Civil Resolution Tribunal

Date Issued: October 7, 2019

File: SC-2019-004120

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Harvey et al v. Hamilton Tile and Stone Ltd.*, 2019 BCCRT 1167

B E T W E E N :

WENDY HARVEY and DOUGLAS EDGAR

APPLICANTS

A N D :

HAMILTON TILE AND STONE LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kathleen Mell

INTRODUCTION

1. This is a final decision of the Civil Resolution Tribunal (tribunal), but it is not a decision on the merits of the claim. The issue is whether the applicants WENDY

HARVEY and DOUGLAS EDGAR are out of time to bring their claim against the respondent HAMILTON TILE AND STONE LTD.

2. The applicants are represented by Douglas Edgar. The respondent is represented by JY, an organizational contact.

JURISDICTION AND PROCEDURE

3. These are the tribunal's formal written reasons. The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

4. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. In some respects, this dispute amounts to a "they said, it said" scenario with both sides calling into question the credibility 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. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope,* 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.

5. The tribunal 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 tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

6. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA:

    a. order a party to do or stop doing something;

    b. order a party to pay money;

    c. order any other terms or conditions the tribunal considers appropriate.

ISSUE

7. The issue is whether the applicants are out of time to bring their claim against the respondent.

EVIDENCE AND ANALYSIS

8. The applicants claim that the respondent breached a contract between them when it performed faulty tile installation in their main floor bathroom. They say they discovered the deficiencies on May 31, 2013. The applicants submitted their application to the tribunal on May 28, 2019, which stopped the limitation period as discussed below.

9. The respondent says in the Dispute Response that the tile work was properly done. The respondent also says that the claim is beyond the applicable limitation period.

10. The tribunal invited the parties to make submissions on whether the dispute was out of time under the *Limitation Act* (LA). The LA applies to disputes before the tribunal. A limitation period is a period within which a person may bring a claim. If that period expires, the right to bring the claim ends, even if the claim would have been successful.

11. In British Columbia, the current LA became law on June 1, 2013. It provides that a claim must be started within two years of when it was discovered. For claims discovered before June 1, 2013, an older LA applies. Under the pre-June 1, 2013

LA, the limitation period for breach of contract discovered before June 1, 2013 is six years.

12. A limitation period begins on the first day that a person discovers a claim, which under the LA means the first day that the person had knowledge of the claim or reasonably ought to have known about the claim.

13. Both parties agree that this claim was discovered before the new LA. The question that remains is when did the applicants discover the claim and was it within six years of the May 28, 2019 tribunal application date.

14. The respondent says that the tiling was done between August 9 and 28, 2012 and that the applicants refused to pay the full amount of the last invoice because they said in the fall of 2012 that they were unhappy with the tile. The respondent says that this means the applicants discovered the claim in August after the work was completed or at the latest in the fall of 2012 when the applicants refused to pay the full amount of the final invoice. Therefore, the respondent argues that this claim is out of time.

15. The applicants submit that they moved into their new townhouse in the last week of May 2013 and May 31, 2013 was the first day they slept there. They say that on that day they performed an inspection and first discovered that the tile installation was faulty.

16. The applicants submitted evidence showing that they moved into the new townhouse at the end of May 2013. I accept that the applicants moved into the new property on this date. However, the issue is when they knew or ought to have known the tiling was flawed, not when they moved into the townhouse.

17. The applicants say they did not discover the flaws before they moved in on May 31, 2013, because the tile installation deficiencies were very small and subtle. The applicants also say that the main bathroom wall tile was blocked from view by construction paraphernalia because other parts of the new townhouse were under construction.

18. Email exchanges show that Mr. Edgar was closely monitoring the work while it was being done including exactly how many hours the tradespeople were putting in. In a May 9, 2012 email, Mr. Edgar notes that he kept computer records as well as a site day-timer logbook for monitoring the respondent's work. The applicants' submissions also indicate that Mr. Edgar was the general contractor for the construction of the new townhouse. Therefore, this is not a situation where other people were responsible for overseeing the work being done. The evidence shows that Mr. Edgar was monitoring the construction of the townhouse throughout the time period in question.

19. Mr. Edgar claims that he called the respondent as soon as he noticed the defects on May 31, 2013 but the respondent refused to admit the tile was faulty and cut off contact. The respondent denies this phone call ever happened. In keeping with the admission that Mr. Edgar was the contractor and overseeing the construction, the applicants submitted that other tile deficiencies had been noticed in the past which the respondent remedied. I find that this shows that the applicants had inspected the tile before May 31, 2013.

20. Also, as noted above, both parties made submissions about an invoice dated September 9, 2012 and whether there remained an outstanding balance. The respondent points to the $1,700.00 left outstanding as proof that the applicants said at that time they were unhappy with the tile installation.

21. The applicants take issue with the veracity of this invoice. They point out that they paid $3,500.00 on November 16, 2012, which is after the date of the September 19, 2012 invoice. However, the September 19, 2012 invoice takes that amount into account and subtracts it from the total. They say this proves the invoice was after the September 19, 2012 stated and is not legitimate.

22. The respondent says that the invoice was first issued on September 19, 2012. It was sent again after that date to show the $3,500.00 November payment. They say that this does not affect the date of the original invoice and that there was no need to change that date.

23. The respondent says that the amount outstanding has not been explained by the applicants and the amount was not paid because the applicants began complaining about the tile in the fall of 2012. The respondent says it decided to write this amount off rather than deal with the applicants any further.

24. The applicants have not provided evidence that they paid the total amount owing. The respondent provided a ledger showing that the last payment was made on November 16, 2012 but that $1,756.91 remained outstanding. I accept the respondent's evidence that the invoice for the tile installation was not paid in full because the applicants were unhappy with the tile installation at that point.

25. Also, the applicants submitted a townhouse elevations memo in evidence to show that the townhouse new construction schedule spanned many months. I first note that in the email dated May 9, 2012, Mr. Edgar indicated that the respondent was going to do the floor elevations. Mr. Edgar also mentioned the good rapport between the parties. I find the fact that the respondent ultimately was not given the contract for that job in November 2012 supports the respondent's claim that there was a breakdown between the parties around that date.

26. Further, the memo shows that on November 13, 2012 the applicants were planning to check the main floor elevations between the tile in the main floor bathroom and laundry room. The applicants' main argument is that there were construction items in the way and improper lighting so they never saw the defects in the tile installation completed in August 2012. I find that the applicants have not reasonably explained how the main floor elevations work could have been done without seeing the tile.

27. I find that the floor elevation in the main bathroom after the tiling was done would have revealed the alleged flaws in the tile installation, especially since Mr. Edgar was the contractor on the project and also the owner of the townhouse. On balance, I find it does not ring true that he would not look at the tile until May 31, 2013.

28. I find that the applicants discovered their claim in November 2012. This is when the applicants refused to pay the outstanding invoice, when they broke off the business

relationship with the respondent such that it was not hired to do the floor elevation in the main floor bathroom, and when the floor elevation work was done which would have led to the discovery of the flaws, if there were any, in the work done by the respondent.

29. Therefore, given the old LA applies, the applicants' claim must be brought within 6 years of when it was discovered. I find the limitation period expired in November of 2018. Since the applicants submitted their application on May 28, 2019, I find that the dispute is out of time because it is statute-barred by the LA.

30. Under section 49 of the CRTA, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. The applicant was unsuccessful, and the respondents have not incurred any tribunal fees, so I decline to make such an order.

ORDER

31. I dismiss the applicants' claims and this dispute.

Kathleen Mell, Tribunal Member