Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Zheng v. Penta Builders Group Inc.*, 2022 BCCRT 603

B E T W E E N :

QILIN ZHENG

APPLICANT

A N D :

PENTA BUILDERS GROUP INC. and PERRY HOOGVELD

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about a partially replaced fence. The applicant, Mr. Qilin Zheng, says the respondents, Penta Builders Group Inc. (Penta) and Mr. Perry Hoogveld, breached an agreement to replace fencing. He also says they failed to repair a grassy

area they damaged. He claims $5,000 as damages. Mr. Zheng did not say what portion of this amount was for the fence or the grassy area.

2. The respondents disagree. Penta says it worked for Mr. Hoogveld and built suitable replacement fencing and repaired any damage done to the grassy area. Mr. Hoogveld agrees with Penta. He also says he and Mr. Zheng jointly owned the old fence, and Mr. Zheng's claim is unreasonable because Mr. Hoogveld paid entirely for the new fencing.

3. Mr. Zheng and Mr. Hoogveld represent themselves. An employee or principal represents Penta.

4. For the reasons that follow, I find Mr. Zheng has proven a small portion of this claims, and make the orders set out below.

JURISDICTION AND PROCEDURE

5. 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.

6. 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, they 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.

7. 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.

8. 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.

ISSUES

9. The issues in this dispute are as follows:

    a. Did the respondents breach any agreement to rebuild fencing between Mr. Zheng's and Mr. Hoogveld's property?

    b. Must the respondents compensate Mr. Zheng for damage to the grassy area?

BACKGROUND, EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, Mr. Zheng as the applicant must prove his claims on a balance of probabilities. This means more likely than not. I have read all the parties' submissions and evidence but refer only to the evidence and arguments that I find relevant to provide context for my decision. Mr. Zheng did not provide reply submissions, though he had the opportunity to do so.

11. I begin with the undisputed facts. Mr. Zheng and Mr. Hoogveld own neighboring detached houses. Mr. Hoogveld's property is to the west of Mr. Zheng's property.

12. A survey plan shows that their properties were previously separated by a fence built on the property line between the Mr. Hoogveld's and Mr. Zheng's properties. Mr. Hoogveld's undisputed submission is that he built the original fence in 1994 before Mr. Zheng moved in. He says he split the cost of the fence with the previous homeowner. Since the original fence ran along the property line, I find that both Mr. Hoogveld and Mr. Zheng had an ownership interest in it. My finding is consistent with the non-binding but persuasive decision of *Ellis v. Dangerfield,* 2021 BCCRT 95 at paragraph 19. Given Mr. Zheng's ownership interest, I also find that the respondents required Mr. Zheng's permission to demolish or remove the original fence.

13. In September 2020 Mr. Hoogveld began the process of demolishing his old house to build 2 new single-family homes. Mr. Hoogveld hired Penta as the builder. Around September 8, 2020, Mr. Zheng met with Mr. Hoogveld and Penta's representative. Mr. Zheng gave the respondents permission to remove part of the fence between their properties. In return, Mr. Hoogveld agreed to build replacement fencing at his cost. The key point in this dispute is exactly what was agreed upon at this meeting. I discuss this in detail below.

14. Photos show that the respondents demolished most of the original fence and replaced those sections with new fencing. The new fencing differed from the replaced sections in both height and style. The original fence had a 4-foot solid fence with a 2-foot lattice above it. The replacement fencing sections were taller. They had an 18-inch retaining wall built along the base and a 6-foot solid fence above it. There was no lattice.

15. Further, photos of the new fencing and a property line marker show that the new fencing was entirely on Mr. Hoogveld's property line. So, at the point where the new fencing connected with the original fencing, the 2 sections were slightly offset from one another.

16. Around September 2021 Mr. Zheng spoke to the respondents while the fence was still under construction. The respondents were adding the new retaining wall at the time. Mr. Zheng objected that the new fence would not look like the old fence. The respondents replied that they had to complete construction of the combination fence, retaining wall and drainage, which they said would protect Mr. Zheng's property.

17. Mr. Zheng spoke to Mr. Hoogveld on the phone in October 2021. They could not come to an agreement. Mr. Zheng applied for dispute resolution shortly after this.

Issue #1. Did the respondents breach any agreement to rebuild fencing between Mr. Zheng and Mr. Hoogveld's property?

18. A binding contract must have the following elements: its parties must have an intention to contract, the parties must agree on the essential terms, and the essential terms must be sufficiently certain. Whether these requirements are met is determined from the perspective of an objective reasonable bystander and not the parties' subjective intentions. The determination must also consider the context, including the parties' communications and conduct both before and after the agreement is made. See *Oswald v. Start Up SRL,* 2021 BCCA 352 at paragraph 34.

19. The parties disagree on the exact terms of their verbal agreement. Mr. Zheng says he agreed that the respondents could demolish part of the fence. However, the respondents had to replace the demolished sections with fencing in the same position, style, and height of the original fence. In contrast, the respondents say they agreed to build a new replacement fence and for Mr. Hoogveld to cover its cost, but did not agree that it would have the same height, appearance, or location.

20. On balance, I find Mr. Zheng's versions of events is likely correct. I reach this conclusion because I find it highly unlikely that Mr. Zheng would agree to replacement fencing that was both mismatched and offset from the original fence. Mr. Zheng's confrontation with the respondents in September 2021 is consistent with my conclusion.

21. Alternatively, to the extent that the parties did not discuss what the replacement fencing would look like, I find it was an implied term that it would be similar to the original fencing. This is because I find an objective reasonable bystander would expect the replacement fencing to be the largely the same as the original fencing. There is no indication the respondents warned Mr. Zheng that it would, in fact, appear different.

22. I also find it likely that only Mr. Zheng and Mr. Hoogveld were parties to the verbal agreement, and not Penta. This is because Penta was Mr. Hoogveld's builder, and I find it likely that Penta built the fence in accordance with Mr. Hoogveld's agreement. So, I dismiss Mr. Zheng's claim against Penta for the fence.

23. This leaves the question of assessing damages against Mr. Hoogveld. Mr. Zheng says he should be compensated for the estimated cost of replacing the new fencing. He provided a March 21, 2021 quotation for $7,350. The measures of damages in this type of case is often the cost of making good the defective work. However, for the reasons that follow, I find this approach would be unreasonable.

24. In *514953 B.C. Ltd. dba Gold Key Construction and Chiu v. Leung,* 2007 BCCA 114 at paragraph 15, the court favourably cited the case of *Ruxley Electronics and Construction Ltd. v. Forsyth,* [1996] A.C. 344 (*Ruxley*). In *Ruxley,* the landowner contracted for a swimming pool with a depth of 7 feet 6 inches. As built, its depth was only 6 feet. The landowner sought damages for the cost of demolishing the existing pool and constructing a new one at the contract depth. The judge found the constructed pool was safe and the shortfall in depth did not decrease the pool's value. The judge also found it doubtful that the landowner intended to demolish and build a new pool, and found that doing so would be unreasonable. So, the judge awarded a modest award of $2,500 pounds for loss of amenity, rather than the demolition and reconstruction cost of $20,000 pounds. The House of Lords subsequently upheld the trial judge's decision in *Ruxley.*

25. Though not binding, I find the reasoning in *Ruxley* persuasive and applicable here. There is no indication that the new fencing sections are deficient or of poor quality. There is no indication the fence has decreased the value of Mr. Zheng's property. He did not pay anything for it. I find it would be unreasonable to demolish and replace the new fencing. So, I find that an award of $200 for loss of amenity is appropriate. I order Mr. Hoogveld to pay it to Mr. Zheng.

Issue #2. Must the respondents compensate Mr. Zheng for damage to the grassy area?

26. I turn to the undisputed background of the grassy area. As part of the construction work, the respondents dug up a grassy area in front of Mr. Zheng's property to work on a water main. The grassy area was on city property. Photo show it was on the side of a row of bushes that faced a nearby street. On the other side of the bushes was Mr. Zheng's property.

27. An August 2021 photo shows the respondents filled in and leveled the area with dirt, but no grass grew. However, by March 2022, grass had grown to incompletely cover the area. Some bare patches remained.

28. As the grassy area is undisputedly owned by the city, I find it unproven that the respondents owe any duty to Mr. Zheng to repair it. I considered the law of nuisance, but in general a respondent does not cause a nuisance if they fail to preserve the aesthetic appearance of their land for their neighbour's benefit. See *McKnight v Bourque,* 2018 BCSC 1342 at paragraph 68. I find similar considerations apply here, though as noted above, the grassy area is city land. So, I dismiss this claim.

29. 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

Mr. Zheng has proven a loss but not any pecuniary loss. I therefore decline to order any prejudgment interest.

30. 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.

31. Mr. Zheng proved part of his claim, so I find he is entitled to partial reimbursement of $87.50 in CRT fees. The parties did not claim for any specific dispute-related expenses.

ORDERS

32. Within 14 days of the date of this order, I order Mr. Hoogveld to pay Mr. Zheng a total of $287.50, broken down as follows:

    a. $200 as damages for loss of amenity, and

    b. $87.50 in CRT fees.

33. Mr. Zheng is entitled to post-judgment interest, as applicable.

34. I dismiss Mr. Zheng's remaining claims, including all claims against Penta.

35. 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.

36. 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