Civil Resolution Tribunal

Date Issued: November 30, 2022

File: SC-2022-003561

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mansfield v. Smith*, 2022 BCCRT 1290

B E T W E E N :

GREGORY MANSFIELD

APPLICANT

A N D :

KEVIN SMITH

RESPONDENT

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about a pressure-treated wood retaining wall. The applicant, Gregory Mansfield, hired the respondent, Kevin Smith, to remove and replace the wall in July 2016. Mr. Mansfield says Mr. Smith's work was deficient because it became rotted within 5 years and Mr. Mansfield says it should have lasted at least 20 years. He claims for a full refund of $3,360.

2. Mr. Smith disagrees. He says Mr. Mansfield caused the wall to rot by failing to maintain it and by painting it on one side, trapping moisture. He also says wood retaining walls are by nature cheap and have no guaranteed product lifespan.

3. The parties are self-represented.

4. For the reasons that follow, I find Mr. Mansfield has proven his claims.

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. 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.

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.

The Limitation Act

9. Under section 13 of the CRTA, the *Limitation Act* (LA) applies to disputes before the CRT. A limitation period is a time period within which a person may bring a claim. The current LA came into force on June 1, 2013. The parties agree that Mr. Smith built the wall in July 2016, so I find the current LA applies.

10. Section 6 of the LA says the basic limitation period is 2 years from the date a claim is discovered. If that period expires, the right to bring the claim ends, even if the claim would have otherwise been successful. Section 8 says that a person discovered a claim when they knew or reasonably ought to have known that they had a claim against the respondent and that a court or CRT proceeding was an appropriate means to seek a remedy.

11. Mr. Mansfield says he discovered his claims on July 8, 2021. I find this is likely the case. This is because emails show he first notified Mr. Smith about the wall rot a few days after this date. I note that Mr. Smith does not allege that Mr. Mansfield's claims are out of time. As Mr. Mansfield applied for dispute resolution on June 1, 2022, I find his claims are in time and consider them below.

ISSUE

12. The issue in this dispute is whether Mr. Smith's work is deficient, and if so, what remedy is appropriate.

BACKGROUND, EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, Mr. Mansfield as the applicant must prove his claims on a balance of probabilities. This means more likely than not. I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

14. In May 2016, Mr. Mansfield hired Mr. Smith to replace his retaining wall. The parties documented their agreement in a series of May 2016 emails and a July 6, 2016

invoice. In the emails, Mr. Mansfield said that his garden retaining wall was both sagging and rotting. Mr. Smith's reply shows he visited the wall and quoted $2,900 to remove and replace it with a new pressure-treated wood wall. He offered to include adequate tie backs, 4 to 6 inches of clear crush aggregate, and a filter cloth behind the wall to provide proper drainage. Mr. Mansfield agreed in a May 26, 2016 email.

15. Mr. Mansfield's undisputed submission is that Mr. Smith's crew did the work without Mr. Smith attending. Emails show the crew completed the work by July 2, 2016. Mr. Smith's invoice shows that he ultimately charged $3,360. This included tax and some additional concrete cutting done to complete the wall. Mr. Mansfield paid the invoice. I find that Mr. Smith did not provide any specific guarantees or representations in the emails or invoice. Mr. Mansfield does not allege otherwise.

16. Shortly after the wall's completion, Mr. Smith painted its exposed side using a wood stain. There is no evidence or submission that Mr. Smith warned against this.

17. Several years later, on July 14, 2021, Mr. Mansfield emailed Mr. Smith to complain that the wall had significantly rotted on the garden, or unexposed side. I find this to be the case given the photographs Mr. Mansfield provided of the wall after dirt was removed from the garden side.

18. Mr. Smith replied on August 3, 2021 after viewing the wall. He said that the wall was in "good condition". However, he acknowledged a section in the upper middle part of the wall was rotting. He said that Mr. Mansfield should not have painted the wall because it locks in moisture. He recommended replacing the rotted section. Mr. Mansfield emailed back that Mr. Smith should fix the wall, and I infer Mr. Mansfield meant at no cost to him. Mr. Smith did not reply.

19. In September 2021, Mr. Mansfield hired another contractor, Mount Royal Developments Ltd. (MRD) to remove and rebuild the wall.

Was Mr. Smith's work deficient?

20. Although Mr. Smith did not explicitly guarantee his work, I find it was an implied term of the parties' agreement that the wall would be of reasonable quality. See *Belfor (Canada) Inc. v. Drescher*, 2021 BCSC 2403 at paragraph 18. The parties disagree on whether Mr. Smith's work was deficient. Where a party asserts deficient work, that party has the burden of proving the deficiencies. See *Absolute Industries Ltd. v. Harris*, 2014 BCSC 287 at paragraph 61. Normally, assessing the quality of a professional's work requires expert evidence, unless I find it is within an ordinary person's knowledge and experience. See *Bergen v. Guliker*, 2015 BCCA 283.

21. Mr. Mansfield says the wall's construction was deficient and, properly built, it should have lasted at least 20 years. I find these allegations are outside an ordinary person's knowledge and experience and I find expert evidence is necessary.

22. Mr. Mansfield provided letters from several different contractors. The first was Shawn Soucy's August 16, 2022 letter. I find the letter is expert evidence under the CRT rules because the author outlined their qualifications as required by CRT rule 8.3(2). They said they worked as a handyman for 20 years, and a fulltime wall building professional for 4 years.

23. The author said they saw pictures of Mr. Smith's wall and viewed MRD's wall in person. I infer the pictures included the photos in evidence. The author provided the following opinion. There was "no way" that staining the wall caused the observed rot. It was likely caused by rainwater accumulating in the soil behind the wall because the wall lacked proper drainage. A wall installed with a moisture barrier, gravel at the back, long anchors, and proper drainage would last 20 to 30 years. The author would have installed such drainage, and Mr. Smith had not done so. Without those measures, a wall like Mr. Smith's would rot quickly.

24. The builder of the replacement wall, MRD, also provided an undated letter. I find it is not expert evidence as its author, Peter Juric, did not describe their qualifications. However, I still place some weight on it because it describes MRD's observations of Mr. Smith's wall and the work MRD did.

25. The author wrote the following observations about Mr. Smith's wall. The wall leaned at the top, away from the garden, because the buttresses were installed incorrectly. The wall was severely rotted on the garden side, despite the fact that it was summer and dry. The wall should have lasted 20+ years and failed after only 5 years because 1) there was insufficient gravel installed right behind the wall, and 2) there was no garden fabric or other protective sheeting installed anywhere. Staining the exterior side of the wall would not cause the wall to lean or reduce the wood's durability.

26. Finally, Dave Fraser from Birchwood Landscapes Ltd. provided an undated letter as evidence. I find this letter is expert evidence as the author stated their qualifications, which included building wood and concrete timber walls since 2006. The author said that a correctly built pressure-treated wood retaining wall should last 20+ years. They wrote that the standard procedure for building such a wall included installing drainage and landscape or garden fabric. The author did not directly comment on Mr. Smith's work.

27. Overall, I find the weight of the evidence proves, on balance, that Mr. Smith's work was deficient. Both expert letters said that the wall required proper drainage, and Shawn Soucy said Mr. Smith's wall lacked it. The 3 letters refute Mr. Smith's submission that staining the exposed side of the wall caused wood to rot. The 3 letters also state that a properly built wall would last at least 20 years.

28. Further, all 3 letters agree that the wall required a moisture barrier or garden fabric. Mr. Smith agreed in the May 2016 emails to install a filter cloth. Mr. Mansfield says the wall lacked such a cloth, and MRD observed that the wall lacked any garden fabric or other protective sheeting. So, I find that by failing to install the cloth, Mr. Smith breached this specific contract term and provided deficient work.

29. Mr. Smith alleges that Mr. Mansfield failed to perform annual maintenance. The 3 letters did not mention this as a cause of the observed rot. So, I find this speculative and place no weight on this unsupported assertion.

30. Given the above, I find that Mr. Smith breached the contract by providing deficient work and in particular by failing to install garden fabric. The question that remains is what remedy is appropriate. In general, damages for breach of contract are measured by the amount of money it would take to put the applicant in the same position as if the contract had been properly performed. Here, I find that an appropriate measurement of damages would be the cost of replacing the wall, with a reduction to account for betterment. Betterment occurs where restoration or repair increases the damaged property's value. Damages can be reduced to account for betterment, but the party relying on betterment has the burden to prove it. See *Madalena v. Kuun*, 2009 BCSC 1597.

31. The difficulty here is that there is no evidence showing what MRD charged Mr. Mansfield for its work. Further, while I am satisfied that Mr. Mansfield received a better wall because it is brand new, no party discussed what an appropriate reduction in damages would be. On a judgment basis, I find that an appropriate measure of damages is to estimate the value Mr. Mansfield received from Mr. Smith' wall. The expert evidence indicates a wood retaining wall should last at least 20 years. Mr. Smith's wall lasted only a little more than 5 years. As this is about 25% of the expected lifespan, I find it appropriate to order a refund of 75%. This equals $2,520.

32. The *Court Order Interest Act* applies to the CRT. Mr. Mansfield is entitled to pre-judgment interest on the damages award of $2,520 from September 1, 2021, the approximate date Mr. Mansfield paid MRD to replace the wall, to the date of this decision. This equals $27.37.

33. 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. I find Mr. Mansfield is entitled to reimbursement of $175 in CRT fees.

34. Mr. Mansfield also claims $100 as he gave one of the contractors providing evidence a gift card in this amount. I find this amount unsupported by evidence, such as a contractor's invoice or card purchase receipt. To the extent that it was a voluntary

payment, I also find it was not a reasonable expense under CRT rule 9.5(2). So, I decline to award this amount.

ORDERS

35. Within 30 days of the date of this order, I order Mr. Smith to pay Mr. Mansfield a total of $2,722.37, broken down as follows:

    a. $2,520 as damages,

    b. $27.37 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175 in CRT fees.

36. Mr. Mansfield is entitled to post-judgment interest, as applicable.

37. 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.

David Jiang, Tribunal Member