SUPREME COURT OF NOVA SCOTIA

Citation: Parslow v. Galeb Construction 1998 Ltd.,2014 NSSC 390

Date: 20141027

Docket: ANT No. 430544
Registry: Antigonish

Between:

Bob Parslow and Madeleine Parslow

Appellants

v.

Galeb Construction 1998 Ltd.

Respondent

DECISION

Judge: The Honourable Justice E. Van den Eynden

Heard: October 23, 2014, in Antigonish, Nova Scotia

Written Decision: October 27, 2014

Counsel: Bob and Madeleine Parslow, Appellants, self-represented
Benedikt and Ruth Lagundzija, self-represented, on behalf of the corporate Respondent

By the Court:

Introduction:

[1] This is an appeal from a decision of a Small Claims Adjudicator rendered on July 30, 2014; the matter was heard on July 27, 2014. Both parties are self-represented.

[2] The decision appealed from is directly related to an earlier decision of the Small Claims Adjudicator rendered orally on October 22, 2012. I call this the "first decision".

[3] The order arising from the first decision was issued on October 25, 2012. It did not contain an important term which required the Appellants to return certain items to the Respondent (Original Claimant). The items were three doors and two windows and a few other miscellaneous items appearing to be a toilet and shower stall. Although the order did not specifically mention the obligation to return certain items, it appears that obligation was ultimately acknowledged by both parties.

[4] There were findings of fact made by the Adjudicator in the first decision which were material to the decision under appeal (which I refer to as the "second decision".) The second decision seems inconsistent with these earlier relevant and material findings of the Adjudicator. As a result, the second decision in effect renders the first decision less favourable to the Respondent. For reasons which I will articulate, the outcome of the second decision under appeal cannot be reconciled with the record and report of the Adjudicator. Ironically, the appeal was not launched by the Respondent. That said, in its submissions the Respondent picked up on what appears to be an error made by the Adjudicator; and indicated it is prepared to live with the second decision and the award of $2,750.00.

[5] These circumstances create somewhat of a challenge when arriving at a just an appropriate outcome of this appeal.

Background:

[6] To explain the inconsistency and to place in context the second decision under appeal I note as follows:

[7] The original claim arose out of a renovation project to the Appellants property. The Respondent Caleb Construction did the work and filed a claim

against the Appellants for money owing. The Appellants counterclaimed for deficient work and/or work not done according to alleged agreed terms.

[8] The end result of the first decision required the Appellants to pay $6,238.61 to the Respondent. The Adjudicator found the Respondent had proved its claim for $12,504.12. He found the Appellants had proved their counterclaim for $6,285.51. This amount was deducted from the $12,504.12 leaving a balance owing of $6,238.61. That amount was paid to the Respondent.

[9] Although not expressed in the order, but made clear by the Adjudicator in his summary report, the success of the Appellants counterclaim was based on a credit awarded them. This credit was directly tied to the value and return of the doors and windows which were the subject of the second decision under appeal. There was no assignment of individual values to each item noted by the Adjudicator in his report. Although only the doors and windows were referenced by the parties and Adjudicator at the July, 2014 hearing; by piecing together the record, other items were to be returned by the Appellants, apparently a toilet and shower stall.

[10] The October, 2012 order provides as follows:

> On the 6th day of September, 2012 and October 15th & 16th, 2012 a hearing was held at Guysborough with both the Claimant and the Defendant appearing and giving evidence.
>
> AND WHEREAS an oral decision was rendered on October 22, 2012 at Guysborough, Nova Scotia.
>
> AND UPON FINDING the Claimant had proven its claim for the sum of
>
> $12, 524.l2 against the Defendant Bob Parslow.
>
> AND UPON FINDING the Defendant had proven its counter claim for the sum of S5.909.70 plus tax at 8 % for a total of $6,285.5l.
>
> IT IS THEREFORE ORDERED THAT:
>
> 1. The Defendant Bob Parslow pay to the Claimant the sum of $6,238.61 representing the difference between the sum awarded to the Claimant less the sum awarded to the Defendant in special damages in the amount of $6,285.51.
> 2. The Claimant shall have its costs against the Defendant Bob Parslow for filing fees in the amount of $182.94 plus its costs for service in the amount of $85.00.

[11] The first decision was not appealed by either party. The Appellants paid the amount owing but did not return the items. The Respondent (original Claimant) then wrote the Adjudicator on September 13, 2013 asking for the issue of the return on property to be addressed. In its letter the Respondent states:

> In the Small Claims Court of Nova Scotia, between us, Galeb Const. l998 Ltd., and Defendants Bob & Madeleine Parslow, it was verbally stated that they were to return to us the material that they were not satisfied with and going to replace, example - the two exterior doors and two *(sic)* exterior windows; one shower stall and perhaps the toilet from upstairs. I noticed that these were not included in the Order sent to us On Nov. 1/12, but as they were included in the oral decision from Adjudicator, we expected that they would be included in the agreement. We called the Parslows on many occasions and failed to reach them and had no reply from our e-mails requesting these items. I finally went to their home in Port Felix a couple of weeks ago and was told by the gentleman that was cutting the grass there, that they had returned to France. As I could see at this time, the doors and the windows have indeed been changed. I am wondering sir, if we could have a

> letter from the Court saying that these above mentioned materials are indeed our property, and they are to be returned to us when they return to Port Felix in the Spring?....

[12] The Adjudicator writes to the clerk of the Small Claims Court and directs the matter can be set down for determination of this one issue; being the non-return of the specified items. The letter from the Adjudicator to the Court Clerk dated May 19, 2014 provides as follows:

> On October 23, (sic) 2012, an Order was issued in the above noted matter in favour of the claimant. In addition, the defendants agreed to return to the claimant the doors and windows that the claimant had installed in the defendant's property.
>
> You have now informed me that the claimant has not received the doors and windows. You also informed me that the defendant has stated to you that he in fact gave the doors and windows to a neighbor who has installed them on their property.
>
> Although my Order does not set out the agreement that the defendant made with the claimant regarding the doors and windows, it nevertheless was a binding agreement that the court considered and approved in making its written Order. The defendant is liable to the claimant for those doors and windows. As it appears now that the doors and windows have not been returned to the claimant, I will, on an application by the claimant hear evidence on the costs of those doors and windows and issue an Order.
>
> Would you kindly notify both parties that I am prepared to hear evidence on this issue whenever it is convenient to the parties. …..

[13] Although the Adjudicator indicates he will *"hear evidence on the costs of those doors and windows"* which he did on July 27, 2014; the report prepared by the Adjudicator as required under section 32 (4) of the **Small Claims Act** when an appeal is filed, indicates he made specific findings of fact at the first hearing regarding the valuation of the subject items.

[14] In their submission on appeal, the Appellants take issue with the Adjudicator not accepting their documentary evidence on valuation; rather accepting the uncorroborated verbal testimony of the Respondent. Although he provides other reasons for rejecting the Appellants evidence, the Adjudicator's primary rationale for rejecting their evidence is rooted in his finding of valuation at the first hearing. At paragraph 16, 17 and 24 of his report the Adjudicator states:

> 16. I found as a fact, the value of the doors and windows had been determined by me on October 22, 2012, and I did not need to see the invoice from the Claimant (Respondent) to again establish this valuation nearly two years subsequent to the Order issued on October 22, *(sic)* 2012.
>
> 17. I found the Order issued on October 25,2012, was not appealed, said Order having taken in account the value of the doors and windows which was not allowed as part of the Claimant's (Respondent's) claim and the Defendant (Appellant) having been compensated/credited for their value by the award of his counter-claim.
>
> 24. I found the Appellant (Defendant) was firstly in breach of the agreement he made with the Claimant (Respondent) on October 22, 2012, to return the doors and windows and secondly, that he could be found in contempt of the oral direction of the Court that the Appellant (Defendant) shall return the doors and windows that had been installed in the Defendant's (Appellant's) residence and which he agreed to return to the Claimant (Respondent) once removed from his residence and arrangements made to have them picked up at a time convenient to the parties, all in return for the credit he had received at the Hearing for the replacement of the said doors and windows.

[15] The total valuation placed upon the subject items was also specifically addressed by the Adjudicator in his report; although there seems to be some slight unexplained variation between $5907.70 + HST and $5,500 + HST. I refer to the following paragraphs of the report:

> 4. And upon finding on October 22, 2012, the Defendant (Appellant) had proven it's counter-claim to the sum of $5,909.70 plus HST at eight percent (8) for a total of $6,285.51; the sum of $5,909.70 being the credit the Appellant was allowed for three doors, two windows and some small miscellaneous items that were not the one's contracted to be installed at the residence.
>
> 6. And upon finding in consideration of the credit given to the Defendant for the doors and windows, the Defendant (Appellant) at the Hearing on October 22, 2012, agreed to return to the Claimant (Respondent) the three doors and two windows that the Claimant had purchased and installed in the Defendant's residence at RR #2 Larry's River, Port Felix that the Defendant had proven to the Court were not the doors and windows that the Defendant (Appellant) had contracted the Claimant (Respondent) to install. The Defendant agreed and the Court directed the Defendant deliver up possession of these doors and windows once they had been removed from the residence and made ready for pickup by the Claimant (Respondent).
>
> 7. And upon finding at the Hearing in September and October, 2012, the sworn evidence of the parties that the three doors and two windows purchased by the Claimant (Respondent) at cost of approximately $5,500 plus HST.
>
> 8. And upon the Court accepting the evidence of the Defendant (Appellant) on October 22, 2012, that he would return the three doors and two windows to the Claimant (Respondent) within a reasonable time after the October 22, 2012, oral decision rendered in Guysborough and the Court directing the Defendant (Appellant) on this date to return to the Claimant (Respondent) within a reasonable time the three doors and two windows for which he was compensated by way of his counter-claim that was awarded in the sum of $5,909.70 plus HST.
>
> 15. Evidence was heard from both parties on July 30, (sic) 2014, at Guysborough, Nova Scotia, with the sole issue being the non-delivery by the Defendant (Appellant) of the doors and windows.
>
> 16. I found as a fact, the value of the doors and windows had been determined by me on October 22, 2012, and I did not need to see the invoice from the Claimant (Respondent) to again establish this valuation nearly two years subsequent to the Order issued on October 22, 2012.
>
> 17. I found the Order issued on October 25,2012, was not appealed, said Order having taken in account the value of the doors and windows which was not allowed as part of the Claimant's (Respondent's) claim and the Defendant (Appellant) having been compensated/credited for their value by the award of his counter-claim.

[16] Notwithstanding the above findings respecting valuation of the subject items and tying that directly to the credit given to the Appellants, the Adjudicator then

went on to deeply discount the valuation of the subject items in his second decision. Respecting the compensation to be paid to the Respondent by the Appellants for their failure to return the agreed items the Adjudicator ordered as follows:

> Finding: My oral decision on October 22, 2012 specifically dealt with this issue and I accept the Claimant's evidence and find there was an agreement whereby the Defendant expressly stated to the Claimant and to the Court that he would have the windows and doors delivered to the Claimant after the doors and windows were removed.
>
> I accept the Claimant's evidence that the windows and doors have not been returned to the Claimant and as a result a breach of that agreement has occurred. The Defendant stated he gave the windows and doors to a neighbour.
>
> The Claimant states his costs for the windows and doors was $5,500.00 plus HST. Those doors and windows would now be considered "seconds" or used and would be worth less now than when they were new. I therefore have assigned a depreciation value of 50% to the windows and doors.
>
> The Claimant shall be awarded the sum of $2,750.00 ($5,500.00/2). The Claimant stated he did not know what he would have done with the windows and doors. I am not satisfied that HST should be added in this case.
>
> I THEREFORE ORDER that the Defendant pay to the Claimant the sum of $2,750.00 in special damages for the windows and doors.

[17] This in effect results in a greater credit received by the Appellants than that originally ordered. Presumably, if the items to be returned were valued at the first hearing, and the Appellants failed to return as required – the Respondent would be entitled to their value (which equated to the credit of $6,285.51) – not some discounted amount. Putting it another way, presumably, if the items were not to be

returned at the time of trial the credit afforded the Appellants would have been materially less if not completely offset based on the valuation findings of the Adjudicator.

[18] There was a long gap in time between the first and second hearing. Other than the written order arising from the first decision there is no "record" from the first hearing respecting certain findings and reasons for same. The record prepared by the Adjudicator was in response to the second decision under appeal and sets out the relevant findings which underpin the first decision and relate to the issues under appeal.

[19] The Adjudicator identified this issue in the beginning of his report:

> Did the Adjudicator fail to follow the requirements of natural justice by accepting the Respondents sworn evidence that the three doors and two windows cost $5,500.00, without documentary evidence to support same?

[20] To a large extent the report focuses on providing the basis for rejecting the evidence provided by the Appellants; with the primary reason being this issue had been determined back in October, 2012 and the Appellants were given a credit totaling $6,285.61 from the amount they otherwise would have had to pay the Respondent. As noted, the report appears to directly tie the credit to the subject items not returned.

Grounds of Appeal and Relief Sought:

[21] In their original submissions the Appellants identify the issue for this appeal as: What were the prices the Respondent originally paid for the three doors and two windows when they purchased them form Central supplies in the spring of 2011?

[22] The Appellants initially sought an order from this Court requiring the Respondent to produce the original invoices to support the valuation of $5,500.00. And once the original invoices are produced, the Appellants seek to pay 50% of that value. (Consistent with the methodology used by the Adjudicator in his second decision.) Alternatively, if the original invoices cannot be located they request the Court use the average used prices provided to the Adjudicator (being $138.00 per door and $275.00 per window).

[23] The Appellants filed an addendum which changed the relief sought because apparently two of the three doors are now available. (The evidence at the July 27, 2014 hearing was they were no longer available as they had been given away by the Appellants and used by a third party.) Accordingly, the relief sought in the addendum has been amended to only seek original information for only one door and two windows; as two are now available for pick up at the third party's home.

During oral submissions this shifted again. The Appellants now state they could make the items known as the "miscellaneous items" available (toilet and shower stall); however, the Appellants have used them during the intervening period.

[24] The Respondent's initial preference was to have all the items returned that the Appellants were credited for; however, the Respondent is now prepared and does accept, the amount of $2,750.00 as ordered. The Respondent pointed out this amount is a lot less than the original credit that was subtracted from its proven claim.

The Law:

[25] An Appeal of an Adjudicator's decision is not a new hearing and the Appellant does not have the absolute right to introduce new or fresh evidence on Appeal. An Appeal of an Adjudicator's decision is based on the record. The record is the Adjudicator's Summary Report; the exhibits presented during the hearing; the pleadings and certain materials contained in the Small Claims Court file.

[26] A brief word on fresh evidence. The Appellants acknowledge the limits on introducing fresh evidence on appeal. Attached as exhibit "D" to the Appellants factum are quotes from Central Supplies the Appellants obtained post the July, 2014 hearing and decision of the Adjudicator. The Appellants wanted to offer this

evidence on appeal to support the oral evidence they attempted to get before the Adjudicator. The Adjudicator set out the reasons he rejected this evidence in his report; the primary reason being he already determined this issue in October, 2012 in his first or main decision.

[27] The law and requirements respecting the admission of fresh evidence has been succinctly canvassed by this Court in **Lacombe v. Sutherland** [2008] N.S.J**.** No. 603; paragraph 29; and **Killam Properties Inc. v. Mark Patriquin**, 2011 NSSC 338; paragraphs 6, 7 & 8; and **Doyle v. Topshee Housing Co-operative Ltd.,** [2012] N.S.J. No. 570; paragraphs 4, 5 and 6.

[28] The Appellants did not make an application to introduce fresh evidence and even if they had, in these circumstances, it would not have been appropriate to entertain.

[29] Section 2 of the **Small Claims Court Act** provides as follows:

> It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.

[30] Section 32(1) of the **Small Claims Court Act** sets out the grounds for Appeal. Section 32(1) provides:

> A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of
>
> (a) Jurisdictional error;
>
> (b) Error of law; or
>
> (c) Failure to follow the requirements of natural justice,
>
> by filing with the prothonotary of the Supreme Court a notice of appeal.

[31] In **Lacombe v. Sutherland** (**supra**) Justice D. R. Beveridge noted the following with respect to Small Claims Court appeals at paragraphs 27, and 28:

> (27) In Nova Scotia the Small Claims Court Act provides an appeal as of right to the Nova Scotia Supreme Court. Section 32 sets out the grounds of appeal that can be raised. Oddly enough the Act does not set out the powers that the Supreme Court has if it finds an error of law, jurisdiction or breach of natural justice. Typically the case law in Nova Scotia is that where any such error is found a re-hearing is ordered before a different adjudicator.
>
> (28) It is well established that in the ordinary course, absent some special power on appeal, such as an appeal by way of a hearing de novo, the appellate court does not engage in a re-hearing of the dispute. Findings by the court below are accorded considerable deference. They can only be interfered with in this regime if the appellant makes out one of the three grounds for an appeal. That is, an error in law, jurisdiction or a breach of natural justice.

[32] The only ground alleged in this appeal is 32 (1)(c). In support, the key assertion of the Appellants is the Adjudicator rejected their documentary evidence and accepted uncorroborated evidence of the Adjudicator. The Appellants hold the view there was not a sufficient determination of the true value of the items and this equates to a denial of natural justice.

[33] **“**Natural justice” is not a defined term in the **Small Claims Court Act**. Natural justice was discussed in **Spencer v. Bennett**, 2009 NSSC 368 at para. 15 and 16 therein provide as follows:

> 15 Natural Justice is not defined in the Small Claims Court Act. Nevertheless it is a familiar concept to the common law, although elusive of definition. In Lloyd v. McMahone, [1987] A.C. 625 at 702, Lord Bridge puts it this way:
>
> …the so called rules of natural justice are not engraved on tablets of stone…what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.
>
> These criteria have been echoed and amplified in Baker v. Canada, [1999] S.C.J. No. 39; [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193 (S.C.C.), (per L’Heureux-Dube).
>
> 16 Natural Justice really means that the parties are entitled to a fair process…… no one should be a judge in his own cause (the adjudicator must be independent) and that one should always hear “the other side.”

[34] As a result of certain findings in this appeal, although an error of law was not alleged by the Appellants; the standard of review respecting an error of law should be noted.

[35] To that end the jurisdiction of this Appellate Court was recently reviewed by Justice Duncan in **Toulany v. Raidan**, 2013 NSSC 180 beginning at para 14: Saunders J. (as he then was), writing in **Brett Motors Leasing Ltd. v. Welsford** (1999) 181 N.S.R. (2d) 76 (NSSC) considered the scope of what constituted an "error of law”:

> 14. One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the Adjudicator. I do not have the authority to go outside the facts as found by the Adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the Adjudicator in the interpretation of documents or other evidence; or where the Adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the Adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the Adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

Decision and Analysis:

[36] I find no denial of natural justice as alleged by the Appellants. The Adjudicator noted in his report that he rejected the valuation evidence presented by the Appellants' in large part due to his specific findings at the first hearing. Given his specific findings the rejection is understandable.

[37] In retrospect, it might have been preferable for the Adjudicator to have identified this finding from the outset of the second hearing; preferable before allowing or inviting new and conflicting evidence on valuation. Because, in the end, he rejected the evidence of the Appellants; concluding he had already decided the valuation issue in October, 2012.

[38] The relief sought by the Appellants' to order production of original invoices is beyond the scope of this appeal. Production requests could and should have been made at the trial stage.

[39] The Appellants do not object to the discount factor applied by the Adjudicator. It is to their benefit. That said, when asked by the Court, the Appellants acknowledge that in his report the Adjudicator states he valued the items which were to be returned, but were not, and ties this value to the credit awarded the Appellants. The discounting applied by the Adjudicator is problematic.

[40] In my view, the Adjudicator's application of a discount factor is inconsistent with the specific findings set out in his report and rationale for affording the Appellants the credit he did in the first hearing. The report confirms a certain value was assigned to the subject items at the first hearing. That first decision was not appealed. As a starting point, neither the parties nor this Court can or should go behind that finding of fact. In effect the Adjudicator did so by applying a discount factor which cannot be reconciled with the first decision. It is at odds with his determination of the credit afforded the Appellants in consideration of their agreement to return the agreed items. Accordingly, in my view, that equates to an error of law.

[41] Having determined the above error what are my options and what is the appropriate remedy in these circumstances?

[42] I could send the matter back for rehearing – typically that would be before a new Adjudicator. The parties have been through two extensive hearings and now this appeal. Given the decision under appeal is so closely tied to the findings of the first hearing, arguably any rehearing ought to be before the same Adjudicator. On any rehearing, determining the individual value of the items which have now surfaced and appear to be available for return to the Respondent could be addressed. That said, I am mindful of the limiting impact the Adjudicator's findings would have on his ability to alter valuations in any event as the first decision was not appealed. If the parties are bound by the valuation of the first hearing; that would determine the outcome. I also note neither party seeks a rehearing. For the above reasons, sending this matter back for a rehearing is not a viable option.

[43] What then? I could, due to the error found with discounting and based on the findings in the record, order the Appellants to repay the amount they were credited, in particular, $6,285.51 since the items which underpinned the credit determination were not delivered. That does not appear to be a just result for several reasons. The Respondent choose not to appeal the Order awarding

$2,750.00 in lieu of return. The record, including the Adjudicators report, is unclear as to how the total valuation of the credit was determined. In its submissions the Respondent indicated the valuation may not be the actual dollar for dollar value; rather the valuation the Respondent put forward (and the Adjudicator accepted) was more in keeping with what the Respondent thought was an overall fair value; and it might have included a component for labour. Lastly, the Respondent no longer seeks return of the items the Appellant received a substantial credit for, and the Respondent unequivocally states it is prepared to accept the lessor amount of $2,750.00.

[44] The position of the Respondent is a concession and one arguably it need not make, given the factual findings of the Adjudicator. That said, making it does present a clearer path for a practical resolution of this rather unusual set of circumstances. Accordingly, I dismiss the appeal and make no adjustment to the order under appeal notwithstanding the discounting error . The Appellants must pay the sum of $2,750.00 to the Respondent.

Justice E. Van den Eynden

10/27/14