



Civil Resolution Tribunal

Date Issued: August 26, 2022

File: SC-2022-000976

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Bader (dba Diamond Shovel Contracting) v. Kerr*, 2022 BCCRT 958

BETWEEN:

ANDREW BADER (Doing Business As DIAMOND SHOVEL
CONTRACTING)

APPLICANT

AND:

KIMBERLY KERR

RESPONDENT

AND:

ANDREW BADER (Doing Business As DIAMOND SHOVEL
CONTRACTING)

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about landscaping work.
2. The respondent and applicant by counterclaim, Kimberly Kerr, hired the applicant and respondent by counterclaim, Andrew Bader (Doing Business As Diamond Shovel Contracting), to perform landscaping services around her home. Mr. Bader says he completed the work, but Ms. Kerr has failed to pay the full amount of his invoice. Mr. Bader claims \$1,627 as the amount outstanding.
3. Ms. Kerr says that Mr. Bader's work was substandard and incomplete, so she does not owe him anything. Specifically, she says Mr. Bader killed a mature tree on her property, installed low quality dead sod, and failed to install a proper underlay, which resulted in drainage issues. She also says Mr. Bader failed to install all requested landscaping ties, and that he removed left over soil and sod that she paid for.
4. Ms. Kerr counterclaims \$5,000, which is the small claims monetary limit for the Civil Resolution Tribunal (CRT), for a new tree, the cost of hiring another landscaper to redo and complete Mr. Bader's work, the sod and soil Mr. Bader removed, and additional landscaping repair work she says will be required in the future.
5. The parties are each self-represented.

JURISDICTION AND PROCEDURE

6. 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.

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. 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.
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.

ISSUES

10. The issues in this dispute are:
 - a. Does Ms. Kerr owe Mr. Bader \$1,627 for unpaid work?
 - b. Does Mr. Bader owe Ms. Kerr \$5,000 for alleged damage, materials, and repair work?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the applicant Mr. Bader must prove his claims on a balance of probabilities (meaning "more likely than not"). Ms. Kerr bears the same burden to prove her counterclaims. 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. Ms. Kerr posted on a Facebook community page that she was looking for someone to assist her with a planned driveway extension. Mr. Bader responded, and the parties

met on June 24, 2020 to discuss Ms. Kerr's plans, which also included a landscaping project.

13. Mr. Bader provided Ms. Kerr with a June 25, 2020 written quote for both the driveway excavation and landscaping project, for a fixed price of \$4,400, including labour and materials. The quote included the following work:
 - a. Redo the front and back yards,
 - b. Excavate for driveway extension, supply and install road base and compact,
 - c. Scrape out entire front yard,
 - d. Supply and install 4x6 ties in backyard "as discussed",
 - e. Supply and install river rock "as discussed", removing grass underneath,
 - f. Finish entire yard with fresh topsoil, compact and install #1 grade turf front and back.

14. Ms. Kerr texted Mr. Bader on June 27, 2020 to clarify that she wanted landscape ties for the following: to divide the grass and river rock around the back patio, to create a flower bed for new cedars along the fence line, to be placed along the existing cedar hedge to the shed, and along the cement walkway from the shed to the deck stairs to create a retaining wall. Mr. Bader responded that it would be best for him come by and go through all the details, but her requests seemed "fine".

15. Contrary to Ms. Kerr's submission, I find that Mr. Bader's response was not confirmation that all the work Ms. Kerr mentioned in her text was included in his June 25 quote. Rather, I find his response indicated further discussion was necessary to determine the scope of work, which suggests at least some of the items were not part of his quote. It is undisputed that the parties met again on June 30, 2020 to further discuss the project. Mr. Bader did not ultimately change his initial quote after that discussion. More on what was included in Mr. Bader's scope of work below.

16. Mr. Bader started the landscaping portion of the project on about July 11, 2020. It is undisputed that Ms. Kerr paid Mr. Bader \$1,400 on July 13. I find this was a partial payment to cover some of the materials expenses.
17. The evidence shows that Mr. Bader sent Ms. Kerr a July 14 text about “extra” costs of \$100 to supply and install a concrete form and \$288 to supply and install 4x6 ties around the shed. Ms. Kerr denies asking Mr. Bader to do the concrete form and says the landscape ties around the shed were part of his quote. However, there is no evidence that she objected to Mr. Bader’s text, which I would have expected if these were not costs Ms. Kerr had anticipated or agreed to. On balance, I find the parties agreed this was extra work Mr. Bader would perform that was not included in his initial quote, and that Ms. Kerr agreed to the pricing set out in Mr. Bader’s text.
18. Mr. Bader finished the project on July 17, 2020. His invoice totals \$5,027.40, which includes the \$4,400 for the work set out in his quote, plus the \$100 for concrete forms, \$288 for extra ties around the shed, and \$239.90 in tax. After accounting for the \$1,400 partial payment, the invoice shows an outstanding balance of \$3,627.40.
19. It is undisputed that Ms. Kerr paid Mr. Bader \$2,000 on July 17, 2020. The parties disagree on what that payment represented. Ms. Kerr says she met with Mr. Bader on July 17 to express her dissatisfaction with his work and to ask when the remainder of the quoted work would be completed. She says Mr. Bader refused to complete further work and they “settled” on \$2,000 as “final payment” for the work he had done.
20. In contrast, Mr. Bader says the only issue Ms. Kerr raised about his work was a few brown spots on some of the sod he laid. The parties’ text messages show Ms. Kerr advised Mr. Bader of the spots on July 16. On July 21, Mr. Bader followed up by text to ask if the patchy areas were growing in or whether he should replace them. It is undisputed that Mr. Bader replaced the browning areas with fresh sod later on July 21, 2020. Given Mr. Bader then repeatedly emailed Ms. Kerr requesting payment of the \$1,627 balance, I accept Mr. Bader’s evidence that he did not agree Ms. Kerr would not have to pay that amount.

Mr. Bader's \$1,627 claim for payment

21. It is well-established that a contractor is entitled to be paid if they substantially complete their work. If the customer believes that there are defects in the contractor's work, they may bring a claim for damages, as Ms. Kerr has here, but they still must pay the invoice. See *Belfor (Canada) Inc. v. Drescher*, 2021 BCSC 2403.
22. So, the question is whether Mr. Bader substantially completed the work the parties agreed to. For the following reasons, I find that he did.
23. The photos in evidence show, and Ms. Kerr does not dispute, that Mr. Bader scraped the front yard, supplied and installed topsoil and sod in the front and back yards, and supplied and installed river rock.
24. Ms. Kerr does not take issue with Mr. Bader's driveway excavation work, and so I find Mr. Bader likely completed it as agreed. As for the concrete form that I find were added to the parties' agreement on July 14, Ms. Kerr says the driveway extension was completed by a concrete company, DC, on July 4, 2020. While she says she has a receipt detailing DC's work, she did not provide a copy of that receipt.
25. When a party fails to provide relevant evidence in their possession or control about a key issue, without good explanation, the decision maker may draw an adverse inference against them. This is because the decision maker assumes that if missing evidence supported the party's case, they would have provided it. I find it is appropriate to draw an adverse inference against Ms. Kerr for failing to provide DC's receipt. This means I find it is likely the receipt did not show that DC completed the concrete form. In the absence of any evidence that someone other than Mr. Bader did the concrete form, given his July 14 text, I find it is more likely than not that he completed that work. Therefore, I find he is entitled to be paid the agreed \$100.
26. This leaves the landscaping ties. As noted, Mr. Bader's quote provided that he would supply and install ties, as discussed, and the parties later had a further discussion about the ties. It is undisputed that Mr. Bader then delivered the landscape ties to Ms.

Kerr's property by about July 3, 2020 so that Ms. Kerr could paint them before they were installed.

27. Mr. Bader says he advised Ms. Kerr during their June 30 meeting that roots from the existing cedar hedges would not allow landscaping ties to lay level with the other ties, so they agreed not to install ties along the hedges. While Ms. Kerr says Mr. Bader gave a different reason for not wanting to install landscaping ties along the hedges, either way I find the parties agreed Mr. Bader would not install ties in that location.
28. Ms. Kerr does not allege that Mr. Bader failed to lay ties around the shed, which I have found above was extra work Mr. Bader agreed to complete outside his initial quote. So, I find Mr. Bader supplied and installed these additional ties.
29. Ms. Kerr's main allegation is that Mr. Bader failed to make a flower box and retaining wall using landscaping ties. However, Ms. Kerr's June 27 text mentions only a flower bed, not a flower box, and Mr. Bader denies that the parties discussed a flower box or retaining wall during their June 30 meeting. The photos in evidence show that Mr. Bader laid landscaping ties along the ground as a border feature to separate the grass from the patio and river rock areas. I find that building a flower box and retaining wall are substantially different than laying ties on the ground, and so they are likely items that Mr. Bader would have specifically set out on his quote, if they were included.
30. I also note the parties' text messages show Ms. Kerr asked Mr. Bader on July 15 what his plans were to finish the job, and Mr. Bader responded: "Supply and install river rock, and finish ties around shop" (reproduced as written). I infer Mr. Bader meant finish ties around the "shed". In any event, I find that if Ms. Kerr believed that Mr. Bader was also supposed to build a flower box and retaining wall, she would have asked about his plans to complete that work, but there is no evidence she did so.
31. Overall, I find the parties did not agree that Mr. Bader was responsible for building a flower box or retaining wall. In any event, I find these items were not included in Mr. Bader's quote and they would have been charged as "extras" had Mr. Bader done that work.

32. So, for all the above reasons, I find Mr. Bader completed all the work set out on his invoice. Therefore, I find Ms. Kerr must pay the outstanding balance of \$1,627, subject to Ms. Kerr's claim for deficiencies discussed below.

Ms. Kerr's counterclaim for deficiencies

33. When a customer alleges that a contractor's work was below a reasonably competent standard, they must prove the deficiencies. See *Absolute Industries Ltd. v. Harris*, 2014 BCS 287, at paragraph 61. Generally, an allegation that a professional's work was below a reasonable standard requires expert evidence to prove. The 2 exceptions to this rule are when the deficiency is not technical in nature or where the work is obviously substandard. See *Schellenberg v. Wawanesa Mutual Insurance Company*, 2019 BCSC 196, at paragraph 112.

34. Ms. Kerr makes several allegations about the quality of Mr. Bader's work, including that he improperly prepared the yards for lawn installation, he improperly installed the sod, and he used substandard soil and sod. Ms. Kerr also say Mr. Bader's negligent work killed an existing maple tree in her front yard.

35. Ms. Kerr provided a May 26, 2022 report from Mike Vandergugten, a landscape horticulturalist and the owner of Higher Ground Landscaping Ltd. (HGL). Mike Vandergugten's report referred to various provisions in the Canadian Landscape Standard, Second Edition (CLS), which I infer is a practice manual or guide for landscape professionals, and he compared those provisions to "evidence" provided by Ms. Kerr. Mike Vandergugten gave the following opinions:

- a. The soil used had an unacceptable amount of foreign matter,
- b. The lawn soil was not leveled or compacted sufficiently,
- c. The sod was installed with many areas of gaps between rolls of sod, up to 1.5 inches or more, where 1/8 inch is the maximum allowable gap,
- d. The tree was planted 4 inches below grade, causing tree failure, and

- e. There was visible browning on multiple rolls of sod.
36. Even if I accepted that the CLS sets the relevant standard for professional landscaping work, I place very little weight on Mike Vandergugten's report. This is because his opinions were not based on his own inspection of Mr. Bader's work at the time. It appears that Mike Vandergugten first came to Ms. Kerr's property almost 2 years after Mr. Bader completed his work, and his opinions were based entirely on a few photos from July 2020, which I find are insufficient to establish Mr. Bader's work fell below the applicable standard.
37. For instance, Mike Vandergugten's opinion about foreign matter in the soil appears to be based solely on a photo of what appears to be 4 or 5 small pieces of white plastic that Ms. Kerr says she found in the soil Mr. Bader provided. There is no evidence that Mike Vandergugten inspected the soil himself. There is also no evidence about what exactly the "foreign matter" in the photo is, or whether it is harmful to plant life, which is the standard set out in the CLS.
38. Further, Mr. Bader provided a soil analysis obtained from his provider of the turf mix and planting mix used for Ms. Kerr's project. The analysis states that the soils met BC Landscape Society Specification requirements. While the evidence shows Mr. Bader provided Ms. Kerr with this soil analysis on July 23, 2020, Mike Vandergugten did not mention it in his report. For all these reasons, I find Ms. Kerr has not established Mr. Bader used substandard soil for the landscaping project.
39. Similarly, Mike Vandergugten's opinion about the sod installation appears to be based on a single close-up photo of what Ms. Kerr says depicts a 2 to 3-inch gap between sod rolls. There is no ruler in the photograph to confirm the gap's width. Further, given the photograph's angle, there is nothing to show where the gap is located on the lawn. While Mr. Vandergugten says there were "many areas of gaps", it is not clear how he arrived at that conclusion 2 years after the sod was installed. I find other photos of Mr. Bader's work on the front lawn do not show any visible gaps between the sod rolls. Overall, I find the single gap depicted in the photo is insufficient to establish Mr. Bader's sod installation was deficient.

40. Further, while Mike Vandergugten notes there were a few areas of sod that browned, I find Mr. Bader replaced those portions right away. There is no evidence before me that the sod later died or was otherwise deficient. Mr. Bader also provided his receipt for the sod, which shows it was “premium turf”. I find there is insufficient evidence before me that the sod’s quality was substandard.
41. Notably, Mike Vandergugten does not specifically comment on Ms. Kerr’s main allegation that Mr. Bader failed to level and compact the soil before laying the sod. He refers to a July 28, 2020 estimate from a different HGL employee to “level and repair” the lawn in both the front and back yards, but does not say that work was needed because Mr. Bader’s work was substandard.
42. I find that whether Mr. Bader should have levelled and compacted the soil before laying the sod, and if he did that work, whether he did it properly, are matters outside ordinary knowledge. Therefore, expert evidence is required, and Ms. Kerr has not provided any expert evidence on these issues. I find the fact that Ms. Kerr hired HGL to do additional work on her yards shortly after Mr. Bader completed the sod installation is insufficient to establish that Mr. Bader’s work fell below the required standard. So, I find he is not responsible for the cost of that additional work.
43. Turning to the maple tree, Mike Vandergugten’s report says only that the tree failed because it was planted 4 inches below grade. Given that the tree was pre-existing, I infer Mike Vandergugten was referring to soil Mr. Bader placed around the tree to create a flower bed. However, Mike Vandergugten does not explain how 4 inches of extra soil around the tree’s trunk for 2 weeks could cause the already established tree to die, as Ms. Kerr says HGL advised her of this issue in July 2020. There is no evidence that Mike Vandergugten ever inspected the physical tree, and Ms. Kerr did not provide any evidence to establish that the tree died. The photographic evidence suggests the tree was still alive in October 2020, and Ms. Kerr did not say when the tree ultimately died. Overall, if the tree died, which is unproven on the evidence before me, I find Mike Vandergugten provided an insufficient explanation of how it died. Therefore, I decline to find that Mr. Bader is responsible for replacing the maple tree.

44. I note that Ms. Kerr provided extensive video and photographic evidence of what she says was substandard river rock placement, as she says the rocks in some areas did not completely cover the landscape fabric underneath. However, it appears Ms. Kerr simply re-positioned the rocks herself, and she did not specifically claim any remedy for this alleged deficiency. I find no remedy is warranted.
45. Finally, as noted above, Ms. Kerr says that Mr. Bader removed extra sod and soil from her property that she paid for. However, I accept Mr. Bader's submission that the parties' agreement was essentially a fixed price contract, so Ms. Kerr did not pay separately for materials and labour. This means that Mr. Bader was only required to supply the materials he used for the project and Ms. Kerr was not entitled to keep extra, unused materials. So, I find she is not entitled to compensation for unused sod and soil.
46. Given my conclusions above, I find Ms. Kerr has not proven any deficiencies, so I dismiss her counterclaim.

Interest, CRT fees, and dispute-related expenses

47. The *Court Order Interest Act* applies to the CRT. Mr. Bader is entitled to pre-judgment interest on the \$1,627 from July 21, 2020, the date he completed the sod remediation, to the date of this decision. This equals \$18.56.
48. 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. As Mr. Bader was successful, he is entitled to reimbursement of \$125 for CRT fees. Mr. Bader did not claim any dispute-related expenses.
49. Ms. Kerr was unsuccessful, so I dismiss her claim for CRT fees and dispute-related expenses, including the \$735 she claimed for reimbursement of Mike Vandergugten's report.

ORDERS

50. Within 21 days of the date of this decision, I order Ms. Kerr to pay Mr. Bader a total of \$1,770.56, broken down as follows:
- a. \$1,627 in debt,
 - b. \$18.56 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$125 in CRT fees.
51. Mr. Bader is entitled to post-judgment interest, as applicable.
52. I dismiss Ms. Kerr's counterclaims.
53. 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