



Civil Resolution Tribunal

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File: SC-2020-006066

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *0955824 B.C. Ltd. v. Zesty Food Services Inc.*, 2022 BCCRT 23

B E T W E E N :

0955824 B.C. LTD.

APPLICANT

A N D :

ZESTY FOOD SERVICES INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sherelle Goodwin

INTRODUCTION

1. This dispute is about a waste disposal contract.
2. The applicant, 0955824 B.C. Ltd. (095), which does business as Van Pro Disposal, provided waste disposal services to the respondent, Zesty Food Services Inc. (Zesty), which operates a restaurant. 095 says that Zesty breached the contract by failing to

make payments on time and by attempting to cancel the contract outside the allowed cancellation window. 095 claims \$531.56 in unpaid invoices, \$1,382.85 in liquidated damages, \$330.75 for bin removal fees, and contractual interest.

3. Zesty says 095 breached the contract by repeatedly failing to provide the agreed upon disposal services on time. It also says 095 agreed to accept \$552 for the unpaid invoices, and \$250 for the bin removal fees, which Zesty says it paid. Zesty asks that this dispute be dismissed.
4. 095 is represented by its manager, WY, but 095's employee, SA, wrote 095's submissions. Zesty is represented by its owner, SI.

JURISDICTION AND PROCEDURE

5. 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.
6. 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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
7. 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.

8. 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.
9. Both parties submitted evidence to the CRT after the deadline to do so had passed, and 095 submitted further evidence after the submissions had been completed. I find the CRT provided each party a copy of the other's late evidence, and an opportunity to respond. Neither party objected to the other's late evidence. I find neither party was prejudiced by the other's late evidence and so find there is no procedural unfairness to either party in accepting the late evidence.

ISSUES

10. The issues in this dispute are:
 - a. Must Zesty pay 095 for outstanding invoices and, if so, how much?
 - b. Must Zesty pay 095 liquidated damages under the contract and, if so, how much?
 - c. Must Zesty pay 095 a bin removal fee and, if so, how much?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, as the applicant 095 must prove its claims on a balance of probabilities (more likely than not). I have read all the parties' submissions and weighed the evidence, but only refer to that necessary to explain my decision. Both parties reference CRT and court decisions between 095 and other customers, as well as between Zesty and another waste disposal provider. I find this information not relevant here as this dispute turns on the specific contract between 095 and Zesty.
12. On July 10, 2017, Zesty entered into a waste disposal agreement with Housewise Construction Ltd. doing business as Segal Disposal (Segal). SI signed the agreement

on Zesty's behalf. The agreement's front page included the following relevant handwritten terms:

- a. Segal would provide 1 bin for waste and 1 for cardboard, starting on January 1, 2018.
- b. Segal would empty the waste bin weekly and cardboard bin monthly,
- c. Zesty would pay \$181.50 per month for disposal; \$31.50 for cardboard and \$150 for waste, plus a 6% fuel surcharge,
- d. Segal would accept payment of only taxes for the first 2 months,
- e. The contract's term was 1 year and would automatically renew for further terms of 1 year each upon the term's end.

13. The agreement's back page included the following relevant pre-printed terms:

- f. Zesty would pay Segal within 15 days of being invoiced, or by pre-authorized credit card payments. 095 could suspend service for slow or non-payment, which would not terminate the agreement. Zesty must continue paying if 095 suspended service.
- g. Zesty would pay "any other charges and fines, surcharges or levies incurred by Segal" in providing the contracted services. Segal was entitled to adjust the rates based on increased fuel costs, insurance rates, disposal facility costs, weight or volume of material, or contamination of materials, among other factors.
- h. Zesty could terminate the agreement by providing Segal written notice by registered mail at least 90 days but no more than 120 days before the end of the term (the cancellation window). If Zesty attempted to terminate the agreement outside the cancellation window, Segal could accept the termination and Zesty would then be required to pay liquidated damages equal to the 12 most recent months of invoices or the sum of the remaining balance of the term.

- i. Segal had the right of first refusal. In other words, Zesty agreed to send to accept any offer from another waste disposal provider to Segal within 10 days, so Segal could attempt to renegotiate with Zesty.
 - j. Segal could assign the agreement at any time without Zesty's consent.
14. In a December 15, 2017 document, Segal assigned its waste disposal contracts to 095, starting on February 1, 2018. Contrary to Zesty's argument, I find the parties' contract allowed the assignment. I find 095 took over Segal's rights and responsibilities in the July 10, 2017 agreement with Zesty.
15. Zesty says 095 did not provide the agreed upon services in a timely manner and so it should not have to pay 095 anything further. I infer Zesty argues that the agreement was terminated because 095 breached its terms. As explained below, I find this is not the case. In a September 22, 2021 affidavit, SI said that 095 did not collect Zesty's cardboard from April to the end of June 2019. However, based on emails between the parties in late June 2019, I find 095 did pick up the waste by the end of June 2019. This is also supported by 095's pick up sheets, signed by SA, who was the driver. So, even if 095 did not provide timely services in 2019, I find it remedied any breach by picking up the waste. I also find Zesty accepted the breach, and the remedy, by allowing 095 to continue providing services and paying its outstanding balance on July 11, 2019 as noted in 095's statement of account.
16. In a September 3, 2019 email Zesty told 095 that it wanted to cancel its waste disposal service. I find the email did not meet the cancellation requirements in the parties' agreement because it was not within the 90-to-120-day cancellation window, which is between September 5 and October 1 each year and because it was not sent by registered mail.
17. Zesty also says it was justified in not paying 095 because it did not collect Zesty's cardboard from February to May 2020, or its waste from mid-March to May 2020. Zesty provided no supporting evidence, other than SI's sworn statement. Based on

095's signed pick up sheets, I find it picked up Zesty's cardboard on February 28, 2020.

18. Based on 095's March 3, 2020 email to Zesty, I find 095 suspended disposal services for non-payment. I find 095 was entitled to suspend service under the terms of the parties' agreement as Zesty had not paid its January or February invoices by their due dates, based on 095's Statement of Account, which Zesty does not dispute. So, I find 095 did not breach the parties' agreement by failing to pick up the garbage and cardboard from mid-March to May 2020.
19. In an April 23, 2020 email, SI said Zesty should only have to pay 20% of its invoice for March 2020 as Zesty had only provided 20% of the agreed upon services. Zesty also said it should have to pay nothing for April as 095 did not provide any services. Zesty again attempted to cancel the agreement with 095 and asked it to pick up its bins. Again, I find Zesty's cancellation attempt did not meet the contract's requirements.
20. The parties agree that SI met with SA on May 14, 2020. SI says SA agreed to take a total of \$552 in full payment of the balance owing: \$226 per month for January and February and \$100 for March which, I note, adds up to \$532 and not \$552. SI says SA agreed not to charge Zesty for April and May 2020, and only start charging Zesty again once the restaurant was opened.
21. As noted, SA wrote 095's submissions in this dispute. SA disputes Zesty's version of events and says he agreed to take \$552 as partial payment for Zesty's outstanding balance, as SI told him he was waiting for government COVID-19 benefits. SA also says he agreed that 095 would reduce its monthly fees by 50% starting on April 1, 2020 as the restaurant was closed.
22. 095's August 7, 2020 statement shows it started charging Zesty \$114.01 on April 1, 2020, which I find is 50% of the \$228 previously charged monthly fee. I find this invoicing supports 095's version of events.

23. It is undisputed that Zesty paid 095 \$552 by cheque dated May 14, 2020, which included a note "Jan, Feb, March 2020". SA says he crossed out the note in front of SI, which SI denies. In any event, I find the note does not prove the cheque was intended as full satisfaction of Zesty's outstanding balance, as Zesty argues. At most, it shows the cheque was intended to be put toward the outstanding balance for those months.
24. Zesty says SA wrote down the terms of the May 14, 2020 agreement and submitted a handwritten note showing calculations and "Received \$552 for Jan. Feb. Mar. 2010. Pay for All. No charge for Apr. May. If reopen after Jun 2010 will be \$226 until end of year.". The note dated May 5, 2014 and signed by YF, rather than SA. There is no indication that anyone named YF was at the meeting. SI says he did not see the note until after he gave SA the cheque and so did not notice the different name and incorrect dates until later. SI cannot explain this but insists this is the note SA wrote at the May 14, 2020 meeting. SA denies this and says the note is from a different contract with a different client. Given the unexplained name and dates on the face of the note, I give it no weight.
25. On balance, I find the evidence favours SA's version of events on May 14, 2020 rather than SI's. I also find it unlikely that 095 would agree not to charge Zesty fees in the spring of 2020 when contractually Zesty was bound to continue paying 095 and to continue receiving waste collection, whether the restaurant was operating or not. I find it more likely that 095 would charge reduced fees in order to keep its customer happy but continue to earn some income.
26. On June 5, 2020 Zesty asked 095 to pick up its waste again, at which point 095 asked Zesty to pay its outstanding balance, which Zesty denied existed. On June 8, 2020 Zesty texted 095 that it had entered into a waste disposal contract with another company and asked 095 to remove its bins. Again, I find the text did not meet the contract's requirements for proper cancellation notice.
27. It is undisputed that 095 picked up Zesty's garbage and cardboard on June 17, 2020, despite Zesty's non-payment. Based on 095's July 6, 2020 email, I find it saw another

company's bins at Zesty's restaurant. Given Zesty's earlier text, I find it breached its contract with 095 by entering into an agreement with another disposal company without first giving 095 the opportunity to negotiate against the other company's offer, as required under the parties' agreement. I find this was a fundamental breach of the contract because it deprived 095 of substantially the whole benefit of the contract. When a party commits a fundamental breach, the wronged party is entitled to terminate the contract immediately (see *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA)). I find 095 did this by charging Zesty liquidated damages on July 4, 2020 and removing its bins on July 11, 2020.

Remedy

28. Based on 095's August 7, 2020 statement, I find 095 charged Zesty \$288 per month for January, February and March 2020. I find 095 charged Zesty a further \$144.01 per month for April, May, and June 2020 which I above found SA and SI agreed to on May 14, 2020. This totals \$1,296.03. After deducting the \$552 Zesty paid on May 14, 2020 and the \$250 it undisputedly paid on July 11, 2020, I find Zesty still owes 095 \$494.03 for outstanding service fees. I find 095 is not entitled to the \$37.53 in finance charges it billed Zesty as it is essentially interest charges, which I separately award 095 below.
29. 095 claims \$330.75 for bin removal fees. I find 095 is entitled to charge this amount as the agreement provides for a \$150 removal fee for each of the 2 bins, plus a 6% fuel surcharge, plus taxes, which I find totals \$330.75. Zesty says that SA agreed to accept \$250 as full payment for the bin removal fee in person on July 11, 2020. In 095's reply submissions, SA denies this and says he accepted \$250 as partial payment because SI said he could not afford to pay the full amount at the time. Given the contrary statements and lack of supporting evidence, I find it more likely than not that SA did not agree to take \$250 as full payment for the bin removal fee, given the higher amount 095 was entitled to under the agreement. I find Zesty must pay \$330.75 for bin removal fees.

30. 095 also claims \$1,382.85 in liquidated damages, which is equivalent to 5 months' worth of service fees at \$263.40 per month and is less than the 6 months left on the term it is entitled to under the contract. Contrary to Zesty's argument, I find the claim for \$263.40 per month is an accurate assessment of the parties' agreement, given 095's fees had increased to \$288 per month by January 1, 2020. After deducting the 6% fuel surcharge and GST, that equals \$263.40 per month.
31. Zesty says this is actually a penalty, and so is not enforceable.
32. Liquidated damages must be a genuine pre-estimate of the damages suffered by the party in the event of a breach of contract. In the binding decision *Tristar Cap Garment Ltd., v. Super Save Disposal Inc.*, 2014 BCSC 690, the court found that the income stream loss over the remaining term of the contract amounts to a genuine pre-estimate of damages and is not a penalty. As 095's liquidated damages claim is based on less than the remaining term of the parties' agreement, I find it is not a penalty, but a genuine pre-estimate of damages for breach of contract. So, I order Zesty to pay \$1,382.85 in liquidated damages.
33. 095 claims 5% contractual interest on its unpaid invoices. The agreement says Zesty must pay 2% monthly interest on any amounts overdue more than 30 days. The agreement does not set out an annual interest rate. Section 4 of the federal *Interest Act* only allows a maximum annual interest rate of 5% where a contract expresses interest rates other than annually and does not provide an annual equivalent, as is the case here. So, I find 095 is entitled to 5% annual interest as claimed. Applying this rate to the total amount of \$2,207.63 for unpaid invoices, bin removal fees, and liquidated damages, I find 095 is entitled to \$166.03 in interest from July 11, 2020 to the date of this decision.
34. 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. As 095 was successful in its claim, it is entitled to reimbursement of \$150 in CRT fees. It claimed no dispute-related expenses. As Zesty was unsuccessful, I find it is not entitled to reimbursement of its paid CRT fees.

ORDERS

35. Within 30 days of the date of this order, I order Zesty to pay 095 a total of \$2,523.66, broken down as follows:
- a. \$494.03 in debt for outstanding service fees,
 - b. \$330.75 in debt for bin removal fees,
 - c. \$1,382.85 in liquidated damages,
 - d. \$166.03 in contractual pre-judgment interest at 5% per year, and
 - e. \$150 in CRT fees.
36. 095 is entitled to post-judgment interest under the *Court Order Interest Act*, 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.
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.

Sherelle Goodwin, Tribunal Member