



Civil Resolution Tribunal

Date Issued: October 25, 2021

File: SC-2021-003963

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Coolen v. Kirkpatrick*, 2021 BCCRT 1129

BETWEEN:

SAM COOLEN

APPLICANT

AND:

KEVIN KIRKPATRICK (Doing Business As TOP GUN REFINISHERS)

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about bathtub reglazing work. The applicant, Sam Coolen, hired the respondent, Kevin Kirkpatrick (Doing Business As Top Gun Refinishers), to reglaze

her bathtub. Ms. Coolen says the work was “completely unacceptable” as it left the tub with a gritty surface. She claims a refund of the \$570 she undisputedly paid.

2. Mr. Kirkpatrick says that Ms. Coolen did not follow his instructions both before and immediately after he did his glazing work and argues that is the likely cause of the grit. He also says he would have buffed out any remaining grit had she brought it to his attention. He denies he owes any refund.
3. The parties are each 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). 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. CRTA section 39 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 CRTA section 42, 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 CRTA section 118, 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.

ISSUE

8. The issue is whether Mr. Kirkpatrick's work was deficient and if so whether he owes Ms. Coolen the claimed \$570 refund.

EVIDENCE AND ANALYSIS

9. In a civil claim like this one, as the applicant Ms. Coolen has the burden of proving her claim, on a balance of probabilities (meaning "more likely than not"). I have only referenced below what I find is necessary to give context to my decision.
10. Ms. Coolen called Mr. Kirkpatrick for a quote on May 7, 2021 and he did the work on May 10. The parties did not have a written agreement. At her request, he returned on May 11 to examine and buff rough spots reported by Ms. Coolen. His May 10, 2021 invoice shows \$125 was for stripping old paint, and \$450 was for reglazing with Isofree Plus Lo 6500 Finish (plus tax). This equals \$575 before tax, but as noted Ms. Coolen only paid \$570. None of this is disputed.
11. Ms. Coolen says that after Mr. Kirkpatrick left on May 11, the tub was still left "gritty", with "overspray" on the floor, toilet, and tub spout. She also says Mr. Kirkpatrick failed to clean up.
12. Ms. Coolen submitted a witness statement from BH, who appears to be her friend. BH wrote that in his opinion the bathroom dirt Mr. Kirkpatrick mentioned to him on May 11 was construction dust from Mr. Kirkpatrick's job. I find BH's observation speculative and I place no weight on it. However, I find BH's statement does show that there was construction dust in the bathroom on May 11, 2021. This is relevant to the grit discussion below.
13. Based on a May 12, 2021 audio recording of Ms. Coolen's call to Mr. Kirkpatrick, he said the overspray would take 10 minutes to clean up but she responded that she would "take care" of it. So, I dismiss that aspect of her claim. She also submitted no evidence about any significant clean-up or that it cost her anything, so I dismiss that aspect as well.

14. In Ms. Coolen's May 12, 2021 call to Mr. Kirkpatrick she also pressed him to admit that he agreed to a \$475 to \$520 price range for the job. She then acknowledged "there was more work involved" but added that he did not have to paint the tub's exterior, so the job should fall within \$520. He disagreed, and said it was \$575 because there was extra work and offered to send a receipt with taxes included. I find nothing turns on this as Ms. Coolen undisputedly only paid \$570, the amount of her claimed refund. I also find it was a fixed price job, and so the amount of time Mr. Kirkpatrick spent is irrelevant.
15. This leaves the tub's gritty surface. As the party alleging deficiencies in the contracted work, Ms. Coolen has the burden to prove them (see *Lund v. Appleford Building Company Ltd. et al*, 2017 BCPC 91). For the reasons that follow, I find it likely Mr. Kirkpatrick improperly left a gritty tub surface.
16. Ms. Coolen submitted close-up photos of the tub which I find show grit or roughness in the glazing. She says the photos were taken on May 12, after Mr. Kirkpatrick's 2nd visit had been completed. In particular, there is one photo of the tub's interior bottom showing the drain, which I find shows a gritty and rough surface.
17. I find this dispute largely turns on the fact Ms. Coolen did not request an anti-skid surface and yet that is what Mr. Kirkpatrick undisputedly applied. Screenshots from Mr. Kirkpatrick's website indicate anti-skid is optional. In the same May 12 audio recording, Ms. Coolen asked why Mr. Kirkpatrick told her friend BH that Mr. Kirkpatrick had put an anti-skid on the tub, saying she had not asked for that. Mr. Kirkpatrick acknowledged he used an anti-skid material in the paint, and did not say she had asked for it. Mr. Kirkpatrick denied using it "up the sides" of the tub, but asked if there was grit now. Ms. Coolen responded that he had not sanded it down completely on May 11. Mr. Kirkpatrick became agitated but ultimately said he would return and Ms. Coolen agreed.
18. Based on all the evidence and submissions, I find Ms. Coolen never asked for an anti-skid surface. Rather, I accept she wanted a smooth surface so she could lay in the bath. I also find Mr. Kirkpatrick has not explained how there was a different anti-

skid glaze on the tub's floor and allegedly another type on the tub's interior walls. In any event, I find nothing turns on this as there was undisputedly anti-skid material on the tub's floor and I find Ms. Coolen never agreed to an anti-skid surface.

19. One of Mr. Kirkpatrick's defences is that Ms. Coolen failed to adequately clean her bathroom ahead of his arrival, which the evidence indicates she had been renovating. He says the dust in the room would have been blown around by his paint sprayer and suggests that is likely a source of the grit. However, he does not explain why he proceeded with the job if he knew it was too dirty or dusty in the room. He also points to Ms. Coolen having undisputedly touched at least one part of the tub before it fully cured. However, he does not explain how her doing so created the visibly rough or gritty surface. I find these explanations do not relieve Mr. Kirkpatrick from responsibility for leaving Ms. Coolen with a gritty tub, when I accept she contracted for a smooth finish tub.
20. Finally, Mr. Kirkpatrick points to the fact that Ms. Coolen admittedly failed to keep at least one cat out of her bathroom. He says there was cat hair in the tub's glazing, along with dirt, when he returned on May 11.
21. Ms. Coolen says the cat was only was on the tub's edge (where paw prints were reportedly found). Ms. Coolen does not say she saw the cat get past her barricade and so there is no evidence Ms. Coolen observed her cat the entire time it was in the bathroom. On balance, I accept that at least some of the tub's rough appearance is the result of cat hair deposited before the tub cured, which I find is not Mr. Kirkpatrick's responsibility.
22. However, Mr. Kirkpatrick says that when he returned on May 11 he cleaned and buffed out the tub (including cat hair) to smooth out the finish. He says at that point he understood she was happy with the outcome. I find this makes the cat hair issue moot, since Mr. Kirkpatrick himself says he smoothed the finish after the cat had been in the bathroom.

23. In contrast, Ms. Coolen relies on her photos, which as noted she says were taken on May 12, to show that the tub's surface remained gritty. On balance, I accept the tub's interior surface remained gritty and rough as of May 12. In the May 12 audio recording Mr. Kirkpatrick asked if grit remained, which I find suggests he himself was not sure he had made it smooth.
24. Ms. Coolen submitted an email exchange she had with Jeff White, with Great White Fiberglass. Mr. White explained he has 15 years' experience in bathtub manufacturing and 5 years of "self-taught" refinishing. I accept his qualifications as an expert under the CRT's rules, noting that Mr. Kirkpatrick does not challenge them although I acknowledge he does challenge the conclusions.
25. Mr. White wrote that "the finish was applied to dry giving it gritty texture". He said there were "large chunks in the finish that could be from not tack clothing the tub out after sanding, or the paint itself was not mixed and had solids in it that came out during painting". Mr. White said he did not know what product was used, and wrote that over time the glaze may fail by peeling and flaking, but at "at the very least it will remain rough and collect dirt and soap scum, making it hard to clean" (quotes reproduced as written). Mr. White gave two options to "redo this unit": sand and apply new paint for about \$450, which he did not recommend as the bond would only be as strong as the product Mr. Kirkpatrick applied. The 2nd option was to chemically strip the tub back to factory finish and re-start the process, which he said would cost around \$700. Mr. Kirkpatrick did not challenge this pricing.
26. I find it unclear whether Mr. White observed the tub in person or relied on photographs. In the circumstances here, I find nothing turns on this. I say that because having used an anti-skid material Ms. Coolen did not want, I find Mr. Kirkpatrick breached the parties' contract. I accept the tub remains gritty, given my conclusions above and the visible grit in the photos. I accept Mr. White's opinion that the tub needs to be re-done and his cost estimates. Mr. Kirkpatrick does not explain how he could continue to "buff out" grit that by his own comments in the audio recording I find are at least in part from his use of an anti-skid product.

Further, if the grit could have been buffed out, I find Mr. Kirkpatrick would have done that on May 11.

27. Finally, Mr. Kirkpatrick argues he was not given sufficient opportunity to fix the deficiencies. I disagree and find in the circumstances that Ms. Coolen reasonably ended the relationship after the failed fix on May 11.
28. Damages or breach of contract are intended to place a party in the position they would have been in if the contract had been carried out as agreed (*Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319 at paragraph 39). Given the tub needs to be re-done, I find the claimed \$570 refund is appropriate.
29. The *Court Order Interest Act* (COIA) applies to the CRT. I find Ms. Coolen is entitled to pre-judgment COIA interest on the \$570, which calculated from May 10, 2021 to the date of this decision equals \$1.18.
30. 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. Ms. Coolen was successful and so I find she is entitled to reimbursement of the \$125 she paid in CRT fees.
31. Ms. Coolen appears to claim \$94.50 as a dispute-related expense, for 3 hours of "secretarial services supporting the drafting of tribunal documents and submission" as she submitted an August 18, 2021 receipt in support from Sonia's Office Services. I do not allow this, as under the CRTA section 20 and the CRT's rules the general rule is that parties are self-represented. There is no evidence before me that Ms. Coolen required secretarial services here, particularly in a dispute that had minimal evidence and submissions. This dispute was not extraordinary. I dismiss the \$94.50 claim.

ORDERS

32. Within 21 days of this decision, I order Mr. Kirkpatrick to pay Ms. Coolen a total of \$696.18, broken down as follows:

- a. \$570 in debt,
- b. \$1.18 in pre-judgment COIA interest, and
- c. \$125 in CRT fees.

33. Ms. Coolen is entitled to post-judgment interest, as applicable. I dismiss her claim for dispute-related expenses.

34. 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.

35. 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