Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Zargar (dba Kylix Production) v. City of Vancouver*, 2022 BCCRT 399

B E T W E E N :

EHSAN HAJI MAHDIZADEH ZARGAR (Doing Business As KYLIX PRODUCTION)

APPLICANT

A N D :

CITY OF VANCOUVER

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This is a final decision of the Civil Resolution Tribunal (CRT), but it is not a decision on the merits of the applicant's claim.

2. As background, this dispute is about alleged copyright infringement. The applicant, Ehsan Haji Mahdizadeh Zargar (Doing Business As Kylix Production), says the

respondent, City of Vancouver (City), used 2 of his photographs in marketing materials for 2 years, without his permission and without paying a licensing fee for their use. Mr. Zargar claims $3,360 for 2 years of the images' licensing.

3. The City says its use of Mr. Zargar's photographs during the relevant period was "minimal and inadvertent", and that Mr. Zargar's claimed license fee is unreasonable. However, the City also says the parties reached a binding settlement during the facilitation phase of this CRT dispute process.

4. Mr. Zargar is self-represented. The City is represented by its in-house lawyer, Andrew Aguilar.

5. For the reasons that follow, I find the parties settled this dispute during facilitation and I have made an order below on the terms of the settlement.

JURISDICTION AND PROCEDURE

6. These are the CRT's formal written reasons. 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. Under section 10 of the CRTA, the CRT must refuse to resolve a claim that it considers to be outside the CRT's jurisdiction. A dispute that involves some issues

that are outside the CRT's jurisdiction may be amended to remove those issues. This dispute involves alleged copyright infringement, which is governed by the federal *Copyright Act*. I have reservations about whether the CRT has jurisdiction to hear disputes brought under the *Copyright Act*. However, given my findings below, I decided it was unnecessary to request the parties' submissions on the CRT's jurisdiction, and I have not considered this issue below.

9. 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.

10. 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

11. The issue is whether the parties reached a binding settlement, and if so, what is the appropriate order?

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, generally it is the applicant (here, Mr. Zargar) who must prove their claims on a balance of probabilities, meaning "more likely than not". However, the party asserting that a settlement has been reached (here, the City), bears the burden to prove the settlement on the balance of probabilities. I have read all the parties' evidence and submissions, but I refer only to what I find is necessary to explain my decision.

13. As noted, in its submissions, the City argues that the parties reached a binding settlement agreement about the issues in this dispute during the CRT's facilitation phase. The City requested that evidence of the parties' communications be admitted

as evidence to prove the settlement occurred. Mr. Zargar denies the parties reached a settlement, and he opposed disclosure of the parties' communications.

14. CRT rule 1.11 says that communications made attempting to settle claims by agreement in the CRT process are confidential and must not be disclosed during the tribunal decision process, except under certain circumstances, including if the parties agree they can be disclosed, the tribunal requires the parties to disclose them, or they would ordinarily be disclosed or produced in a tribunal decision process.

15. I find that CRT rule 1.11 is essentially a codification of the common law principles of settlement privilege, which protects documents and communications created for the purpose of settlement from production to other parties and to strangers.

16. The City argues that the circumstances here fall under a well-established exception to settlement privilege that otherwise privileged communications will cease to be privileged if disclosing them is necessary to prove the existence or scope of a settlement. See *Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35. I agree with the City. That is, given the allegation that the parties reached a settlement, I find the parties' communications about settlement are producible in these proceedings to prove the existence of the alleged settlement.

17. I acknowledge that for obvious timing reasons, the City did not raise the settlement allegation in its Dispute Response, and it did not file an amended Dispute Response to include this defence to Mr. Zargar's claim. Normally, I would not consider issues that were not raised at the outset of the dispute due to considerations of fairness to the parties. However, I decided it would be unreasonable to decide this claim on its merits if the parties had already settled the issues.

18. So, I asked the parties to provide copies of their communications during the facilitation phase and to provide their submissions on whether a binding settlement was reached. For the reasons that follow, I find the parties reached a binding settlement.

19. Creating a settlement agreement is no different than creating any other contract. There must be an offer and acceptance of that offer. In the context of a settlement

agreement, there must be evidence that the parties agreed to the essential terms of a settlement, at which point, the settlement agreement is binding. There is no need for a formal signed agreement to make the contract binding. See *Fieguth v. Acklands Ltd.*, 1989 CanLII 2744 (BC CA) at paragraphs 35 and 36, and *Salminen v. Garvie*, 2011 BCSC 339 at paragraphs 24 to 27.

20. The email evidence shows that following an August 31, 2021 CRT facilitated telephone conference (teleconference), the assigned case manager sent the parties an email confirming that they had reached a settlement and setting out the proposed terms to be included in a Consent Resolution Order (CRO). The CRO's proposed terms included: (1) the City would pay Mr. Zargar $2,500, (2) by cheque, and (3) by placing the cheque in a mailbox no later than September 30, 2021. Mr. Zargar responded to that email, confirming that he agreed to the CRO's proposed wording.

21. The City responded in a September 1, 2021 email that the order may require some changes to ensure the City could comply with the payment timeline and to accommodate Mr. Zargar's previous request to pick up the settlement funds rather than mailing the cheque. The City proposed payment by October 30, 2021, but indicated it would try to have payment ready well before that date, if possible.

22. Mr. Zargar responded that he was content to either have the cheque mailed to him or to pick it up, but he did not agree to any additional time to pay the settlement, beyond the 30 days they had agreed upon. On September 9, 2021, the City confirmed it was agreeable to payment by September 30, 2021. Neither party provided Mr. Zargar's response to this email, if any. The City then sent a September 20, 2021 email advising the settlement cheque was ready to be picked up, but it required Mr. Zargar to confirm his consent to the CRO's terms before releasing the cheque. Again, no further correspondence from Mr. Zargar is before me. I infer he did not confirm his consent to the CRO and instead decided to proceed with the tribunal decision process.

23. I am satisfied on the evidence before me that the parties agreed to settle Mr. Zargar's claims in this dispute for $2,500. In fact, Mr. Zargar does not dispute that point. However, he says that payment of the funds within 30 days was an essential term of

their settlement agreement, and that the City's September 1 email requesting payment in 60 days was a counter-offer, which rendered his offer to settle "null and void". He says he did not accept the City's counter-offer, so there was no binding settlement.

24. I do not agree with Mr. Zargar's position. I accept the City's evidence that the parties discussed a 30-day payment timeline during the August 31 teleconference and that the City raised the issue of its potential inability to issue a cheque within 30 days. So, I find that the parties may not have come to a meeting of the minds about the payment timeline during the August 31 teleconference. However, I find the parties continued to negotiate and eventually came to an agreement on all the essential terms, including timing of the payment.

25. I accept that the draft CRO represented Mr. Zargar's offer to the City, and the City's September 1 email proposing 60 days to pay constituted a counter-offer. However, I find that Mr. Zargar's September 1 email about the method of payment delivery and rejecting any additional time to pay, was a further counter-offer to the City. There is no evidence before me that Mr. Zargar withdrew this counter-offer or indicated he no longer agreed to any of the already agreed terms. I find the City accepted Mr. Zargar's counter-offer, as it ultimately agreed to the 30-day payment term in its September 9 email. I find this created a binding settlement agreement.

26. Contrary to Mr. Zargar's submissions, I find a signed CRO was not required to make the parties' settlement agreement binding. I note it is the CRT's practice when parties reach a settlement during facilitation, to offer the option of confirming the settlement in an email or formalizing it in a CRO. Here, the evidence shows Mr. Zargar requested a CRO. However, signing and issuing the CRO is not what creates the binding contract. Oral settlement agreements and settlements confirmed informally by email are just as binding. I also find it was not the case manager's role to enforce the parties' settlement agreement, and she properly referred this dispute to the adjudication phase for a decision when Mr. Zargar declined to complete the CRO.

27. Under the circumstances, I find it is appropriate to make an order on the terms of the parties' settlement agreement. Given the City has advised it agrees to a 30-day payment term, I order the City to pay Mr. Zargar $2,500 within 30 days of this decision.

28. Generally, the *Court Order Interest Act* applies to the CRT. However, my order is simply a reflection of the parties' existing settlement agreement, so I decline to award pre-judgement interest in addition to what the parties agreed to.

29. 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. I find that the City was the successful party, as it proved the parties reached a binding settlement of the issues in this dispute. In any event, neither party paid any fees, so I make no order for reimbursement of CRT fees.

30. Mr. Zargar claimed $1,599.50 for dispute-related expenses, including $787.50 for an expert report and $812 for legal fees. He also submitted invoices for additional legal fees, which appear to be for assistance with his CRT submissions. I find all of Mr. Zargar's claimed expenses were incurred after the parties had reached their binding settlement agreement. On that basis alone, I find it would be unreasonable to hold the City responsible for the claimed expenses.

ORDERS

31. Within 30 days of the date of this decision, I order the City to pay Mr. Zargar a total of $2,500, according to the terms of their settlement agreement.

32. Mr. Zargar is entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

33. 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.

34. 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.

Kristin Gardner, Tribunal Member