



Civil Resolution Tribunal

Date Issued: January 28, 2022

File: SC-2021-006773

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Santos v. Simoes*, 2022 BCCRT 108

BETWEEN:

NERY SANTOS

APPLICANT

AND:

MARIO SIMOES

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. The respondent, Mario Simoes, hired the applicant, Nery Santos, to supply and install paving stones in his backyard. Mr. Santos says that Mr. Simoes has failed to pay the outstanding balance of his invoice. Mr. Santos claims \$1,681.25.

2. Mr. Simoes says that Mr. Santos' work was substandard. He also says Mr. Santos failed to complete the job, so he refused to pay the \$1,681.25 outstanding balance. Mr. Simoes says he owes Mr. Santos nothing.
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). 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. 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.
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.
8. In his submissions, Mr. Santos says that Mr. Simoes should be fined \$10,000 plus jail time for allegedly providing a false witness statement in this dispute. I infer that

Mr. Santos is referring to section 92 of the CRTA, which says a person who provides false or misleading evidence in a CRT proceeding commits an offence and is liable on conviction to a fine of \$10,000 or up to 6 months imprisonment. However, I find I do not have the authority to decide whether someone has committed an offence under section 92 of the CRTA. Rather, I find under the *Provincial Court Act*, a judge of the BC Provincial Court has jurisdiction over offences under section 92 of the CRTA because conviction carries the possibility of imprisonment. In any event, I find that this issue was not raised in the Dispute Notice, so it is not properly before me. For these reasons, I decline to address this requested remedy in my reasons below.

ISSUES

9. The issues in this dispute are:
 - a. Was Mr. Santos' work deficient?
 - b. To what extent, if any, does Mr. Simoes owe Mr. Santos for his \$1,681.25 outstanding invoice?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, Mr. Santos as the applicant must prove his claims on a balance of probabilities (meaning "more likely than not"). I have read all the parties' evidence and submissions, but I refer only to what I find is necessary to explain my decision.
11. Mr. Simoes lives in a strata corporation, and his backyard is limited common property. This means that Mr. Simoes needs the strata's permission before making any alterations to the backyard. The evidence shows Mr. Simoes applied to his strata council to remove the existing grass in the backyard and replace it with paving stones. As part of Mr. Simoes' application, Mr. Santos emailed the strata council a drawing and explanation of his plans, including that the paving stones would be placed on top

of compacted sand and sloped towards the hedge and not the house. The strata council approved Mr. Simoe's backyard renovations on about March 31, 2021.

12. It is undisputed that the parties signed an April 2, 2021 agreement for Mr. Santos to install the paving stones in Mr. Simoes' backyard, for a lump sum of \$3,125 plus GST. The strata is not a party to the agreement. The agreement provided that Mr. Santos would remove and dump the existing grass, lay sand with a slope towards the hedge, compact the sand as required, place paving stones as required, compact the stones to ensure they are properly placed, and put "special" sand between the stones as required. Other terms in the agreement about the quality and colour of the stones used are not relevant to this dispute.
13. The parties' agreement also stated that the payment terms were "50% advance and 50% on completion of job". The time for completion was stated as 2-3 days, with work time between 9 am and 6 pm. At the bottom of the typed portion of the agreement was a handwritten statement that said "2 year warranty for installation", with Mr. Santos' signature beside it. A further handwritten statement confirmed Mr. Santos received a \$1,600 cheque from Mr. Simoes on April 2, 2021, and the balance payable on the project's completion was \$1,681.
14. I note that the project's agreed cost of \$3,125 plus GST, equals \$3,281.25. So, after accounting for the \$1,600 Mr. Simoes paid on April 2, 2021, I find he owed the claimed \$1,681.25 on completion of the project, under the parties' contract.
15. Mr. Santos prepared for this dispute a timeline of his work on the project. He says the paving stones and sand were delivered on April 2, 2021, and from April 3 to mid-May he excavated the grass and top-soil and laid the sand. Mr. Santos says he then rented a compacting machine on May 25, 2021 to compact and level the sand before he installed the paving stones between May 27 and mid-June 2021.
16. Mr. Santos did not explain why the project took him approximately 10 weeks to complete when the contract provided it would take only 2 to 3 days, other than to say Mr. Simoes verbally told him that he was not in a hurry to complete the job. However,

Mr. Simoes complains that Mr. Santos showed up at random hours to do a bit of work “here and there” over several months, contrary to the contract. On balance, I find it is unlikely that Mr. Simoes agreed to extend the contract’s completion to mid-June.

17. In any event, the delay is not Mr. Simoes’ primary complaint. Rather, Mr. Simoes says he should not have to pay Mr. Santos the outstanding balance because Mr. Santos’ work was not completed to a reasonable standard, and the work had to be redone. Given that Mr. Simoes did not file a counterclaim, I find that he is claiming a set-off of the remaining amount owing under the contract for the delay and alleged deficiencies in Mr. Santos’ work.
18. When a customer alleges that a contractor’s work was below a reasonably competent standard, they bear the burden of proving the deficiencies (see *Absolute Industries Ltd. v. Harris*, 2014 BCSC 287 at paragraph 61). Generally, an allegation that a professional’s work was below a reasonable standard requires expert evidence to prove. The 2 exceptions to this rule are when the deficiency is not technical in nature or where the work is obviously substandard (*Schellenberg v. Wawanesa Mutual Insurance Company*, 2019 BCSC 196 at paragraph 112).
19. Based on the photographs in evidence, I find Mr. Santos’ paving stone installation was obviously substandard, so expert evidence is not required. I find the paving stones were not level, nor were they properly aligned. There were gaps between many stones, with some edges lifted, which I find posed an obvious tripping hazard. I also find the photos show the stones were not evenly sloped toward the hedges, as the contract required. Rather, the surface appeared to be wavy, with dips and hills.
20. Mr. Santos says when he was excavating the grass and soil, he discovered “huge” roots from a nearby tree that were not visible until he removed the grass. Mr. Santos says Mr. Simoes instructed him not to remove the large roots because he did not have the strata’s approval to do so. Mr. Santos says he went ahead and completed the paving stone installation on Mr. Simoes’ instructions, despite knowing the surface would not be level due to the roots.

21. Mr. Simoes does not specifically deny that Mr. Santos advised him that he found roots under the grass. However, he argues that Mr. Santos could not have compacted and levelled the sand as he claims, given the presence of the roots. He also says that Mr. Santos should have stopped work if he knew the stones would not be level. So, based on the context of his submissions, I find Mr. Simoes denies that Mr. Santos advised him that the presence of the roots would make it impossible to place the stones on a level, even surface.
22. On balance, I find it is very unlikely that Mr. Simoes instructed Mr. Santos to complete the project in such an obviously substandard manner. So, I accept that Mr. Santos failed to advise Mr. Simoes that the roots would result in the paving stones being misaligned and unevenly installed. Given the parties' contract required Mr. Santos to lay sand with a slope towards the hedge, and to compact the stones to ensure they were "properly placed", I find Mr. Santos should have stopped work and fully advised Mr. Simoes of the situation, so a solution could be found. I find that by proceeding to install the stones on an unlevel surface, Mr. Santos' work breached the parties' contract, and the result was substandard.
23. While Mr. Santos argues that he had properly completed the work as required under the contract, he also says he made adjustments to the paving stones between July 29 and August 3, 2021, to address concerns the strata and Mr. Simoes raised about the ground not being levelled and the stones being uneven. The evidence shows Mr. Santos emailed Mr. Simoes on August 3 that the job was complete, and he demanded payment of the outstanding balance under their contract. Mr. Simoes responded that once the strata approved the work, he would pay the amount owing.
24. I find the photographs Mr. Santos provided of his "adjustments" show the paving stone surface remained wavy, uneven, and misaligned. Overall, I find there was no substantial difference after the adjustments, and Mr. Santos' paving stone installation remained substandard as of August 4, 2021.
25. The evidence shows that the strata arranged for an arborist to inspect the roots on August 13, 2021, and the arborist confirmed the roots could be removed from Mr.

Simoes' backyard. While there is some evidence that Mr. Santos agreed to reinstall the stones "as a favour" after properly levelling the yard, Mr. Simoes says that after August 13, 2021, Mr. Santos' work stalled.

26. Mr. Simoes says he eventually decided to complete the work himself. I accept Mr. Simoes' undisputed evidence that he and a friend spent 7 hours per day for 8 days, removing the stones, removing the roots, levelling the ground, and reinstalling the stones. Mr. Simoes also provided a statement from his strata council president, MV, who confirmed that Mr. Simoes completed the backyard renovations himself, which the strata ultimately approved.
27. Mr. Santos does not dispute that he did no further work on the project after the arborist confirmed the roots could be removed to level the backyard. It is Mr. Santos' position that he had completed the job under the contract as of August 4, 2021, and he should be paid even though the work had to be redone. Generally, a contractor is entitled to be paid if he substantially completes the work under the contract. However, Mr. Santos' right to be paid is subject to Mr. Simoes' entitlement to a set-off for proven deficiencies. As noted, I find Mr. Santos' work fell below the standard of a reasonably competent contractor.
28. So, what is an appropriate set-off for Mr. Santos' deficient work? The usual remedy for deficiencies is damages, measured by the cost to fix the deficient work. Here, I find Mr. Simoes did the work himself, with a friend, and he submitted no evidence of any further expenses. Nevertheless, I find Mr. Simoes' and his friend's time and effort are worth something.
29. Given Mr. Simoes did not provide any evidence about how much his time was worth, on a judgment basis, I find that applying BC's \$15.20 per hour minimum wage is appropriate. For 2 people working 7 hours per day for 8 days, this equals \$1,702.40, which is more than Mr. Santos' claimed \$1,681.25 outstanding balance. In the absence of a counterclaim, any set-off I award is limited to the value of Mr. Santos' claim. Under the circumstances, I find that \$1,681.25 is a reasonable set-off.

30. Therefore, I find Mr. Simoes owes Mr. Santos nothing. I dismiss Mr. Santos' claim.

31. 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. Mr. Santos was unsuccessful and so I dismiss his claim for CRT fees. As the successful party, Mr. Simoes did not pay any CRT fees or claim any dispute-related expenses, so I make no order.

ORDER

32. I dismiss Mr. Santos' claim and this dispute.

Kristin Gardner, Tribunal Member