

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Forward v. Millside Contractors Ltd., 2014 NSSM 69

Claim No: SCCH 428198

BETWEEN:

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| Name | <u>Sheryl-Lynn Forward</u> <u>Scott William Young</u> | Claimants |
| Address | <u>27 Willowdale Drive</u> <u>Musquodoboit Harbour, NS</u> <u>B0J 2L0</u> | |

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| Name | <u>Millside Contractors Limited</u> | Defendant |
| Address | <u>5020 Highway #7</u> <u>Porter's Lake, NS B3E 1J3</u> | |

Editorial Notice: Phone numbers have been removed from this electronic version of the judgment.

Sheryl Forward and Scott Young appeared on their own behalf.

Doreen Mitchell and Graham Mitchell appeared for the Defendant.

DECISION

This is a claim by the Claimants, Sheryl Forward and Scott Young, for breach of contract arising from a roofing job performed by the Defendant, Millside Contractors Limited ("Millside"), at their home at 27 Willowdale Drive in Musquodoboit Harbour. I shall summarize below the facts with which both parties are in agreement, followed by a review of the evidence.

Facts

In October or November, 2009, Ms. Forward and Mr. Young, who are spouses, hired the Defendant, Millside, to install roofing shingles on their home. The Claimants purchased the shingles and the Defendant was to install them. The couple purchased the shingles from her employer, Jeddore Home Hardware, which were shown as Building Products of Canada ("BP"), Mystique model shingles. It would later be determined that at least one other model of BP

shingles were included. From the time of installation until December 2013, a total of eight shingles fell off the roof. The couple had their roof redone in December 2013 by KD Roofing. The cost of that job was \$5070.35. The Claimants seek \$5070.35 + \$100 general damages + prejudgment interest and costs.

The Evidence

Both sides tendered a significant amount of documentary evidence, much of it was redundant or the result of hearsay. Hearsay evidence is admissible in Small Claims Court but it is given little weight. In addition, much of it was irrelevant. I have considered all of the testimony of each witness and the documentary evidence tendered. While in the interests of brevity, I have not referred to all of it in this decision, it has all been considered and given the weight it deserves.

Sheryl-Lynn Forward

Ms. Forward testified that she and Mr. Young sought three separate quotes for the installation of the shingles. She had purchased BP Mystique and Dakota brand shingles and wished to have a contractor install them for her. The couple decided to hire the Defendant, Millside. They purchased 56 bundles of Mystique brand shingles and six bundles of Dakota shingles. Each of these brands carried a 30 year warranty. In addition, the couple purchased other supplies, which would be necessary for the installation of the shingles. The total amount they paid was \$2719.31. There is no quote given for the work performed by the Defendant as it was included as part of a larger contract consisting of seven different jobs. The total quote was \$13,800 plus HST for the seven jobs.

Ms. Forward tendered into evidence a bundle of unbound document. Tab 9(a) is a document entitled "BP Application Instructions Asphalt Shingles." The document provides directions on the manufacturer's recommendation for installing shingles. For example, on page 7, it provides directions on how to properly nail shingles including instructions on how not to overdrive them. On page 8, there is direction on its application on steep sloped roofs. For such roofs, the manufacturer recommends using six nails per shingle instead of four. The shingles are to be placed 14 cm from the bottom edge of the shingle. In addition, it recommends that for laminate shingles, nailing is to take place on the nailing line of the shingle rather than between the cement dabs. In addition, it is recommended that if shingles are installed in colder weather, hand sealing should be used. The document references the time between September 21 and March 21 as the period for colder weather. Finally, with respect to the type of wind in Eastern Canada, two types of applications are addressed. The instructions provide for a regular wind warranty and a high wind application. Mystique shingles are warranted up to 175 km/h or 110 mph when using the high wind application and up to 115 km/h or 70 mph for regular installation. For Dakota shingles, the high wind warranty applies up to a maximum of 130 km/h or 80 mph while the regular wind warranty is the same as for Mystique shingles, 115 km/h or 80 mph. For Mystique shingles, the document stipulates using six nails for all shingles located at the roof edges and having them cemented together using plastic cement in order for the warranty to apply.

Ms. Forward and Mr. Young tendered into evidence photographs of various shingles. Specifically, exhibits 4 and 13 show that only four nails were used on the shingles and none of them were nailed on the nailing line. Ms. Forward showed various photographs where shingles were buckling or where there was no tar paper placed underneath the shingles. Several of the photographs tendered into evidence were taken by Mr. Ken Hamilton of KD Roofing. Ms. Forward confirmed that several of the photographs were of the same shingle. Mr. Hamilton gave evidence in this proceeding.

Kenneth Wayne Hamilton is the president of KD Roofing Limited. Mr. Hamilton has been in the roofing business for 34 years and has owned KD Roofing for 13 years. He received a call from Ms. Forward regarding difficulties she was experiencing with her roof. Mr. Hamilton agreed to come and view the job.

When Mr. Hamilton viewed the roof, he found the shingles were nailed high, namely, the nails were placed well above the nailing line of the shingle. He had been asked by Ms. Forward and Mr. Young for a quote to redo the nailing on the roof. He did not feel comfortable warranting shingles with which he is not familiar. Consequently he recommended the roof be reshingled from the beginning. He provided a quote for the job, which has been tendered into evidence. Ms. Forward and Mr. Young accepted the quote and had all of the roof shingles replaced. Mr. Hamilton testified that the shingles were nailed by hand. He testified that he finds using a nailing gun results in inadequate control over the speed and depth of the nails. He found many of the shingles were missing tarpaper, the nails were not put on the nailing line and many shingles used four nails rather than six.

Under cross examination, Mr. Hamilton indicated that he uses Bitmore shingles. He confirmed that he did not offer to use the shingles that were already there. He observed a 1" projection over the roof and testified there was no need for it. He also confirmed that Ms. Forward and Mr. Young advised him that shingles were blowing off the roof on a daily basis.

Doreen Mitchell testified and spoke on behalf of herself and her husband, Graham Mitchell throughout much of the proceeding. Where the evidence concerned him directly or could only be testified to by him, Mr. Mitchell spoke to the evidence. The Mitchells are the owners and primary shareholders of Millside.

Ms. Mitchell testified that Millside has been in the business of roofing, carpentry and repairs. Since its inception, it has installed over 600 roofs. Mr. Mitchell has been a carpenter for 35 years. She reviewed the quote for all of the work tendered into evidence, which included among various jobs, the installation of the shingles on the roof. She estimates that the roofing job to have been approximately \$1200.

Ms. Mitchell testified to research she conducted in preparation for court. It is apparent that she has spoken with the company on several occasions. She testified to viewing several of the

shingles. A number of them were brought to court but were not retained by me. There are photographs in evidence which make several of the observations to be clear. One of the shingles which was found on the job site and entered by the Claimants was labelled with a BP code number 0559. Ms. Mitchell submits that it is an Everest shingle. She tendered into evidence an excerpt from BP's website to that effect. She testified that Mr. Hamilton's recommendation to nail into the adhesive strip is no longer the recommended practice by BP. The Mystique shingles using the design initially purchased by Ms. Forward and Mr. Young has been discontinued. According to her, BP has changed the Mystique model several times since 2009.

She testified that representatives from Millside did not use tar in October or November 2009, as the weather was too warm. No evidence was provided to that effect. She had discussions with the Claimants regarding insurance issues due to excessive tar on the roof. The tarring was apparently performed by Mr. Young. It is Millside's policy to fix shingles if there are any problems. According to Mr. Mitchell, only one or two shingles were noted to be in disrepair.

Ms. Mitchell tendered into evidence a printout report from Environment Canada's website showing the average wind speeds in 2010 and 2011. In 2010, the highest wind speeds were between 104-120 km/h. In 2011, they were between 93 – 104 km/h.

Kevin Robert Skudder is the former building inspector for the Halifax Regional Municipality. He reviewed the roof and found that it met the building code. He testified that it is necessary only to put tarpaper on the first 3 feet from the side of the roof underneath shingles.

Gabriel Arnold installed a Selkirk model chimney in the fall of 2009. He testified that he was called to repair the chimney as it blew down following Hurricane Earl in 2010. His testimony described some of the deficiencies with the structure of the chimney at the time. Following that the manufacturer modified the model to ensure greater stability.

Darren Myers is the owner of Jeddore Home Hardware. He testified that the bundles of shingles were ordered from BP on October 28, 2009 and were delivered to the store on October 30, 2009. They were sent to Ms. Forward on November 13, 2009. He confirmed that Ms. Forward is in the accounting department in his business. He testified that the only shingles ordered on that day were Mystique and Dakota. He viewed the bundles stack at his location. He could only see approximately 70% of all the bundles. Under cross examination, he confirmed that he has no experience as a roofer.

Terrence Pettipas has owned his own construction business for 28 years. He has approximately 35 years of experience in construction. He described some of the process for roofing. He testified that he does not like Mystique or Everest shingles. He testified that nailing shingles can be done off the nailing line without much difficulty. He did confirm that an overhang is recommended to allow water to drip off the roof without buildup. He recommends using tabbing (black colored sealant used from a tube) for shingles in a high wind area. He testified that depending on the

circumstances, either four or six nail holes are appropriate for roofing shingles. Under cross examination, he acknowledged that he did not physically examine the roof.

In rebuttal evidence, Ms. Forward testified that she and Mr. Young paid for five replacement bundles which were installed by Mr. Young. She has no idea when excessive tar was used.

The Law

In construction contracts, it is an implied term that construction work shall be performed in a good and workmanlike manner. I considered this issue in the case of *Lowe v. Shanmaura Developments Inc.*, 2013 NSSM 46, where I stated the following:

“When dealing with construction contracts, the law requires that work be completed in a good and workmanlike manner. This has been interpreted by the Nova Scotia Supreme Court in *Flynn v. Halifax Regional Municipality*(2003), 219 N.S.R. (2d) 345 per Justice Arthur LeBlanc:

“Certain terms are implied in every building contract: materials must be of proper quality, the work must be performed in a good and workmanlike manner, the materials and work, when completed, must be fit for their intended purposes, and the work must be completed without undue delay (*Markland Associated Ltd. v. Lohnes*(1973), 11 N.S.R. (2d) 181 (S.C.T.D.); *Girroir v. Cameron* 1999 CanLII 2401 (NS SC), (1999), 176 N.S.R. (2d) 275 (S.C.)”.

While this case was varied by the Court of Appeal at 2005 NSCA 81, the principle was cited and not overturned. Justice LeBlanc recently applied this principle in the case of *Pavestone Creations Limited v. Kuentzel*, 2013 NSSC 199, where he added the following:

In the *Manual of Construction Law* (Toronto: Carswell, looseleaf), Howard M. Wise comments, at §3.5(b)(ii), that courts will imply a term in a construction contract that the work contracted for will be completed in accordance with a certain standard. What the comparative standard is will depend on the nature of the work and the parties’ expectations and may include the industry standard, a regulatory body’s standards, or other acceptable standards.

[46] Another term which has been implied in construction contracts is that the contractor’s work be completed in a proper and workmanlike manner. What constitutes a “proper and workmanlike manner” will seemingly depend upon the particular facts of each case.

[47] A similar phrase that is often used as an implied term in a construction contract is that the work must be of quality or suitable workmanship. If the workmanship is not of the quality that an owner could reasonably expect, the contract is in breach.

[48] There is authority to the effect that in determining the appropriate standard, the court should consider “all the circumstances of the contract including the degree of skill expressly or impliedly professed by the contractor”: Donald Keating, *Building Contracts*, 4th edn. (1978), at 37, cited in *Stavelly Community Centre v. L.&D. Masonry Enterprises Ltd.* reflex, (1983), 45 A.R. 375, [1983] A.J. No. 813 (Alta. Q.B.), at para. 14.

In order to find liability, I am required to consider if the shingles were installed in a good and workmanlike manner.

Findings

As noted above, while I have not referred to all of the evidence in this decision, I have considered all exhibits tendered and oral evidence provided by the witnesses and make the following findings of fact.

Ms. Forward and Mr. Young sought to have the Defendant, Millside install the shingles which they purchased from Jeddore Home Hardware. I find that they purchased, three types of shingles manufactured by BP: Mystique, Dakota and Everest.

Considerable evidence was tendered concerning the proper manner to install shingles. The evidence was far from consistent or conclusive. Mr. Hamilton's evidence followed the complete removal of the BP shingles and a new roof installed. His evidence is to the effect that the shingles were installed completely inadequately and the job he did was necessary and the only course of action. I disagree. For the most part, I found Mr. Hamilton's evidence to be completely self-serving.

The Defendants' witnesses who were involved in roofing all spoke to their negative views of this model shingles. It leaves me to ask, if the shingles were considered by the Defendant and their contractors to be so poor, why would they agree to install them? Further, of their witnesses, only Mr. Mitchell saw the roof being installed and completed by Millside. I do not accept any version given in evidence. It is unfortunate that given the range of experience among the witnesses called, their evidence would have been beneficial if they had been privy to the installation and finished job.

The most objective test of what is appropriate is provided in the BP application guide. These are sometimes written to protect the manufacturer. Nevertheless, in the absence of conclusive evidence, I find the method described to be quite reasonable. The method prescribed in the guide states as follows at p. 8:

"To qualify for High Wind Warranty which warrants against wind damage or shingle displacement for winds between 130 km/h (80 mph) and 210 km/h (130 mph), shingles must be fastened using 6 nails and all shingles located at the roof edges must be cemented together in a 10 cm (4") wide layer of plastic cement. If above special application instructions are not followed, shingles will be warranted for winds from 115 km/h (70 mph) to 140 km/h (90 mph)."

And then further in the guide at page 9:

"BP recommends that hand sealing should be done from September 21 to March 21."

I find the vast majority of the shingles were Mystique. A regular warranty for Mystique shingles has a maximum recommended wind speed of 115 km/h. For anything higher (to a maximum of 175 km/h), the high wind installation was required. The Defendant's evidence is clear that in 2010, wind speeds were recorded as high as 120 km/h. In order to qualify for the high wind coverage, the instructions recommend using six nails along the nailing line and hand sealing. I find this was not followed. Indeed, the guide was not consulted.

It is no secret to anyone living in Nova Scotia that wind speeds during the remnants of tropical storms and hurricanes can and sometimes do exceed 115 km/h. It is also common knowledge to

residents of Nova Scotia that roofing shingles can and sometimes blow off the roof during tropical cyclones. It is reasonable to expect a roofer to take additional care to ensure that it meets the installation guidelines recommended for a particular model of shingle. That did not happen. While it is equally reasonable to expect at least some deficient shingles, there is an expectation for the shingles to be repaired.

I reject any suggestion that the Defendants were wrong in using a “nail gun”. Page 2 of the application instructions lists the tools required. One tool is a hammer which follows in parenthesis as a “claw hammer, roofer’s hatchet or pneumatic nailer.” While no evidence was called on the point, I think it safe to conclude that a pneumatic nailer and nail gun are the same type of tool. If the manufacturer recommended against using a nail gun, they would not have specifically provided for it in their instructions.

I find as a fact that a total of eight shingles blew off the roof before the shingles were replaced by Mr. Hamilton. Ms. Forward’s statement to Mr. Hamilton that shingles were blowing down on a daily basis was an exaggeration. It defies simple arithmetic.

I find the Defendant failed to follow the installation instructions which contributed to some of the shingles blowing down. Given the relative frequency of tropical storms and hurricanes in Nova Scotia, it is to be expected that the installation will meet any high wind specifications. It is reasonable to conclude that inadequate nailing and sealing contributed to this and it was necessary to inspect the shingles and make adjustments.

I find Mr. Young attempted to do this himself but it proved unsuccessful.

Accordingly, I do find there was a breach of contract. However, the damage remedy is nowhere near as significant as that sought by the Claimants. In my opinion, the proper course would have been to either allow the Defendant the opportunity to restore the roof to the condition it ought to have been in, or a contractor should have been hired by the Claimants to remedy it. As I indicated at the conclusion of the hearing, I find the decision to replace all of the shingles to be excessive.

Damages

In making an award of damages for breach of contract, the object is to put the parties into the position they would have been in had the breach not taken place. I have already found that the decision to refinish the entire roof was excessive. I am not satisfied that failure to install the roof in the manner suggested by the manufacturer resulted in a complete failure of consideration.

In my view, a more modest approach was in order. The Claimants ought to have repaired the shingles rather than replaced them.

I have been given several figures representing the amount of the loss. From the Claimants, there is the amount of the claim \$5070.35, which I have already found to be excessive. For the Defendants, I find Ms. Mitchell's estimate of \$1200 for the total job to be too low. The job simply forms part of a larger contract and was not given consideration as a separate individual job.

In the absence of suitable estimates, I am prepared to award the all-inclusive figure of \$1000. Where success has only been modest, I award costs of \$100.

Summary

In summary, I find the Defendants, Millside Contractors Limited, liable to the Claimants in the amount of \$1100.

An order shall issue accordingly.

Dated at Halifax, NS,
on November 14, 2014.

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)