



Civil Resolution Tribunal

Date Issued: January 26, 2022

File: SC-2021-005449

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kloss v. Boketto Photography*, 2022 BCCRT 99

B E T W E E N :

KAITLIN KLOSS

APPLICANT

A N D :

BOKETTO PHOTOGRAPHY and LINDSAY WICKENHEISER

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This dispute is about a cancelled wedding photography contract.
2. The applicant, Kaitlin Kloss, hired the respondent, Boketto Photography (Boketto), to photograph her wedding scheduled for August 27, 2021. The respondent, Lindsay

Wickenheiser, is one of Boketto's partners. Ms. Kloss says she had to cancel the wedding due to the COVID-19 pandemic and seeks a refund of her \$2,000 deposit.

3. The respondents say Ms. Kloss paid a \$2,000 non-refundable booking fee to secure the date. They say that when Ms. Kloss cancelled the contract she forfeited the \$2,000 fee and agreed not to pursue any forms of legal action against them.
4. Ms. Kloss is self-represented. Ms. Wickenheiser represents Boketto and herself in this proceeding.
5. For the reasons that follow, I dismiss Ms. Kloss's claim.

JURISDICTION AND PROCEDURE

6. 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.
7. 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.
8. 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.

9. 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.

ISSUE

10. The issue in this dispute is whether Ms. Koss is entitled to a \$2,000 refund.

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, as the applicant Ms. Kloss must prove her claims on a balance of probabilities (which means “more likely than not”). 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.
12. Ms. Kloss, who ordinarily resides in Australia, planned a wedding in Canada for August 27, 2021. In January 2020, Ms. Kloss hired Boketto to photograph her planned wedding for \$4,000 and paid \$2,000 as a retainer or deposit. After booking Boketto, the Australian government shut down the international borders because of the COVID-19 pandemic and advised people that international travel would not resume until 2023. These facts are not disputed.
13. As set out in the parties’ emails, Ms. Kloss emailed Boketto about postponing the wedding and they offered her 1 “complimentary date change”. Ms. Kloss says her other wedding vendors only allowed her to move the date within 12 months. As there was no guarantee that the wedding would proceed within 12 months, Ms. Kloss says she decided to cancel their Canada wedding and she held her wedding in Australia during “lockdown” instead.
14. Ms. Kloss says all the vendors but Boketto refunded her in full when she cancelled their contracts. She argues that Boketto should have refunded the retainer because COVID-19 was a “*force majeure*” and it should have allowed her to cancel with no penalty. A *force majeure* means an unforeseeable situation that prevents a party from

fulfilling a contract. Ms. Kloss says it was unprofessional or unfair for Boketto not to refund her in the circumstances of the pandemic. I address below the party's contract and whether it had a force majeure clause.

15. Ms. Wickenheiser says there is no basis for a refund. She says Ms. Kloss paid a \$2,000 "booking fee" to secure the August 27, 2021 date and agreed that the fee would not be refundable. She also says they were understanding of the pandemic situation by offering to reschedule the date at any time and for free. Also, Ms. Wickenheiser says the parties signed a second contract where Ms. Kloss agreed she was forfeiting the \$2,000 and that she would not pursue any forms of legal action for the cancelled contract.
16. Ms. Wickenheiser submitted a copy of the second "cancellation contract", electronically signed on January 25, 2021. The cancellation contract states that Ms. Kloss understands the "nonrefundable retainer fee" of \$2,000 will not be refunded "pursuant to the original contract Retainer and Payment section". It also states that the parties mutually agreed to cancel and terminate the photography contract "without further recourse of legal obligation by either party". As for this latter clause, I find I do not need to decide if it was enforceable because even in its absence I find Ms. Kloss is not entitled to a refund. My reasons follow.
17. Neither party submitted a copy of their original written contract signed in January 2020. So, I do not know its exact terms. However, I find it likely did not include a *force majeure* clause because neither party says that it did. I also find the original contract stated the \$2,000 was a non-refundable retainer fee to book the date because Ms. Kloss acknowledged this in the signed cancellation contract.
18. In the absence of a *force majeure* clause, the common law doctrine of frustration may apply to relieve parties from their contractual obligations. A contract is frustrated when an unforeseeable event occurs and makes performance of the contract something radically different from what the parties originally agreed: see *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at paragraph 53. The event must make it truly pointless to continue to perform the terms of the contract, not just inconvenient,

undesirable, or because there is increased hardship or expense for one or both parties: *Wilkie v. Jeong*, 2017 BCSC 2131.

19. As I discuss next, I find Ms. Kloss has not established that the original contract was frustrated and so the non-refundable term applied to the fee.
20. I accept Ms. Kloss was uncertain about how long the pandemic related travel restrictions would be in place and I understand Ms. Kloss wanted to get married at a time of her own choosing. However, there is no evidence that the wedding was urgent or had to occur on any particular date. Boketto agreed to reschedule the wedding for free and it is undisputed that Boketto would have allowed Ms. Kloss to reschedule more than once if she paid a rescheduling fee. Rather than rescheduling to a later date, Ms. Kloss chose to cancel the wedding and get married in Australia. I find this was her choice. I find it was open to Ms. Kloss to postpone the wedding until the travel restrictions eased or were lifted. On the evidence before me, I am not satisfied that the pandemic made Ms. Kloss's contract with Boketto pointless or impossible to perform in the future. I find Ms. Kloss has not proven that the original contract was frustrated. So, I find the contract's non-refundable term applies to the \$2,000 fee and Ms. Kloss is not entitled to a refund.
21. In the alternative, Ms. Kloss argues that Boketto was allegedly able to secure paid work on the wedding day and Boketto should therefore issue the refund. Ms. Wickenheiser disagrees and says Boketto was never able to secure paid replacement work on the cancelled wedding date. I find the evidence shows Boketto did a free photoshoot on August 27, 2021. In any event, I find nothing turns on Boketto's ability to have booked paid work with another client. There is no evidence to conclude the parties agreed Ms. Kloss would be entitled to a refund even if Boketto booked replacement paid work for the cancelled date.
22. One of the primary benefits of the parties' contract was to reserve the wedding date in Boketto's calendar. I find Ms. Kloss paid the fee and received that benefit. She also agreed to the non-refundable term. So, I find Ms. Kloss forfeited the fee when she cancelled the contract and Boketto was entitled to keep the \$2,000 fee. For these

reasons, I dismiss Ms. Kloss's refund claim. Given my conclusion, I find no need to discuss Ms. Wickenheiser's personal liability.

23. 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. The respondents were successful but paid no CRT fees and claimed no dispute-related expenses. So, I make no order.

ORDER

24. I dismiss Ms. Kloss's claim and this dispute.

Trisha Apland, Tribunal Member