



Civil Resolution Tribunal

Date Issued: January 31, 2023

File: SC-2022-004035

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Pratt v. Shaw (dba K&J Fencing)*, 2023 BCCRT 83

B E T W E E N :

KARI PRATT and CHRISTOPHER PRATT

APPLICANTS

A N D :

KURT SHAW (Doing Business As K&J FENCING)

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Eric Regehr

INTRODUCTION

1. Kari Pratt and Christopher Pratt hired Kurt Shaw, who does business as K&J Fencing, to build a fence. The Pratts say that the fence Mr. Shaw built was deficient to the extent that it needed to be torn down and rebuilt. They claim \$2,350, which they break down as a \$2,150 refund and \$200 for the additional cost of hiring another contractor. Mrs. Pratt represents the Pratts.

2. Mr. Shaw acknowledges that there were deficiencies with the initial fence construction. However, he says that he already fixed them. He denies that there is anything wrong with the fence. He asks me to dismiss the Pratts' claims. Mr. Shaw is self-represented.

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.
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. 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.
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.
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. Have the Pratts proven any deficiencies in the fence's construction?
- b. If so, what are their damages?

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the Pratts as the applicants must prove their case on a balance of probabilities, which means "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. I will start with the applicable law. In all contracts for professional or trade services, which I find includes contracts to install fencing, there is an implied term that the professional will perform the work to a reasonably competent standard. Where the customer alleges deficiencies, as the Pratts do, they must prove them. In general, expert evidence is required to prove whether a professional's work fell below a reasonably competent standard. This is because an ordinary person does not know the standards of a particular profession or industry, such as fence construction. The exceptions to this general rule are when the work is obviously substandard, or the deficiency relates to something non-technical. See *Absolute Industries Ltd. v. Harris*, 2014 BCCA 287, and *Schellenberg v. Wawanesa Mutual Insurance Company*, 2019 BCSC 196. With that in mind, I turn to the facts.
10. The Pratts hired Mr. Shaw to build a front and side fence on their property. This dispute is about the side fence. According to a May 22, 2021 quote, Mr. Shaw proposed to remove the old side fence and replace it with a "6ft framed fir slat fence using 5x5 fir posts", plus a gate, for \$2,250 plus GST. The Pratts accepted this quote, and I find that it sets out the terms of the parties' contract. Notably, the quote does not say anything about concrete depth or whether the fir posts would be treated. Mr. Shaw's employees built the fence in mid-September 2021 (the exact date is not clear, but nothing turns on it).

11. Mrs. Pratt emailed Mr. Shaw on September 21, 2021, raising several concerns about the fence's quality, including that several panels were mouldy and the foundation cement for the posts was considerably below-grade. Mrs. Pratt attached photos that I find corroborate some of her complaints, namely the mouldy wood and posts covered in soil. The Pratts also provided a photo in this dispute showing that the posts were set in concrete that was about 7 inches below grade.
12. It is undisputed that Mr. Shaw returned at some point after the September 21, 2021 email. On September 30, 2021, Mrs. Pratt texted Mr. Shaw thanking him for fixing part of the fence. Mr. Shaw says that he addressed all of Mrs. Pratt's concerns. In this dispute, the Pratts accept that Mr. Shaw addressed some issues, but they maintain that he failed to address the mouldy planks and below-grade concrete. They also say that Mr. Shaw never installed trim boards.
13. The Pratts say that Mr. Shaw promised to clean the mould off the wood in a September 27, 2021 email, but they did not provide it as evidence despite providing other emails, so I find it unproven that Mr. Shaw sent this email. The Pratts say that they ended up cleaning the wood themselves because Mr. Shaw never came back. This is undisputed, and in current photos of the fence, it appears to have been cleaned and stained.
14. There is no evidence that the parties communicated again until March 8, 2022, when the Pratts emailed Mr. Shaw. They demanded a full refund because they would need to hire another contractor to remove and reinstall the posts, repair an unlevel gate, install trim, and wash all the mouldy wood. They mention the gate in the Dispute Notice, but they provided no evidence or submissions about it, so I dismiss it as unproven. I turn then to the 3 remaining alleged deficiencies.
15. The most significant alleged deficiency is the post installation. The Pratts say that Mr. Shaw should have poured concrete to grade to avoid direct contact between the posts and the soil. The parties' contract says nothing about concrete depth. The Pratts make 2 arguments about the concrete.

16. First, the Pratts rely on representations Mr. Shaw made in his Facebook marketing materials. Mr. Shaw undisputedly advertises on Facebook that his fences are “set in the ground deeper than anyone else and fully cemented”. The Pratts also provided 2 photos of fences from Mr. Shaw’s Facebook account that show posts set in at-grade cement.
17. A representation in marketing materials can form part of a contract in certain situations, but the representation must be clear and precise, and there must be evidence that the parties both intended it to be a contractual term. See *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 1050. Here, I find that the marketing materials were vague, as it is unclear what exactly “fully concreted” meant. It is also unclear whether all of Mr. Shaw’s marketing photos show above-grade concrete, or that the 2 photos provided were associated with the post about fully concreted fences. I therefore find that the Facebook posts about concrete are not part of the parties’ contract.
18. The Pratts also argue that Mr. Shaw should have installed treated fir posts set in above-grade concrete to avoid rotting. They essentially argue that it was incompetent for him to install the fence posts as he did.
19. The Pratts rely on an estimate from Evan Caton of Wild West Fencing as expert evidence. I find that I do not need to consider whether to admit this evidence as expert evidence because, even if I did, I find that it does not prove that Mr. Shaw’s actions were not to a reasonable standard. Evan Caton says that untreated fir posts installed directly in soil will be less durable because the soil contact increases the risk of rot. I accept that this is likely true, but Evan Caton does not say that Mr. Shaw’s installation falls below a reasonable standard. In other words, Evan Caton does not rule out that Mr. Shaw’s approach is a lesser, but still reasonably acceptable, way to install fence posts. I make the same conclusion about using untreated fir. While it may be that the posts end up lasting less long than treated fir, there is no evidence that it is unreasonable to use untreated fir.

20. Most importantly, there is no evidence that the fence posts are currently rotting or deteriorating, so it is unclear why Evan Caton or the Pratts believe they need to be replaced immediately. In any event, Mr. Shaw undisputedly provided a 5-year warranty for the fence, which may apply if the fence posts rot within that time regardless of the cause. Nothing in this dispute prevents the Pratts from bringing a future CRT dispute based on the warranty.
21. I dismiss the Pratts' claim for compensation to replace the fence posts.
22. The next issue is the trim boards. The Pratts say that Mr. Shaw left without installing the trim as required, and that they had to hire someone else to install it. Recent photos of the fence show the trim installed. However, there is nothing in the contract about trim and the Mrs. Pratt did not raise it in her September 21, 2021 email. I find it unproven that the parties' contract required Mr. Shaw to install trim boards.
23. Finally, the mould. The photos from Mrs. Pratt's September 21, 2021 email show discolouration on many of the fence's above-grade planks that I accept was likely mould. Mr. Shaw does not dispute this. He also does not dispute that he never returned to clean it despite knowing it was an issue. The Pratts say that they cleaned the mould themselves so they could stain the fence.
24. I find that it was an obvious breach of the parties' contract for Mr. Shaw to provide mouldy wood planks and fail to clean them. The Pratts did not say how long it took them to clean the mould, but I accept that it was more than a minor inconvenience. On a judgment basis, I award \$300 for this contractual breach.
25. The *Court Order Interest Act* (COIA) applies to the CRT. It is unclear when the Pratts cleaned the mould, so I find that the Pratts are entitled to pre-judgment interest from June 16, 2022, the date they started this CRT dispute, to the date of this decision. This equals \$3.76.
26. 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. The Pratts claim \$10 for registered mail to serve Mr.

Shaw, which I find is a reasonable expense. However, the Pratts were only partially successful, so I find they are entitled to reimbursement of half of their \$125 in CRT fees and \$10 in dispute-related expenses, which is \$67.50.

ORDERS

27. Within 30 days of the date of this order, I order Mr. Shaw to pay the Pratts a total of \$371.26, broken down as follows:

- a. \$300 in damages,
- b. \$3.76 in pre-judgment interest under the COIA, and
- c. \$67.50 for \$62.50 in CRT fees and \$5 for dispute-related expenses.

28. The Pratts are entitled to post-judgment interest, as applicable.

29. I dismiss the Pratts' remaining claims.

30. 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