



Civil Resolution Tribunal

Date Issued: August 12, 2022

File: SC-2022-000049

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kerr v. Raymond S. Bonter, Designer Ltd.*, 2022 BCCRT 913

BETWEEN:

KELLY KERR

APPLICANT

AND:

RAYMOND S. BONTER, DESIGNER LTD.

RESPONDENT

AND:

KELLY KERR

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. The applicant and respondent by counterclaim, Kelly Kerr, hired the respondent and applicant by counterclaim, Raymond S. Bonter, Designer Ltd. (RSBD), for a custom home design. Mr. Kerr says RSBD failed to determine the correct zoning requirements for the project, resulting in delays and added expenses. Alternatively, Mr. Kerr says RSBD abandoned the project. Either way, Mr. Kerr claims \$5,000, which is the monetary limit for small claims disputes at the Civil Resolution Tribunal (CRT).
2. RSBD says it did its due diligence but was not aware of additional reports required by municipal bylaws. It says those reports can be prepared quickly and so it denies causing any delay. RSBD also denies abandoning the project. I infer that RSBD asks me to dismiss Mr. Kerr's claim.
3. In its counterclaim, RSBD seeks \$3,800 for services it provided that it says were outside the initial scope of the project. Mr. Kerr says those services were offered without charge or without agreement on price. He also disputes the value of those services.
4. Mr. Kerr represents himself in this dispute. RSBD is represented by an employee.

JURISDICTION AND PROCEDURE

5. 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.
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. 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.

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:
 - a. Did RSBD "abandon" the project?
 - b. Did RSBD breach the contract or its duty of care by failing to determine zoning requirements?
 - c. If RSBD breached the contract, what damages flowed from the breach?
 - d. Is RSBD entitled to compensation for claimed out-of-scope work?

EVIDENCE AND ANALYSIS

10. As the applicant in this civil proceeding, Mr. Kerr must prove his claims on a balance of probabilities, meaning more likely than not. RSBD must prove its counterclaims to the same standard. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.

11. Mr. Kerr engaged RSBD to design a 5,500 square foot custom home and provide working drawings. It is undisputed that the essential terms of the parties' agreement are captured in a September 16, 2019, "Invoice for Service" (contract). Under the contract, Mr. Kerr was required to pay 3 retainers based on a total estimate of \$16,642.50, which was subject to adjustments based on actual square footage. Mr. Kerr paid the first retainer of \$6,245 on September 16, 2019 when the work was initiated.
12. On October 8, 2020, Mr. Kerr paid a second retainer of \$8,080, which was due upon substantial completion of the preliminary floor plans. The second invoice shows that by that time the home's estimated square footage had increased by 1,150, and there were additional charges for a 480 square foot accessory building.
13. There is no record of any other payments, so I find Mr. Kerr paid RSBD a total of \$14,325. RSBD does not claim for a third retainer, I infer because it did not complete work that would have entitled it to the third retainer.

Did RSBD "abandon" the contract?

14. Most of RSBD's work occurred in the first 15 months after September 2019. In December 2020, RSBD provided Mr. Kerr with a revised set of preliminary drawings for the project and asked for review and comment.
15. At some point, Mr. Kerr engaged an interior designer who provided consulting about the project's layout and exterior. Mr. Kerr preferred the interior designer's designs. In March 2021, Mr. Kerr sent RSBD his interior designer's designs and asked RSBD to turn them into working drawings. RSBD replied that doing so would essentially mean starting over on a "new project". Based on the designs and drawings in evidence, I agree with RSBD. RSBD also said its rates had increased.
16. Mr. Kerr says RSBD failed to get back to him for weeks, so he was left with no choice but to hire another company to complete the work. Thus, he argues that RSBD abandoned the project.

17. As noted by the BC Court of Appeal, abandonment is not a term of legal significance in contract law (see *R.N. Tanner Const. Ltd. v. K-west Estates Ltd.*, 1986 CanLII 993 (BC CA) at paragraph 8). The legal significance of abandoning the work agreed to be performed depends on the terms of the contract. Here, I find RSBD was not obligated under the contract to perform the additional work Mr. Kerr requested in March 2021. The contract specifically said after payment of the second installment, “significant revisions to the layout (such as moving rooms)” may not be permitted without additional fees.” After RSBD advised that Mr. Kerr would have to pay for the significant changes he wanted, Mr. Kerr bore some responsibility to confirm that he was prepared to proceed on that basis.
18. Although Mr. Kerr says RSBD stopped returning his emails and phone calls, he did not provide any copies of unanswered emails, or any phone records. On the evidence before me, I find Mr. Kerr simply selected another contractor to complete the drawings. I find RSBD did not breach the contract by failing to perform additional work without compensation.

Did RSBD breach the contract or its duty of care by failing to determine zoning requirements?

19. Mr. Kerr says that in June 2021 when he submitted his building permit application, he discovered that there were particular zoning requirements that RSBD never addressed. Specifically, the project was in a Sensitive Ecosystems Development Permit [SEDP] Area, which meant an SEDP application was required before applying for a building permit. This required an Environmental Development Plan submitted by a Qualified Environmental Professional. The SEDP application also needed a site plan, a *Riparian Areas Protection Regulation* (RAPR) report, which is reviewed by the provincial authorities, and an arborist report. Mr. Kerr did not have these things in June 2021. None of this is disputed.
20. RSBD denies that it owed Mr. Kerr a duty of care to confirm zoning requirements. RSBD also argues that the second designer who prepared the final drawings Mr. Kerr submitted, or Mr. Kerr’s builder, owed Mr. Kerr an equal duty of care to determine the

zoning requirements. RSBD alternatively argues that Mr. Kerr negligently failed to determine the zoning requirements and was responsible in whole or in part for his claimed losses. However, I find RSBD had an explicit contractual duty to determine zoning requirements. I say this because the contract included a \$1,000 charge for “site preliminary, building scheme and zoning analysis”. The contract also said no drawings would be prepared unless RSBD confirmed that the work in question was “fully known to be allowed by the Authority Having Jurisdiction”. So, because I find an explicit contractual duty, it is not necessary to determine whether RSBD had a duty of care to confirm zoning requirements, or whether Mr. Kerr or any other party was contributorily negligent.

21. RSBD says it used the municipal online mapping system to determine the zoning requirements. It says the mapping system did not show the project to be within an SEDP area. However, Mr. Kerr provided confirmation from the municipality that the SEDP requirement was in place and enforced since September 2016, and the stream in question was visible in the Official Community Plan at that time. On the evidence, I find the SEDP requirement was there for RSBD to discover with reasonable diligence. I therefore find RSBD breached its contractual obligation to determine the applicable zoning requirements.

What are the damages flowing from the breach?

22. The starting point for assessing damages for breach of contract is to try to place the non-breaching party in the position they would be in if the contract had been performed.
23. As noted, Mr. Kerr claims \$5,000 in damages. He says most of his losses arose from the delay in receiving the building permit, which he says he still did not have when he made submissions in this dispute.
24. RSBD says there was no significant delay because the SEDP reports were required regardless of when the requirement was discovered. RSBD says the reports can be completed “quite quickly” by the proper professional. However, RSBD provided no

supporting evidence. Mr. Kerr provided emails between the municipality and his project biologist showing that the SEDP process takes at least 6 months, and only happens after a RAPR report is reviewed provincially, which takes 3-4 months. These requirements must be substantially completed before the municipality will review a building permit application. I agree with Mr. Kerr that, had RSBD identified these requirements at the outset, work could have started on them immediately. I agree that construction on the home therefore would have started earlier.

25. Mr. Kerr says his losses arising from the delay include a 10-25% increase in construction costs and an increase in borrowing costs, among other things. He did not provide supporting evidence for these assertions.

26. Mr. Kerr claimed losses in the form of additional rent he paid during the delay, which he supported with documentary evidence. I find that the need to have living accommodations was in the reasonable contemplation of the parties when they agreed to the contract. Defendant contractors have been required to compensate plaintiffs for rental costs experienced during delays (see *Nguyen v. Dang*, 2018 BCSC 382, at paragraph 48). I find that in 2022, Mr. Kerr paid \$5,500 per month to rent a residence. He also earned \$3,500 in monthly rental income from a home on the project site that I infer was to be demolished before construction started. This means Mr. Kerr had a net loss of \$2,000 per month for each month of delay. On that basis alone, if there were 2.5 months of delay, Mr. Kerr has proven his \$5,000 in claimed damages. I have no trouble concluding that RSBD's contractual breach caused at least 2.5 months of delay, and so it is unnecessary to determine the precise extent of the delay.

27. I find Mr. Kerr is entitled to \$5,000 in damages for breach of contract, subject to any allowable set-off below.

Is RSBD entitled to compensation for out-of-scope work?

28. RSBD claims \$1,800 for providing 3D renderings and \$2,000 for drawing "secondary elevations" in 2D.

29. To determine liability for the cost of “extra work,” the questions are:
- a. Did the work fall outside the scope of work originally contemplated by the contract?
 - b. If so, did the owner explicitly or implicitly authorize the work?
 - c. Was the owner informed or necessarily aware that the work would increase the cost?
 - d. If there was a term requiring changes to be in writing, did the owner waive it or acquiesce?
30. If the contractor can establish each element for each extra claimed, the owner is liable for a reasonable amount for the extra work (see *Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd.*, 1996 CanLII 3443 (BC SC) at paragraph 41).
31. Here, the contract specifically said 3D renderings were “optional services” with “fees to be discussed”. So, I find the 3D renderings were outside the scope of the contract. Mr. Kerr says RSBD “offered” to provide the extra services when he indicated that he did not like the home’s exterior. I find it is implicit in this submission that Mr. Kerr authorized the work by accepting RSBD’s offer. I find Mr. Kerr should have been aware that the 3D renderings would increase the cost because the contract said they would.
32. RSBD says the elevation drawings were to be supplied during the third retainer phase, but in an effort to help Mr. Kerr understand the layout, RSBD provided those drawings in advance with the understanding that those fees would be recovered when Mr. Kerr paid the final retainer. However, the contract does not mention secondary elevations as an element of the third retainer phase, or at all. Given the lack of detail about what the parties discussed, I find RSBD has not proved that Mr. Kerr should have known the secondary elevations would increase the cost.
33. So, what is a reasonable sum for the 3D renderings, given that the fees were “to be discussed” but were never discussed? To determine a reasonable sum, courts may

rely on evidence of market value, or evidence of the cost of labour and materials plus a reasonable percentage for profit (see *Kei-Ron*). RSBD provided an invoice from its rendering technician for \$432 based on the technician's rate of \$36 per hour and 12 hours of work. RSBD says it charges this technicians' work at a rate of \$150 per hour (a 380% profit). Court decisions generally award something closer to 10% for profit (see, e.g., *Fairwood Construction Ltd. v. Lin*, 1997 CanLII 4292 (BC SC), at paragraph 35). On a judgment basis given the limited evidence before me, I add 10% to the technician's invoice to arrive at \$475.20 as fair compensation for RSBD's 3D renderings.

34. Setting off RSBD's \$475.20 for extra work against Mr. Kerr's \$5,000 in damages, the net result is that RSBD must pay Mr. Kerr \$4,524.80.
35. The *Court Order Interest Act* applies to the CRT. Mr. Kerr is entitled to pre-judgment interest on the \$4,524.80 in damages. It is not clear from the evidence exactly when RSBD breached the contract, and Mr. Kerr did not discover the breach until June 2021. In the circumstances, I have calculated interest from October 8, 2020, the date Mr. Kerr paid the second retainer, to the date of this decision. This equals \$44.26.
36. 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. Mr. Kerr was successful in his claim, and so I find RSBD must reimburse him \$175 for CRT fees. RSBD's counterclaim was partially successful, so I find Mr. Kerr must reimburse RSBD \$62.50 for half its \$125 in CRT fees. The net result is that RSBD must pay Mr. Kerr \$112.50 as reimbursement for CRT fees.
37. Mr. Kerr did not claim any dispute-related expenses. RSBD claimed \$2,500 for an insurance deductible it says it paid. Given that RSBD was unsuccessful in defending Mr. Kerr's claim, it is not entitled to dispute-related expenses. I am also not satisfied that the insurance deductible payment satisfies the requirement of being "directly related to the conduct of the tribunal process" under CRT Rule 9.5(2).

ORDERS

38. Within 30 days of the date of this order, I order RSBD to pay Mr. Kerr a total of \$4,681.56, broken down as follows:
- a. \$4,524.80 in damages,
 - b. \$44.26 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$112.50 for CRT fees.
39. Mr. Kerr is entitled to post-judgment interest, as applicable.
40. 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.

Micah Carmody, Tribunal Member