Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Mullett v. Frigon*, 2023 BCCRT 1116

B E T W E E N :

STEPHON MULLETT

APPLICANT

A N D :

SAMANTHA FRIGON

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This dispute is about a photography contract.

2. The applicant, Stephon Mullett, is a photographer. The respondent, Samantha Frigon, is a model. The parties agreed that the applicant would photograph the respondent and neither party would pay the other for their time and services. The

applicant says the parties also both agreed they would not make any money off the photos by selling them or posting them on "paid" websites, but they could post them on free social media sites. The applicant says he discovered the respondent had posted his photos on a paid website without his permission or the copyright to do so. He claims $2,500 in damages.

3. The respondent admits to posting the photos on a paid website, but the respondent says the parties never agreed that was not permitted. The respondent says they removed the photos from the website at the applicant's request, and that the only money they earned from the photos was the $10 the applicant paid to access them. The respondent also says the parties never discussed the value of the photoshoots they did together, so they say the applicant is not entitled to the claimed damages.

4. The parties are each self-represented.

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.

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 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, 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.

8. In submissions, the respondent referred to settlement discussions between the parties during the CRT's facilitation process. CRT rule 1.11 says that parties cannot disclose settlement discussions unless all parties agree. The applicant expressly objected to those discussions being admitted. So, I have not considered the respondent's references to settlement discussions in coming to my decision.

9. The respondent also referred to the *Intimate Images Protection Act* (IIPA) in submissions, related to the applicant's use of certain photos as evidence in this dispute. IIPA is new legislation that is not yet in force in BC. So, I make no findings about it in this decision.

Jurisdiction over copyright infringement

10. As noted, the applicant argues the respondent was not entitled to profit from the photos because the respondent does not own the copyright in them. Copyright is governed by the federal *Copyright Act* (CA). In a previous CRT decision, a tribunal member (now vice chair) held that the CRT does not have jurisdiction over alleged copyright infringement under the CA. Section 41.24 of that Act grants concurrent jurisdiction to the Federal Court and "provincial courts" to hear and determine all proceedings for the enforcement of the CA and available civil remedies. As the CRT is not a "court", the tribunal member refused to resolve the applicant's claim for copyright infringement (see *1316633 B.C. Ltd. v Windsor-Martin*, 2022 BCCRT 979). Previous CRT decisions are not binding on me.

11. I find the CRT has jurisdiction to hear and decide claims for copyright infringement. I rely on the reasoning set out by the Supreme Court of Canada in *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17 at paragraphs 38 to 46, which does not appear to have been argued before the tribunal member in *Windsor-Martin*. In *Desputeaux*, which is binding on me, the court held that because the CA did not

assign jurisdiction to a specific provincial court, the reference to "provincial courts" was sufficiently general to include arbitration procedures created by provincial statute. I find that the CRT was similarly created by provincial statute to be a part of this province's justice system. As the CA does not expressly exclude tribunals from deciding claims under that Act, I find the CRT can decide copyright infringement disputes within its small claims jurisdiction. So, I have considered the applicant's claim for alleged copyright infringement below.

ISSUES

12. The issues in this dispute are:

    a. Did the respondent breach the parties' agreement?

    b. Did the respondent infringe the applicant's copyright?

    c. If so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

13. In a civil dispute like this one, the applicant must prove his claims on a balance of probabilities. This means the applicant must prove it is more likely than not that the respondent breached the parties' contract and owes him the claimed damages. I have read all of the parties' submissions and evidence but refer only to what I find is necessary to provide context for my decision.

14. It is undisputed that the parties participated in several photoshoots together, though the specific number and dates of those shoots are not before me. The applicant alleges that the respondent posted several photos from the shoots on a website that requires a paid membership, without the applicant's knowledge or permission. It appears that the respondent posted one set of photos on their feed, which I infer could be seen by anyone with a membership. Another set was posted on a "pay-to-see" basis, which required members to pay the respondent a fee to see the photos.

15. Under section 13 of the CA, a work's author is the first owner of the copyright in the work. The photographer is considered the author of a photograph, and so they generally own the copyright in the photos they take. Section 27(1) of the CA says that it infringes copyright when a person does anything only the copyright owner has the right to do unless the person has the copyright owner's consent.

16. I note that there is an exception to copyright infringement of photographs in section 32.2(1)(f) of the CA. It says that it is not copyright infringement for a person who commissioned a photo for personal purposes to use that photo for private or non-commercial purposes, unless the person and the copyright owner have agreed otherwise. In other words, people who hire a photographer to take photos of them, such as for their wedding, are permitted to use those photos for non-commercial purposes without infringing copyright. However, the parties here undisputedly intended to use the photos for commercial purposes, essentially to advertise themselves and their respective businesses (as a photographer and a model). So, I find the exception found in section 32.2(1)(f) does not apply to this dispute.

17. With that, I turn to the parties' agreement.

Did the respondent breach the parties' agreement?

18. The parties agree that each of their photoshoots was conducted on a "TFP" basis. However, they disagree about what that acronym stands for and the specific terms of such an arrangement.

19. The applicant described TFP as a "Trade for Portfolio" arrangement, while the respondent says TFP means "Time for Print". The Wikipedia and Google search evidence the respondent provided suggests that TFP can mean either of those, as well as other terms such as "Trade for Photo" or "Time for Portfolio". In any event, I find they all effectively mean the same thing. The consistent feature of TFP agreements is that the photographer and model exchange their time and services for free, which is what undisputedly occurred here.

20. The issue is what the parties agreed about how the photos generated from the photoshoots could be used. The applicant says that with a TFP agreement, each party can post the photos on free social media sites but that neither party can make money off the photos by selling them or posting them on paid sites. In contrast, the respondent says the "industry standard" is that both the model and photographer receive full rights to use the photos, including the right to benefit financially from them.

21. The respondent provided a signed statement from another photographer, Sergey Akhankin, who stated they have negotiated TFP agreements that permit models to use the photos for their financial gain, so long as Sergey Akhankin can also use the photos to advertise their photography business. I find this does not prove an industry standard, as the respondent suggests. Rather, it is an example of a specific negotiated arrangement. Similarly, the applicant admits that he has a TFP agreement with another model that she can post his photos on a specific paid website, so long as the model gives the applicant photography credit in her post.

22. I note that the Wikipedia evidence also suggests that photographers and models entering a TFP arrangement can negotiate specific terms about the photos' use. So, on the evidence before me, I find that TFP agreements likely do not have standard terms, and the participants must specifically agree on how they can each use the photos from their shoots. Therefore, I find it necessary to determine what the parties agreed to here.

23. The applicant says the parties specifically "discussed" that the respondent could not post the photos on paid websites without the applicant's knowledge and permission. As noted, the respondent denies this and says they had no specific agreement about where they could or could not post the photos.

24. It is undisputed that the applicant asked the respondent during one of their photoshoots whether they planned to post the photos on a specific paid website, and that the respondent said they did not have an account for that particular site at the time. I find this conversation alone does not prove any agreement that the respondent would not post the photos on that or any other paid site in the future.

25. In an October 22, 2022 direct message, after the applicant discovered the respondent had posted his photos on a paid website, the applicant said: “I think we discussed that if you were going to post any of my photos [there] you’d let me know as it’s a paying site”. Given the applicant began with “I think”, I find his statement is insufficient to prove the parties in fact had the alleged discussion. I note the respondent replied to the applicant that the photos were “very much so my photos as well”, which I find suggests the respondent did not agree with the applicant’s statement.

26. The applicant also provided a November 25, 2022 direct message exchange between the respondent and another model. The respondent wrote that they had posted 4 photos on the paid site and “he found out”, referring to the applicant. The applicant argues that this shows the respondent knew they needed the applicant’s permission to post the photos on the site. I disagree. While that is one possible interpretation of the respondent’s statement, I find it is equally possible that the respondent was explaining what had happened using the applicant’s own words. That is, in a November 22, 2022 email to the respondent, the applicant said “you never told me” about posting my photos, “I found out”. Given this context, I find the respondent’s statement that the applicant “found out” about posting the photos on a paid site is insufficient to prove the respondent knew they were not entitled to do so.

27. The applicant also relies on a November 24, 2022 email, in which the respondent stated “it was perhaps an error in judgement to use the photos”. However, contrary to the applicant’s submission, I find that comment is insufficient to establish that the respondent knew posting the photos was a breach of their agreement. When read in the context of the entire email, I find the respondent was acknowledging that with hindsight and given the applicant’s reaction, they perhaps should have double-checked whether the applicant was okay with posting the photos on a paid site. I find this generally supports the respondent’s submission that the parties had not specifically discussed the issue. The respondent also stated that they had since received express permission from all other photographers they worked with to post their photos on paid websites.

28. Despite several direct accusations by the applicant that the respondent had breached their agreement in posting the photos on a paid website, I find the respondent never agreed that they had breached the parties' agreement. Rather, it appears the respondent assumed that because they were undisputedly permitted to post the photos widely on their social media feeds, the applicant had generally agreed the respondent could post the photos anywhere, including on paid sites. I note the evidence shows the respondent knew that other models had also posted photos the applicant took on paid sites.

29. Overall, I find it unproven that the parties specifically agreed the respondent would not post the applicant's photos on paid sites. As the parties clearly agreed to both use the photos for business purposes, in the absence of an express term otherwise, I find there is little distinction between posting photos on free sites and posting them on sites requiring a paid membership to see them. As I find there was no express term that the respondent would not post the photos on paid sites, I find the applicant has not established that the respondent breached the parties' contract.

Did the respondent infringe the applicant's copyright?

30. As noted above, section 27(1) of the CA requires a person to have the copyright owner's consent to do anything the owner is entitled to do with the photos. This means that it would be copyright infringement if the respondent posted the applicant's photos on a paid site without the applicant's consent to do so. I find the respondent bears the burden to prove they had the applicant's consent here.

31. Based on the circumstances set out above, I find the respondent has established they had the applicant's implied consent to use the photos without restriction, including by posting them on paid sites. That is, I accept the respondent's evidence that the parties did not have any specific discussions about how the photos could and could not be used. I find this is the most reasonable explanation for the respondent's actions in posting the photos and their response to the applicant's objections after the fact. I note that I find the applicant's evidence that he specifically told the respondent they

did not have his consent to post the photos on paid sites is inconsistent with his admitted agreement with other models to the contrary.

32. In the absence of any express discussion or agreement about not posting the photos on specific sites, I find it was implied that the respondent could use them without restriction. Therefore, I find the respondent did not infringe the applicant's copyright by posting them on a paid site. I dismiss the applicant's claims.

Remedy

33. As I have found no breach of contract and no copyright infringement proven, I do not have to discuss the applicant's claimed remedy in any detail. However, even if I had found the respondent breached the parties' agreement or infringed the applicant's copyright, I would not have awarded the applicant's claimed damages. The applicant did not explain what the claimed $2,500 was based on. He provided no evidence about his standard charge for a photoshoot, the cost of an unlimited license to use his photos, the industry standard charge for these services, or his time spent on the photoshoots with the respondent and the value of his time.

34. Under section 35(1) of the CA, someone who infringes copyright may also have to pay the profits they made from the infringement to the copyright owner. The evidence suggests the respondent removed the photos at the applicant's request, and they were not posted on the paid site for a significant period of time. There is also no evidence the respondent profited from the posts, other than the $10 the applicant admittedly paid to confirm the "pay-to-see" photos were his. I find the $10 such a trivial amount, it would not warrant an order for the respondent to refund it.

35. For these reasons, I would have dismissed the applicant's claim in any event for a failure to prove his claimed damages.

36. 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 the applicant was unsuccessful, I find he is not entitled

to reimbursement of CRT fees or claimed dispute-related expenses. The respondent did not pay any fees or claim dispute-related expenses.

ORDER

37. I dismiss the applicant's claims, and this dispute.

Kristin Gardner, Tribunal Member