

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Busk Custom Home Builders v. Metlege, 2006 NSSC 169

**Date:** 20060516

**Docket:** SH 225777

**Registry:** Halifax

**In the matter of:** The Mechanics' Lien Act, being Chapter 277  
Of the revised Statutes of Nova Scotia 1989, and  
Amendments thereto.

**Between:**

Busk Custom Home Builders

Plaintiff

v.

Steven Joseph Metlege

Defendant

**Judge:** The Honourable Justice Charles E. Haliburton

**Heard:** May 1, 2 & 3, 2006 in Halifax, Nova Scotia

**Oral Decision** May 16, 2006

**Counsel:** Allen C. Fownes, for the Plaintiff  
Phillip Whitehead, for the Defendant

**By the Court:**

[1] This is the decision in *Busk Custom Home Builders v. Steven Joseph Metlege* which was a short trial involving a building contract where the issues raised included the value of a claim for deficiencies by the owner and general contractor, and a claim for failure to pay the contract price by the framing contractor.

[2] The principals that apply in a case like this are very simple and well known. A contractor who has a contract to build a structure, or to do other work is entitled to be paid for their work when it is finished. If there are deficiencies, then the owner is entitled to be compensated for those deficiencies and those things which are, if they are not made good by the contractor; and if work is left to be completed after the contractor left the site then the owner is entitled to claim for the work which has not been completed and the cost of that completion in accordance with the original contract.

[3] Proof, as in other civil matters is on a preponderance of the evidence; with the contractor, in this case *Busk* (being the framing contractor) obliged to prove that there was a contract; and that he didn't get paid; and the owner *Metlege* (who

also acted as the general contractor in this case) establishing that there were deficiencies and/or the cost of remedial work done. So, the position of Busk is that there was a contract, that an agreed price; in fact, it was an estimate which is included in the documents at Tab 'A', the contract price being \$41,280 plus H.S.T.

[4] Busk is of the view that the work contemplated was done, that full payment was not made and received, that there was extra work not included in the contract that was done and for which he has not been paid. The position of Metlege, on the other hand, is that the work contemplated was not completed, that deficiencies were not remedied by Busk and that he incurred additional expense at reasonable rates to remedy those deficiencies.

[5] It is a principle of the civil law that parties are restricted to claiming that which they have set forth in their pleadings and it is evident that the fact that an assertion is made in pleadings is not proof of the claim.

[6] Just a few general comments with respect to this contract and the parties. At the time of the contract, neither party had extensive experience either as a builder

or a contractor. Metlege who was acting as a developer in this case is, in fact, a landlord of a number of units, some 400 units in and about the City of Halifax. When he decided to build this 8 unit Townhouse structure, he decided not to engage a general contractor to complete this construction for him. He would act as his own general contractor. Busk had considerable experience in the construction area but not as an actual contractor working on his own. He had been a consultant with an architectural firm, or an engineering firm. He had been a draftsman, he had worked with others in the construction business, but his actual experience as a specialized framing contractor was a year or so, and this was, (as I recall the evidence) the first time he had framed a structure of this particular type.

[7] I am going to review some of the evidence that the witnesses gave that I thought was relevant, subsequently, but I would say that what I intend to do in going through my decision and in reciting the evidence is to focus on the counter-claim pleaded by Metlege as the pleading which encompasses the dispute between the parties.

[8] Perhaps before I get too far, I would say that many of the claims advanced by Metlege are totally without proof at the end of the day. One of the allegations

was that of “timeliness.” The evidence is that there was no agreement as to how long it would take to frame this project. It was wintertime, the construction plans were not finalized until a day or two before the work actually began and it is not at all clear that the plans, when they were finalized were furnished to Busk, who undertook to frame the building. There is evidence of several snow storms, including White Juan which delayed the work of the framer. There was delay in the supply of materials which was not his responsibility, parallam beams could not be obtained when they were required. Trusses were late arriving, a substitute of steel for the parallam beam involved a further delay. The failure of the general contractor to clear snow from the work area, also would have been a cause for delay and in the face of that, the work was essentially completed by the end of March or very early in April. It is my view that the work was completed within a reasonable time frame as contemplated by the parties.

[9] There is another allegation that the building has suffered water damage and that was, at least, one of the basis on which it was suggested in the pleadings that there was a diminished value of the property. No evidence was offered, at least, at the trial, that the building had suffered any water damage. There was evidence of a “risk” of water damage which resulted from this roof, or gable roof which ended at

a vertical wall. That was admitted, or at least suggested, by one of the witnesses to be a design fault; it seemed to me in my own judgement that it was quite an obvious design flaw. A roof sloping down into a vertical wall is obviously a potential source of problems and it matters not what material is used on that vertical wall. Having a dam with water accumulating is going to get through a great many surfaces. That would create a risk even though they may be designed or worked on to prevent their leaking. So, the design created a heightened risk. I accept the evidence of Busk that he raised that particular design issue with the owners and that nothing was done to change it. Busk, in fact, cured it as best he could. His evidence was that he installed a triple layer of a patented material which he called "ice or gutter shield." This solution was very similar to that which was proposed by Engineer, John Sala, who suggested some kind of "torched on" roofing which would have helped. Mr. Sala also, testifying about the fact that the wall had been intended by the designer to be brick, conceded that brick and mortar are not water proof either, but that certain provisions could be made that would make them more water proof than they would normally be. That design created a risk. So, there were steps that could be taken to diminish the risk. Some steps were taken, the risk was created by the design and there is no evidence with respect to the decreased value of the project resulting from the way this wall was

constructed, or installed or completed. As I say, if there was such a diminution of value, it wasn't because of the construction, it was because of the design.

[10] There is a further allegation that the property as framed and ultimately completed could not be qualified under the "Atlantic Home Warranty Program." Now in the course of the evidence, it was not referred to as the Atlantic Home Warranty Program, although that was what was in the pleadings. I am left with the impression that it was some other warranty program that was being considered. Whatever the warranty program was, whatever was being considered by the owner, neither of the parties was approved under this program for construction of a building to be qualified. Mr. Sala was retained because of his connections with the particular program and upon his recommendation and approval, apparently such a designation, such a warranty would have been issued or provided. However, I think the bottom line with respect to the warranty and in terms of the responsibility of Busk is that no such warranty was ever part of the contract. None was discussed between the parties and it was not incorporated into the contract. So, Busk cannot be held liable for the failure to meet a standard of which he had no knowledge. He was working on the assumption that the standard he had to have approved was the

normal *National Housing Code* Standards that apply and that are enforced by the HRM authorities.

[11] There was some deviation from the plans which was complained about. Nonetheless the building was completed, the deviation, apparently, did not result in any material difference in the end product. It was alleged there was a failure of Busk to supervise, that there was negligence, that there was verbal abuse, I find those things are all either unproven or irrelevant to reaching a decision; to the resolution of the differences between the parties. All of that is not to say that there were no deficiencies in the work that was executed and it is clear from what several of the witnesses had to say that the quality of the work was not exemplary.

[12] So, with that introduction, I want to just review what it was that the witnesses said that appeared to me to be relevant as to what I have to decide between the parties. According to David Busk, the plaintiff, the contract required that this building be framed, roof ready for shingles and exterior siding that the interior walls were to be framed and ready for drywall. He was delayed, he said, in waiting for Trusses, he was held up waiting for a parallam beam. All materials were being supplied by the owner and to be acquired from Kent Building Supplies.



On this basis Busk said that he obtained from Kent Building Supplies the rough size openings or RSO's for windows and doors which had been ordered for the structure. Ultimately, he discovered that the rough size openings that he had constructed were not the appropriate size for the windows and doors that were provided. He said he made Mr. Metlege aware of the fact that the door openings were different from the size he had been given by Kent. He was required to move the location of 16 rear windows which were too high. He was instructed by Mr. Metlege Senior to do that. By agreement with the owners, an alteration was made in the laundry rooms for laundry rooms on the lower floor of the first units in order to adjust it so that the laundry room would be elsewhere. He removed walls that were built in the living, kitchen area. He constructed a firewall which was subsequently the subject of complaints and that discrepancy, he testified, resulted from a defect in the plan. That particular item was changed at a cost of \$1,080 dollars.

[13] On April 5<sup>th</sup>, a few months after having commenced work Busk said he decided to pull out. He had heard a rumour that Metlege was not going to pay him for the work, for the unpaid value of the work that he had done and he said he had "lost money anyway." So there was contact between them. Mr. Metlege called

him to find out why he wasn't there. As a result of that conversation Metlege promised Busk that he would be paid. A letter appears at Tab "C", I think, or thereabouts, confirming and assuring, as far as Busk is concerned "the April 5<sup>th</sup> letter assures me that I will get paid;" and he made the observation that in work of this kind there are frequently extras in the range of \$5,000 or 10% which he thought was no big deal.

[14] He talked about the reasons for the delay, he referred specifically to White Juan and a couple of large snow storms. He referred to the fact that the contractor did not keep the area clear of snow, he referred to the fact that there was no dumpster on site to put debris in and that materials were inclined to get confused.

[15] There was no time specified for the completion of the contract. Busk wanted to get it over with so that he could get paid. He agreed that there was a defect in the execution of the construction of a laminated beam in several units. He agreed that there was an erroneous placement of the steel beam which was brought in as a substitute for the parallam beam and that because of his error, holes needed to be drilled in that steel beam. He agreed with Metlege that construction work actually began on December 8<sup>th</sup> and he said that work was all completed by mid April when

he had just two or three men on the site doing some cleanup and finishing touches.

[16] Under cross-examination, he agreed, as I say, about the laminated 2 x 10 beam that was not installed on the first floor and that electrical and plumbing materials had to be removed and reinstalled in order to accommodate the additional timber. He reiterated that the defect in the design with respect to that roof and the vertical wall was discussed and that everybody agreed it was a flaw in the design. He accepted that there was a defect in the construction of the rear wall in the basement where a one inch air space had been designed between the framing and the concrete wall, and that an air space had not been left, but he said it was never brought to his attention or he would have rectified it. With respect to that roof and wall junction, his evidence was that on the wall he ran “ice and water shield” on the wall to help waterproof it.

[17] A building inspector, at least what I call a building inspector, he was a building official, Derrick Arsenault testified he inspected the structure for compliance in terms of framing, compliance with the *National Building Code*. He observed that there were deficiencies as the structure went along but he said these

are “deficiencies we see on a regular basis, they are easily rectified.” At the framing stage “there was a problem with the firewall and the design had to be corrected.” These were details omitted from the drawings, he said. “Absolutely not” the framers problem and subsequently the framing, he said, was all approved.

[18] The defence case led off with Steven Metlege Sr. Mr. Metlege has a lot of experience both in building buildings according to his own evidence and in operating or managing them. It was he that gave many of the orders that altered the structure as it had been designed, that it was clear that he was on the site giving orders on behalf of his son. With respect to the partitions in the living room, his evidence was that he said, “take it away.” With respect to the steel beams he said, that Busk put the steel beam in “upside down” and with respect to the windows, he instructed that they be lowered and “they were lowered.”

[19] Steven Metlege Jr., testified. He is the plaintiff in this case. Between he and his father they own 400 housing units. His father has built other properties over the years but this was the first occasion that this Mr. Metlege was in charge of a construction project. With respect to his responsibilities as general contractor, he observed that he “was not there to supervise” what the sub-trades were doing, he

was “interested more in the cosmetics.” With respect to the contract, he agreed on the terms of the contract and that Busk was to frame the building ready for shingles. He thought he must have had the plans, he thought Busk must have the plans because he started building and he agreed that he started on December 8<sup>th</sup>. I mention that because listening to the evidence I was in some doubt about whether anybody knew when the building had started and, indeed, I was curious that neither of the parties had kept any diary about the construction process or difficulties that arose as they went along.

[20] The last cheque that Metlege provided in the normal course of payments bounced. I don't know whether that contributed to the skittishness that Busk felt or not, anyway the cheque was made good and it was of no consequence in the overall matter. With respect to the “rough size openings” for the doors and windows Mr. Metlege observed that he knew nothing about that, that it was strictly between the sub-contractor and the supplier as far as he was concerned. If there was this fault, it was not his. He made an attempt to measure the windows and doors during the trial. He concluded that they were “pretty much” the size that was contemplated in the plans. He testified that the rear windows, the 16 rear windows that were moved on his father's instructions were moved only because the framer had incorrectly

framed the cantilevered wall. He complained that the walls along the firewall are not plumb, that the opening in the roof to accommodate the firewall was more than the eight inches designed. He subsequently hired a man named Keith Nurse to remedy the deficiencies which he encountered. He retained John Sala, an Engineer, in connection with the Home Warranty Program because his inspection and approval were required in order to obtain that home warranty designation. He testified with respect to some of the work that Keith Nurse did. One significant thing was the replacement of stringers on a stairway in Unit 8 which had been improperly installed. He spoke to the drilling of holes in the steel beam in order to rectify that error. He spoke to the fact that the dry waller's charged him an extra few cents per square foot of dry walling because of irregularities in the 2 x 4 framing partitions. He spoke to an extra that the plumber's charged in order to reinstall their pipes through the three, 2 x 10's which had been added to the structure after the pipes had been initially installed; and he spoke to a re-routing of the vacuum cleaner pipes, as a result of the same problem. When asked in cross-examination whether Busk had not remedied the deficiencies discovered before he left the site, he conceded that he did remedy them "until he left" the scene and he testified that he did not discuss the home warranty business with Busk, either first nor last.

[21] John Sala testified. The evidence that I thought was of significance given by Mr. Sala was with respect to that Dormer roof and the water directed at the vinyl siding; vinyl siding having ultimately replaced the brick intended to be there. He testified that in his view, a “torched on” roofing would have water proofed it. He was not asked about the alternative used by Busk. He testified that all the defects were capable of remedy.

[22] Mr. Lidstone, from W.M. Fares and Associates, the designers of the building testified. He commented on the fact that there were intermittent studs which had been cut short and that in some cases they were shimmed “as much as an inch and a half.” That was not, in his view up to the industry standard. It was he that observed that the framer must have been using an earlier set of plans than the last time they were revised “for construction.” He spoke to some deficiencies in the work that Busk had performed. The nailing pattern of the parallam beam, the fact that hurricane clips were not installed when he thought they should have been, that it would have been preferable had they been installed earlier. He talked of the fact that the steel beam was installed incorrectly and required further work. He was asked in cross-examination about whether he had engaged Busk with respect to the

items that he was commenting on and the question was, “You relied on Metlege to convey this information to Busk?” and he said he did. That included the details of how to install the steel beam and he said, he did. Again he spoke of these random studs that were shimmed.

[23] Keith Nurse testified and he was kind of an interesting character. He worked on the project as an employee of Metlege. There are some concerns about his testimony. He has a long relationship with Metlege. I am speaking in terms of his independence. He works as a handyman for the Metleges’ and he is apparently paid occasionally or upon occasion \$10 an hour for his efforts. He has 30 years experience, he told us, as a Carpenter. He had previously belonged to the Carpenter’s Union, if I understood his evidence correctly. His work on this project was partly for Busk or briefly for Busk and mostly for Metlege. In working for Metlege on the project, Mr. Metlege testified that he picked Nurse up in the morning, took him for coffee, took him for meals and paid him. We have invoices submitted for what Mr. Metlege considers to be the cost of having Nurse effect the remedial work.



[24] The fact is that Metlege told Busk that he could hire Nurse for \$10 an hour. It is agreed that Busk did hire Nurse for \$10 an hour, at least one day. There is a conflict in the evidence with respect to whether or not Busk may have hired Nurse for more than one day. It would appear from Mr. Metlege's evidence that he was paying Nurse, that if Busk did pay him \$10 an hour for other days than the one, then Mr. Nurse was collecting from both of them. So, as I say, I am approaching Mr. Nurse's evidence with some degree of skepticism but there are a number of things which I accept as factual with respect to his recitation of facts. He worked at this project long after Busk was gone and on things that bore no relation to this contract, but his first work on the project was another design flaw. He was to help Mr. Metlege Sr. installing the vents for the several furnaces. In fact, because there was an error in the plans, they had to erect chimney's. So, that was his first work on the building.

[25] With respect to the work that Busk was responsible for, I am satisfied that Mr. Nurse did some work on erecting studs in the Bay windows, that he did work on installing additional 2 x 10's for these laminated beams, that he did install Styrofoam on the basement wall where there was intended to be an airspace and where an adjustment had to be made in order to compensate for the lack of the air

space. He was involved when the steel beams were re-drilled so that the wall framing could be attached to them with bolts. He worked on that. He installed some hurricane clips, he adjusted some soffits where subsequent changes had made the soffits installed by Busk were not fitting properly. I have doubts about the actual time spent doing the things which he recited. It appeared to be all very much a recollection. He did install new stringers on the interior stairway where the stringers were not installed properly and had to be replaced. He did work around the stairwells where his observation was that the studding was too far from the steps, that 2 x 6 should have been installed and not 2 x 4. Mr. Busk made it clear in his rebuttal that, that was to be a 2 x 4 wall. I have examined the plans as carefully as I can and it appears to me that it was to be a 2 x 4 wall. I noticed the architect who testified was not asked about that, I have come to the conclusion that, that was not an error that Busk made, that the wall was designed to be 2 x 4 and whatever the complaint from the dry waller's, it was not the fault of Busk's execution of the work. There was another complaint with respect to the framing of a wall around the tub. I am left in a quandary about whether Busk had any responsibility for that, it is not proven that he had. Nurse's evidence is that, that wall is normally not installed until after the tub is installed. Busk in his rebuttal evidence testified that he had engaged Nurse four or five days other than the one

day that was agreed. He testified that the central vac pipes did not go through the beam in question and that there should have been no extra expense for that. Again, examining the plans, I may be, possibly I am looking at the wrong beam but I do not understand why a central vac pipe would have been run through that beam which is at the extreme end of the dwelling. So, I accept Busk's evidence with respect to that. He thought Nurse's charges for remedial work were "some of them fair and some of them not so fair." I have already said the plans show that stairway wall as being framed with 2 x 4. He said with respect to the stringers on the stairway that he didn't dispute that, but he had not been made aware of it and if he had been made aware, he would have fixed it himself. He reiterated with respect to that wall/roof problem that they did 36 inch adhesive material, three laps up the gable. With respect to the complaints made about the shimming of studs, he said they do "get a little ugly when you make changes." It is clear that there were quite a few changes made as the work went along. Some of them, no doubt fall to Mr. Busk, some of them not.

[26] All of that is by way of saying that I do find that there are some deficiencies proven. At Tab 'Z', MacDonald or MacDonnell Welding and Metal Working, \$271.69 is a proven item. The dry waller's extra charge of \$270 per unit is a

proven item for \$2,484. New design heating is partially a proven item. To cut, reinstall and reconnect waterlines, 12 hours at \$55. is \$660. The materials for that were a total of \$125. There is another item that Mr. Metlege spoke to which is a special toilet 10" centre ordered because of the support wall too close. I do not consider that to be proven, it wasn't explained to me what support wall and what was necessary to be done. That apparently only occurred in one unit and so I find the proven claim for deficiencies from that account to be \$785.

[27] The other item that I intend to allow as a deficiency is that relating to the work done by Mr. Nurse that appears at Tab "X." As I said, I have some concerns about how Mr. Nurse was paid, the work that was done, this is an invoice that was generated by somebody in Mr. Metlege's office based on notes that were passed in about time spent. It is clear from the evidence that the time spent was not the time of Mr. Nurse in all cases. Metlege, either as owner or general contractor is not entitled to claim for his own time with respect to these items. So, accordingly, I have concluded that there was time spent by Nurse, as I have said, on the stud in the Bay widow, the 2 x 10's, the basement air space, the steel beam, the hurricane clips, adjusting door frames, soffit adjustments, and stairway stringers, I am going to allow the items appearing at Tab 'X' at half the value claimed or \$2,160 dollars.

The alteration required with respect to the central air vac, I find is not proven to my satisfaction and that the new home warranty is improperly claimed. No money value is put on that, in any case. So, I find the deficiencies to be \$5,700 as proven.

[28] With respect to the extras, I find that there was extra work done at the request of either Mr. Metlege Sr. or Jr. To lower the bedroom windows \$1,440, to adjust the walls and doors in 4 laundry rooms \$720, eight kitchen walls \$480, and a change in the firewall which resulted from a design flaw \$1,080. For a total of \$3,720 in extras. With respect to the rough size openings for doors and windows, again it is not proven to my satisfaction whose responsibility it was to make that determination and/or whether the doors are the size that were ordered or whether they weren't the size that were ordered. So, I will not allow any claim for extras for adjusting the rough size openings of the doors.

[29] The contract price was \$41,280 H.S.T. on that is \$6,192. The extras I will allow, or I am allowing at \$3,720, together with H.S.T. on that of \$558 for a total of \$4,278 that makes a contract total of \$51,750. Take away the cost of remedying the deficiencies of \$5,700 and you have a proven claim by Busk of \$5,800. The

bottom line basically is that these Town Houses were built for sale, they were sold. If there was any deviation from Industry Standards, they are now of no consequence to Mr. Metlege. They were inspected by HRM and approved, occupancy permits were issued and I understand from the evidence, or the inference that I have drawn from the evidence, is that the several houses have been sold. If there was any deviation from the best construction practices that might have affected their value, there is no evidence to quantify that, nor is there any evidence that there was, in fact, a loss to Mr. Metlege as a result of any such problems.

[30] Unless there are any questions or concerns?

[31] Mr. Whitehead: I do My Lord, I apologize. I don't have the Exhibit Book with me, the amounts for deficiencies, those were, I understand from your decision, those included tax?

[32] THE COURT: The extras included tax.

[33] Mr. Whitehead: No, when you talk... the deficiencies....

[34] THE COURT: The deficiencies, the things that were done?.

[35] Mr. Whitehead: Yes?

[36] THE COURT: Those appeared, I think, they included tax.

[37] Mr. Whitehead: Okay... I was trying to do the math.

[38] THE COURT: I think the amount said it included tax. I may have missed the tax on one, could you focus me on that? Well, there was no tax charged, that's curious. The new design heating....

[39] Mr. Fownes: No it is not.

[40] THE COURT: There's no tax, no tax mentioned on that invoice. So, that would be an appropriate adjustment \$725 plus tax. Anything else?

[41] Mr. Fownes: My Lord, there is just, one...ah, I was going through something during the math, I didn't catch, you said the proven claim is \$5,800 to set after deducting the extras on the....

[42] THE COURT: Yes, but now we have to take the tax, have to adjust it for the tax that Mr. Whitehead wants to get recovered for his client. So, that's somewhere around \$ 90 down.

[43] Mr. Whitehead: Not that I am trying to preempt Your Lordship with anything but would Your Lordship like comments on costs or have you already made a decision on costs?

[44] THE COURT: I think I have already made a decision on costs.

[45] Mr. Whitehead: Okay.

[46] THE COURT: My feeling, I guess, is that there has been no great success by any party. We spent a significant time hearing this, three days were we? I do



not think either party should be further penalized by paying costs to the other, so there will be no costs. Each party will bear their own costs.

[47] Mr. Whitehead: And one more question, My Lord. I would note that the money had been paid into court for sometime. I am not sure how the process of that works. Perhaps Your Lordship will clarify. Is it that once an order is issued, the cheque would be cut.

[48] THE COURT: That should, that could be incorporated in the same order, it has to be, an order has to be provided with final sheet of paper on the recording. So, some of it will go to Mr. Busk and some of it will go back to Mr. Metlege, I guess.

[49] Mr. Whitehead: Thank you.

[50] Mr. Fownes: Thank you My Lord.

**J.**