



Civil Resolution Tribunal

Date Issued: November 17, 2022

File: SC-2021-008998

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Byrne v. Miller*, 2022 BCCRT 1245

BETWEEN:

MICHAEL BYRNE

APPLICANT

AND:

WAYNE MILLER and TAMMY MILLER

RESPONDENTS

AND:

MICHAEL BYRNE

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Nav Shukla

INTRODUCTION

1. The respondents, Wayne Miller and Tammy Miller, hired the applicant, Michael Byrne, to do renovation work at Mrs. Miller's mother's strata lot. The Millers undisputedly terminated their contract with Michaelⁱ on November 16, 2021, before the work was finished. Michael claims \$5,000 for the amount he says he would have earned to complete interior painting and tiling work, had the Millers not ended the contract.
2. The Millers say they owe Michael nothing and were justified in terminating the contract for various reasons discussed in detail below.
3. The Millers also counterclaim against Michael seeking \$4,500, broken down as follows:
 - a. a \$1,738 refund for an allegedly improperly installed bathroom wall membrane,
 - b. a \$2,000 refund from the deposit paid for kitchen cabinets,
 - c. \$300 for materials and labour to fix Michael's alleged poor baseboard installation, and
 - d. a \$462 refund for alleged incomplete and poorly completed ceiling work.
4. The parties are each self-represented in this dispute.

JURISDICTION AND PROCEDURE

5. 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.

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. In some respects, both parties of this dispute call into question the credibility, or truthfulness, of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.
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.

Preliminary Issues

Preliminary Decision

9. Originally, only Mr. Miller was a respondent in this dispute. Michael and his significant other, VM, brought a separate dispute (SC-2021-009244) against Mrs. Miller. In each dispute, the named respondent brought a \$5,000 counterclaim. In a May 5, 2022 preliminary decision, a CRT tribunal member found that the Millers' respective counterclaims in each dispute were for the same breach of contract. The tribunal member found it appropriate to refuse to resolve Mrs. Miller's counterclaim in SC-2021-009244 since Michael and VM had already withdrawn their claim in that dispute.
10. Since the decision meant that the only remaining claims involved Michael and Mr. Miller but not VM or Mrs. Miller, the tribunal member ordered that Michael could amend the Dispute Notice in this dispute to add VM as an applicant or Mrs. Miller as

a respondent within 7 days of the preliminary decision. Mr. Miller was also given 7 days to amend the Dispute Notice for their counterclaims.

11. Following this preliminary decision, Michael asked the CRT to add Mrs. Miller as a respondent to the Dispute Notice. Mr. Miller also asked the CRT to add Mrs. Miller as a counterclaim applicant. On May 17, 2022, the CRT informed Michael of Mr. Miller's request and that the CRT was adding Mrs. Miller as a counterclaim applicant. However, due to an oversight, the Dispute Notice for the counterclaim was not amended by CRT staff. At my request, CRT staff have now issued the amended Dispute Notice to correct this oversight. Since the CRT informed Michael on May 17, 2022 that Mrs. Miller would be added as an applicant to the counterclaim and the parties proceeded with this dispute on that basis, I find there has been no prejudice to any party due to this oversight.

Withdrawn and Additional Claims

12. In the counterclaim, the Millers originally sought an additional \$500 for Michael's alleged refusal to accept delivery of items from the Millers' plumber. However, during the CRT's facilitation stage, the Millers withdrew this claim. So, I do not address it any further in this decision.
13. Further, in their submissions, the parties each make additional allegations beyond what is in their respective Dispute Notices. The purpose of the Dispute Notice is to define the issues and provide notice to the respondent of the claims against them. So, I decline to make findings about anything not related to claims raised in the Dispute Notices.

Evidence

14. The Millers provided some evidence after the CRT's deadline for doing so. Michael objects, arguing the Millers have not respected the CRT's rules. I have reviewed the late evidence and find that it is relevant to this dispute. Michael is not prejudiced because he had the opportunity to review the Millers' late evidence and respond to it.

Bearing in mind the CRT's flexible mandate, I allow the late evidence and have considered it in my analysis below.

15. Further, Michael provided some evidence that I was unable to view. At my request, CRT staff asked Michael to resubmit the unviewable evidence, which he did. The Millers were given an opportunity to respond, and Michael provided a final reply. After Michael's final reply, the Millers emailed CRT staff responding to Michael's reply. I reviewed the Millers' unsolicited comments and found they did not provide any new relevant information, and it was not in the interests of efficiency to provide them to Michael for comment before issuing this final decision. So, I do not rely on the Millers' unsolicited comments in my decision below. Nothing would turn on them in any event.

Settlement Discussions

16. In their submissions, the Millers refer to settlement discussions. CRT rule 1.11 says that communications made attempting to settle claims by agreement in the CRT process are confidential and must not be disclosed during the CRT's decision process. CRT rule 1.11 exists to encourage settlement by allowing parties to make admissions without fear that those admissions will end up as evidence in a later hearing. Here, Michael objects to these settlement discussions being disclosed. So, I have not considered these discussions in reaching my decision.

ISSUES

17. The issues in this dispute are:
 - a. Did the Millers breach the parties' contract? If so, is Michael entitled to damages for the Millers' breach?
 - b. Did Michael deficiently install the bathroom wall membrane? If so, what damages, if any, are the Millers entitled to?
 - c. Did Michael deficiently install the baseboards? If so, what damages, if any, are the Millers entitled to?

- d. Are the Millers entitled to a \$2,000 refund from the kitchen cabinet deposit?
- e. Did Michael charge for incomplete or poorly completed ceiling work? If so, are the Millers entitled to a \$462 refund?

EVIDENCE AND ANALYSIS

18. In a civil proceeding like this one, as the applicant, Michael must prove his claims on a balance of probabilities (meaning “more likely than not”). The Millers must prove their counterclaims to the same standard. I have reviewed all the parties’ submitted evidence and argument but refer only to what I find relevant to provide context for my decision.
19. The parties undisputedly did not have a formal signed contract. The Millers say that because they had no written contract with Michael, they were entitled to terminate their arrangement without providing notice or compensation to Michael. I disagree. Though there was no written contract, the evidence includes various estimates that Michael provided to the Millers for different work scopes for the project. These estimates were amended from time to time, based on changes in the scope of work the Millers asked Michael to do. I find these estimates, which the Millers do not deny accepting, together became the parties’ contract. They set out the agreed work and approximate price. More on the estimates below.
20. The evidence shows that Mrs. Miller first contacted Michael for a quote for some renovation work on September 27, 2021. As noted above, Michael then provided various estimates to the Millers from time to time. In early October, the Millers paid Michael the requested deposits and Michael started the renovation work. On November 12, 2021, after the Millers visited the property to inspect Michael’s work, Mr. Miller emailed Michael and said that they wanted him to “halt” the work until “a decision is made next week”. As noted above, on November 16, 2021 the Millers undisputedly terminated their contract with Michael.

Did the Millers breach the parties' contract?

21. As mentioned above, Michael's \$5,000 claim is for interior painting and tiling work that he was unable to complete due to the Millers terminating the parties' contract. I find estimates 1209, 1222, and 1232 show that tiling and interior painting were part of Michael's work scope for this project.
22. The Millers say that Michael is not entitled to any compensation because he was an independent contractor and the *Employment Standards Act* (ESA) does not apply to him. However, I find Michael's claim is not for compensation under the ESA, which is outside of the CRT's jurisdiction in any event. Rather, and though he does not use these words, I find Michael alleges the Millers breached the parties' contract by unreasonably terminating it before the agreed upon work was completed.
23. The Millers allege that they were entitled to terminate the contract for the following reasons:
 - a. Michael's work was substandard. In particular, the Millers say Michael deficiently installed a bathroom wall membrane.
 - b. Michael displayed abusive and uncooperative behaviour towards Mrs. Miller and trades and failed to follow the Millers' communication instructions.
 - c. Michael did not follow the Millers' instructions to install backing blocks for safety bars in the tub and shower, adjust a wall in one bathroom, keep the exterior hallways clean, and protect furniture and appliances in the strata lot.
 - d. Michael allegedly removed the door lock box on November 12, 2021 to keep the Millers' plumber from entering the strata lot while he was working there.
24. Though they do not use these exact words, I find the Millers argue that Michael's alleged actions set out above were a fundamental breach and gave them the right to terminate the parties' contract.
25. Not every breach of a contract is a fundamental breach. Where a party fails to fulfill a primary obligation of a contract in a way that deprives the other party of substantially

the whole benefit of the contract, it is a fundamental breach (see *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC) and *Bhullar v. Dhanani*, 2008 BCSC 1202 at paragraph 27). If there is a fundamental breach, the wronged party may terminate the contract immediately, and does not have to perform the contract further (see *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BCCA) at paragraph 23).

26. Based on the evidence before me, I find the allegations set out in points b and d above are either unproven or do not go to the core of the parties' contract such that if proven, they would constitute a fundamental breach. The same applies to the Millers' allegations in point c that Michael did not adjust a wall in one bathroom, keep the exterior hallways clean, and protect the furniture and appliances. This leaves the allegations that Michael improperly installed the bathroom wall membrane and that he did not install backing blocks for safety bars in the tub and shower.

Alleged deficient bathroom wall membrane and failure to install backing blocks

27. Where a party asserts deficient work, that party has the burden of proving the deficiencies (*Absolute Industries Ltd. v. Harris*, 2014 BCSC 287 at paragraph 61). Here, the burden is on the Millers to prove Michael's work was deficient. Normally, the assessment of the quality of a professional's work would require expert evidence, unless I find the assessment of it is within ordinary knowledge (see *Bergen v. Guliker*, 2015 BCCA 283). Here, I find expert evidence is necessary to determine whether Michael's bathroom wall membrane installation was substandard. I also find expert evidence is necessary to determine whether Michael should have installed backing blocks before installing the bathroom wall membrane.
28. The Millers rely on opinions from 3 contractors which they say prove Michael's work was deficient. These contractors commented on various alleged deficiencies. However, I focus my discussion here on their comments about the bathroom wall membrane and the backing blocks because these are the only deficiencies raised in the Millers' Dispute Responses that I find could be a fundamental breach.

29. The first opinion is from Nick Zemora, who has been a professional tile contractor for over 12 years. I accept Nick Zemora's evidence as expert evidence under the CRT's rules. In their letter, Nick Zemora says that Mrs. Miller contacted them to do work at the strata lot. Nick Zemora commented that the waterproofing work Michael did in the bathroom was not done correctly. They said that the ceiling had a 1.5 to 2 inch gap with no drywall and the tub section had the drywall board sitting on top that was not covered by mesh tape. They added that a lot of water hits the bottom section and if that gap is not filled, it will result in a lot of water moisture seeping through. Nick Zemora said that over time, this gap will affect the walls' inner section. Nick Zemora further commented that the waterproofing may have looked good, but it was not serving its purpose properly.
30. Joe Kadar, a general contractor for the past 30 years, gave essentially the same opinion, which I also accept as expert evidence under the CRT's rules. Lastly, the Millers submitted an opinion from Shayne Finskars, who gave another similar opinion. However, other than stating their title as president and owner of City & Country Contracting Ltd., Shayne Finskars did not provide any evidence of their qualifications as required by CRT rule 8.3(2). So, I find this opinion does not qualify as expert evidence and give it no weight.
31. In his submissions, Michael explains why he says the bathroom wall membrane work was not deficient. However, I do not accept Michael's own opinion as expert evidence since as a party to the dispute, he is not neutral. Michael argues the Millers' expert opinions are not objective. However, Michael provided no expert evidence from any individuals to rebut that evidence. The only expert evidence before me is from Nick Zemora and Joe Kadar. So, based on this expert evidence, I find that the bathroom wall membrane installation was deficient and, if not remedied, would have led to more serious problems in the future.
32. Joe Kadar also commented that backing blocks for safety bars are required per the "BC building code". Nick Zemora gave a similar opinion. They also said that it would have been difficult to install the backing blocks after installing the bathroom wall

membrane. They said that if the backing blocks were not installed, the safety bar could fail when used. Michael says that the Millers had not yet chosen a handle, so he did not have the necessary information to install the backing blocks. He says that the wall could be opened as required and the backing blocks could be added on the opposite side of the shower. On balance, I accept Joe Kadar and Nick Zemora's expert evidence that the backing blocks should have been installed before the bathroom wall membrane and would be difficult to install afterwards. Without any supporting evidence, I do not find Michael's submission that he needed the Millers to first choose the safety handle they wanted before he could install the backing blocks persuasive. So, I find Michael's failure to install the backing blocks before installing the bathroom wall membrane was a deficiency.

33. The existence of deficiencies does not necessarily mean there has been a fundamental breach. However, in this situation, I find the deficient bathroom wall membrane installation work and failure to install the backing blocks together were sufficiently serious to constitute a fundamental breach. I find this breach was so significant that the Millers reasonably lost confidence in Michael's ability to complete the renovation work. So, I find the Millers were entitled to terminate the contract when they did, and Michael is not entitled to any damages he may have incurred as a result of the Millers' termination. I now turn to the Millers' counterclaims.

What damages, if any, are the Millers entitled to for the deficiently installed bathroom membrane wall?

34. The Millers claim a \$1,738 refund for the deficient membrane work. Invoice #1125 in evidence confirms Michael charged the Millers \$1,738.28 for this work. Given the deficient installation, and based on the expert opinions before me, I accept that the Millers would need to have the bathroom wall membrane removed and redone. So, I find Michael's bathroom wall membrane work had no value and the Millers are entitled to a \$1,738.28 refund for this work.

Did Michael deficiently install the baseboards?

35. On November 12, 2021, Michael emailed the Millers and said that the flooring installed by the flooring contractor was not levelled. He said that he could not, in good conscience, install baseboards on flooring that is not properly levelled and would remove this work from his work scope schedule.
36. Michael had at this point undisputedly installed only a few baseboards in one closet and part of one wall. The Millers say Michael's limited baseboard installation was substandard and seek \$300 for materials and labour to re-do this work. Michael denies the work was substandard.
37. I find photographs in evidence show that some of the installed baseboards had gaps at some corner edges and at least 1 baseboard was not secured to the wall. I find these deficiencies are obvious and do not require expert evidence. To the extent Michael argues the baseboard installation deficiencies were caused by the unlevelled flooring, I do not find this obvious from the photographs. I find expert evidence is needed to prove the flooring issues caused the deficient baseboard installation and there is none before me addressing this point.
38. It is unclear how the Millers arrived at \$300 for the baseboard deficiencies. The Millers do not say Michael charged them for the baseboard installation, but say they paid Michael an unspecified amount for purchasing the baseboards.
39. In their submissions, the Millers say that after minor floor levelling was completed by their flooring contractor, a finishing carpenter completed the baseboard installation. However, the Millers did not provide any invoice from the finishing carpenter to show how much they were charged to redo Michael's baseboard work. So, on a judgment basis, I award the Millers \$50 for labour and materials for having Michael's deficient baseboard installation removed and redone.

Are the Millers entitled to a \$2,000 refund from the kitchen cabinet deposit?

40. It is undisputed that part of the renovation work included new kitchen cabinets. Michael engaged another company to make the cabinets. The evidence shows the kitchen cabinet maker provided 2 quotations for the cabinets totaling \$14,260. The Millers undisputedly paid Michael \$6,825 as a deposit for the kitchen cabinets.
41. On November 17, 2021, Mr. Miller emailed Michael about the kitchen cabinets and said, "You will return \$1,000 to us and the order is cancelled". Emails between Michael and the cabinet maker show that the cabinet maker agreed to return \$1,000 from the \$6,825 deposit. Michael's statement of the Millers' account notes a further \$650 "reimbursement from cabinet", which Michael says was not from the cabinet maker but that he applied to the Millers' account himself. Michael says the total refund to the Millers for the kitchen cabinet deposit was \$1,850. However, I find the statement of account shows Michael applied a \$1,650 kitchen cabinet deposit reimbursement against the Millers' account.
42. In any event, based on Mr. Miller's November 17, 2021 email, I find that the Millers accepted that other than the \$1,000 reimbursement, they would forfeit the deposit's remainder due to them cancelling the order. There is no evidence that Michael received more than the \$1,000 refund from the cabinet maker for the deposit paid by the Millers. So, I find the Millers are not entitled to any further reimbursement from the kitchen cabinet deposit. Since the evidence shows that the \$1,000 deposit refund has already been applied against invoices issued to the Millers by Michael, I make no order about the kitchen cabinet deposit.

Did Michael charge for incomplete or poorly completed ceiling work?

43. The Millers says Michael charged them for ceiling work in the laundry room that was not done and the kitchen ceiling work required repair. They claim \$462 for the allegedly incomplete and deficiently completed ceiling work. In their submissions, the Millers also say the ceiling work done in the bathrooms had deficiencies.

44. Invoice 1109 shows that Michael charged the Millers \$7,323.75 for the ceiling work, the full amount estimated for ceiling work in estimate 1213. Michael says that the kitchen ceiling work was not deficient. In support, he refers to an undated text message from Mrs. Miller where they told Michael that the “ceilings are amazing!!!!!!”. Michael also provided photographs of finished ceilings with some damage that he says was caused by the Millers’ flooring contractor. The Millers did not provide any photographs showing the alleged incomplete or deficient ceiling work.
45. Joe Kadar, who I find is qualified to give expert opinion about painting, commented that the preparation and painting of the walls and ceilings in the laundry room, en-suite bathroom and kitchen was poorly done. However, he did not describe what the alleged deficiencies were or how extensive they were, so I give little weight to this part of Joe Kadar’s opinion. I note that Joe Kadar appears to suggest that the laundry room ceiling work may have been at least partially completed.
46. On balance, I find the Millers have failed to prove that Michael failed to complete the ceiling work, or that any deficiencies in the ceiling work were caused by Michael and not by other trades. So, I find the Millers are not entitled to any refund for the ceiling work.

CRT FEES, EXPENSES AND INTEREST

47. The *Court Order Interest Act* (COIA) applies to the CRT. The Millers are entitled to pre-judgment interest on the \$1,788.28 from November 12, 2021, the date I find the Millers likely discovered the deficiencies, to the date of this decision. This equals \$16.75.
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. I see no reason in this case not to follow that general rule. Since the Millers were partially successful, I find they are entitled to reimbursement of half of their paid CRT fees. This totals \$62.50. Since Michael was unsuccessful

with his claims, I find he is not entitled to reimbursement of his paid CRT fees. The parties did not claim any dispute-related expenses.

ORDERS

49. Within 30 days of the date of this decision, I order Michael to pay the Millers a total of \$1,867.53, broken down as follows:
 - a. \$1,788.28 in damages,
 - b. \$16.75 in pre-judgment interest under the COIA, and
 - c. \$62.50 in CRT fees.
50. The Millers are entitled to post-judgment interest, as applicable.
51. I dismiss the parties' remaining claims.
52. 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

ⁱ The CRT has a policy to use inclusive language that does not make assumptions about a person's gender. As part of that commitment, the CRT asks parties to identify their pronouns and titles to ensure that the CRT respectfully address them throughout the process, including in published decisions. The applicant advised that he prefers to use the title "Michael" and pronouns "he/him/his". The respondents provided their preferred titles and advised that they prefer the pronoun "they". Accordingly, I address the applicant as Michael, the respondent Wayne Miller as Mr. Miller, the respondent Tammy Miller as Mrs. Miller, and the respondents together as the Millers.