



Civil Resolution Tribunal

Date Issued: December 5, 2023

Files: SC-2022-007992
and SC-2023-001313

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Zysman v. Sims*, 2023 BCCRT 1062

BETWEEN:

MAYA ZYSMAN

APPLICANT

AND:

JEFF SIMS

RESPONDENT

AND:

MAYA ZYSMAN

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. These 2 linked disputes are about house and cat-sitting services. As I find these 2 linked disputes are essentially a claim and a counterclaim, I have issued 1 decision for both disputes.
2. In dispute number SC-2022-007992, the applicant Maya Zysman claims against the respondent Jeff Sims. Ms. Zysman says that Mr. Sims breached the parties' contract by 1) failing to disclose that the cat was very ill, 2) sending a "supervisor", ES, to watch over her, 3) booking Ms. Zysman's flight home under a false name, and 4) using the police to evict her from Mr. Sims' house without justification. Ms. Zysman claims \$5,000, broken down as follows: \$1,423 for travel expenses plus cash and items left at Mr. Sims' house, \$2,176 for her services, \$1,400 for "unrealized" accommodation for September 9 to 24, 2022, and \$1 in punitive damages.
3. Mr. Sims denies liability. He says Ms. Zysman terminated the parties' agreement. He says she subsequently tried to extort him for more money in exchange for leaving his house, so he reasonably called the police.
4. In dispute number SC-2023-001313, Mr. Sims is the applicant by counterclaim and Ms. Zysman is the respondent by counterclaim. Mr. Sims says that Ms. Zysman's refusal to leave the house led him to incur additional costs. He claims \$1,600 for hiring ES to take over Ms. Zysman's duties, \$150 in long-distance phone charges, \$300 for installing new locks, \$720 as reimbursement of money paid to Ms. Zysman under duress, and \$500 to hire a "mediator" to deliver the money. These claims total \$3,270.
5. Ms. Zysman disagrees. She says the counterclaim is an abuse of process and should be dismissed.
6. The parties are self-represented.
7. For the reasons that follow, I dismiss Ms. Zysman's claims. I find Mr. Sims has proven most of his counterclaims.

JURISDICTION AND PROCEDURE

8. These are the formal written reasons of the 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.
9. 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. Some of the evidence in this dispute amounts to a "she said, he said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. 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. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.
10. 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.
11. 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.

ISSUES

12. The issues in this dispute are as follows:
 - a. Did either party breach the house and pet-sitting contract?
 - b. Are any remedies appropriate?

BACKGROUND, EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, Ms. Zysman and Mr. Sims must each prove their respective claims and counterclaims 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. Ms. Zysman provided no evidence in dispute number SC-2023-001313, though she had the opportunity to do so. That said, I considered the parties' submissions and evidence globally in reaching my decision. This is because in each dispute, the parties are the same, the issues are linked, and the submissions overlap. Considering the submissions and evidence together avoids inconsistent findings.

The Parties' Agreement

15. The parties proceeded informally without a written agreement. Based on the submissions, I find that the parties had a verbal agreement with the following terms.
16. Ms. Zysman agreed to the following. She would fly in from the USA and look after Mr. Sims' house from August 22 to September 24, 2022. During this time, Mr. Sims and his family would be absent on vacation. Ms. Zysman would feed the cat in the main part upstairs, clean the litterbox, and water the houseplants and the gardens.
17. In exchange, Ms. Zysman would stay in the downstairs guest suite. She would have the opportunity to leave the house to view real estate she wished to purchase. There would be no exchange of money.

18. Ms. Zysman says that she acted as Mr. Sims' employee. Mr. Sims disagrees. The relevant factors to consider in determining whether a person is an independent contractor or employee are discussed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 and further in *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044. The non-exhaustive factors include the level of control the employer has over the worker's activities and whether the worker provides his own equipment. The central question is whether the worker is performing services as a person in business on their own account. If so, the person is more likely an independent contractor.
19. I find Ms. Zysman was not an employee and acted as a contractor. This is because the work was for a relatively short and fixed period of time, the work was not connected to any ongoing business, Mr. Sims did not provide any tools or equipment, Mr. Sims had a limited role in directing Ms. Zysman's activities, and the parties did not agree on a wage. I find Ms. Zysman performed the services on her own account, largely to view local real estate, as noted above.
20. Further, I find the exchange was essentially a barter agreement. See, for example, the non-binding decision of *Ruddell v. McKay*, 2019 BCCRT 579 at paragraph 14. I find this is another reason it was not an employment arrangement.
21. Ms. Zysman also says she was a tenant. Mr. Sims disagrees. I find Ms. Zysman was not a tenant because she never entered into a tenancy agreement. For example, Ms. Zysman did not pay rent and agreed her stay was only for a short duration. There is no indication she intended to live there. The parties agree that Mr. Sims had hired Ms. Zysman previously for temporary house and pet sitting. I find these prior arrangements are consistent with my conclusion that Ms. Zysman was not a tenant.

The Cat becomes Sick

22. Ms. Zysman emailed Mr. Sims on August 23, 2022. She reported initially that the cat was fine. Around August 26, 2022, Ms. Zysman reported to Mr. Sims that the cat was very ill. Ms. Zysman could not drive. Mr. Sims had earlier arranged with ES to assist

with the cat if needed. So, Mr. Sims contacted ES to drive the cat to a veterinarian's appointment for August 29, 2022. This is reflected in ES' September 11, 2023 written statement.

23. The veterinarian, HJ, emailed the parties. HJ said that the cat had, among other conditions, pancreatitis and probable kidney disease.
24. Ms. Zysman says that Mr. Sims breached the contract by failing to advise her that the cat was ill. I find it unproven that the cat was ill before Mr. Sims left or that he knew it was ill for the following reasons.
25. HJ wrote the following in an undated letter. The cat was 17 years old. Mr. Sims brought in the cat on August 17, 2022, because it had vomited a few days prior to the visit. Mr. Sims wanted to ensure the cat would be fine during the family vacation. The cat appeared stable with very mild abnormalities. HJ felt the cat did not need to start any treatment for the abnormalities until the family returned. HJ noted that Mr. Sims continued to bring the cat for all recommended follow-ups and remained under HJ's care.
26. I find that Mr. Sims took reasonable precautions to ensure the cat would be relatively healthy for the duration of the trip. Given the veterinarian's findings, I also find that Mr. Sims reasonably concluded that the cat would only require regular care. I find Mr. Sims did not misrepresent the cat's condition or breach the contract.
27. I return to the chronology. ES' written statement says the following. Around August 29, 2022, Ms. Zysman and ES had a videoconference with Mr. Sims to show how the cat was doing. Ms. Zysman said she did not feel trusted, wanted to return home, and refused to take care of the house or garden. Mr. Sims asked ES to take over house and cat sitting duties for \$1,600. ES agreed and stayed upstairs.
28. I find ES' account corroborated by Ms. Zysman's emails on the morning of August 30, 2023. Ms. Zysman wrote that her plans were "ruined". She said, "I don't feel comfortable staying here anymore so I think paying for my return asap is the least you can do".

29. I find that Ms. Zysman could still perform the contract as of August 30, 2023, although at greater inconvenience and hardship. I acknowledge this might have left her less time to view local real estate. However, there is no indication she had to stay next to the cat for the entire duration of Mr. Sims' vacation.
30. I find the law of contract repudiation applies. A party may repudiate a contract by refusing to perform its terms. The non-repudiating, or innocent, party may then either 1) accept the repudiation or 2) affirm the contract and keep it alive for both parties. If the innocent party accepts the repudiation, this ends the contract, both parties are relieved of their obligations under it, and the innocent party may sue for damages immediately. See, for example, *Dosanjh v. Liang*, 2015 BCCA 18 at paragraphs 33 to 34.
31. I find that Ms. Zysman repudiated the contract. Ms. Zysman's emails and ES' statement show Ms. Zysman refused to continue taking care of both the house and cat. Those were her core responsibilities. I also find it clear that Mr. Sims as the innocent party accepted Ms. Zysman's repudiation, terminated the contract, and hired ES to take over Ms. Zysman's duties. I find he is entitled to sue for damages, and I discuss this below. I also find that, given the termination, Ms. Zysman had no legal right to stay at Mr. Sims' house. I find that Mr. Sims could lawfully ask her to leave at any time. However, the emails show she stayed and made further demands.

The Remainder of Ms. Zysman's Stay

32. The parties exchanged further emails. In summary, Ms. Zysman asked Mr. Sims to pay for her plane ticket home. Mr. Sims agreed to do so in principle, but Ms. Zysman disagreed about the specifics. For example, she said the flight could not have long connections and that Mr. Sims had to pay for her ride to return from the airport. Ms. Zysman also suggested that Mr. Sims instead pay for separate local accommodation until her originally scheduled flight. At one point, on September 8, 2022, Mr. Sims emailed Ms. Zysman to ask if she would agree to resume her duties. Ms. Zysman did not agree to this. I find this supports my conclusion that Ms. Zysman had repudiated the contract, as stated above.

33. I agree with Mr. Sims that, overall, the emails show Ms. Zysman attempted to extract further concessions rather than to leave as soon as possible. I find this is because, during this time, Ms. Zysman could essentially take the contract's benefit and view local real estate as planned, despite its termination.
34. On September 10, 2022, Mr. Sims emailed Ms. Zysman advising she had to leave his house. Otherwise, he would call the police. He also said he would pay for the cost of a plane ticket. He booked a flight using admittedly incorrect information about Ms. Zysman, as the emails show Ms. Zysman did not wish to cooperate. Ms. Zysman refused and asked for other compensation including the cost of a \$45 bus pass and \$30 USD for the expected cost of taking a ride home from the airport.
35. Mr. Sims called the municipal police, and they attended that evening. The reports contain some redactions, but I find these are insignificant. The reports show that police confirmed Ms. Zysman was not a tenant and had been asked to leave several times. She refused the police's request to leave. They advised she would be arrested if she did not leave. At that point she agreed to leave and started packing. The police noted that Mr. Sims sent a mediator in person to pay Ms. Zysman \$720 for her flight home. One of the constables concluded that Ms. Zysman was "stalling" and "attempting to take advantage of people who were out of the country".

Did either party breach the house and pet-sitting contract?

36. I turn to Ms. Zysman's allegations. I have found that Mr. Sims had no reason to believe the cat was abnormally ill at the time the parties entered the contract. I also find that Mr. Sims reasonably hired ES because Ms. Zysman repudiated the contract. She was not "supervising" Ms. Zysman, as Ms. Zysman refused to do the work. I find that Mr. Sims had no obligation to book a flight for Ms. Zysman, so I find nothing arises from the fact that he did so using incorrect information. I also find that Mr. Sims reasonably contacted the police as Ms. Zysman had no legal right to stay at the house.

37. I next discuss Ms. Zysman's requested remedies. The contract did not require Mr. Sims to pay for travel expenses and services. I also find it unproven that Ms. Zysman left any of her belongings at Mr. Sims' house. This allegation is unsupported by any documentary evidence. I have found that Ms. Zysman breached the contract and Mr. Sims was the innocent party, so I find she is not entitled to any compensation for "unrealized" accommodation or punitive damages.
38. In summary, I dismiss all of Ms. Zysman's claims.
39. I turn to Mr. Sims' counterclaims. The general rule for assessing damages for breach of contract is that the innocent person is entitled to the amount of money that would put them in the same position as if the contract had been performed.
40. Mr. Sims claims \$1,600 for hiring ES. I find that by refusing to perform the contract, Mr. Sims had to hire someone else to house and pet sit. I find this was especially the case given the length of this vacation, the cat's declining health, and the unwanted presence of Ms. Zysman. ES says Mr. Sims paid her \$1,600 and bank documents show this as well. So, I order Ms. Zysman to reimburse Mr. Sims \$1,600.
41. Mr. Sims also claims \$720 as reimbursement for money paid to Ms. Zysman. Although Mr. Sims did not frame it this way, I find this and some other requested remedies flow from the law of trespass. Trespass consists of entering upon the land of another without lawful justification. To constitute trespass the respondent must in some direct way interfere with land possessed by the applicant. See *Lahti v. Chateauvert*, 2019 BCSC 1081 at paragraph 6, citing G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Carswell, 2010) at 29. Mistake is not a defence to trespass. Trespass will occur, even if the respondent is not conscious of wrongdoing, so long as the respondent intends to conduct themselves in a certain way and willingly does so. See *Lahti* at paragraph 8. If trespass is proven, one measure of damages is the actual damages suffered by the owner. See *Kolny (Litigation Guardian of) v. Moghaddam*, 2021 BCSC 1243.

42. I find it clear that Ms. Zysman trespassed at least on September 10, 2022, when Mr. Sims explicitly asked Ms. Zysman to leave. The reports show that the police put some weight on the fact that Mr. Sims paid money so that Ms. Zysman could either return home to the USA or find temporary accommodation. The reports' wording suggests the police might not have acted in the absence of the payment, despite the trespass. Ms. Zysman only accepted Mr. Sims's \$720 payment because the police forced her to leave. I find that the payment was damages required to secure the premises rather than part of an actual agreement, so I order Ms. Zysman to reimburse Mr. Sims for it.
43. Similarly, I find that it was reasonably necessary for Mr. Sims to install new locks on the house. This is because he had to call the police and even then, Ms. Zysman was uncooperative. The money is part of a documented payment to the mediator. So, I order Ms. Zysman to reimburse Mr. Sims \$300 for the new locks as well.
44. Mr. Sims also claims \$500 to hire the mediator. I find it was reasonably necessary for Mr. Sims to have someone at the premises to secure it and interact with both the police and Ms. Zysman. I allow this amount in full as well.
45. Finally, Mr. Sims claims \$150 in long-distance charges. The phone records show Mr. Sims paid \$252 for international roaming charges for a period of 18 days. I find Mr. Sims is entitled to 1 days' worth of charges when he coordinated with the police. So, I order on a pro rata basis Ms. Zysman to pay \$14 of this amount.
46. In total, I order Ms. Zysman to pay Mr. Sims ($\$1,600 + \$720 + \$300 + \$500 + \$14$) \$3,134. The *Court Order Interest Act* applies to the CRT. Mr. Sims is entitled to pre-judgment interest on the damages of \$3,134, from September 10, 2022, the approximate date of the loss, to the date of this decision. This equals \$152.81.
47. 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 dismiss Ms. Zysman's claims for reimbursement. I find Mr. Sims is largely successful

and entitled to reimbursement of \$175 in CRT fees. Mr. Sims did not claim any specific dispute-related expense.

ORDERS

48. Within 30 days of the date of this order, I order Ms. Zysman to pay Mr. Sims a total of \$3,461.81, broken down as follows:

- a. \$3,134 as damages,
- b. \$152.81 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$175 in CRT fees.

49. Mr. Sims is entitled to post-judgment interest, as applicable.

50. I dismiss Ms. Zysman's claims.

51. 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