

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Asphalt Patch Match v. Baddeck Cabot Trail
Campground (1995) Ltd., 2003 NSSC 42

Date: 20030303
Docket: SN No. 187091
SC SN No. 113297
Registry: Sydney

Between:

Asphalt Patch Match - Leonard Gerow

Appellant

v.

Baddeck Cabot Trail Campground (1995) Ltd.

Respondent

Judge: The Honourable Justice Frank Edwards

Heard: February 17, 2003, in Sydney, Nova Scotia

Written Decision: March 3, 2003

Counsel: Leonard Gerow, in person
Ivo Winter, Esq., for the Respondent

By the Court:

- [1] This is an appeal from a decision of an Adjudicator of the Small Claims Court.
- [2] The Claimant/Respondent had hired the Appellant to repair the asphalt driveway to its campground. Mr. Schumacher, President of the Claimant company and Leonard Gerow, owner of the Appellant met at the site to discuss the proposed repair work. Mr. Gerow provided an estimate and subsequently proceeded to do the job. The estimate contained the words “All work guaranteed”.
- [3] Within weeks, holes and cracks in the pavement began to appear. The Appellant did repairs but a short time later holes and cracks re-appeared. The Adjudicator found that Mr. Schumacher noticed that the Appellant was attempting to make the repairs in the same manner as he had previously. Mr. Schumacher therefore ordered the Appellant’s work crew off his property.
- [4] The Adjudicator went on to find that the Appellant had breached his guarantee and that the Claimant’s eviction of the Appellant was reasonable in the circumstances. He implicitly found that the Appellant had been given

a reasonable opportunity to effect the necessary repairs and honour his guarantee.

[5] As to the measure of damages, the adjudicator appears to have accepted the Claimant's submission that the driveway was worse after the repairs than it was prior to the repairs. He found there was a total failure of consideration and that the Claimant was entitled to the return of the full contract price of \$8,266.20.

[6] The Notice of Appeal states that the grounds of appeal are: "The Adjudicator failed to consider all the testimony given at the hearing." In his oral submission before me, Mr. Gerow submitted that he had not been given a sufficient opportunity to honour his guarantee. He argued that by ordering Mr. Gerow's crew off the site, Mr. Schumacher was tacitly accepting the job "as is".

[7] Mr. Gerow repeated the argument he had apparently made before the Adjudicator that he was unaware of some "extreme conditions" when he gave his guarantee. Finally he argued that the Adjudicator had failed to properly assess damages. In his view, the problem pertained to only a small portion of the driveway and therefore the Claimant was not entitled to a full reimbursement of the contract price.

[8] I explained to Mr. Gerow that to succeed he would have to satisfy me that the Adjudicator had made an error of law or failed to follow the requirements of natural justice. I have reviewed and re-weighed the evidence to the extent that that is possible where there is no transcript of the Small Claims Court proceedings. I have tried to determine whether the Adjudicator had misapprehended the evidence to the extent that there was no foundation for his findings. I explained to Mr. Gerow that I am not permitted to simply substitute my view of the evidence for that of the Adjudicator.

[9] Considering the evidence, I am satisfied that the Adjudicator could reasonably make the findings he in fact made. In his decision, he considered the guarantee and Mr. Gerow's opportunity to honour it. Nor can I say that he made any error in principle in his assessment of damages. The Adjudicator had the advantage of hearing all of the evidence first hand. It appears that all of the points raised on appeal by Mr. Gerow were before the Adjudicator in the first instance.

[10] Mr. Gerow's grievance lies in the conclusions reached by the Adjudicator. As I told him, I do not have the jurisdiction to re-try the case and substitute my own findings.

[11] Mr. Gerow says he was unaware of “extreme conditions; (a) underground springs; (b) usage by heavy vehicles; and (c) a steep hill. In the circumstances he was the professional. He was therefore obliged to inform himself of all conditions that might affect his guarantee. Alternatively, he could have put written qualifications on his guarantee. He did neither. He therefore cannot now reasonably fault the Adjudicator for holding him accountable.

[12] The appeal is dismissed and the decision of the Adjudicator affirmed.

Order accordingly.

J.