Civil Resolution Tribunal

Date Issued: November 23, 2022

File: SC-2022-003009

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Viral in Nature Inc. v. Prokosh*, 2022 BCCRT 1264

B E T W E E N :

VIRAL IN NATURE INC.

APPLICANT

A N D :

NANCY PROKOSH

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This dispute is about website and advertising services. The respondent, Nancy Prokosh, hired the applicant, Viral in Nature Inc. (Viral), to build a new website for her small business and perform social media ad management. Viral says that Ms. Prokosh breached their contract by terminating it early. Viral also says Ms. Prokosh reversed the non-refundable deposit and first month's payment from her credit card

and refused to pay for completed social media ad management. Viral claims a total of $4,195.80 in damages for breach of contract.

2. Ms. Prokosh says Viral guaranteed it would build her new website within 2 weeks, but it was still incomplete after 3 months. She says Viral was the party that breached their contract. I infer it is Ms. Prokosh's position that she was entitled to terminate their contract.

3. Viral is represented by its principal, Shawn Michael Alain. Ms. Prokosh is self-represented.

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. In some respects, both parties to 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 in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 28, 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.

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.

8. Viral provided several items of late evidence along with its final reply submissions. Viral says the late evidence relates to new allegations Ms. Prokosh raised her response submissions. Ms. Prokosh was given the opportunity to review and respond to Viral's late evidence, so I find she would not be prejudiced if it was admitted. As I find Viral's late evidence is relevant to this dispute, and bearing in mind the CRT's flexible mandate, I admit the late evidence and have considered it below.

ISSUES

9. The issues in this dispute are:

    a. Who breached the parties' agreement?

    b. To what extent, if any, does Ms. Prokosh owe Viral the claimed $4,195.80?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, Viral as the applicant must prove its claims on a balance of probabilities (meaning "more likely than not"). I have read all of the parties' evidence and submissions, but I refer only to what I find is necessary to explain my decision.

11. Ms. Prokosh runs a business selling tea. Viral is a social media and website development agency. In January 2022, Ms. Prokosh initially hired Viral to perform some updates to her existing website. On January 8, 2022, the parties signed a service agreement (contract) for Viral to develop a new website for Ms. Prokosh and manage her paid social media advertising.

12. The parties' contract stated the website development set-up fee was $1,000 "down", plus $200 per month for a minimum of 12 months, which included 1 hour per month of website update services. The contract also stated that Viral would perform social media ad management services for $99 per hour. Clause 9 of the contract stated that if Ms. Prokosh terminated the agreement less than 12 months after the service start date, she must pay for the remainder of days left in the contract.

13. On January 8, 2022, Ms. Prokosh emailed Mr. Alain to confirm that given their agreement for Viral to develop a new website "within the next two weeks at the very latest", Viral would not charge her for its work on her existing website. Mr. Alain confirmed that Viral would not charge her for about 4 hours of services it had already performed. Viral does not dispute that it initially agreed to complete the new website within 2 weeks.

14. It is undisputed that Viral took longer than it expected to complete the new website. The parties' email and text message evidence shows the parties were in near daily contact about the website until January 25, 2022. Ms. Prokosh then texted Mr. Alain for an update on January 31, and he responded that Viral would need more time, as there was "a lot to the site" and Viral wanted to ensure it was just as Ms. Prokosh wanted it. Ms. Prokosh did not specifically agree to the extra time, but she continued to provide Viral with additional photos and content for the new website over the following days, at Viral's request.

15. On February 11, 2022, a Friday, Ms. Prokosh texted Mr. Alain about when they could connect for an update. He suggested the following Monday, as he was away for the weekend. Mr. Alain repeated that the website was much bigger than anticipated but essentially only pictures were left to include. Ms. Prokosh expressed frustration that the website was still not up after more than a month, even though Viral had previously worked on her website, and so it knew the website's scope before they signed their contract. Mr. Alain responded that he was just waiting on her to send the pictures.

16. The evidence shows that Ms. Prokosh sent Viral the requested photos over the following days. However, I find the evidence shows Viral was also still working on

other aspects of the website, including uploading videos, pricing, and payment content.

17. The evidence suggests that at some point the parties agreed to a March 1, 2022 launch date for the new website. However, on February 27, Mr. Alain texted Ms. Prokosh that he was worried Viral would not have the site ready by March 1, as it still had to update the price of each item one-by-one. Ms. Prokosh responded that it did not have to be done by March 1. It is unclear on the evidence exactly what date the website ultimately became “live”, though I find it was likely on about March 1.

18. The parties’ text messages show that throughout March, Ms. Prokosh reported being unable to log in to the website, dissatisfaction with text content and appearance and the speed of the mobile site, and requests for additional content to be uploaded. On March 20, Ms. Prokosh reported that 2 customers had emailed their orders to her because they had been unable to process the orders through the website.

19. On March 24, Ms. Prokosh texted Viral about several other order problems, including: the website was adding tax on tea in error, Ms. Prokosh was not notified of 3 website orders and could not see what had been ordered, a customer notified her that they could not complete an order on the website, and another customer was not charged for shipping. It appears that Mr. Alain responded to and resolved the issues as Ms. Prokosh reported them. Ms. Prokosh expressed concern that there were so many problems with the ordering process. Mr. Alain responded that she should just keep advising him when people have issues, and he will work them out one-by-one, as “that’s how it works”.

20. On April 4, 2022, Ms. Prokosh emailed Viral that it no longer had access to her website, and she had hired a new website developer because Viral’s work remained unfinished after 3 months. Ms. Prokosh also set out the following list of other unresolved issues: inability to navigate from one page to another, PayPal did not work, customers continued to email her that they were unable to place orders, the website did not work with Android and Apple, and no beta testing was completed to ensure the website was working before it went live. Ms. Prokosh advised she would

not pay Viral's recent $200 bill for site maintenance, given the site was non-functioning. She also stated she would not pay an invoice received for social media ad management because she did not understand what this work entailed.

21. Viral says that Ms. Prokosh's April 4 email constituted early termination of the parties' contract, and so she is obligated to pay Viral $2,200 for the monthly payments remaining under the contract. In contrast, Ms. Prokosh says that Viral breached the contract, so she is not obligated to complete the monthly payments.

22. Although Ms. Prokosh does not specifically use the term "fundamental breach", I find she argues that Viral's failure to produce a functioning website after almost 3 months was a fundamental breach of the parties' contract, which gave her the right to terminate the contract. I agree. My reasons follow.

23. Not every breach of contract is a fundamental breach. Where a party fails to fulfil 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). Put another way, a fundamental breach is a breach that destroys the whole purpose of the contract and makes further performance of the contract impossible: see *Bhullar v. Dhanani*, 2008 BCSC 1202.

24. Whether a breach is a fundamental breach matters because there are different remedies available to the wronged party. For most breaches of contract, the wronged party can claim against the other party for damages arising from the breach. For a fundamental breach, the wronged party can terminate the contract immediately. If the wronged party terminates the contract because of a fundamental breach, they do not have to perform any further terms of the contract: see *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 Can LII 2647 (BC CA). As the party alleging a fundamental breach, I find Ms. Prokosh bears the burden of proving it.

25. The test for whether a breach of contract is a fundamental breach is an objective test. That means that I must assess the nature of the breach from the perspective of a

reasonable person in Ms. Prokosh's position. I note that ongoing delays can constitute a fundamental breach when the delays have the effect of creating a completely different situation from what the parties contemplated when they entered into the contract: see *Bridgesoft Systems Corp. v. R.*, 1998 Can LII 3950 (BC SC) and *FortisBC Energy Inc. v. Surrey (City)*, 2013 BCSC 2382 at paragraph 364.

26. I find the parties agreed that Viral would complete Ms. Prokosh's new website within 2 weeks of signing the parties' contract. I also find it was an implied fundamental term of the contract that the completed website would be capable of accepting customers' orders, as a retail website that cannot reliably process orders is essentially useless.

27. While Ms. Prokosh appeared to initially accept some delay in the website completion, I find she reasonably expected that once the website went live, it would essentially be in its completed form, ready to accept and process orders. However, when the website went live at the beginning of March, I find the evidence shows there were multiple issues with its content, including spelling mistakes, inconsistent spacing, text and images that were cut off, and missing links.

28. More importantly, I find that customers were unable to order tea on the website. Ms. Prokosh's concern that she may have missed orders between March 1 and 20 is likely valid, as it appears Viral was unaware of any ordering issues until a customer first brought it to Ms. Prokosh's attention in a March 20 email. I find customers continued to report an inability to order tea on the website up to April 4, 2022. I also accept the list of issues set out in Ms. Prokosh's April 4 email remained unresolved or incomplete, as Viral does not suggest otherwise.

29. I find that by April 4, 2022, Ms. Prokosh could reasonably say she had lost the entire benefit of the contract. By that point, the new website had been live for over a month, yet I find it remained unfinished and unable to accept orders, contrary to Viral's submission. Further, I find Viral's recommendation that Ms. Prokosh simply continue to advise it of issues when customers reported them was inadequate under the circumstances. I find Viral's response provided Ms. Prokosh with no expectation that Viral would produce a well-functioning website in the near future, if at all.

30. I note that there is no suggestion that Ms. Prokosh materially changed the website or its scope after the parties' signed their contract. I find Viral's delay in completing a website that reliably processed orders fundamentally breached the parties' contract.

31. Given Viral's fundamental breach, I find Ms. Prokosh was entitled to terminate the contract when she did so on April 4, 2022. This means that I find she was not obligated to perform the contract after that date, including the $200 monthly payments for website development. So, I dismiss that aspect of Viral's claim.

32. As noted, Viral says that Ms. Prokosh later had all payments she had previously made to it reversed from her credit card, including the $1,000 down payment and the first $200 monthly charge. Ms. Prokosh did not respond to this allegation, but I find nothing turns on whether she reversed those payments. This is because I find she received no value from Viral's work, as it produced an unfinished website that Ms. Prokosh could not use. Therefore, I find Viral is not entitled to any payment for its website work, and I dismiss Viral's claim as it relates to the alleged reversed payments.

33. Finally, Viral says that Ms. Prokosh failed to pay for 4 hours of social media ad management. While Viral did not provide its invoice for this work, I find the parties' emails show that Viral billed Ms. Prokosh for a strategy phone call, setting up the ad account, ad creation, and weekly data reviews. Viral provided screenshots and text messages showing that it completed this work and provided it to Ms. Prokosh. I find Ms. Prokosk agreed in a March 24, 2022 email to pay for 4 hours at the contractually-agreed $99 per hour for this work. As noted, Ms. Prokosh retracted that agreement in her April 4 email. I find she was not entitled to do so, as it related to contractually-agreed work performed before Ms. Prokosh terminated the parties' contract. Therefore, I order Ms. Prokosh to pay Viral $415.80 for 4 hours of social medial ad management, including tax.

34. Viral claims annual contractual interest of 17.9% but does not say how it arrived at that rate. The contract says that Ms. Prokosh owed interest of 3% per month on invoiced amounts over 21 days past due. That interest rate is not expressed as a yearly rate. Under section 4 of the federal *Interest Act*, whenever contractual interest

is not expressed as an equivalent annual rate or percentage, the interest rate is limited to a maximum of 5% per year. So, I find the 5% per year maximum applies to the $415.80 award. I find that contractual interest is reasonably calculated from April 25, 2022, which is 21 days after Ms. Prokosh terminated the parties' contract, until the date of this decision. This equals $12.13.

35. 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 Viral was partially successful, I find it is entitled to reimbursement of half its paid CRT fees, which is $87.50. Ms. Prokosh paid no fees and neither party claimed dispute-related expenses.

ORDERS

36. Within 30 days of the date of this order, I order Ms. Prokosh to pay Viral a total of $515.43, broken down as follows:

    a. $415.80 in debt for unpaid social medial ad management services,

    b. $12.13 in contractual interest, and

    c. $87.50 in CRT fees.

37. Viral is entitled to post-judgment interest, as applicable.

38. I dismiss the remainder of Viral's claims.

39. 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