Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Turko v. High Mountain Ventures Ltd.*, 2022 BCCRT 224

B E T W E E N :

PENNY TURKO and ANDREW TURKO

APPLICANTS

A N D :

HIGH MOUNTAIN VENTURES LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Chad McCarthy

INTRODUCTION

1. This dispute is about landscaping. The applicants, Penny Turko and Andrew Turko, hired the respondent, High Mountain Ventures Ltd. (HMV), to provide and plant 50 cedar trees on their property. The Turkos say the trees died because they were defective and improperly planted. HMV offered to provide smaller replacement cedar trees or a $300 refund, but did not agree to remove the dead trees, plant the new

trees, or provide a further refund for using smaller trees than originally agreed. The Turkos seek a full refund of the $3,600 they paid for the trees and planting.

2. HMV says it provided the size of trees the Turkos requested, and that they died from multiple causes. HMV says its offer to deliver replacement trees or provide a partial refund was adequate, but since the Turkos refused the offer, HMV owes nothing.

3. The Turkos are represented by Penny Turko in this dispute. HMV is represented by its owner, Charles Joyal.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT), which 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.

ISSUE

8. The issue in this dispute is whether HMV's work met an acceptable quality standard, and if not, does it owe the Turkos a $3,600 refund?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, as the applicants the Turkos must prove their claim on a balance of probabilities, meaning "more likely than not". I have read all the parties' submissions but refer only to the evidence and arguments that I find relevant to provide context for my decision.

10. The Turkos undisputedly paid $3,600 in cash for the landscaping work, and there was no receipt or formal written agreement. HMV is undisputedly in the landscaping business. However, HMV's representative, Mr. Joyal, says that to give the Turkos the best deal, he provided their landscaping work in his personal capacity using equipment he borrowed from his company, HMV, which he says is not a proper party to the dispute. The Turkos deny this. I find there is no evidence showing that Mr. Joyal told the Turkos he would personally provide the services rather than HMV, or that he borrowed equipment from HMV. Further, Mr. Joyal does not deny that 3 HMV employees performed most of the work for the Turkos, and he does not say whether he paid them out of his own pocket. On balance, I find the evidence shows the Turkos had an agreement with HMV, not Mr. Joyal, and that HMV performed the work.

11. Verbally and through text messages, the parties agreed that HMV would obtain and plant 50 8-foot-tall cedar trees on the Turkos' property. HMV undisputedly planted 50 such trees on May 19, 2021. HMV does not dispute that the Turkos watered the trees regularly and thoroughly after they were planted, as HMV instructed.

12. The Turkos say that the trees were unstable and prone to falling over, so they had to tie up 22 of them in the first week after planting. They also say that despite their watering efforts, within days the trees began to dry out and appeared to be dying. They first contacted HMV about the struggling trees on May 25, 2021, and HMV said to water them more, which the Turkos undisputedly did.

13. The trees continued to decline. The parties together hired a horticulturalist, Gregory Houghton, who personally inspected the trees on June 22, 2021. He said most of the trees showed signs of stress and needle browning, and several were dead. The Turkos say the trees all died and they removed them on June 30, 2021 with HMV's agreement. HMV says the Turkos should have waited longer to see if any of the trees could have survived but agrees that at least 80% of the trees had died by June 22, 2021. Given submitted photos of dry brown trees, and emails from garden nurseries saying that the trees shown in photos were unlikely to survive, I find that the trees were all dead or irretrievably sick by June 30, 2021. So, I find none of the trees were likely to recover, and their removal was reasonable.

14. The Turkos say that HMV was negligent because it provided trees with root balls that were too small and could not survive transplanting, and it planted them too deeply and not in containers or bags, so they could not absorb enough water. HMV says that the trees died from other causes, including heat, cold, and being too tall to survive.

15. I find that the Turkos' allegations are, essentially, that HMV failed to provide materials and services that were of reasonable quality. Although I find HMV gave no express warranties about the quality of its work, I find it was an implied term of the parties' agreement that the services and materials would be of reasonable quality (see *Lund v. Appleford Building Company Ltd. et al.*, 2017 BCPC 91 at paragraph 124). As the applicants alleging deficient work, the Turkos bear the burden of proving that HMV failed to perform the work in a reasonably professional manner.

16. HMV does not dispute that the trees' root balls were smaller than normally expected, and does not address whether it planted the trees too deep or should have used containers. It also does not directly dispute Mr. Houghton's findings, discussed below.

17. The Turkos submitted Mr. Houghton's written report of his June 22, 2021 tree inspection. Based on his stated qualifications, I find Mr. Houghton is a qualified or certified horticulturist, arborist, and tree risk assessor, with significant related work experience. I accept his report under the CRT's rules as expert evidence of landscaping industry standards for trees and their planting.

18. Mr. Houghton said that the planting holes were large enough, and the soil had good moisture and composition. He dug up the root balls of several dead cedars and observed that they were smaller than expected, referring to highlighted portions of the Canadian Nursery Stock Standard attached to his report. I find that according to that standard, root balls of trees grown in fabric bags must be at least 50 centimeters (19.5 inches) in diameter for trees approximately 8 feet tall. It is not clear whether the HMV trees were grown in fabric bags, but the minimum root ball size for unbagged trees is much larger (31.5 inches). I find submitted photos show that the planted trees' root balls were only about 8 to 10 inches in diameter. Mr. Houghton said that several trees were staked to hold them in place, and should not have needed staking if their root balls were large enough to support them. He further noted that it was not recommended to plant cedars bare root, with no pot or container, as these trees undisputedly were.

19. Mr. Houghton also said that the trees were planted too deep, between 6 and 8 inches deeper than standard recommended depth. I find photos show soil marks several inches up the trunks of uprooted trees, past small lower branches, indicating that those branches had been buried.

20. There is no other expert evidence before me, and I find Mr. Houghton's findings are uncontradicted. So, I find HMV provided trees with root balls far smaller than industry standards for nursery stock. I also find HMV planted the trees too deep and without recommended containers, also contrary to industry standards. Mr. Houghton's report did not explicitly state an opinion on the causes of the trees' difficulties and death. The Turkos say that Mr. Houghton verbally indicated that the root ball sizes and planting method caused the trees' problems, but there is no independent evidence

before me confirming that he said that. However, given that Mr. Houghton did not identify any other defects or conditions that adversely affected the trees, I find his report supports a finding that the deficient root ball size and deep planting without containers harmed the trees' health.

21. Further, the Turkos say that on June 23, 2021, they transplanted a similar 5-foot-tall cedar tree with a 20-to-22-inch root ball from a neighbouring property to the same location as the HMV cedar trees and to industry standards, which I infer means to an appropriate depth. I find that root ball diameter met the nursery stock industry standards included in Mr. Houghton's report. I find this cedar tree appeared to be healthy and green in an October 16, 2021 photo, and the Turkos say it was still healthy on December 13, 2021. I find this supports a finding that cedar trees with root balls and planting depths that met industry standards could survive on the Turkos' property at around the time HMV planted its trees.

22. HMV does not directly deny that the root ball size and planting method could have affected the trees' survival. However, HMV says the tree deaths and poor health had multiple causes. HMV says Mr. Houghton indicated that 8-foot-tall trees were too tall to survive in the Turkos' yard, which the Turkos deny. HMV does not explain why it agreed to obtain and plant allegedly too-tall trees without first warning the Turkos that they might not survive. Further, I find there is no evidence, including in Mr. Houghton's report, showing that 8-foot-tall trees could not survive there, so I give HMV's tree height argument limited weight.

23. HMV also says that the trees' difficulties were caused by cold temperatures while the trees were on HMV's truck the night before planting, and a June 2021 heat wave. Undisputed temperature records in evidence show that the overnight low on May 18, 2021 was 6°C. HMV submitted no documentary evidence in this dispute, including any showing that this temperature could have harmed the unplanted trees. Even if the trees had been harmed by cold, I find HMV was responsible for the trees' health while on its truck, and I find HMV accepted the risk that they would not survive by choosing to plant them anyway.

24. Turning to the heat wave, the temperature records show that most daily highs between May 19, 2021 and Mr. Houghton's June 22, 2021 inspection were less than 30°C, and never exceeded 36°C. I find there is no evidence showing that the trees could not withstand those temperatures, or higher temperatures. I also find the evidence shows that all the trees were already very unhealthy or dead before the daily high exceeded 40°C on June 26 through June 30, 2021. Further, I find that the 5-foot-tall tree the Turkos transplanted on June 23, 2021 survived the June 26 to June 30, 2021 heat wave. So, I find that high temperatures likely did not kill the HMV trees.

25. On the evidence before me, I find it more likely than not that HMV's use of trees with sub-standard root ball sizes, and planting them to an incorrect depth without recommended containers, caused the trees to die. I find this broke the implied term of reasonably quality in the parties' agreement. So, I find HMV is liable for damages resulting from its breach of the contract.

26. As noted, the Turkos claim a full $3,600 refund. HMV offered to provide 50 shorter replacement cedar trees or a $300 refund. I find HMV's offer would not have provided full compensation to the Turkos, who paid HMV for planted 8-foot-tall trees. Further, the Turkos submitted pricing information that shows 50 replacement trees, even shorter ones, would likely cost much more than $300, before removal and replanting costs. So, I find the Turkos reasonably refused HMV's offer, and did not fail to mitigate their losses by rejecting it. I allow the Turkos' claim for a full $3,600 refund.

CRT Fees, Expenses, and Interest

27. The *Court Order Interest Act* applies to the CRT. I find the Turkos are entitled to pre-judgment interest on the $3,600 owing, reasonably calculated from the date they paid HMV on or around May 20, 2021, until the date of this decision. This equals $12.74.

28. Under section 49 of the CRTA, and the 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. The Turkos were successful in this dispute, so I find they are entitled to reimbursement of the $175 they paid in CRT fees.

29. Mr. Houghton's June 22, 2021 tree inspection did not include a written report. After initiating this CRT dispute, the Turkos paid Mr. Houghton $100 for a written report to use as expert evidence, as shown on submitted receipts. I find that amount is reasonable, so the Turkos are entitled to reimbursement of $100 as a CRT dispute-related expense. The Turkos also claim $11.36 for a registered mail expense. I deny this registered mail expense claim because it was for sending a demand letter before applying for CRT dispute resolution, which is not a CRT dispute-related expense.

ORDERS

30. Within 30 days of the date of this decision, I order HMV to pay the Turkos a total of $3,887.74, broken down as follows:

    a. $3,600 in damages for breach of contract,

    b. $12.74 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175 in CRT fees and $100 in dispute-related expenses.

31. 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.

32. 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.

Chad McCarthy, Tribunal Member