



Civil Resolution Tribunal

Date Issued: October 18, 2022

File: SC-2022-000644

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *RMC Ready-Mix Ltd. v. McNamara*, 2022 BCCRT 1138

BETWEEN:

RMC READY-MIX LTD.

APPLICANT

AND:

KEVIN MCNAMARA and PUMP IT RIGHT CONCRETE

RESPONDENTS

AND:

RMC READY-MIX LTD.

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This dispute is about allegedly substandard concrete. The applicant and respondent by counterclaim, RMC Ready-Mix Ltd. (RMC), supplied concrete to the respondent homeowner and applicant by counterclaim, Kevin McNamara. RMC says the other respondent, Pump It Right Concrete (PIRC), was Mr. McNamara's concrete placer. RMC claims \$2,872.80 for the concrete it supplied.
2. PIRC says it was not involved in the job in any way and denies liability. Mr. McNamara says he should not have to pay RMC because the concrete cracked excessively and was defective. In the counterclaim, Mr. McNamara seeks \$5,000 from RMC to remove the concrete and install new concrete. PIRC is not a party to the counterclaim.
3. RMC and PIRC are each represented by employees or principals. Mr. McNamara 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. 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.

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.

ISSUES

8. The issues in this dispute are
 - a. Was the concrete defective?
 - b. If so, what are Mr. McNamara's damages?
 - c. If not, what do Mr. McNamara or PIRC owe for the concrete?

EVIDENCE AND ANALYSIS

9. As the applicant in this civil proceeding, RMC must prove its claims on a balance of probabilities, meaning more likely than not. Mr. McNamara must prove his 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.
10. There is no written contract in evidence. However, Mr. McNamara does not dispute that he contracted with RMC and originally paid its invoice for the concrete. Mr. McNamara provided copies of text messages between him and J, who was undisputedly an RMC employee. Those texts show that RMC and Mr. McNamara agreed on the essential terms of a price of "about \$2790" for "8.5m of concrete." The concrete was to provide a floor for a crawlspace and area below a deck.

11. RMC delivered the concrete on May 28, 2021 and invoiced Mr. McNamara on May 31. The total cost was \$3,012.80, including taxes. As noted, RMC only claims \$2,872.80 in this dispute, without explaining the difference. I find the difference is likely the \$125 charge for “returned concrete”, which presumably should not have been charged, plus taxes, which amounts to the \$140 difference. Nothing turns on this given Mr. McNamara does not dispute the amount claimed.
12. The May 28 order sheet and delivery slip each identified the “placer” as “Pump it Rite”. From the contextual submissions and evidence, I find a placer is generally responsible for conveying the concrete from the truck to its final location, distributing it, and ensuring that it properly sets. It is undisputed that RMC was responsible for supplying, but not placing, Mr. McNamara’s concrete.
13. Mr. McNamara paid RMC’s invoice with a credit card, but later disputed the charge. It is undisputed that the funds were returned to Mr. McNamara. RMC says it did not receive the chargeback notice in time to dispute the claim. The fact that the credit issuer returned the funds to Mr. McNamara is not determinative of this dispute or binding on me.
14. As noted, PIRC says it did not place the concrete or do any work for Mr. McNamara. It says it referred the job to another company, Canamex. RMC and Mr. McNamara dispute this. I find it is unnecessary to resolve this issue. RMC’s claim is for a debt arising under the concrete supply contract. Whether or not PIRC was responsible for placing the concrete, there is no evidence it agreed to pay for the concrete, which was undisputedly Mr. McNamara’s responsibility. RMC does not identify any other basis for its claim against PIRC, so I dismiss RMC’s claim against PIRC.

Was the concrete defective?

15. As the party alleging a defective product, Mr. McNamara bears the burden of proving the defect. Photos show multiple thin cracks along the surface of the concrete, some extending for several feet, and covering large areas of the concrete. Most cracks

appear to be under a millimeter wide, although some cracks appear wider. It is difficult to tell because the photos do not show anything for scale.

16. When Mr. McNamara reported the cracks, RMC gave him some crack repair materials at no charge. Mr. McNamara says this was an admission that the concrete was defective. RMC says it was simply trying to help Mr. McNamara. I find RMC's provision of repair materials was not an admission of liability, as there may be business and goodwill reasons for doing so.
17. Generally, a customer alleging deficiencies in a contractor's work or materials must prove the deficiency with expert evidence. Here, the cracks are an obvious visible deficiency. The issue is whether the cracks are the result of a defect in the concrete, as opposed to something avoidable that happened after RMC delivered the concrete. I find that whether concrete was defective is a technical issue beyond the knowledge and experience of an ordinary person, and therefore requires expert evidence to prove.
18. Mr. McNamara submitted 2 expert opinions as evidence. Both opinions are from general contractors who do not say they have any experience mixing, pouring or assessing concrete. As a result, I do not accept their opinions as expert opinions. Both observed that the concrete was cracking, and suggested it was from poor quality concrete. However, neither witness explained how they reached that conclusion, and how they determined that poor quality concrete was a more likely cause of the cracking than any other mechanism. For these reasons, I do not accept either opinion as expert evidence, and I give them little weight.
19. Shortly after the cracks appeared, RMC quality control manager Zeyad Sattar investigated. In an internal email, Zeyad Sattar said they found the cracks were "shrinkage type" attributable to exposing the concrete to direct sunlight, causing rapid evaporation. Zeyad Sattar said the cracks were minimal on the concrete placed under the house compared to outside. That is consistent with the photos. Zeyad Sattar also said there was no protection or curing in place after the concrete was poured. They concluded that the cracks were not related to any issues with the concrete itself.

20. Zeyad Sattar provided further evidence that RMC submitted as expert opinion evidence in this dispute. Mr. McNamara argues that I should not accept Zeyad Sattar's opinion because their employment relationship with RMC makes their opinion biased.
21. The CRT's rules require an expert to be impartial. I find that Zeyad Sattar is not entirely impartial because RMC employs them. However, an employment relationship does not automatically disqualify a person from giving expert evidence or diminish the value of their opinion. The weight given to the opinion depends on all the circumstances, including the expert's position, experience, qualifications, methods, objectivity and area of expertise (see *Dumas v. Nissan Canada Inc.*, 2021 BCPC 132).
22. Zeyad Sattar has a bachelor's degree in civil engineering and planning. They are certified to test and inspect concrete by the Canadian Council of Independent Laboratories. They have 14 years of construction experience, the last 9 of which was spent working as a quality engineer or inspector of cement, concrete, aggregate and soil. I find Zeyad Sattar is an expert in concrete inspection and analysis under the CRT's Rules. Their opinion was supported by reference to objective standards and reports. I have no reason to give less weight to Zeyad Sattar's evidence. I accept it and give it full weight, with one exception noted below.
23. Zayed Sattar's opinion evidence was consistent with their internal email discussed above. They provided the batch report for the specific load of concrete delivered to Mr. McNamara and explained how it complied with the Canadian Standards Association (CSA) 23.1 batching tolerance. That evidence stands unchallenged. Mr. Sattar also pointed to several CSA requirements that Mr. McNamara or the concrete placer undisputedly failed to follow, such as the use of contraction joints, protection from direct sunlight, and use of spraying to reduce evaporation, all of which the CSA standards indicate are required to reduce or prevent cracking.
24. The only part of Zayed Sattar's evidence that I put no weight on has to do with concrete thickness. I accept that he observed that the majority of the concrete slab

was less than 2 inches thick, and in places less than half an inch, which is below CSA minimum standards. However, he did not explain how the thinness could have contributed to the appearance of surface cracks.

25. In summary, I find Mr. McNamara has not proven, on a balance of probabilities, any defect within the concrete RMC supplied. I agree with RMC that its contractual obligation was to provide suitable concrete according to applicable standards. I find it met that obligation. Site preparation, placement, and protection of the poured concrete was not RMC's responsibility and not within its control. I find it more likely than not that the cracking was caused by something other than a defect in the concrete.
26. Further, even if the cracking was caused by a defect in the concrete, Mr. McNamara has not explained the significance of the small cracks. There is no evidence that the cracks present any structural or functional issue. I accept that they present a cosmetic issue, but the concrete is primarily the floor of a crawl space, and it is unclear why the cracks matter to the extent that would warrant a full demolition and refund.
27. As I have found no defect in the concrete, it follows that Mr. McNamara is responsible for the \$2,872.80 claimed by RMC in this dispute, and I dismiss Mr. McNamara's counterclaim for damages.
28. The *Court Order Interest Act* applies to the CRT. RMC is entitled to pre-judgment interest on the \$2,872.80 from May 31, 2021 the invoice date, to the date of this decision. This equals \$28.74.
29. 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 RMC is entitled to reimbursement of \$175 in CRT fees. I dismiss Mr. McNamara's claim for reimbursement of CRT fees. Neither party claimed any dispute-related expenses.

ORDERS

30. Within 14 days of the date of this order, I order Mr. McNamara to pay RMC a total of \$3,076.54, broken down as follows:
- a. \$2,872.80 in debt,
 - b. \$28.74 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$175.00 in CRT fees.
31. RMC is entitled to post-judgment interest, as applicable.
32. I dismiss the claims against PIRC.
33. I dismiss Mr. McNamara's counterclaims.
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. 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