



# Civil Resolution Tribunal

Date Issued: November 2, 2022

File: SC-2022-000682

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Nitkin v. J&S Reclaimed Wood Custom Furniture*, 2022 BCCRT 1201

B E T W E E N :

ELLIOT JACOB NITKIN

**APPLICANT**

A N D :

J&S RECLAIMED WOOD CUSTOM FURNITURE

**RESPONDENT**

---

## REASONS FOR DECISION

---

Tribunal Member:

Eric Regehr

### INTRODUCTION

1. This is a dispute about an allegedly unpaid commission. J&S Reclaimed Wood Custom Furniture is a partnership that manufactures furniture. Elliot Jacob Nitkin designs and sources art and furniture for clients, doing business as The Art and Furniture Concierge. Mr. Nitkin referred a client to J&S, who purchased 2 pieces of furniture costing \$13,346.75. Mr. Nitkin claims that J&S agreed to pay a 15%

commission for the referral, but never did. Mr. Nitkin claims \$2,002.02, which is 15% of \$13,346.75. He also asks for a \$500 “penalty” against J&S for “intentionally breaking their word”. Mr. Nitkin is self-represented.

2. J&S denies agreeing to pay Mr. Nitkin a commission. If it did, J&S argues that Mr. Nitkin breached the parties’ contract, primarily by failing to act as the intermediary between J&S and the client. J&S also argues that Mr. Nitkin failed to verify the client’s measurements and fostered a hostile working relationship between J&S and the client. With that, J&S denies that it owes Mr. Nitkin a commission. J&S asks me to dismiss Mr. Nitkin’s claims. J&S is represented by a partner, Steven McFarlane.

## **JURISDICTION AND PROCEDURE**

3. 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.
4. 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 sides to this dispute call into question the credibility, or truthfulness, of the other. However, in the circumstances of this dispute, I find that it is not necessary for me to resolve the credibility issues that the parties raised. I therefore decided to hear this dispute through written submissions.
5. 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.

6. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money or to do or stop doing something. The CRT's order may include any terms or conditions the CRT considers appropriate.

## **ISSUES**

7. The issues in this dispute are:
  - a. Did the parties have a contract for a 15% commission?
  - b. If so, did Mr. Nitkin breach the parties' contract?
  - c. How much, if anything, does J&S owe Mr. Nitkin?

## **EVIDENCE AND ANALYSIS**

8. In a civil claim such as this, Mr. Nitkin as the applicant must prove his case on a balance of probabilities (meaning "more likely than not"). While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
9. Mr. Nitkin first connected with J&S in August 2020. The nature of their initial interactions is unclear, but I infer they discussed the possibility of Mr. Nitkin referring J&S clients. I say this because on October 28, 2020, Mr. McFarlane emailed Mr. Nitkin that J&S offers a 15% commission for referrals. This email does not appear to have been in relation to a specific client referral.
10. The parties both rely on the terms and conditions on J&S's website. Relevant to this dispute, the terms say that "trade partners" are responsible for all client management and must act as a "third party between J&S and the client". The terms also say that the trade partner is responsible for ensuring that furniture items are "properly ordered" to fit the client's space. The terms say that if "these duties are neglected, commissions may be reduced or not issued at all". The terms say that a commission must be pre-arranged before an order is placed.

11. Mr. Nitkin introduced J&S to a new client by email in November 2020. This client was interested in a custom dining room table, credenza, and desk. In early December 2020, Mr. Nitkin and the client went to J&S's shop to meet and discuss the project. On December 24, 2020, the client paid J&S an 80% deposit for a custom dining room table and credenza (they decided against the desk). The cost was \$13,346.75.
12. J&S's first argument is that it never promised to pay Mr. Nitkin a commission for this referral. It is true that the parties' email correspondence does not include J&S offering a commission for this specific client, or any other direct evidence about an agreement for a commission. However, it is not necessarily true that the parties did not have a contract just because they did not sign a formal agreement or explicitly agree to one in their emails. Parties can form a contract through their correspondence and their conduct if they show that the parties agreed to clear contractual terms. (See *Crossen Estate (Re)*, 2012 BCSC 26, at paragraph 30).
13. Here, Mr. Nitkin introduced the new client after J&S told Mr. Nitkin about its standard commission. As mentioned above, Mr. Nitkin works as a designer. Commissions on referrals form at least part of his business's revenue. I agree with Mr. Nitkin that it is not believable that J&S expected Mr. Nitkin to refer clients and manage the design and manufacturing process for free. Although the terms say that commissions must be "pre-arranged", I find that J&S's email about the 15% commission meets this requirement in the circumstances. I find that the parties agreed to a 15% commission.
14. J&S's main arguments are that Mr. Nitkin breached the parties' contract. It alleges 3 separate breaches. J&S says that Mr. Nitkin abandoned the client partway through the process, and that his actions disentitle him to a commission.
15. It is undisputed that J&S's initial time estimate for the entire project was 6 to 8 weeks. Mr. Nitkin emailed J&S asking for updates about the design process on February 17, March 27, and May 3, 2021. J&S responded each time that the drawings were not ready.

16. On May 6, 2021, Mr. Nitkin emailed Mr. McFarlane about the ongoing delays. He said the client was growing impatient and concerned. Mr. Nitkin suggested that there were 3 options on how to proceed: a face-to-face meeting between J&S, Mr. Nitkin, and the client, immediate delivery of design drawings and a firm commitment on a completion date, or a full refund. In response, J&S's other partner, Joshua Hooge, declined to provide a firm completion date given the "dynamic global situation" and said that a refund was "not an option". They said that the client's project was on J&S's "direct worklist" and that they would not be rushed. They did not respond to Mr. Nitkin's proposed solutions and did not provide drawings.
17. On June 7, 2021, the client emailed J&S directly asking for an update on the project's status. Mr. McFarlane responded on June 10 that Mr. Nitkin was supposed to keep the client updated and that the drawings would be complete soon. The client forwarded this email to Mr. Nitkin and expressed frustration at J&S's attempt to "pass the buck". Mr. Nitkin says that the client decided to deal directly with J&S without Mr. Nitkin's involvement because Mr. Nitkin's relationship with J&S had soured.
18. It is undisputed that after May 2021, Mr. Nitkin had no further involvement in the process. Mr. McFarlane communicated directly with the client. It is undisputed that the clients received the dining room table in July and the credenza in December 2021. It is also undisputed that the clients paid J&S's invoice and have no complaints about the furniture's quality.
19. J&S argues that Mr. Nitkin forfeited his right to the commission by abandoning the client midway through the process. Mr. Nitkin agrees that it was his job to communicate with the clients. However, he says that it is implicit in this obligation that J&S would give him information to pass along, which it did not do. He also says the client decided to communicate with J&S directly. So, he says he did not breach the contract.
20. As mentioned above, the terms say that Mr. Nitkin's commission may be reduced if he "neglects" to act as the intermediary between J&S and the client. This language

suggests that Mr. Nitkin's commission would only be reduced if he did something (or failed to do something) to cause a communication breakdown. This interpretation reflects the reality that Mr. Nitkin could not control the client and should not be penalized if the client decided to contact J&S on their own.

21. Mr. Nitkin provided the email chain between him and the client where he says the client said they wanted to communicate directly with J&S. However, he redacted the client's final email. Mr. Nitkin says that he did so because the client wanted their "personal thoughts" to remain private.
22. I considered drawing an adverse inference against Mr. Nitkin for failing to provide this email. An adverse inference is when the CRT assumes that a party did not provide relevant evidence because it would not have helped their case. However, I find that the rest of the email chain supports Mr. Nitkin's account. In the email before the redacted email, Mr. Nitkin said that he had contemplated how to respond to J&S but had not said anything yet, and then asked the client how Mr. Nitkin could help him move the project forward. With that, I find that Mr. Nitkin remained ready and willing to continue working with the client and J&S. I find that the client chose to communicate directly with J&S on their own. In other words, I find that Mr. Nitkin did not "neglect" to act as an intermediary between the client and J&S. I find that he did not breach this term of the parties' contract.
23. J&S also argues that Mr. Nitkin breached the contract by actively fostering a "hostile attitude" towards J&S. This is based on a June 2021 email where Mr. Nitkin suggested that the client take a hard line against J&S, including by hiring a lawyer if the project did not move forward promptly. There is nothing in the parties' contract governing what Mr. Nitkin can say to his client. More importantly, the client's subsequent dealings with J&S were undisputedly polite and constructive. So, there is no evidence that anything resulted from Mr. Nitkin's advice.
24. Finally, J&S argues that Mr. Nitkin breached the contract by failing to provide appropriate measurements for the credenza. It is undisputed that after receiving the initial credenza design in early October 2021, the client told J&S that they had not

realized that the credenza would block at least one heat register. J&S had to slightly redesign the credenza to address this issue. J&S says that this caused considerable wasted time.

25. As mentioned above, the terms say that Mr. Nitkin was responsible for ensuring that the furniture is “properly ordered” for the space. On December 22, 2020, Mr. Nitkin emailed Mr. McFarlane that the client wanted the credenza, subject to Mr. Nitkin confirming the dimensions. I find that ensuring that the furniture was appropriately suited for the intended space was one of Mr. Nitkin’s obligations to earn his commission. I find that by failing to identify the obvious issue with blocking heating vents, he breached this contractual term.
26. The final question is how much J&S owes Mr. Nitkin after accounting for this contractual breach. On December 17, 2021, Mr. Nitkin sent J&S a \$1,334.68 invoice, which was only 10% of the total project cost. Later that day, Mr. Nitkin sent an amended invoice for \$2,002.02, which was 15%. Mr. Nitkin says that the first invoice was an administrative error on his part. I find that the parties agreed to a 15% commission, and nothing turns on Mr. Nitkin accidentally sending an inaccurate first invoice. I find that he did not agree to a lower rate by doing so.
27. Also on December 17, 2021, J&S sent Mr. Nitkin an invoice for \$1,680 for 10 hours of work redesigning the credenza at \$150 per hour, plus GST. I find that this is the amount J&S says Mr. Nitkin’s commission should be reduced because of the credenza redesign. There were 18 emails back and forth about the necessary changes, most of which were 1 or 2 sentences. The credenza’s dimensions did not change. The only change was that the 2 doors at the credenza’s edges became sliding doors instead of swing doors. The design drawing in evidence is a simple single page document showing the front and back of the credenza with dimensions. J&S does not explain why it took 10 hours to make this minor change. On a judgment basis, I find that Mr. Nitkin’s \$2,002.02 commission should be reduced by \$300 to account for his failure to ensure that the furniture was appropriate for the intended space.

28. As for the claimed \$500 “penalty”, I find that this is essentially a claim for punitive damages. Punitive damages are not compensatory. Rather, punitive damages punish harsh, vindictive, reprehensible, and malicious conduct. They are extremely rare in breach of contract cases. See *Vorvis v. Insurance Corporation of British Columbia* [1989] 1 SCR 1085. I see nothing in the evidence to suggest any behaviour deserving of punishment. I dismiss this claim.
29. In conclusion, I order J&S to pay Mr. Nitkin \$1,702.02 for his commission.
30. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Nitkin is entitled to pre-judgment interest on the commission from December 17, 2021, to the date of this decision. This equals \$13.92.
31. 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. Nitkin was partially successful, so I find he is entitled to reimbursement of half of his \$125 in CRT fees, which is \$62.50. Mr. Nitkin also claimed \$1,000 in dispute-related expenses but did not say what these expenses were or provide any evidence about this. I dismiss his claim for dispute-related expenses. J&S did not pay any CRT fees or claim any dispute-related expenses.

## **ORDERS**

32. Within 30 days of the date of this order, I order J&S to pay Mr. Nitkin a total of \$1,783.44, broken down as follows:
  - a. \$1,702.02 in debt,
  - b. \$13.92 in pre-judgment interest under the COIA, and
  - c. \$67.50 in CRT fees.
33. Mr. Nitkin is entitled to post-judgment interest, as applicable.
34. I dismiss Mr. Nitkin’s remaining claims.



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.

---

Eric Regehr, Tribunal Member