1996 S.H. No. 122608

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Acme Environmentals v. Parkes, 1998 NSSC 90

IN THE MATTER OF: The Mechanics Lien Act, being Chapter 277 of the Revised Statutes of Nova Scotia, 1989;

BETWEEN:

KEN TIMMONS, carrying on business under the business name of **Acme Environmentals**

PLAINTIFF

- and -

TAMARA PARKES

DEFENDANT

DECISION

HEARD: at Halifax, Nova Scotia before the Honourable Justice Walter R.E. Goodfellow on May 1, 1998 and May 28, 1998

DECISION: June 1 , 1998

COUNSEL: Karen A. Quigley and Eric G. Taylor
Solicitors for the Plaintiff

Donna Hollister Smith
Solicitor for the Defendant

Goodfellow, J.:

1. BACKGROUND

The parties first met in May of 1995 when Ken Timmons was an employee of Maritime Nurseries, who had been engaged by Ms. Tamara Parkes to do work on her home, including the construction of a retaining wall and deck.

In June of 1995 Parkes hired Timmons to construct some curved lattice panels on her property, during which they had a discussion with respect to further improvements to her property, which eventually resulted in a contract being signed by the parties July 12, 1995.

Differences arose between the parties and a Mechanics Lien was filed for the corrected amount of $2,622.19. Ms. Parkes wished to sell her property and relocate in Alberta, and a Chambers Application resulted in an Order July 30, 1996 vacating the lien on payment into court of $4,300.00 as security for payment of the claim.

In addition to the claim of $2,622.19, a Statement of Claim was amended seeking special damages for Alleged Breach of Contract for an additional amount of $560.00.

Ms. Parkes filed a defence and counter claim. In her counter claim she sought the cost to complete the contract, losses allegedly attributed to her business, medical expenses, none of the foregoing were quantified in the counter claim. At trial, Ms. Parkes advanced a claim for loss attributed to diminution in the sale price of her home. This was estimated by her to be about $3,500.00. Ms. Parkes called the Real Estate agent, who handled the sale of her property. However, there was no evidence whatsoever, that the sale price was, in fact, less than would otherwise have been the case and counsel for Ms. Parkes limited the claim advanced to invoices paid by Ms. Parkes to Linden Landscaping and a thousand dollars Ms. Parkes paid to have someone look after her mother so that she could attend trial plus her air fair to attend the trial from her home in Calgary,

Alberta.

2. ISSUES

1. Has there been a breach of the contract between the parties and if so, by whom?
2. What damages have been established that flow from such breach?

3. MECHANICS LIEN ACT

Ms. Parkes' counsel, in argument, raised the issue that by virtue of Section 13 of the Mechanics Lien Act, the degree of completion of the contract by Timmons, fell short of the statutory requirement for a lien and that therefore, the funds should be returned to Ms. Parkes. The parties agree, that the contract was in the amount of $10,667.19 and that Ms. Parkes has paid $7,110.00. Timmons evidence is that the value of the work outstanding and not completed by him, is a labour component of $510.00 and material of $50.00. Based on his evidence of $560.00 to complete, then the prerequisite of Section 16 of the Mechanics Lien Act has not been met. The reality is that the parties vacated the lien on the posting of security in the amount of $4,300.00. Ms. Parkes has left the jurisdiction, sold her property and secured from the court an order posting security. In the circumstances whether or not Timmons was entitled to a lien is mute and fairness dictates that the security be applied to any entitlement for breach of contract that he is able to establish on a balance of probabilities.

4. ISSUE (1)

Has there been a breach of the contract between the parties and if so, by whom?

The contract is in relatively simple terms. I find as a fact, that prior to the entry into the contract, Timmins made it clear to Parkes that he was getting into the business on his own, without any capital resources and that he would require timely payment for work performed and I am satisfied that Ms. Parkes acknowledged his situation and agreed to accommodate him. There are differences of opinion between Timmons and Parkes as to what transpired, particularly in relation to how the

contract was not fulfilled, the payment of $1,000.00, the state of completion and the quality of work performed.

I have no reservation indicating that wherever there is a conflict between the evidence of Timmons and Parkes, that I strongly prefer the evidence of Timmons.

It was indicated that Ms. Parkes suffered some brain injury, however she is a well educated, articulate person, who I am certain had no difficulty whatsoever in comprehending what she entered into and what transpired.

I am satisfied that the $1,000.00 payment on Sept 6, 1995, as indicated in the note, Ms. Parkes had Mr. Timmons make was intended in fact as a payment on account, and not as Ms. Parkes subsequently attempted to label as an advance on future work.

If Ms. Parkes had lived up to her end of the bargain and provided funds in a timely fashion, then I am satisfied Timmons would have completed the work outstanding. In his letter of September 26, 1995 to Ms. Parkes, Timmons said "Kindly deliver a cheque in the amount of $2,612.19 made payable to Acme Environmentals, no later than Monday, October 09.1995. Once this amount is paid, Acme would be willing to discuss with you further works towards finalization of your "Phase I" plans for your property." Counsel for Ms. Parkes invite me to conclude that Timmons was not prepared to return and finalize the work, but merely to discuss the matter. This letter must be interpreted in the context of what had transpired. Separate from the failure to pay in a timely fashion, there had been a major confrontation verbally and bordering on the physical between the parties and essentially, Ms. Parkes dismissed Mr. Timmons. I am satisfied that he would have and intended to complete the work provided arrangements could be agreed, to avoid further confrontation and for the timing of his completion of the outstanding work.

I can understand Ms. Parkes finding some degree of confusion in the billing process of Mr. Timmons. However, it would be a simple matter for her to note, as is admitted, of the contract price of $10,667.19. Her payments of $7,110.00 for a balance of $3,557.19. Part of the confusion arises

over a credit given by Mr. Timmons of $175.00. He believes it to be a credit and I am satisfied it is in fact a credit for work performed on his contract by other personnel, Ms. Parkes had working in landscaping on her property at the same time. I also accept Mr. Timmons estimate that the total cost of work to complete was $560.00, of which the labour component would be $510.00. Ms. Parkes brought the contract to an end by her conduct, including canceling the payment of the $1,000.00 and then, the only way she could make certain the cheque would not be honoured, was to close out her account and she did so before the cheque could be cleared.

I am satisfied that the conduct of Ms. Parkes breached the contract.

5. ISSUE (2)

Timmons seeks payment of the final invoice in the amount of $2,622.19.

The final invoice of September 25, 1995 seeks payment of $2,612.19 which was corrected to $2,622.19. Included in that amount is the rental of a chain saw $47.51. It seems to me reasonable for Ms. Parkes to rely upon Mr. Timmons to have the basic tools necessary to do the work and the contract did not provide for rental costs for equipment. No entitlement to recovery has been established for this item.

The account also includes the cost of purchasing an axe $29.68 and similarly, there is no entitlement to recovery of this item, which presumably has been retained by Timmons.

There remains his claim included in the invoice of $560.00 for the contract balance. As previously noted, a measure of confusion exists as relates to the billings. Indeed there were some extras apparently paid, for labour relating to a wooded area. The amended statement of claim clearly claims $2,622.19 plus special damages in the amount of $560.00.

Mr. Timmons estimates a material component of approximately $50.00. In certain circumstances where a contract is breached by one party, the loss from that breach can result in

payment equivalent to the balance of the contract, including for work that has not been completed. Timmons seeks the full labour cost of work that he would otherwise have performed in the event there had been no breach. It seems to me that in these circumstances, the most he would be entitled to recovery is the loss he actually incurred. He suffered no loss as he was able to find alternate work immediately.

In any event, I have reflected carefully on the contribution Timmons made to the breach of contract by Ms. Parkes. It reached a stage of verbal and almost physical confrontation and while I repeat Ms. Parkes precipitated such, Mr. Timmons made a sufficient contribution to render it extremely difficult, if not impossible for him to complete the work and on balance, I am not satisfied that he has established, or should be entitled to recovery of any part of the additional $560.00 claim.

6. COUNTERCLAIM

The counter claim filed December 20, 1995 seeks recovery of the cost to complete the contract to correct the work allegedly improperly performed, interference with Ms. Parkes business operations, medical expenses, etc.

On the first day of trial, Ms. Parkes quantified generally what she thinks is the loss in diminution of the sale price of her property at $3,500.00. The Real Estate agent called was unable to give any evidence in this regard, and this aspect of the counter claim clearly has not been established.

None of the other headings set out in the counter claim were advanced in evidence and the only evidence advanced was the claim for accounts to Linden Landscapers, one in the amount of $187.25 and a second in the amount of $213.00. Her contract clearly excluded mechanical work and the first invoice from Linden was in relation to replacement of a filter and neither of these accounts are recoverable.

The counter claim is predicated upon Ms. Parkes establishing a breach of contract by

Timmons and specifically, that the work he performed was either negligently performed or not of a sufficient standard one would be entitled to expect in a landscaping type contract.

Robert Taboski, of Linden Landscapes, a qualified landscaper gave evidence and in short summary, he acknowledged that the problems experienced by Ms. Parkes were related to leakage due to the liner at the back of the water falls not being high enough.

I accept the evidence of Mr. Timmons that when he left the job site, the liner at the back of the water falls was in the range of 15 inches plus and therefore, any loss or damage suffered by Ms. Parkes as a result of the liner being in the condition found by Mr. Taboski, namely only two or three inches above ground level, was not as a result of any work or lack of such on the part of Timmons. It is noted that Ms. Parkes had a number of other people working in the landscaping area and while Timmons, who is not required to prove an alternate source for the shortness of the lining as found by Taboski, nevertheless, there is distinct possibility such came about by one or some of the additional workers hired by Ms. Parkes. In any event, I accept Mr. Timmons evidence.

Ms. Parkes measured the level of the soil at or near the border and very clearly, the photographs indicate a measure of gravel tapering from the border inward so that measurement and advancing inadequate soil, cannot be established by the location of Ms. Parkes measurements. Indeed, the photography would seem to suggest a very considerable depth throughout the bed leading up to the borders.

The counter claim has not been established and also, no loss has been established as, in any way, flowing from any conduct on the part of Timmons.

Ms. Parkes also advanced what appeared to me to be for the first time in giving evidence, two elements of special damages, namely an apparent cost of $1,000.00 to look after her mother while she came from Alberta for the trial and the cost of her air fair. The cost of her airfare might well have been dealt with under the heading of costs, but in any event, I repeat the comments on special damages I made in **McDonald v. Mombourquette et al, (1995) 145 N.S.R.(2d) 360 at page 379**:

> **(1) Special Damages**
>
> **[70]** The distinction between special and other damages reflects a pleading rule that special damages are to be specifically pleaded and specifically proven. Special damages are those such as repairs to a motor vehicle, ambulance costs, lost clothing, loss of earnings to date of trial, etc. which damages are capable of precise calculation. Special damages are recovered as a matter of restitution, placing the injured party in the same financial position she/he would have been had the injury not occurred.

This outlines the preferred approach and if appropriate, I would have granted an amendment. Ms. Parkes failed to establish any entitlement under her counter claim in any event.

The counter claim stands dismissed.

COSTS

Counsel are entitled to be heard on costs and I would ask that they file and exchange their representations on or before the 12th of June, should they be unable to agree on costs and disbursements.

J.