



Civil Resolution Tribunal

Date Issued: May 3, 2022

File: SC-2021-006513

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mark v. McGill*, 2022 BCCRT 523

BETWEEN:

TERRY MCGILL

APPLICANT

AND:

MEI-LAN MARK

RESPONDENT

AND:

TERRY MCGILL

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about an unpaid August 2, 2020 invoice for painting and flooring work. The applicant and respondent by counterclaim, Mr. Terry McGill, claims \$5,000 for unpaid work. The respondent and applicant by counterclaim, Ms. Mei-Lan Mark, disagrees. Ms. Mark says Mr. McGill's work was deficient.
2. Ms. Mark counterclaims for \$5,000. In particular, she says she had to hire others to redo painting the walls and ceilings and to repair the vinyl plank flooring.
3. I note that both parties say they have suffered loss in excess of \$5,000, but reduced their claims to fit within the Civil Resolution Tribunal's (CRT's) small claims monetary limit.
4. The parties are self-represented.
5. For the reasons that follow, I find Ms. Mark has proven her counterclaims and dismiss Mr. McGill's claims.

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. Some of the evidence in this dispute amounts to a "he said, she said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom

or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. 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. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue

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.

Mr. McGill's Late Evidence

10. Mr. McGill provided late evidence labelled by CRT staff as "Late evidence from applicant". The files are too numerous to individually describe. They include videos, letters, and photos. Ms. Mark objected to the late evidence.
11. I find the late evidence relevant to this dispute. Ms. Mark had the opportunity to review it and comment on it. Consistent with the CRT's mandate that includes flexibility, I find there is no prejudice to Ms. Mark in allowing the late evidence. So, I allow the late evidence. However, as discussed below, my decision does not turn on the late evidence in any event.

ISSUES

12. The issues in this dispute are as follows:
 - a. Is Mr. McGill entitled to payment for work done?
 - b. Is Ms. Mark entitled to any compensation for repairs for deficient work?

BACKGROUND, EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, Mr. McGill and Ms. Mark must each prove their respective claims and counterclaims on a balance of probabilities. This means 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.
14. I begin with the background facts. The parties entered into a July 23, 2021 written agreement for house renovations. Ms. Mark agreed to pay Mr. McGill \$50 per person-hour. The parties agreed a crew of 3 labourers would do the work.
15. The contract outlined 4 weeks' worth of work. Week 1 consisted of removing fixtures. Week 2 consisted of preparing and painting the walls and installing vinyl plank flooring. Week 3 consisted of installing new fixtures. Week 4 consisted of finishing work. Mr. McGill estimated 120 person-hours for each of weeks 1 to 3, and 40 person-hours for week 4.
16. Mr. McGill commenced the week 1 work in early August 2021. He invoiced Ms. Mark on August 6, 2021 for 107 person-hours. With supplies and taxes, the total was \$6,169.75. Ms. Mark paid it by e-transfer on the same date. Mr. McGill then completed the week 2 work as detailed in an August 13, 2021 invoice. The work was mainly preparing and painting ceilings and walls and installing the vinyl plank flooring. Mr. McGill charged for 108 person-hours and charged a total of \$5,670, inclusive of tax. Ms. Mark paid it by e-transfer on August 13, 2021.

17. Finally, Mr. McGill completed the week 3 work as detailed in an August 20, 2021 invoice. This work mainly consisted of continued painting and flooring work, rather than the planned work of installing fixtures. Mr. McGill charged for 100 person-hours for a total of \$5,250, inclusive of tax.
18. Ms. Mark refused to pay the August 20, 2021 invoice. She says that after reviewing the week 2 work she concluded that the work done was unprofessional. She says Mr. McGill's did not adequately prepare the surfaces for painting and the resulting paint work had uneven colours. She also says the vinyl plank flooring had inconsistent spacing and had to be removed and reinstalled. The parties met during week 3 to discuss the alleged deficiencies but the parties did not come to an agreement.
19. It is undisputed that Mr. McGill's crew worked the billed hours for week 3. So, I find Ms. Mark must pay the claimed amount unless she can prove the work was deficient.
20. When a customer alleges that a contractor's work was below a reasonably competent standard, the customer must prove the deficiencies: *Absolute Industries Ltd. v. Harris*, 2014 BCSC 287 at paragraph 61. Generally, expert evidence is required to prove a professional's work was below a reasonable standard: *Bergen v. Guliker*, 2015 BCCA 283. 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.
21. Mr. McGill says he is not a professional painter or floor installer. However, I find he is a professional contractor and as such, his work was still subject to a professional standard. Given this, I find expert evidence is necessary in this dispute to evaluate his work.
22. Ms. Mark provided a considerable number of opinions from different contractors. I place the heaviest weight on a September 15, 2021 letter from Scott McAlpine, a manager of a local building and renovation centre with 40 years' experience. I find they are qualified under CRT rule 8.3 to give an opinion on Mr. McGill's work.

23. Scott McAlpine wrote the following. They visited the worksite on August 16, 2021, to provide Ms. Mark an opinion on the work done so far. Stains showed through the paint on the ceiling and the paint itself had different shades. The walls were also rough and not sanded, with holes and cracks left unfilled before painting. The vinyl plank flooring was installed uniformly, without the correct staggering pattern. Some planks were installed with no space for expansion while others were installed with a gap from the wall which would not be hidden by baseboards. Overall, Scott McAlpine was “shocked by the extremely poor quality of work supposedly complete”.
24. Scott McAlpine added that he and Ms. Mark met with Mr. McGill the next day to advise him of the mistakes. Scott McAlpine returned on August 17, 2021, after Mr. McGill advised Ms. Mark that he had fixed the flooring and paint deficiencies. Scott McAlpine wrote that Mr. McGill appeared to have done nothing, save for painting over the ceiling stains again. This led to colour inconsistencies and stains that were still showing through the new paint.
25. Scott McAlpine’s evidence is consistent with the evidence of a contractor named Antoine Webster, whose evidence I also accept as expert opinion evidence under CRT rule 8.3. In their January 5, 2022 email and January 13, 2022 handwritten statement, they said they were a flooring installer with 30 years’ experience. They said they looked at the installed flooring in September 2022 and found the following.
26. The flooring installation, including work done around the stairs, were “not up to industry standards”. There were gaps between the boards and between the treads and risers. The subfloor had many imperfections “glaringly evident”. The only way to fix it would be to install a float floor over it or cover it with carpet. They added, “I would not accept this floor”.
27. Similarly, in a December 21, 2021 letter, Kay Profoehr says they were hired by Ms. Mark to remedy the painting. They did not state their qualifications, so I do not accept the letter as expert evidence. However, the letter is consistent with the expert evidence before me. Kay Profoehr wrote that the ceilings “appeared to be painted without first using a stain blocking primer because the stains were bleeding through

the paint". They also wrote that the basement walls had been poorly prepped and primed. They observed unfilled holes, loose paneling, and unprimed wall areas.

28. I find the expert evidence of Scott McAlpine and Antoine Webster compelling and consistent with the other evidence, including the evidence of Kay Profoehr and the many videos taken by Ms. Mark that show the deficiencies mentioned above, such as stains on the ceiling. I conclude that Mr. McGill's work was significantly deficient.
29. Mr. McGill provided letters of recommendation from previous clients and business contacts. However, I do not find them relevant as they do not comment on the work at issue. Mr. McGill also provided photos and videos of the work done. However, I do not find it apparent from the videos whether Mr. McGill's work met reasonable standards. Some were taken at a distance, and the videos in particular were often shaky.
30. The question that remains is what remedy is appropriate. As noted above, I find that Mr. McGill completed the work he agreed to do and worked the hours charged. Ms. Mark provided a September 21, 2021 quote from a contractor, AP, that said it would cost \$10,000 to rectify mistakes in the painting, flooring, and subflooring. She also provided a September 12, 2021 quote from a painting company, CLCP, indicating that it would cost \$5,150 to remedy the painting alone. I accept these valuations.
31. Given the above, I find that Mr. McGill's week 3 work had to be redone and essentially provided no benefit to Ms. Mark. I find that he fundamentally breached the contract and is not entitled to further payment. So, I dismiss his claim.
32. I also find that Ms. Mark has proven her counterclaim for \$5,000. This is because the evidence shows she will be paying at least that amount to redo the work. So, I order Mr. McGill to pay \$5,000 to her as damages.
33. The *Court Order Interest Act* (COIA) applies to the CRT. The COIA says that the CRT must add pre-judgment interest to a pecuniary judgment, meaning a judgment for money, at a rate it considers appropriate in the circumstances. However, section 2(a) of the COIA says that the CRT must not award pre-judgment interest on those parts

of an order that are for a pecuniary loss arising after the date of the order. Here, I find Ms. Mark has proven a loss but not that she has already paid for any repairs. So, I find that she has not yet suffered a pecuniary loss. I therefore decline to order any prejudgment interest.

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. I see no reason in this case not to follow that general rule. I order Mr. McGill to reimburse Ms. Mark \$125 in CRT fees. The parties did not claim for any specific dispute-related expenses.

ORDERS

35. Within 14 days of the date of this order, I order Mr. McGill to pay Ms. Mark a total of \$5,125, broken down as follows:

- a. \$5,000 as damages for breach of contract, and
- b. \$125 in CRT fees.

36. Ms. Mark is entitled to post-judgment interest, as applicable.

37. I dismiss Mr. McGill's claims.

38. 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.

39. 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.

David Jiang, Tribunal Member