Civil Resolution Tribunal

Date Issued: June 3, 2022

File: SC-2021-008559

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Sallay v. Kolybaba*, 2022 BCCRT 650

B E T W E E N :

JOSEPH SALLAY

APPLICANT

A N D :

DAVID KOLYBABA also known as DAVE KOLYBABA

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. Joseph Sallay (who asked to be referred to as Joe) hired David Kolybaba, also known as Dave Kolybaba, to supply and install windows in 2 strata lots. Joe says that Mr. Kolybaba failed to install 2 upstairs windows in one of them (unit 12) so he had to hire a different contractor to complete the job at a cost of $3,530.97. In his

Dispute Notice he claims $2,539.97, which I infer is a typo because he breaks the claim down as $3,530.97 less a $1,000 holdback. I therefore find that Joe's claim is actually for $2,530.97.

2. Mr. Kolybaba says that he refused to install the final 2 windows because Joe had refused to pay him for work he did on the other strata lot (unit 5). He also says that he was willing to complete the job after Joe paid for unit 5, but Joe did not give him the opportunity to do so. Finally, Mr. Kolybaba says that the other contractor's cost was excessive. He asks me to dismiss Joe's claims.

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. In some respects, both parties of this dispute call into question the credibility, or truthfulness, of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.

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 pay money or to do or stop doing something. The CRT's order may include any terms or conditions the CRT considers appropriate.

ISSUES

8. Joe initially made a claim about brick molding but withdrew that claim during the CRT's facilitation process. I find that any issues about the molding are not before me in this decision.

9. The remaining issues in this dispute are:

    a. Who breached the parties' contract?

    b. If Mr. Kolybaba breached the contract, what are Joe's damages?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, Joe as the applicant must prove his case on a balance of probabilities. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

11. In October 2020, Joe hired Mr. Kolybaba to install windows in 2 strata lots he owned in a building in Osoyoos. Joe lives in the Lower Mainland. Mr. Kolybaba provided separate quotes for the 2 strata lots. The first, dated October 14, 2020, was for unit 12. The total cost was $8,925.93. The second, dated October 15, 2020, was for unit 5. The quotes included a detailed description of the work Mr. Kolybaba would do for each unit. Even though they are not signed, the parties agree that these quotes set out the 2 contracts' terms.

12. Neither party provided much detail about the work Mr. Kolybaba did or exactly when. I infer that at some point before December 4, 2020, Mr. Kolybaba disputed that he had agreed to install 2 upstairs windows in unit 12. I say this because on December 4, 2020, Mr. Kolybaba sent Joe a text acknowledging a "misunderstanding" and confirming that he would do the "windows in 12 as soon as concrete poured". The next day, Joe sent Mr. Kolybaba an email confirming that the parties' contract included these 2 upstairs windows. In this email, Joe acknowledged that Mr. Kolybaba could not complete the windows until after the new concrete driveway had set. Joe says this was done on February 24, 2021.

13. It is unclear when, but the parties agree that Joe paid the entire cost of the unit 12 job less a $1,000 holdback that he would pay upon completion.

14. On February 8, 2021, Mr. Kolybaba emailed Joe that the work on unit 5 was complete. He asked Joe to pay the balance owing less a $750 holdback until Joe had a chance to "come down to view". It is undisputed that Joe paid the requested amount.

15. Despite Mr. Kolybaba's evidence that he demanded payment for unit 5 "many times", there is no evidence of any written correspondence between the parties until April 12, 2021, when Mr. Kolybaba texted Joe demanding payment of the $750 holdback. By that time, Mr. Kolybaba had learned that Joe had sold unit 5, with the new owners taking possession in June. Mr. Kolybaba said that there was "obviously" an "issue with final payments being made to me on work I have completed". He said that the circumstances led him to "assume there will be trouble being paid for any further work". He said he would drop off the key to unit 12.

16. Joe texted back that Mr. Kolybaba had agreed to wait until Joe inspected unit 5 before receiving final payment. Joe said that he had not inspected unit 5 because of COVID-19 travel restrictions. Joe also said that he had "passed this same courtesy on to the new owner", apparently without informing Mr. Kolybaba. I find that it was implicit in this message that the new owner would pay the holdback. Joe then said that he would hire another contractor install the last 2 windows.

17. Mr. Kolybaba responded that he had not done the unit 12 windows because he had been waiting for Joe to pay for unit 5. He did not offer to complete the unit 12 job, and later dropped off the unit 12 key to another resident.

18. After this exchange, both parties considered the contract terminated. Joe hired another contractor to install the last 2 windows at a cost of $3,530.97. It is unclear when the other contractor did this work. The new owner of unit 5 paid Mr. Kolybaba's outstanding invoice in June 2021.

Who breached the contract?

19. Joe argues that Mr. Kolybaba terminated the contract when he told Joe that he would return unit 12's key. He says that this clearly showed that Mr. Kolybaba had no intention of completing the project. Joe argues that he was therefore entitled to hire a new contractor to finish the job.

20. Mr. Kolybaba's primary argument is that Joe's failure to pay the final invoice on unit 5 permitted Mr. Kolybaba to delay completion of unit 12. He argues that he could no longer trust Joe to pay for his services.

21. Neither party uses this legal term, but I find that their arguments raise the legal concept known as "anticipatory repudiation". Anticipatory repudiation occurs when a party says or does something that shows that they will not perform a future contractual obligation. When a party repudiates a contract in this way, the other party is entitled to terminate the contract. Then, neither party has any further obligations under the contract. See *Kaur v. Bajwa*, 2020 BCCA 310, at paragraphs 13 to 19.

22. So, did Joe anticipatorily repudiate the unit 12 contract by failing to pay the unit 5 final invoice? I agree with Joe's submission that even though the parties were the same, the 2 contracts for the 2 units contained separate and unrelated obligations. There is no suggestion that Joe breached or repudiated the unit 12 contract, so I find that Mr. Kolybaba's obligation to complete unit 12 continued despite the allegedly delayed final payment for unit 5.

23. I also agree with Joe that Mr. Kolybaba repudiated the contract by telling Joe that he was giving the unit 12 key back, and later by actually doing so. I find that the only reasonable interpretation of giving the unit 12 key back is that Mr. Kolybaba would not complete the job. I note that Mr. Kolybaba says that he gave the unit 12 key back because Joe demanded it, but I find that this explanation is inconsistent with Mr. Kolybaba's April 12, 2021 text message.

24. Mr. Kolybaba also argues that he remained willing to complete the job. However, I find this argument is inconsistent with Mr. Kolybaba's decision to give the unit 12 key back even after Joe explained that the new owner would pay the unit 5 final invoice. In any event, as mentioned above, after Mr. Kolybaba initially repudiated the contract Joe was entitled to terminate it, which he did. Joe therefore had no legal obligation to allow Mr. Kolybaba the opportunity to finish the job even if Mr. Kolybaba was willing to do so.

25. With that, I find that Joe was entitled to terminate the contract and hire a new contractor.

What are Joe's damages?

26. When a party breaches a contract, the innocent party is entitled to the amount of money it would take to put them in the position as if the contract had been performed. I agree with Joe that the proper measure of damages is the amount he paid the other contractor (again, $3,530.97) less the $1,000 holdback, subject to Mr. Kolybaba's argument that the new contractor's cost was excessive. Mr. Kolybaba essentially argues that Joe did not reasonably mitigate his damages because he overpaid for the windows. The burden to prove that Joe failed to reasonably mitigate his damages is on Mr. Kolybaba.

27. Mr. Kolybaba relies on a quote he received that shows a total cost of $937.97 for 2 windows (not including labour). However, the parties' contract includes specific requirements for the windows. Having compared the contract to the quote Mr. Kolybaba provided, I am not satisfied that he has proven that the quoted windows

met the contract's specifications. In particular, the contract requires windows with a "low e" coating. It is unclear from Mr. Kolybaba's quote whether the windows included this feature.

28. I therefore find that Mr. Kolybaba has not proven that Joe acted unreasonably by hiring the other contractor. I find that Joe has proven his $2,530.97 claim.

29. The *Court Order Interest Act* (COIA) applies to the CRT. Because there is no evidence about when Joe paid the other contractor, I find that November 8, 2021, the day Joe submitted his application for dispute resolution to the CRT, is an appropriate date for prejudgment interest to start. This equals $6.46.

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 find Joe is entitled to reimbursement of $125 in CRT fees. Joe did not claim any dispute-related expenses.

ORDERS

31. Within 30 days of the date of this order, I order David Kolybaba to pay Joseph Sallay a total of $2,662.43, broken down as follows:

    a. $2,530.97 in damages,

    b. $6.46 in pre-judgment interest under the COIA, and

    c. $125 for CRT fees.

32. Joe is entitled to post-judgment interest, 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.

Eric Regehr, Tribunal Member