Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Liza D Pattern, Design and Sourcing Lab Inc. v. Wicklund*, 2022 BCCRT 1003

B E T W E E N :

LIZA D PATTERN, DESIGN AND SOURCING LAB INC.

APPLICANT

A N D :

EVAN WICKLUND

RESPONDENT

A N D :

LIZA D PATTERN, DESIGN AND SOURCING LAB INC.

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Nav Shukla

INTRODUCTION

1. This is a small claims dispute about design fees for a golf apparel line. The applicant and respondent by counterclaim, Liza D Pattern, Design and Sourcing Lab Inc. (LDP), says it did certain design work for the respondent and applicant by counterclaim, Evan Wicklund, but has not been paid in full. LDP claims $1,880.50 for the alleged unpaid design work.

2. Mr. Wicklund admits LDP did some work but says that he paid it a $6,336.40 deposit and has not received work product equivalent to that amount. He counterclaims against LDP for a $2,842 refund. LDP says Mr. Wicklund is not entitled to a refund because it has not been fully paid for the work it had completed.

3. LDP is represented by its owner or principal, Liza Deyrmenjian. Mr. Wicklund represents himself.

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. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. 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.

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 do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

Preliminary Issue – Late Evidence

8. Both parties submitted evidence after the CRT's deadlines. Mr. Wicklund's late evidence includes a text message exchange between himself and RB, LDP's former employee, about an allegedly "fake" email submitted by LDP as evidence in this dispute.

9. LDP's late evidence includes a quote from another design company as well as emails between Ms. Deyrmenjian and RB from February 2022 that LDP says prove the above-mentioned text messages are fake.

10. Overall, I find both parties' late evidence is relevant to issues raised in this dispute. Since both parties had the opportunity to review the other's late evidence and respond to it, I find there is no prejudice to either party in admitting the late evidence. So, consistent with the CRT's flexible mandate, I allow the late evidence and have considered it in my analysis. However, I find that nothing turns on the late evidence in any event.

ISSUES

11. The issues in this dispute are:

a. What amount, if any, is LDP entitled to for the design work it says it did?

b. Is Mr. Wicklund entitled to a refund? If so, how much?

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, the applicant, LDP must prove its claims on a balance of probabilities (meaning "more likely than not"). Mr. Wicklund must prove his counterclaim to the same standard. I have read all the parties' submitted evidence and argument but refer only to what I find relevant to provide context for my decision.

Background Facts

13. It is undisputed that in October 2021, Mr. Wicklund hired LDP to design 8 items for his start-up golf apparel line. The parties have not provided a signed written contract setting out the terms of their agreement.

14. However, the evidence includes LDP's October 19, 2021 quote for $12,672.80. The quote included the following:

    a. Ideation and design for 8 items: $3,120 based on $65 an hour and 6 hours per item,

    b. Technical pack (tech pack) creation for 8 items: $3,040 based on $95 an hour and 4 hours per item,

    c. First pattern creation for 8 items: $2,080 based on $65 an hour and 4 hours per item,

    d. First sample creation for 8 items: $2,600 based on $65 an hour and 5 hours per item,

    e. Fabric sourcing: $475 for 5 hours at $95 an hour, and

    f. Taxes totaling $1,357.80.

15. The October 19, 2021 quote set out a 50% deposit of $6,336.40 and noted that the final invoice may be 10% to 20% higher than the quote. It also stated that a 10% administrative fee would be charged if Mr. Wicklund cancelled the project after the deposit has been paid and work had not started. If LDP had begun work on the project, the quote noted the deposit would be non-refundable.

16. Mr. Wicklund says he accepted this quote, transferred the deposit, and instructed LDP to proceed with the design work. LDP does not dispute this. I find the October 19, 2021 quote was LDP's offer, and that Mr. Wicklund accepted that offer by paying the $6,336.40 deposit. So, I find the October 19, 2021 quote became the parties' contract. Mr. Wicklund says that before LDP provided the October 19, 2021 quote, he had told LDP that he required premium fabrics for the apparel line. LDP does not dispute this. So, I find that an unwritten term of the parties' contract was that LDP would source premium fabric for Mr. Wicklund.

17. It is undisputed that LDP began the work and completed the ideation and design stage for Mr. Wicklund. The evidence shows that on December 7, 2021, Mr. Wicklund emailed LDP and said he was happy with the designs and asked how quickly they could move to the next steps.

18. Emails in evidence show that the parties had a meeting on or about January 31, 2022 to review fabric samples and "mock-ups" of 2 items, a polo shirt and pull-over sweater. The following day, Mr. Wicklund emailed LDP with some concerns, noting he was not impressed with the fabric samples and the pull-over sweater's mock-up. It is undisputed that many of the samples were not premium fabrics but rather 100% polyester. Mr. Wicklund stated that the priority at that point was to figure out what fabric to use. Mr. Wicklund concluded the email by saying that if LDP could not offer what he was looking for, he thought it was a "great splitting point with no hard feelings".

19. Ms. Deyrmenjian responded to this email the same day, noting that the premium fabrics Mr. Wicklund was looking for were not available in Canada and would need to be sourced elsewhere. She then set out some options for Mr. Wicklund.

20. The evidence shows that following this email exchange, the parties agreed to a February 3, 2022 meeting. Mr. Wicklund says that during this meeting, LDP proposed an additional $20,000 would be needed to complete the project.

21. It is undisputed that on or about February 4, 2022, LDP sent Mr. Wicklund a February 3, 2022 quote which increased the project's total cost to $20,228.25. Mr. Wicklund says that after receiving this revised quote, he parted ways with LDP.

LDP's claim for unpaid work

22. As mentioned above, LDP says it has not been paid in full for the work it completed for Mr. Wicklund. LDP's evidence includes a February 7, 2022 "quote" which it refers to as its final invoice. It notes $1,880.90 as the amount due which is the same amount LDP claims in this dispute. I find the February 7, 2022 invoice essentially sets out a breakdown of the amount LDP claims in this dispute.

23. Mr. Wicklund says that this invoice charged for work that LDP did not do. LDP says that it has only charged for work that it completed. I now consider whether the evidence establishes on a balance of probabilities that LDP completed the work it charged for in its February 7, 2022 invoice.

24. Since it is undisputed that LDP completed the ideation and design stage and Mr. Wicklund admits LDP should be paid for this work, I find LDP is entitled to the $3,120 it charged for the ideation and design work. In the February 7, 2022 invoice, LDP charged Mr. Wicklund for creating tech packs for all 8 items. Neither party has explained what a tech pack is.

25. Mr. Wicklund says that LDP did not create the tech packs. In support, Mr. Wicklund refers to Ms. Deyrmenjian's comments in her February 1, 2022 email. In this email, she said, "we are fine designing and creating tech packs for your brand" and "I do feel with the finishings you are wanting we need to create a complete tech pack at the start of sampling". I find that Ms. Deyrmenjian's comments in this email suggest that at least some tech packs had not been created as of February 1, 2022.

26. LDP says that the tech packs were needed before it could create any samples for Mr. Wicklund. LDP's evidence includes an undated document that it says is a screenshot of the tech packs that are done. However, for the following reasons, I find LDP is not entitled to compensation for any tech packs.

27. First, as mentioned, LDP has not explained what a tech pack is or what information a tech pack usually includes. So, I am unable to determine whether the screenshot provided is actually a tech pack. Second, although LDP says it created all 8 tech packs and refers to its screenshot in evidence, only the polo shirt is included in this screenshot.

28. LDP says the tech packs were needed before it could create any samples. However, I find certain comments in Ms. Deyrmenjian's February 1, 2022 email contradict this assertion. In this email, Ms. Deyrmenjian essentially said that normally she would not create tech packs at the start of sampling unless the items were being made overseas because it is not cost-effective. For the reasons set out above, and given Ms. Deyrmenjian's comments in her February 1, 2022 email, I find LDP has failed to prove on a balance of probabilities that it had completed any tech packs for Mr. Wicklund.

29. Next, LDP charged $260 per first pattern created for 3 different patterns, one being for the polo shirt. Mr. Wicklund submits that there is no evidence that LDP created any first patterns. Though the parties did not explain the design process in any detail, based on the evidence before me, I find it is more likely than not that a first pattern was needed before LDP could prepare a first sample of an item. As mentioned above, the evidence shows LDP had created mock-ups, which I infer are samples, of a polo shirt and a pull-over sweater. LDP says it did not charge for the first pattern for the pull-over sweater that Mr. Wicklund took issue with. Since LDP did not charge for the pull-over sweater's first pattern, and since the only other sample LDP created was for the polo shirt, I find LDP is entitled to $260 for the polo shirt's first pattern only. This is because there is no evidence that LDP created the other 2 first patterns it claims for.

30. LDP further charged $325 for the polo shirt's first sample. Mr. Wicklund says he should not be charged for any samples because the only samples he received were for the polo shirt and the pull-over sweater, both of which he says were of poor quality. LDP says that Mr. Wicklund only took issue with the pull-over sweater's sample, so it says it has not charged him for that sample. I agree with LDP that the evidence does not support Mr. Wicklund's claim that both samples were substandard. This is because Mr. Wicklund's February 1, 2022 email addressed issues with only the pull-over sweater. Further, although it is undisputed that the fabric samples LDP provided Mr. Wicklund were inadequate, Mr. Wicklund does not argue, nor does the evidence show, that he was unhappy with the polo shirt's fabric. So, I find LDP is entitled to $325 for the polo shirt's first sample.

31. LDP further charged $475 for sourcing fabric and trim. I have found above that the parties' contract included an unwritten term that LDP would source premium fabrics for Mr. Wicklund. It is undisputed that LDP was unable to source the premium fabrics required under the parties' contract. As such, I find LDP is not entitled to the $475 it claims for sourcing fabric and trim.

32. Lastly, LDP charged $86 for shipping fabric swatches. The evidence includes a January 15, 2022 shipping invoice for $66.26 which I infer is for the fabric swatches. As noted above, it is undisputed that the fabric swatches LDP provided Mr. Wicklund were not the premium fabrics required under the parties' contract. I find this shipping invoice is likely for fabric swatches that were not the premium fabrics LDP was required to provide. So, I find LDP is not entitled to any compensation for shipping fabric swatches.

33. In total, I find LDP has proven it is entitled to compensation in the amount of $3,705 for the design work it completed. Since it is undisputed that Mr. Wicklund already paid LDP a $6,336.40 deposit, I find Mr. Wicklund does not owe LDP anything further and dismiss LDP's claim.

Mr. Wicklund's claim for a refund

34. I now consider Mr. Wicklund's refund counterclaim. As mentioned, Mr. Wicklund says he is entitled to a refund of $2,842. However, I have already found above that LDP is entitled to $3,705 from the $6,336.40 deposit. This leaves $2,631.40 remaining from the deposit. So, if Mr. Wicklund is entitled to a refund, I find that refund would be limited to the $2,631.40 that remains.

35. Whether a deposit is refundable depends on the facts of a dispute, including the parties' contractual terms. As noted above, I have found that the October 19, 2021 quote set out the terms of the parties' agreement. As mentioned, the quote stated that an administrative fee would be charged if Mr. Wicklund cancelled the project after the deposit had been paid and work had not started yet. If work had begun, the quote stated the deposit would be non-refundable.

36. Does this contractual term mean Mr. Wicklund is not entitled to the deposit's refund? For the reasons that follow, I find the deposit was only non-refundable if it was Mr. Wicklund that cancelled the contract.

37. In *No. 151 Cathedral Ventures Ltd. v. Gartrell et al*, 2003 BCSC 1801 at paragraph 236, the court found that although the deposits in that case were "non-refundable", the defendants could only keep them if it was the plaintiffs who repudiated the contract. I find the same reasoning applies here. If the deposit here was non-refundable regardless of who ended the contract, it could result in a situation where LDP could essentially do some work, refuse to do further work, and obtain a windfall by keeping the whole deposit.

38. So, in order for Mr. Wicklund to be entitled to a refund for the remaining portion of the deposit, I must find that LPD cancelled or repudiated the parties' contract.

39. Repudiation occurs when a party indicates to the other party that they no longer intend to follow through on a contract. If a party repudiates a contract, the other party is entitled to accept the repudiation and terminate the contract (see *Kuo v. Kuo*, 2017 BCCA 245 at paragraph 39). A party's subjective intentions are not relevant in

determining whether they have repudiated a contract. The question is whether an objective bystander would consider their words or actions to show that the party rejected their obligations under the contract.

40. Mr. Wicklund says that LDP sent him the February 3, 2022 quote which increased the project's total cost, even though the project's scope had undisputedly not changed. In particular, in the February 3, 2022 quote, LDP changed its original rate for creating tech packs from $95 an hour (as set out in the October 19, 2021 quote) to $1,200 an hour for some items and $1,500 an hour for others. As noted, LDP has not addressed what a tech pack is or why a change to the hourly rate for creating tech packs was necessary.

41. In addition to increasing the hourly rates for the tech packs, LDP also increased the number of hours for fabric sourcing. I infer this change was a result of the issues LDP faced in sourcing premium fabrics for Mr. Wicklund.

42. In its submissions, LDP does not address the revised quote other than to say that other comparable companies are 3 times more expensive than it. Based on LDP's submissions, I find that LDP increased the tech pack's hourly rates not because of changes in the project's scope, but rather because it realized it had originally quoted an hourly rate that was too low for its profitability.

43. Here I find that by increasing the rates for creating tech packs, LDP indicated to Mr. Wicklund that it no longer intended to create the tech packs for him at the original rates agreed to. Since it is undisputed that the project's scope had not changed, I find by increasing the hourly rates for the tech packs in the February 3, 2022 quote, LDP repudiated the parties' contract. As noted above, Mr. Wicklund says that after receiving the February 3, 2022 quote, he decided to part ways with LDP. I find that by "parting ways", Mr. Wicklund accepted LDP's repudiation.

44. As such, I find the deposit is refundable since LDP repudiated the contract. The appropriate remedy for repudiation of a contract is damages (see *Mantar Holdings Ltd. v. 0858370 B.C. Ltd.*, 2014 BCCA 361). Damages for breach of contract are

generally intended to put the innocent party in the position they would have been in if the contract had been carried out as agreed (see *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319). However, in the case of a repudiatory breach, the innocent party may claim damages based on their out-of-pocket losses, rather than the ordinary measure of expected performance (see *Bhullar v. Dhanani*, 2008 BCSC 1202 at paragraphs 41 to 45 and *Karimi v. Gu*, 2016 BCSC 1060 at paragraphs 206 to 211).

45. Here, the only evidence of Mr. Wicklund's out-of-pocket losses is that portion of the deposit he paid but received no benefit for. So, I find Mr. Wicklund is entitled to damages in the amount of $2,631.40 for LPD's repudiation.

46. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Wicklund is entitled to pre-judgment interest on the $2,631.40 from February 4, 2022, the date of LPD's repudiation, to the date of this decision. This equals $13.47.

47. 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. As the successful party, I find Mr. Wicklund is entitled to reimbursement of $125 for his paid CRT fees. Neither LDP nor Mr. Wicklund claimed any dispute-related expenses, so I order none.

ORDERS

48. Within 21 days of the date of this decision, I order LDP to pay Mr. Wicklund a total of $2,769.87, broken down as follows:

    a. $2,631.40 in damages,

    b. $13.47 in pre-judgment interest under the COIA, and

    c. $125 in CRT fees.

49. Mr. Wicklund is entitled to post-judgment interest under the COIA, as applicable.

50. I dismiss the parties' remaining claims.

51. 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.

Nav Shukla, Tribunal Member