



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *M.H. Nusbaum & Associates Ltd. v. Tectonic Advisory Services Inc.*,
2024 BCCRT 52

B E T W E E N :

M.H. NUSBAUM & ASSOCIATES LTD.

APPLICANT

A N D :

TECTONIC ADVISORY SERVICES INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Nav Shukla

INTRODUCTION

1. This dispute is about unpaid invoices for consulting services. M.H. Nusbaum & Associates Ltd. (Nusbaum) says that Tectonic Advisory Services Inc. (Tectonic) has not paid it for consulting services it provided in August and September 2022. Nusbaum says Tectonic owes it \$8,001 for the unpaid work, but claims only \$5,000,

the monetary limit for small claims disputes at the Civil Resolution Tribunal (CRT). Nusbaum is represented by its principal.

2. Tectonic says the parties had a \$52,000 fixed-price contract and it has already paid Nusbaum more than that amount over the course of the project. So, it says that Nusbaum is not entitled to the claimed amount. Instead, Tectonic says Nusbaum owes it \$11,814, the amount it says it accidentally overpaid Nusbaum. Tectonic did not file a counterclaim. Tectonic also argues the CRT does not have jurisdiction to decide this dispute because the parties allegedly agreed to bring all disputes in the Ontario courts. Tectonic is represented by its principal.

JURISDICTION AND PROCEDURE

3. These are the CRT's formal written reasons. 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 without an oral hearing.
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 do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUES

7. The issues in this dispute are:
 - a. Does the CRT have jurisdiction to decide this dispute?
 - b. If so, is Nusbaum entitled to the claimed \$5,000, or some other amount, for the allegedly unpaid consulting services?

EVIDENCE AND ANALYSIS

8. As the applicant in this civil proceeding, Nusbaum must prove its claims on a balance of probabilities (meaning more likely than not). I have considered all the parties' submitted evidence and argument but refer only to what I find relevant to provide context for my decision.
9. The following facts are undisputed. Between June 2018 and September 2022, Nusbaum provided consulting services to Tectonic on various projects. In October 2021, Tectonic hired Nusbaum to provide consulting services for a project Tectonic was working on for Ontario Health. Tectonic's contract with Ontario Health had a fixed price. Nusbaum worked on the Ontario Health project from October 2021 to September 2022 and issued monthly invoices to Tectonic for its services based on an hourly rate of \$200.
10. Tectonic paid Nusbaum's invoices for its work on the Ontario Health project between October 2021 and July 2022. However, Tectonic refused to pay Nusbaum's August 31, 2022 invoice for \$3,832.50 and its September 30, 2022 invoice for \$4,168.50. These are the 2 invoices Nusbaum claims for in this dispute.

Does the CRT have jurisdiction to decide this dispute?

11. I will first address Tectonic's argument that the CRT does not have jurisdiction over Nusbaum's claims. Under CRTA section 10, the CRT must refuse to resolve a claim that it considers to be outside the CRT's jurisdiction. Section 11(1)(a)(i) of the CRTA says that the CRT may refuse to resolve a claim or a dispute within its jurisdiction if it

considers the claim or the dispute would be more appropriate for another legally binding process or dispute resolution process.

12. Tectonic argues that Nusbaum should have brought this dispute in Ontario, and not at the CRT in British Columbia. In particular, in its written argument, Tectonic says the parties' contract is governed by Ontario law and the parties agreed to "the non-exclusive jurisdiction of the courts of the Province of Ontario".
13. Nusbaum denies it agreed to a term that Ontario law governs the parties' contract or that it would bring any claims about the contract in the Ontario courts.
14. In order for the CRT to have jurisdiction, there must be a real and substantial connection between British Columbia and the facts in the dispute. If the CRT has jurisdiction but a party argues that some other forum is better for resolving the dispute, the test to be applied is called *forum non conveniens* (inconvenient forum) (see *Club Resorts Ltd v. Van Breda*, 2012 SCC 17).
15. I find the CRT has jurisdiction to decide this dispute for the following reasons. Nusbaum is a British Columbia company that operates within this province. Tectonic is an Ontario company. It is undisputed that Nusbaum performed most, if not all, of the consulting work for Tectonic in British Columbia. I find that this is a presumptive connecting factor to British Columbia, as described by the Supreme Court of Canada in *Van Breda*. So, I find this claim has a real and substantial connection to British Columbia, and that the CRT has jurisdiction to hear it.
16. The burden then shifts to Tectonic to prove that Ontario is a more convenient forum for resolving this dispute. Tectonic's appears to argue that an unsigned written agreement that is in evidence set out the terms of the parties' contract and based on those terms, Nusbaum should have brought this dispute in Ontario. For the reasons that follow, I disagree.
17. Not only is this agreement not signed by either party, but Nusbaum specifically denies agreeing to its terms. While emails in evidence, discussed in more detail below, show that Tectonic sent a draft agreement to Nusbaum in December 2021 and Nusbaum

provided some comments on it, there is no documentary evidence proving that the parties ever agreed on a final draft. So, I find the parties did not have a written agreement and the contract between them was a verbal one. I further find it unproven that the parties verbally agreed that Ontario law applied to their contract, or that any disputes must be brought in the Ontario courts.

18. In any event, I note that the written agreement in evidence does not say that all disputes must be brought in the Ontario courts as Tectonic argues. Rather, the agreement only says that Ontario law applies. So, even if the parties had agreed to the written agreement's terms, this would not necessarily mean that Ontario is a more convenient forum. This is because the applicable common law about breach of contracts, which this dispute is about, is essentially the same in Ontario and British Columbia.
19. As Tectonic's argument for Ontario being the more convenient forum is based solely on the unsigned draft agreement which does not say that the Ontario courts have exclusive jurisdiction, I find Tectonic has failed to prove that British Columbia is an inconvenient forum. Under the circumstances, I find no basis on which to refuse to resolve this claim under CRTA section 11(1)(a)(i) and find I can proceed with deciding this dispute.

Did the parties have a fixed-price contract?

20. I turn now to consider the merits of Nusbaum's claim. Here, the parties do not dispute that a contract existed between them, and I have found above that the parties had a verbal contract. The parties agree that Tectonic hired Nusbaum to provide consulting services on the Ontario Health project. Nusbaum's scope of work under the parties' contract is not in dispute, nor is it disputed that Nusbaum completed that work. The sole issue is what amount Tectonic agreed to pay Nusbaum for that work.
21. Nusbaum says that the parties' verbal agreement was that Tectonic would pay it \$200 an hour for its services. It says that it has provided consulting services to Tectonic since 2018 and Nusbaum has always been paid for its hourly services.

22. As mentioned above, Tectonic says that Nusbaum agreed to a total fixed price of \$52,000 for its work on the Ontario Health project. It says that it has already overpaid Nusbaum \$11,814 and Nusbaum is not entitled to anything further.
23. As noted, Nusbaum started working on the Ontario Health project for Tectonic in October 2021. At that time, the parties undisputedly did not have a written contract and Nusbaum invoiced Tectonic for the work it completed in October and November 2021 at \$200 an hour. Tectonic paid these invoices without dispute. So, I find the parties agreed when Nusbaum started working on the Ontario Health project that Tectonic would pay it \$200 an hour for its services.
24. On December 20, 2021, GL, Tectonic's CEO, sent Nusbaum a draft agreement for its work on the Ontario Health project. The parties exchanged a number of emails about the draft agreement, discussing in particular the fact that Tectonic was attempting to reduce Nusbaum's hours down from the 220 hours Tectonic had initially budgeted. In a December 21, 2021 email, Nusbaum expressed concern about the attempted reduction, as well as the 220 hours originally budgeted. Nusbaum said that it may be better to cut Nusbaum from the project altogether or otherwise Tectonic would need to dig further into its own profitability. In a later email the same day, Nusbaum said that it was not prepared to work for free and would only do work as requested, as long as the assigned work was billable. Nusbaum also sent Tectonic its comments on Tectonic's proposed draft agreement.
25. Nusbaum says that Tectonic never provided a revised draft agreement for Nusbaum to review and the parties continued working together without a signed written contract. However, Tectonic says that Nusbaum agreed to a fixed price of \$44,000 (based on a budget of 220 hours) at a December 2021 meeting, where NS, the new project manager for the Ontario Health project, was a witness. Tectonic further says that it later authorized Nusbaum to spend 20 more hours (\$8,000) for additional work on the Ontario Health project, bringing the parties' contract's alleged fixed price to \$52,000 based on 260 hours.

26. Nusbaum agrees that Tectonic added to its work scope during the course of the Ontario Health project and acknowledges that Tectonic had budgeted a certain number of hours for Nusbaum's portion of the work. However, it denies that the parties agreed on a fixed price or that it ever agreed not to be paid for any hours it spent over Tectonic's budgeted amount. Notably, Tectonic did not provide a witness statement from NS setting out what happened at the alleged December 2021 meeting where it says Nusbaum agreed to a fixed-price contract for its work on Ontario Health project.
27. Nusbaum undisputedly continued invoicing Tectonic as it had previously, based on its \$200 hourly rate from December 2021 to September 2022. On June 30, 2022, Nusbaum wrote to NS and said that Nusbaum had managed to keep its total hours for the project to the budget (only 3 hours over) but said that it either needed more budget allocated to it or Tectonic could run a budget deficit to complete the assigned work, whichever method worked best for Tectonic. Nusbaum says that NS did not respond to this email in writing but that they discussed the matter and NS said that they would talk to Tectonic's management about giving Nusbaum hours that were unallocated in the project.
28. Nusbaum says, and Tectonic does not dispute, that Tectonic never told Nusbaum to refrain from doing any further work on the Ontario Health project after Nusbaum's June 30, 2022 email to NS. Notably, Tectonic did not raise any issue with Nusbaum's billing practices or invoiced amounts until after Nusbaum completed its work on the Ontario Health project.
29. Tectonic alleges that Nusbaum purposely overbilled it, knowing that its accounting department would not catch the alleged errors. It also alleges that Nusbaum directed another consultant working on the same project to also overbill Tectonic. Nusbaum denies both allegations, and correctly notes Tectonic has provided no documentary evidence to support them. Given the lack of evidence showing otherwise, I find both of these allegations speculative and unproven.

30. Based on the evidence before me, I find the parties did not agree on a fixed-price contract. I note that the draft agreement that Tectonic relies on does not say that it is a fixed-price contract. Rather, its schedule A1 lists a “total budget” of \$44,000 based on 220 hours at Nusbaum’s \$200 hourly rate. While I find Nusbaum was aware that Tectonic had an estimate or budget of hours for the work it asked Nusbaum to do, an estimate or budget is not the same as a fixed-price contract. I accept Tectonic budgeted \$52,000 for Nusbaum’s work on the Ontario Health project as it asserts. However, there is simply no evidence to support Tectonic’s assertion that Nusbaum agreed to a \$52,000 fixed price for its work on the project. Based on Tectonic’s conduct, specifically that it paid for Nusbaum’s invoices between October 2021 and July 2022 and did not take issue with Nusbaum’s hourly billing until after Nusbaum completed its work, I find that Tectonic agreed to Nusbaum’s \$200 hourly rate for its work on the Ontario Health project.
31. As Tectonic does not dispute that Nusbaum completed the invoiced work, I find Tectonic owes Nusbaum \$8,001 for the consulting services it billed for in its August 31 and September 30, 2022 invoices, which work is also detailed in the timesheets in evidence. Given the CRT’s \$5,000 monetary limit for small claims disputes, I order Tectonic to pay Nusbaum \$5,000.
32. The *Court Order Interest Act* (COIA) applies to the CRT. Nusbaum is entitled to pre-judgment interest on the \$3,832.50 owed for its August 31, 2022 invoice from that date, to the date of this decision. Nusbaum is further entitled to pre-judgment interest on the remaining \$1,167.50 from September 30, 2022, the date of its final invoice, to the date of this decision. In total, I find Nusbaum is entitled to \$274.94 in pre-judgment interest.
33. 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 successful party, I find Nusbaum is entitled to reimbursement of \$200 for its paid CRT fees. Neither party claims any dispute-related expenses, so I award none.

ORDERS

34. Within 30 days of the date of this decision, I order Tectonic to pay Nusbaum a total of \$5,474.94, broken down as follows:
- a. \$5,000 in debt for the unpaid consulting services,
 - b. \$274.94 in pre-judgment interest under the COIA, and
 - c. \$200 in CRT fees.
35. Nusbaum is entitled to post-judgment interest under the COIA, as applicable.
36. 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.

Nav Shukla, Tribunal Member