



Civil Resolution Tribunal

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SC-CC-2023-002824

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Anchored Athletics Inc. v. Brand and Banter Inc.*, 2024 BCCRT 138

B E T W E E N :

ANCHORED ATHLETICS INC.

APPLICANT

A N D :

BRAND AND BANTER INC.

RESPONDENT

A N D :

ANCHORED ATHLETICS INC.

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Leah Volkers

INTRODUCTION

1. This dispute is about website design and related services. This decision relates to two linked disputes that I find collectively consist of a claim and counterclaim. So, I have issued one decision for both disputes.
2. Anchored Athletics Inc. (Anchored) contracted with Brand and Banter Inc. (Brand) to design and develop its website. Anchored says Brand failed to complete the website in 8 to 12 weeks, contrary to the estimated timeline in the parties' contract, and it was still not complete over a year later. Anchored also contracted with Brand to complete a photoshoot and provide photographs and videos for the website. Anchored says Brand completed the photoshoot but failed to provide Anchored with any videos or the raw photographs. Anchored collectively claims reimbursement of \$4,461.19 for the website deposit and the photography package payment.
3. Brand disputes Anchored's claim. Brand says it completed the photoshoot and provided Anchored with photographs and videos. Brand does not dispute that there were delays in completing the website. However, Brand says the website design was delayed because of Anchored's own delays in booking the photoshoot and failing to provide timely website revisions and feedback.
4. Brand collectively counterclaims for \$5,000. In its counterclaim, Brand says the website work was 90% complete and claims payment for 90% of the contract's balance. Brand also claims for project resumption fees it says it is entitled to charge after Anchored's alleged delays. Finally, Brand claims for additional work it says it completed beyond the scope of the parties' contract.
5. Anchored is represented by one of its owners. Brand is represented by a person I infer is an authorized employee or principal, BL.

JURISDICTION AND PROCEDURE

6. 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.

7. 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. 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 in the interests of justice.
8. 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.
9. 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

10. The issues in this dispute are:
 - a. To what extent, if any, is Brand responsible to reimburse Anchored \$4,461.19 for the website services deposit and photography package?
 - b. To what extent, if any, is Anchored responsible to pay Brand \$5,000 for the contract's balance, project resumption fees, and additional unbilled work?

EVIDENCE AND ANALYSIS

11. As the applicant in this civil proceeding, Anchored must prove its claims on a balance of probabilities (meaning more likely than not). Brand has the same burden for its

counterclaim. I have reviewed all the parties' submissions and evidence in both disputes but refer only to what I find necessary to explain my decision.

12. The parties signed a website services contract in August 2021. The contract quoted \$6,297.38 for website design and development services. Among other things, it included audit and site planning, design, word press development, content addition, review, and launch. The contract also said Brand would provide weekly updates to Anchored and answer any questions about the project's progress. It said "typically, projects like this take 8-12 weeks to launch". Finally, it said one round of revisions was permitted on any deliverables.
13. Brand issued an August 18, 2021 invoice for 50% of the website project cost, totaling \$3,148.69.
14. Anchored undisputedly paid Brand a \$3,148.69 deposit for the website services contract, although the parties' dispute when the deposit was paid. I find the documentary evidence shows the deposit was likely paid on August 19, 2021.
15. Anchored also undisputedly paid Brand \$1,312.50 for a photography package around October 2021. The photography package was not included in the parties' August 2021 contract for website services, and was billed separately. Together, the website services contract deposit and the photography package payment total \$4,461.19, the amount Anchored claims in its dispute. With that brief background, I turn to the parties' claims.

Is Brand responsible to reimburse Anchored \$4,461.19?

Website services

16. It is undisputed that there were several delays in completing the website. I find the emails and text messages establish the following timeline:
 - a. The parties agreed to schedule a photography and video shoot for October 2, 2021, and it was completed that day. I will return to the parties' photography contract further below.

- b. In mid-October 2021, Anchored followed up with Brand about the website progress. Brand responded on October 18, 2021 and said it had received the edited photos and was working on layouts and video edits. Brand said it hoped to be finished the site for revisions in 2 weeks, but it may take up to 3 weeks.
- c. In November 2021, Anchored again followed up with the website progress. Brand responded a few days later that it was hoping to send over finished site for review 4 days later.
- d. Later that month, Brand said it had finished 99% of the website over the weekend, and had sent it to a third party agency friend to fix styling details and once that is done, the website would be good to go.
- e. In January 2022, Anchored texted Brand asking for an update. Brand advised it needed a few days and would then send over the website for review.
- f. In March 2022, Anchored asked Brand for another update and expressed concern that Brand was abandoning the website project. Anchored expressed concern over the delays, and referenced the parties' contract where it indicated the timeline was around 8 to 12 weeks to launch, noting that at that time it was 4 months beyond that timeline. Brand's employee or principal, BL, responded on March 22, 2022. BL acknowledged Anchored's frustration, and said that the website was not done because BL had been dealing with various personal issues. BL said they would brief Brand's partner agency the same week, and ensure the site was available for review by April 1, 2022.
- g. On April 1, 2022, Brand emailed Anchored that the website was ready for its first review.
- h. In April and May 2022, the parties exchanged emails about revisions. Anchored said it was having difficulty figuring out how to even provide revisions and said it expected more support and back and forth about how to do so. It also said it was unhappy with the look of the initial website mock-up overall. In response, Brand asked Anchored to make a video or voice note of its concerns.

- i. In June 2022, Anchored emailed Brand twice requesting a time to discuss the website progress and its concern with the website mock-up and revisions.
- j. In early July 2022, Brand told Anchored it would book a call with its partner agency to review the site and implement the changes Anchored hoped to see. In late July, Brand told Anchored its partner agency had been out of the office for summer break, and said the partner agency would close off all revisions over the next week to 10 days, and then could meet with Anchored to review it and implement style changes. Anchored says at this point, it had still not been able to talk to anyone to discuss the issues it had with the initial website mock-up. Brand does not dispute this, so I accept it.
- k. The evidence does not show any correspondence between Anchored and Brand between late July and late September 2022, when Anchored emailed Brand for a status update.
- l. On October 21, 2022, Anchored says it called Brand and left a message asking for a call back, which Brand does not dispute. On October 22, 2022, Anchored texted Brand asking for a call back. Anchored says it did not receive a call back from Brand.
- m. On October 28, 2022, Anchored emailed Brand a letter that said Brand had breached the parties' contract because the project was still incomplete as of October 26, 2022, and asked for a \$4,461.19 refund. Later that day, Brand responded and said it would have M from another agency reach out to discuss the project and act as Brand's "proxy" from here on out. M emailed Anchored to discuss the project, and Anchored told M that Brand had breached the parties' contract and would not be doing any further work on the website.

Fundamental breach

17. Although neither party specifically uses the term "fundamental breach", I find Anchored argues that Brand's failure to complete the website after over a year

fundamentally breached the parties' contract, and gave them the right to terminate the parties' contract.

18. Not every breach of a contract is a fundamental breach. Where a party fails to fulfill a primary obligation of a contract in a way that deprives the other party of substantially the whole benefit of the contract, it is a fundamental breach. See *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC). Put another way, a fundamental breach is a breach that destroys the whole purpose of the contract and makes further performance of the contract impossible. See *Bhullar v. Dhanani*, 2008 BCSC 1202.
19. Whether a breach of contract is a fundamental breach matters because there are different remedies available to the wronged party. For most breaches of contract, the wronged party can claim against the other party for damages arising from the breach. For a fundamental breach, the wronged party can terminate the contract immediately. If the wronged party terminates the contract because of a fundamental breach, they do not have to perform any further terms of the contract. See *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA).
20. If Brand fundamentally breached the contract, Anchored is relieved from any further performance of the contract. This means Anchored would be entitled to terminate the contract, refuse to finalize the website if later completed, and claim damages. Anchored would also not be obligated to pay any balance alleged to be owing.
21. The test for whether a breach of contract is a fundamental breach is an objective test. That means that I must assess the nature of the breach from the perspective of a reasonable person in Anchored's shoes. In this dispute, I find that a reasonable person would consider the contract to be completely undermined because Brand failed to complete the website over a period of over one year. Ongoing delays can constitute a fundamental breach when the delays have the effect of creating a completely different situation from what the parties contemplated when they entered into the contract. See *Bridgesoft Systems Corp. v. R.*, 1998 CanLII 3950 (BC SC)

(overturned on appeal on other grounds) at paragraph 114. I find that is the situation here.

22. I find that by October 2022, Anchored could reasonably say that they had lost the entire benefit of the contract. I accept that some delay as a result of Brand's employee's personal circumstances was excusable, and I acknowledge the email evidence shows Anchored agreed to some delays. However, the contract provided a 8-12 week estimate for the website launch, and Brand repeatedly indicated that the website would be ready soon, only to repeatedly delay the initial website mock-up delivery between November 2021 and April 2022. After undisputedly delivering an initial mock-up in April 2022, there is no evidence of any further progress on the website. Brand also failed to connect with Anchored to facilitate website revisions after April 1, 2022, despite numerous requests from Anchored between April and July 2022. Brand was not in contact with Anchored at all between July and October 2022, when Anchored again reached out to Brand for a response, and received none until it terminated the contract and asked for a refund.
23. Given all the above, I find that by October 2022, it was no longer reasonably possible for Anchored to continue to wait for Brand to complete the website in the face of further indefinite delays. By that point, there was no reason to believe Brand would complete the website in a timely way, or at all. I find that Brand's repeated delays in completing the website fundamentally breached the parties' contract. In making this finding, I place significant weight on Brand's November emails where it told Anchored that that it hoped to complete initial website by November 2021, and on Brand's own admission that by June 2022 its business was "more or less closed down".
24. As noted, Brand argues that Anchored is responsible for the website delays because it failed to book the photoshoot in September 2021, and failed to provide timely revisions. I find these allegations unproven. The evidence shows Anchored booked the photoshoot for October 2, 2021, and it was undisputedly completed that day. Brand has not reasonably explained how Anchored booking the photoshoot for

October 2, 2021 instead of in September 2021 could cause such significant later delays. Further, after the photoshoot was completed, Brand itself repeatedly told Anchored the website would be ready in November 2021. So, I find unproven Anchored's photoshoot booking caused any significant delay. As for Anchored providing revisions, the evidence does not show Brand gave Anchored any timeline for providing its revisions to the initial website mock-up. Further, as discussed above, Anchored attempted to communicate its concerns with the revision process on several occasions and meet with Brand to address them. I find Brand was not responsive and did not meet with Anchored to address the revisions. It follows that I find Anchored did not delay the website by failing to provide timely revisions.

25. Given that I have found Brand fundamentally breached the parties' contract, I find that Anchored was entitled to terminate the parties' contract when it did so on October 28, 2022.

Remedy

26. Having found that Brand fundamentally breached the parties' contract, I must now consider Anchored's remedy. Damages for breach of contract are generally intended to put the innocent party in the position they would have been in if the contract had been carried out as agreed. See *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319. However, in the case of a repudiatory or fundamental breach, the innocent party may claim damages based on their out-of-pocket losses, particularly where the innocent party received no substantial benefit under the contract and the breach is substantial. See *Bhullar* at paragraphs 41 to 45 and *Karimi v. Gu*, 2016 BCSC 1060 at paragraphs 206 to 211.
27. Anchored claims reimbursement of the \$3,148.69 deposit for the website work that I have found was likely paid on August 19, 2021.
28. Brand says Anchored is not entitled to any refund because it refused to work with its "proxy" to finalize the website. As noted above, I have found Anchored was entitled to terminate the parties' contract, and did so on October 28, 2022. Once terminated,

Anchored was relieved of any further obligations under the contract, including any obligation to work with Brand's proxy to complete website revisions and finalize the website after that date.

29. Brand also argues the website is "defacto completed". It says it completed 90% of the website work, and provided screenshots of its website mock-up. However, Brand also admitted that the requested revisions were incomplete, and the technical integrations were not done. Further, the website was undisputedly not launched. It is unclear how the website is of any use to Anchored in its current form, which is itself unclear. Anchored undisputedly paid a \$3,148.69 deposit for the website, and received no benefit. Given all the above, I find Anchored is entitled to have its \$3,148.69 deposit returned.

Photography package

30. I turn now to Anchored's request for a refund of \$1,312.50 for the photography package.
31. The parties agreed to schedule a photography and video shoot for October 2, 2021, and it was completed that day. As noted, the photography package was separate from the parties' website services contract. So, Brand's website services contract breach does not mean Anchored is entitled to a refund of the photography package costs. However, I find Brand also breached the parties' contract for photography services. My further reasons follow.
32. The deposit invoice and balance invoice both say the photography package included 2 hours of photography, 50 edited images, access to all raw photographs, and 5 edited video clips. The edited video clips charge was \$250.
33. Anchored said it received 50 edited photos, but did not receive the raw photos or the videos. On April 10, 2022, Anchored emailed Brand asking for a link to the raw photos and the video files. In response, Brand provided a link for the photos, but said the remaining deliverables would be shared at the end of the project. I find the link shows both the edited photos and the raw photos were included. However, although Brand

says it provided the videos to Anchored by uploading them to “Vimeo”, it provided no documentary evidence to support this. So, I find Brand likely failed to provide Anchored with any videos, in breach of the parties’ photography contract.

34. I find the most appropriate measure of Anchored’s damages for Brand’s breach of the parties’ photography contract is the \$250 plus GST Anchored paid for the videos. This totals \$262.50

35. In total, I award Anchored \$3,411.19 in damages (\$3,148.69 for the paid deposit plus \$262.50 for the videos).

Is Anchored responsible to pay Brand \$5,000 for the contract’s balance, projection resumption fees, and additional work?

36. As I have found Brand fundamentally breached the parties’ contract, it follows that Brand is not entitled to its claimed \$5,000 for 90% of the contract’s balance, or alleged project resumption fees or additional work. Further, Brand did not provide evidence to support its counterclaims for alleged project resumption fees or alleged additional work that fell outside the scope parties’ contract in any event. I dismiss Brand’s counterclaims.

Interest, CRT fees and expenses

37. The *Court Order Interest Act* applies to the CRT. Anchored is entitled to pre-judgment interest on \$3,411.19 damages award, reasonably calculated from October 28, 2022, the date Anchored terminated the website services contract, to the date of this decision. This equals \$191.62.

38. 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 Anchored was substantially successful in its claims, I find it is entitled to reimbursement of \$175 in CRT fees. Brand did not pay any CRT fees and neither party claimed any dispute-related expenses.

ORDERS

39. Within 30 days of the date of this order, I order Brand to pay Anchored a total of \$3,777.81, broken down as follows:

- a. \$3,411.19 in damages,
- b. \$191.62 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$175 in CRT fees.

40. Anchored is entitled to post-judgment interest, as applicable.

41. I dismiss Brand's counterclaims.

42. 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.

Leah Volkers, Tribunal Member