must determine whether WB was entitled to end the contract based on Mr. Henriques' failure to timely complete the project.

26. Where a party fails to fulfill a primary obligation of a contract in a way that deprives the other party of substantially the whole benefit of the contract, it is a fundamental breach (See *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC). Put another way, a fundamental breach is a breach that destroys the whole

purpose of the contract and makes further performance of the contract impossible (See *Bhullar v. Dhanani*, 2008 BCSC 1202).

27. For a fundamental breach, the wronged party can terminate the contract immediately. If the wronged party terminates the contract because of a fundamental breach, they do not have to perform any further terms of the contract (See *Poole v. Tomenson Saunders Whitehead Ltd.,* 1987 CanLII 2647 (BC CA). The test for whether a breach of contract is a fundamental breach is an objective test. That means that I must assess the nature of the breach from the perspective of a reasonable person in WB's position.

28. Applied to this case, if Mr. Henriques fundamentally breached the contract, WB was entitled to terminate the contract and be relieved from any further performance of the contract. I find that Mr. Henriques failure to complete the project completely deprived WB of any benefit from the contract I find that a reasonable person would consider the agreement to be completely undermined by Mr. Henriques' failure to complete the project within 6 months of contract amendment date. As such, I find that WB is entitled to a refund, subject to any set-offs discussed below.

Set-off

29. I will now consider whether Mr. Henriques is entitled to any set-off from WB's refund. Mr. Henriques did not file a counterclaim. Because he is alleging the set-off, the burden to prove the set-off shift to Mr. Henriques (see *Lund v. Appleford*, 2017 BCPC 91).

30. A set-off is a right existing between parties that owe each other money where their respective debts are mutually deducted, leaving the applicant to recover only the residue (see *Black's Law Dictionary*, revised 4th edition, at paragraph 1538). When the desired set-off is closely enough connected with an applicant's claimed rights that it would be unjust to proceed without permitting a set-off, equitable set-off may be applied (see *Jamieson* v*. Loureiro*, 2010 BCCA 52 at paragraph 34).

31. Mr. Henriques argues that he is entitled to a set-off because he performed work for WB and because WB allegedly improperly used his software work product after the contract ended. I find that there is a sufficient relationship between WB's request for a refund for these equitable set-offs to apply. I will first consider whether Mr. Henriques is entitled to a set-off based on his work performed.

32. A person can be entitled to compensation under a principle known as quantum meruit, for the value of agreed work performed. As discussed above, Mr. Henriques has the burden of proving that he is entitled to a set-off. Based on WB's satisfaction with Mr. Henriques' April 30, 2019 software demonstration, I find that Mr. Henriques performed a significant portion of his promised work before WB ended the contract. However, Mr. Henriques has not provided any timesheets or invoices showing the amount of work he allegedly performed. Without this evidence, I am unable to determine the value of the Mr. Henriques performed for WB.

33. Further, as discussed below, Mr. Henriques says that he could make further use of the website development solution he prepared for WB and he claims ownership of the work product. Mr. Henriques sent WB a November 19, 2019 email saying that WB had surrendered all rights to his software by terminating the contract. By claiming ownership of the software work product, I find that Mr. Henriques has not proved that he is entitled to a set-off for his labour creating it.

34. For the above reasons, I find that Mr. Henriques has not proved that he is entitled to a set-off for work performed.

35. Mr. Henriques also claims that he is entitled to a set-off because WB has allegedly improperly used the software he developed after the contract ended. WB denies using Mr. Henriques' work product. WB hired another website development contractor, AB, to build its website after the contract with Mr. Henriques ended. AB provided an April 12, 2021 statement saying that they did not reuse Mr. Henriques' code. AB says all their work was originally developed or came from open source libraries.

36. Although Mr. Henriques says that WB's website looks similar to the product he developed, I find that Mr. Henriques has not proved that WB has used his work product. Rather, I find expert opinion evidence is necessary in this case, because the subject matter of website development is technical and outside the knowledge and experience of the ordinary person (see *Bergen v. Guliker*, 2015 BCCA 283). In the absence of expert evidence, I am unable to determine whether WB has used Mr. Henriques' website code.

37. For the above reasons, I find that Mr. Henriques has failed to prove that he is entitled to a set-off based on WB's use of his work product. So, I find that Mr. Henriques must pay WB $5,000.

Interest, CRT fees and dispute-related expenses

38. The *Court Order Interest Act* (COIA) applies to the CRT. WB is entitled to pre-judgment interest on the $5,000 refund from November 19, 2019, the date the contract ended, to the date of this decision. This equals $87.34.

39. 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. Since WB was successful, I find it is entitled to reimbursement of $175 in CRT fees. WB did not request reimbursement of dispute-related expenses.

ORDERS

40. Within 30 days of the date of this order, I order Mr. Henriques to pay WB a total of $5,262.34, broken down as follows:

    a. $5,000 as a refund of software development fees,

    b. $87.34 in pre-judgment COIA interest, and

    c. $175 in CRT fees.

41. WB is entitled to post-judgment interest, as applicable.

42. 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.

43. 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.

Richard McAndrew, Tribunal Member