

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Bear Mountain Construction Ltd. v. Bishop*, 2013 NSSC 286

**Date:** 20130918

**Docket:** Ken No. 340569

**Registry:** Kentville

**Between:**

Bear Mountain Construction Ltd.

Plaintiff

v.

Susan Hamilton Bishop and Glen Stewart

Defendants

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DECISION

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**Judge:** The Honourable Justice Gerald R. P. Moir

**Heard:** June 13, 2013

**Counsel:** Jonathan G. Cuming, for the plaintiff  
Susan Hamilton Bishop and Glen Stewart, on their own

**Moir J.:**

[1] *Introduction.* Bear Mountain Construction made a contract with Susan Hamilton Bishop to renovate a home she was purchasing with her husband, Glen Stewart, at Port Williams. The contract was in writing. The work was specified and a fixed price was agreed.

[2] Ms. Hamilton Bishop terminated the contract before completion. Bear Mountain filed a claim for lien and started this action for what it says is the balance, after credits for payments, of the value of labour and cost of materials. Hamilton Bishop and Stewart defended on the basis that "there is nothing due to the plaintiff".

[3] I heard the builder's lien trial in one day, and I have to determine what, if anything, Hamilton Bishop and Stewart owe to Bear Mountain. I have concluded that only \$2,000 is owed.

***Contract***

[4] The renovation contract is made up of a detailed estimate prepared in June of 2010 and an offer prepared by Bear Mountain and accepted by Ms. Hamilton Bishop. The estimate provides a detailed description of work to be done. The offer provides for the described work to be done on these terms:

- "for the sum of \$36,304.35"
- "with a 20% deposit (\$7,260.87)"
- "3 equal payments of \$9,681.16 as work progresses with the final payment paid in full within 14 days of completion."
- "Work to be commenced on 12<sup>th</sup> August 2010."
- "All work to be carried out in a professional and good workman like manner."

[5] The scope of work was extensive. It required Bear Mountain to hire electrical, plumbing, and plaster subcontractors. It involved a renovated kitchen, new windows, restored interior doors, an improved laundry room, a renovated bathroom, and a six by sixteen foot addition.

*August 13 to August 24*

[6] Bear Mountain is operated by Alan Whincup and his wife, Lisa Whincup. They, and a young man hired as a helper, were to do all of the work that was not subcontracted. After sourcing materials, making subcontracts, and doing other necessary preparations, the three workers reported at the Port Williams home at 7:30 on August 13, 2010.

[7] The house was vacant when work started. The project was expected to take six weeks. The new owners were to move in after the first week.

[8] I accept the evidence of the Whincups about the portion of work that got done before termination. In the course of the six work days starting August 13<sup>th</sup>, Bear Mountain and its subs supplied about one-quarter of the required labour for

the project not including the addition. They purchased about three-quarters of the materials required for renovation of the existing building. Bear Mountain paid \$3,522 to the plumber and \$800 to the electrician.

### ***Termination***

[9] What exactly happened on August 24, 2010 is central to the dispute. I shall review the evidence before providing my findings.

[10] Ms. Hamilton Bishop, Mr. Stewart, and their children had just moved in. Mr. Whincup was not happy with what he found. He says every room was filled with furniture. Even the entry was blocked. This would mean unexpected work, extensive moving, and risk of damage, according to Mr. Whincup.

[11] He says he had a chat with Ms. Hamilton Bishop. She had a complaint about some of the work, and he replied by saying that some people watch too many home renovation television shows. She started crying. She had been up all night unpacking.

[12] Mr. Stewart spoke with Mr. Whincup. According to the later, Mr. Stewart said "we should terminate" the renovation contract. He says he left, but was telephoned by another contractor later that day. Mr. Phil Barnett discussed with him what had happened. Mr. Barnett offered to help resolve the issue, but Mr. Whincup was not interested. "They asked us to leave so that would not work."

[13] According to Ms. Whincup, it was around five o'clock on the 24<sup>th</sup> that the owners asked them to leave and to terminate the contract. She and her husband met the owners on the porch. Mr. Stewart asked them to terminate and not to come back. "It was a civil discussion." Her husband apologized for the remark he had made.

[14] Ms. Hamilton Bishop testified. The workers had left August 23<sup>rd</sup> as a day for moving. She had agreed to put furniture out of their way, but it was a big move and some furniture was in the way. When Mr. Whincup saw this the next day, he became very angry.

[15] According to Ms. Hamilton Bishop, she said "I have concerns as well." They went upstairs. Her main concern was an electrical junction that had been

installed directly below a water supply. She also judged some finish work to be shoddy.

[16] According to Ms. Hamilton Bishop, Mr. Whincup then went to her husband. She heard him say to Mr. Stewart, "Women are too emotional." Mr. Stewart told him to leave.

[17] Later, Ms. Whincup called. She said that she and her husband would like to come over to talk. Mr. Whincup apologized. Ms. Whincup explained that he does this sort of thing. He gets worked up. Ms. Hamilton Bishop and Mr. Stewart said that trust had been broken. They were not interested in continuing the relationship. They asked the Whincups to give them a reasonable number, expecting that some portion of the deposit would be paid back.

[18] Ms. Hamilton Bishop retained Mr. Phillip Barnett to take over the project. He testified that he was called in on the same day as the termination, August 24, 2010. After inspecting the work, he called Mr. Whincup, but he was dismissive. He made reference to a television show about rescuing owners from poor renovations.

[19] I find that Mr. Whincup provoked termination by doing two things. He insulted the owners by refusing to address a serious question about the risk of an electrical connection being placed below a source of water. And, he insulted Ms. Hamilton Bishop by making a sexist remark against her. In both respects, he displayed anger in his customers' home. I find that these transgressions fully justified the order to leave.

[20] I also find that the request for a reasonable number was not an admission that anything was owing to Bear Mountain. (Had it amounted to an admission, the evidence that justified termination, which includes problems discovered after August 24<sup>th</sup>, would explain the admission away.)

[21] On termination, Ms. Whincup reviewed the records and prepared an invoice for what Bear Mountain claims as a balance owing over the deposit. She invoiced \$13,150 plus HST less the \$7,260 deposit for a balance of \$7,861. Ms. Hamilton Bishop disputes the invoice on the basis that it includes a half a day that she says the workers took off, and she ridicules it on the basis of the percentage of days worked to the days estimated for completion.



[22] Had the termination been unlawful, a correct calculation of Bear Mountain's losses could have been its cost of labour, materials, and subcontracts to the date of termination plus loss of profits afterwards. I do not find that the workers took a half-day off. Nor do I find the time comparisons helpful. There is evidence that usually more work is done at the end, rather than the beginning, of a home renovation. However, in the circumstances of this contract, I do not know how much of the work was loaded into the front end, I do not know whether the expenses happened to overrun estimates in the beginning, and I do not know how much, or how little, the addition would have cost.

[23] With some minor errors, the invoice fairly reflects labour, material, and cost of subs to August 24<sup>th</sup>. I find Bear Mountain's damages would have been \$7,000 had the contract been wrongfully terminated.

### ***Findings of New Contractor***

[24] As I said, Ms. Hamilton Bishop and Mr. Stewart retained Mr. Phillip Barnett to complete the renovation. Ms. Hamilton Bishop tried to advance

opinion evidence from Mr. Barnett. However, she did not deliver an expert's report for Bear Mountain's consideration and she filed no report to satisfy the purposes of Rule 55 - Expert Opinion.

[25] Ms. Hamilton Bishop did not know the requirements of Rule 55, and she did not appreciate the importance of them. Consequently, Mr. Barnett could not be qualified as an expert witness and he was unable to offer opinions about *Building Code* requirements or defects in work. There were times when his testimony crossed the line before Bear Mountain could object. I ignore what he said on those occasions.

[26] Some things Mr. Barnett said sounded like expert opinion, but were actually fact. He has been in the business for twenty-five years, and some of his testimony was nothing more than factual inference resulting from a host of experiences, sometimes called lay opinion.

[27] Mr. Barnett gave evidence about two subjects that led me to conclude that there were serious failures in the work done before he took over the job. There were other things he repaired or improved, but they were less important.

[28] The Bear Mountain contract required the following for a laundry room:

Move laundry to the other side of the laundry room, includes removing the floor for plumbing access, shim the floor to level and fix new plywood to the floor. Wainscotting is to be fitted to all the walls up to the corner of the stairs. Frame under the loft stairs, drywall and fit door.

This is the room in which Ms. Hamilton Bishop found an electric junction box below a drain. Mr. Barnett expressed an opinion about *Building Code* requirements, which I am ignoring. But he found something else. The fixtures had not been vented.

[29] The specifications for an upstairs bathroom read:

In the loft bathroom remove section of the existing wall, and reframe new walls to build the bathroom. Remove the floor for plumbing access, refit a new floor after plumbing rough in. Re-drywall, leaving the chimney exposed. Move the closet door from the end wall to the new position in the front wall using the original doors. The old position will be framed and drywalled, taped, and crack filled. All taping and filling will be done at this stage.

Mr. Barnett found that the floor was out of level. Also, the sink and the toilet were not vented.

[30] Mr. Barnett pulled up the floor to create the necessary even level. When he did this, he discovered a live electrical wire that had been taped off rather than junctioned. He had to get a building permit and an electrical permit when he took over. Apparently, Bear Mountain had failed to do so, and the prospect that there may never have been an electrical inspection is important to the case.

[31] A judge, or a jury, does not need help to understand that a container well filled with liquid needs a source of air when the liquid is to be displaced. A judge, or a jury, needs no help understanding that when such a container is fitted with a drain at the bottom, the liquid itself will act as a stopper unless there is some place for the air below it to go. So, sinks and toilets with unvented drains may well glug slowly. No expert is required for us to understand that.

[32] Nor do we need an expert to tell us that it is a bad idea to have live wires under a bathroom without their being insulated in a junction box. We do not need an expert to tell us that electricity from the taped end of a line can conduct through water. Or, that bathrooms sometimes flood. Or, that the combination of the live wire and the flood may be most unpleasant, even fatal, for a person getting out of the bath or mopping up the flood.

[33] The plumber's invoice describes as extras "Laundry Box with sure vent & ice maker Box & new valves on Kitchen sink". So, it is suggested that the plumber planned to install a "sure vent". Mr. Barnett said that this kind of vent is only installed in islands. I think that is the kind of inferential evidence a person with Mr. Barnett's experience is able to provide even though he could not be qualified as an expert because of Ms. Hamilton Bishop's failure to provide a report.

[34] Further, I accept Mr. Barnett's evidence that no sure vents were found at the residence and that none were installed. The invoice was for the finalized work and, despite the hearsay on the document, I find that the plumber never installed vents for fixtures.

[35] Oddly, the invoice is at pains to provide evidence about venting when it gives little other information. This is written on it: "Waterlines & Drainage was water tested. (It was great.)" Why is the plumber telling us this, especially when he had to know that he did not install any sure vents? Because he knew the drains were not vented.

[36] It is not reassuring that the drainage was "great" at the time. Leaving aside for the moment that this too is hearsay inadmissible to prove the fact but keeping in mind that no witness detected a drainage problem at this time, one wonders how well the drains would function over time.

[37] I find that the failure of the plumber to vent the fixtures was a serious breach of the renovation contract.

[38] No reassurance is offered about the live wire under the bathroom floor. In addition to having liability for electrical work as a matter of contract law, Bear Mountain bears direct responsibility for this breach. The Whincups tore up the bathroom floor to give access to the plumber and the electrician. Then, they installed a new subfloor that concealed the danger left behind by the electrician. I find Bear Mountain ignored the problem.

*Nature of Bear Mountain's Breach*

[39] The seriousness of Bear Mountain's breaches deprived Ms. Hamilton Bishop of substantially the whole of what she had contracted for. I say this for two reasons.

[40] Firstly, this is one of those renovation contracts that brings strangers into an occupied residence. One is not invited into a home except on the understanding that one will show respect for its quality as a person's home. The manner of showing respect will depend on the circumstances and culture of the family as known to the other contracting party, but to contract to come into a home occupied by a family is a contract not to behave intolerably.

[41] How long would a person tolerate allowing a contractor into their home who belittles the mother's legitimate questions about performance of the contract, brings her to tears, and makes sexist remarks against her. Not long. And, that is the measure of the breach that occurred here.

[42] Secondly, the work was fundamentally incompetent. To deliberately or carelessly provide drains that may clog and a live wire unprotected under a bathroom floor is to provide something offensive to the spirit of the renovation contract. In the circumstances of this case, it deprives the owner of the substantial benefit of the contract.

[43] Consequentially, the owners in this case were justified in terminating the renovation contract. They were not to take unjust enrichment on account of the termination, but they were entitled to damages for losses the breaches caused.

### *Damages*

[44] As I have said, the \$13,150 invoiced fairly reflects Bear Mountain's labour, purchases of materials, and payments to subcontractors. The set-off of the \$7,260 deposit is acknowledged by Bear Mountain, but it takes issue with the defendants setting-off any losses because they did not specifically claim set-off in the statement of defence. (There is no counterclaim.)



[45] The statement of defence says that nothing remains owing to Bear Mountain. In the circumstances, I think that fair warning the defendants would seek set-off. Otherwise, I would allow an amendment to the pleading.

[46] There are two ways the owners' damages can be measured for these kinds of breaches of this kind of contract. One is to compensate for the difference between the cost of the restoration or completion and the agreed price under the terminated contract. The other is to compensate for the cost of repairs.

[47] Mr. Barnett provided more than Bear Mountain had contracted for, and it is not possible to segregate the value of the extra work and materials. There is no evidentiary basis to support the first approach for compensating the losses caused by Bear Mountain's breach.

[48] What was the cost of repairs? We have some evidence on that from Mr. Barnett. The costly repairs were in the bathroom, where the floor had to be torn up, and in the laundry room, where a variety of defects required extensive adjustments. Mr. Barnett says, and I accept, that the work in those two rooms cost \$4,400.

[49] On September 20, 2010, Mr. Barnett submitted an invoice for \$5,185. Ms. Hamilton Bishop and Mr. Barnett say this was for the repairs. I am satisfied that Ms. Hamilton Bishop's losses on account of the major and minor breaches are \$5,000.

***Conclusion***

[50] The plaintiff will have judgment for \$2,000. The parties may send me submissions on costs. (Ms. Hamilton Bishop may now send me the documents about settlement she was prevented from entering at trial.)

J.