



Civil Resolution Tribunal

Date Issued: June 13, 2024

File: SC-2023-001855

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Clarke v. Markowsky*, 2024 BCCRT 543

BETWEEN:

MICHAEL DOUGLAS CLARKE

APPLICANT

AND:

MICHAEL MARKOWSKY

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Maria Montgomery

INTRODUCTION

1. The applicant, Michael Clarke, paid the respondent, Michael Makowsky, \$700 to have a coating applied to his garage floor. Mr. Clarke says he is entitled to a full refund because there were problems with the work performed. Mr. Markowsky has already refunded Mr. Clarke \$300, so Mr. Clarke seeks the remaining \$400.

2. Mr. Markowsky says that the coating failed because the property has a high water table, which Mr. Clarke did not disclose when asked. Mr. Markowsky denies owing Mr. Clarke anything further.
3. Mr. Clarke is self-represented. Mr. Markowsky is represented by his father, who is not a lawyer.

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.
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. As credibility is not an issue in this case, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. 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.
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.

ISSUE

8. The issue in this dispute is whether Mr. Markowsky applied the coating to Mr. Clarke's garage floor to a professional standard, and if not, what the appropriate remedy is.

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, Mr. Clarke must prove his claims on a balance of probabilities. 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.
10. It is undisputed that in May 2022, Mr. Clarke paid \$700 to Mr. Markowsky to have a coating applied to his garage floor. It is also undisputed that the coating applied did not adhere to the garage floor.
11. Mr. Clarke says that the material began peeling after 10 days and that larger areas peeled off as time went on.
12. Both parties agree that Mr. Markowsky returned to repair the peeling sections 2 weeks after the initial application. He did this by grinding those sections and reapplying the coating. Mr. Markowsky later offered to remove and replace the coating, but he never did. The parties disagree about why Mr. Markowsky did not perform this work. Given my findings below, I find it unnecessary to resolve this disagreement. The parties agree that Mr. Markowsky eventually refunded a portion of the amount paid (\$300) to Mr. Clarke.
13. Mr. Clarke submits that the coating failed because Mr. Markowsky did not properly prepare the surface area before applying the coating. He says that there was no peeling in areas where Mr. Markowsky repaired by grinding before reapplying the coating. Mr. Clarke says that this fact proves the other areas were not properly prepared.

14. Mr. Markowsky says that the coating failed because it was epoxy, a low permeability coating, and the garage floor has a high water table problem. He says that he asked Mr. Clarke if his property had a high water table but Mr. Clarke said it did not.
15. The parties did not have a written agreement. There is no evidence that the parties agreed to any terms other than Mr. Markowsky applying the coating for \$700. Despite this lack of detail, there is generally an implied term in a contract for professional services that the services will be performed to a reasonably competent standard (see *Demosten v. E.M.J. Construction Ltd.*, 1995 CanLII 1142 (BC SC)). As Mr. Markowsky was hired to apply the coating, I find he was required to perform work to the required standard. I find this is true even if Mr. Markowsky gave Mr. Clarke the coating for free and only charged for his labour.
16. Generally, where a customer alleges a professional's work fell below a reasonably competent standard, the customer must prove the deficiencies (see *Absolute Industries Ltd. V. Harris*, 2014 BCSC 287 at paragraph 61). Expert evidence is usually required to prove a professional's work was below a reasonable standard (see *Bergen v. Guliker*, 2015 BCSC 283). This is because the standards of a particular industry are outside an ordinary person's common knowledge. The 2 exceptions to this are when the deficiency is not technical in nature or when the work is obviously substandard (see *Schellenberg v. Wawanesa Mutual Insurance Company*, 2019 BCSC 196 at paragraph 112).
17. Mr. Clarke provided photos that he says prove Mr. Markowsky's work was deficient. These photos show that the coating was cracking and peeling off the concrete surface, but I find they are insufficient to prove the work was obviously substandard. I find that the reason the coating peeled or cracked is technical, so determining that the application of the coating was deficient requires expert evidence.
18. In this case, neither party submitted expert evidence. As noted above, Mr. Clarke bears the burden of proving his claim. Without expert evidence, I am not able to find that the work performed was deficient. As a result, I dismiss Mr. Clarke's claim.

19. 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 Mr. Clarke was unsuccessful, I dismiss his fee claim. Mr. Markowsky did not pay any fees and neither party claimed dispute-related expenses.

ORDER

20. I dismiss Mr. Clarke's claim and this dispute.

Maria Montgomery, Tribunal Member