



Civil Resolution Tribunal

Date Issued: July 8, 2022

File: SC-2021-004940

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Grant v. Fitzgerald*, 2022 BCCRT 785

BETWEEN:

JUDY LYNN GRANT

APPLICANT

AND:

WINIFRED SHERYL FITZGERALD

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. The parties own neighbouring lots in a campsite park, and this dispute is over payment for a replacement fence. The applicant, Judy Lynn Grant, says the respondent, Winifred Sheryl Fitzgerald, verbally agreed to replace the parties' shared fence and equally split the cost.

2. The respondent did not provide her preferred title and asked to be referred to as “Sheryl Fitzgerald” in this dispute.
3. Ms. Grant says Sheryl Fitzgerald refused to pay her share of the fence building costs. Ms. Grant claims \$800 for Sheryl Fitzgerald’s portion.
4. Sheryl Fitzgerald says she agreed to replace the fence, so long as it looked like the fence at the front of Ms. Grant’s property. Sheryl Fitzgerald says that Ms. Grant did not involve her in the fence design or building process, and that the result did not meet her expectations. Sheryl Fitzgerald says she should not have to pay for a fence that she did not approve.
5. The parties are each self-represented.

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. In some respects, both parties to this dispute call into question the credibility, or truthfulness, of the other. 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. 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 in

Yas v. Pope, 2018 BCSC 282 at paragraphs 32 to 28, 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.

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.

ISSUE

10. The issue in this dispute is to what extent, if any, must Sheryl Fitzgerald pay Ms. Grant \$800 for the new fence.

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the applicant Ms. Grant must prove her claims on a balance of probabilities (meaning "more likely than not"). I have read all of the parties' evidence and submissions, but I refer only to what I find is necessary to explain my decision.
12. The parties refer to their lots as "campsites", which are located in what I infer is a type of RV and mobile home park. Ms. Grant says that in the summer of 2018, Sheryl Fitzgerald asked if Ms. Grant and her husband would be interested in replacing the common fence between their lots and sharing the cost, to which Ms. Grant agreed.
13. In contrast, Sheryl Fitzgerald says it was Ms. Grant who approached her about replacing the fence. While Sheryl Fitzgerald says the common fence did not require replacement, she says she admired the fence at the front of Ms. Grant's lot and

thought a new common fence in the same style would enhance her lot. So, Sheryl Fitzgerald says she agreed to Ms. Grant's proposal, so long as the fence looked like Ms. Grant's front fence.

14. I find nothing turns on whose idea it was to replace the common fence because, either way, I find it is clear the parties agreed to replace their fence with one like Ms. Grant's front fence, and to share the costs equally.
15. Ms. Grant says she contacted the person (RT) who built her front fence about replacing the common fence. She says RT provided a quote for \$1,655 but said he was unavailable to start construction until the following year. Ms. Grant says that Sheryl Fitzgerald agreed to the quote. Sheryl Fitzgerald does not deny she agreed to the proposed cost, so I find she likely did.
16. The parties' email evidence shows that Ms. Grant advised Sheryl Fitzgerald on August 21, 2019 that the fence construction was set to begin after Labour Day. Ms. Grant also advised that she and her husband would be staining the lumber in advance. Sheryl Fitzgerald responded: "this is great. I can get some days off after labour day. So leave some for me to paint" (reproduced as written). She also thanked Ms. Grant for making the arrangements.
17. Sheryl Fitzgerald later sent Ms. Grant a September 6, 2019 email advising that she had been unable to get any time off, and she had just seen the completed fence. She said she was "mostly happy" with her side, but she noted the bottom of the fence boards were not cut straight and did not look finished. Ms. Grant responded that she should contact RT directly about any concerns. Ms. Grant also advised that the total for materials and labour had come to \$1,600 and confirmed that Sheryl Fitzgerald had agreed to e-transfer her share, which was \$800.
18. The following day Sheryl Fitzgerald sent Ms. Grant further emails noting the fence's "nice finishing" was facing Ms. Grant's lot, but that she was looking at raw nails and uneven boards. She also said she assumed she would be getting the same finishings as Ms. Grant's front fence, but what she got was "unattractive". Sheryl Fitzgerald told

Ms. Grant she would send her half of what she owed, and suggested Ms. Grant recover the other half from the builder because the deficiencies had to be fixed. It is undisputed that Sheryl Fitzgerald has not paid Ms. Grant anything for the new fence.

19. I find it is Sheryl Fitzgerald's position that Ms. Grant breached their agreement to design and build a fence that looked like Ms. Grant's front fence. In order for Sheryl Fitzgerald to be entitled to terminate the agreement and be relieved of her obligation to pay her share of the new fence, I find Ms. Grant's breach must be a fundamental breach.
20. A fundamental breach is where a party fails to fulfill a primary obligation of a contract in a way that deprives the other party of substantially the whole benefit of the contract: see *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC). Put another way, a fundamental breach is a breach that destroys the whole purpose of the contract and makes further performance of the contract impossible: see *Bhullar v. Dhanani*, 2008 BCSC 1202. When a fundamental breach occurs, the wronged party can terminate the contract immediately, and they do not have to perform any further terms of the contract: see *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA).
21. So, I find the question is essentially whether the new common fence was so unlike Ms. Grant's front fence, that Sheryl Fitzgerald was deprived of the fence she had agreed to.
22. The photos of Ms. Grant's front fence show it is about 4 feet high. The boards are stained a natural wood colour and are arranged into panels of about 14 to 17 boards each, with wood posts between each panel. The panels also have a border of wood trim around them. The posts and panel trim are a dark charcoal colour.
23. The photos of the new common fence show the boards have been stained the same or a similar colour as Ms. Grant's front fence. The boards of the common fence have also been arranged into panels separated by wood posts. The posts and each panel's top border are the same or a similar dark charcoal colour as Ms. Grant's front fence.

It is undisputed that the pre-existing common fence was about 6 feet high, as is the new fence. Sheryl Fitzgerald does not suggest that she believed the new fence would be only 4 feet high, so I find she agreed the replacement fence would remain around 6 feet tall.

24. I find Sheryl Fitzgerald's primary complaints are that the fence panels on her side did not have any trim borders, and the nail heads are visible to her where the boards were nailed to horizontal rails on the top, middle, and bottom of the Grants' side of the fence. She also says the bottom of the boards were cut unevenly, so the fence bottom is not a straight line, and there was no bottom trim to cover this imperfection.
25. Sheryl Fitzgerald argues that Ms. Grant did not involve her in any of the design, planning, or building process. However, I find there no indication in the evidence before me that Sheryl Fitzgerald asked to see the fence design or sought to communicate with the Grants or the builder about how the fence would be constructed. Instead, I find the evidence shows Sheryl Fitzgerald was content to allow Ms. Grant to make all the arrangements. As noted, Sheryl Fitzgerald initially indicated to Ms. Grant that she would be present for the build but was unable to get time off. There is no evidence that Sheryl Fitzgerald asked for any progress updates or photographs to confirm she approved of the design and construction.
26. Sheryl Fitzgerald admits that before construction began, Ms. Grant asked her if she wanted the good, smooth side of the boards facing her, to which she agreed. I find this is consistent with how the pre-existing common fence was constructed. The photos of the pre-existing fence show white boards screwed into rails that faced the Grants' side, so on Sheryl Fitzgerald's side there was one line of screw heads visible in the top third and one line in the bottom third of each board. I find there is no indication in the evidence that Sheryl Fitzgerald advised Ms. Grant that unlike the pre-existing fence, she did not want any nail or screw heads visible on her side of the new fence.
27. Overall, I find the colours and basic design of the replacement common fence are consistent with Ms. Grant's front fence, in accordance with the parties' agreement. I

find that Sheryl Fitzgerald's complaints about the trim and visible nail heads do not go to the heart of the parties' agreement. So, I find Sheryl Fitzgerald has not shown that Ms. Grant fundamentally breached the parties' agreement. Therefore, I find Sheryl Fitzgerald was not relieved of her obligation pay Ms. Grant for her share of the fence construction costs. As Sheryl Fitzgerald does not dispute Ms. Grant paid \$1,600 for materials and labour, I find Sheryl Fitzgerald owes her \$800.

28. I note the photographic evidence shows Sheryl Fitzgerald later added trim to the top, middle, and bottom of the panels on her side of the fence, almost entirely hiding the nail heads. She also placed rocks along the fence bottom to conceal the uneven boards, which I find were likely not cut a uniform length only because the ground was not level. The parties' emails show Ms. Grant offered to reduce the amount Sheryl Fitzgerald owed her by her costs for the extra trim. However, there is no evidence before me that Sheryl Fitzgerald provided Ms. Grant with her expenses, and she did not provide any evidence of them in this dispute.
29. Sheryl Fitzgerald did not claim a specific set-off or file a counterclaim for her expenses to resolve what I find were relatively minor personal aesthetic preferences. For these reasons, and given the lack of any evidence of her costs, I decline to consider whether Sheryl Fitzgerald was entitled to any set-off for extra expenses she incurred.
30. Therefore, I order Sheryl Fitzgerald to pay Ms. Grant \$800.
31. The *Court Order Interest Act* applies to the CRT. Ms. Grant is entitled to pre-judgment interest on the \$800 from September 6, 2019, the date she first asked for payment, to the date of this decision. This equals \$20.04.
32. 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 find Ms. Grant is entitled to reimbursement of \$150 in CRT fees. Neither party claimed any dispute-related expenses.

ORDERS

33. Within 30 days of the date of this decision, I order the respondent, Winifred Sheryl Fitzgerald, to pay the applicant, Judy Lynn Grant, a total of \$970.04, broken down as follows:
- a. \$800 in debt,
 - b. \$20.04 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$150 in CRT fees.
34. Ms. Grant is entitled to post-judgment interest, as applicable.
35. 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. 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