Claim No: 283593

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Shea v. McCarthy's Roofing Ltd., 2007 NSSM 53

BETWEEN:

GLEN RICHARD SHEA

Claimant

- and -

McCARTHY'S ROOFING LTD.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on September 4, 2007

Decision rendered on September 10, 2007

APPEARANCES

For the Claimant - self-represented

For the Defendant - Charles Thoms, Estimator

BY THE COURT:

[1] This is essentially a claim over a disputed bill for roofing services, although it has other elements that take it out of the ordinary.

[2] The facts as I find them are these. The Claimant Glen Shea and his wife Charlene (hereafter sometimes referred to as “the Sheas”) were interested in having their roof redone, and decided to get some estimates. One of the companies they called was the Defendant.

[3] On July 26, 2006, Mr. Thoms, who is an estimator for the Defendant company, attended at the Shea residence and looked at the roof. He provided a written estimate to replace the roof at a cost of $3,861.00 plus HST, for a total of $4,401.54. Charlene Shea was the only one there when Mr. Thoms attended and I accept her evidence entirely that she advised Mr. Thoms that she could not make a final decision without consulting her husband.

[4] There were follow up discussions where the question was asked of Mr. Thoms when the work could be done. The Sheas were interested in having it done at the soonest possible date, but not before they returned from a planned vacation in mid-August. They were told that it might not be done before September.

[5] It was at this juncture that a misunderstanding clearly occurred. The Defendant company believed it had the verbal go-ahead to do the work as soon as possible. The Sheas believed that there was no deal, and, in fact, they entered into an agreement for another roofer to do the work. They

soon thereafter headed out for their vacation, unaware of what would greet them upon their return.

[6] Before the Sheas returned on August 14, 2006, the Defendant's roofing crew showed up and started replacing the roof. That same day, the company that the Sheas had legitimately hired also showed up to begin their preparation work. Seeing the Defendant's roofing crew already there, they left and contacted the Sheas the next day to find out why they had apparently hired two roofers.

[7] The Defendant was instructed to stop work immediately upon the Sheas learning that they had been working. By then, one section of the roof comprising about one-third of the total, had been completed. The second company completed the job on a revised quote and charged the Sheas a total of $2,900.00 for their work.

[8] The Defendant shortly thereafter, on August 29, 2006, sent the Claimant a bill for $1,404.25 for the work they had done, which the Claimant refused to pay. His reasons for not paying included not only the fact that he had not hired McCarthy's, but also the fact that he now has a roof where the sections done by the different roofers do not match colours precisely.

[9] Unbeknownst to the Sheas at the time, McCarthy's filed a lien on title to their home pursuant to the *Builder's Lien Act*. This lien was not served upon or otherwise brought to the attention of the Claimant. Nor was an action commenced to enforce the lien. That point is significant because the scheme of the Act is very clear that the lien ought to have been considered void if no action were commenced after 105 days:

> **Expiry of registered lien**
> 26 (1) Every lien for which a claim has been registered shall absolutely cease to exist on the expiration of one hundred and five days after the work or service has been completed or materials have been furnished or placed, or after the expiry of the period of credit, where such period is mentioned in the claim for lien registered, or in the cases provided for in subsection (5) of Section 24, on the expiration of thirty days from the registration of claim, unless in the meantime an action is commenced to realize the claim and a certificate thereof (Form E) is registered in the registry office in which the claim for lien was registered.

[10] By my calculation, the lien filed by McCarthy's expired about the end of November 2006. The Sheas only found out about the lien when they were refinancing their mortgage many months after that, in about July of 2007. The evidence before me was that the Sheas' mortgage company insisted on a proper discharge being obtained. When contacted, the Defendant insisted upon being paid as a condition of lifting the lien. The Sheas attended upon McCarthy's lawyer, made the payment under protest and obtained a Discharge of Lien.

[11] I gather that it is not well known in some circles that old liens left on title are meaningless and should be ignored, unless they have been followed up by a court action. Instead, in cases such as this, they are apparently used by some contractors to tie up people's title to their property indefinitely, and to place the onus on these owners to pay up in order to clear their title. Mr. Thoms was quite unrepentant in saying that he filed the lien knowing that eventually he would get paid when the Sheas might need to remove the lien. This approach is absolutely contrary to the law, which places the onus on the contractor to assert the claim in court within a short period of time or essentially lose lien rights. Time bombs on title are not permitted or encouraged by the *Builders Lien Act*.

[12] The injustice of the situation here is that the Sheas were delayed in getting their new mortgage, and in the meantime interest rates went up. Unfortunately, the Claimant did not provide any specific evidence as to how much it cost him.

The Basis for the Claim

[13] This claim seeks return of the $1,483.82 which the Claimant paid to have the lien discharged.

[14] Looked at from the reverse, the question which I must answer is what amount of money, if any, should the Defendant be entitled to retain, under all of the circumstances?

[15] I find as a fact that there was no contract for the Defendant to do roofing work on the Shea home. I do not accept that there was a verbal contract. Having been presented with a written estimate that explicitly made room for their written acceptance, the Sheas reasonably expected that by not signing it they were not entering into a contract. Moreover, I was satisfied from the evidence of Ms. Shea that she would have made clear to Mr. Thoms that she did not have authority to make a final decision. I can accept that Mr. Thoms was very busy, certainly too busy to make a return trip to get the quote signed, and that he would not have <u>deliberately</u> made such an error. But the error was his entirely and the Defendant must answer for it.

[16] There being no contract in existence, the case falls to be decided on the legal principles of *quantum meruit* and unjust enrichment. In other words, what is the value of the work and would the Claimant be unjustly enriched by not having to pay for it?

[17] The roofing work done by McCarthy's would normally have some value, but that value is diminished by the fact that the roof now has sections with two slightly different shades of black. It is also true that the Sheas only had to pay their other roofer $2,900.00, and so (if not obliged to pay something to McCarthy's) would end up paying less than either of the quoted prices.

[18] As for the difference between $2,900.00 and their original quote, the evidence was that the original quote from the other roofer was $3,900.00. As such, all other factors not yet being considered, the most I would allow McCarthy's would be $1,000.00. The error was entirely their fault, as I have found, and there is no reason why the Sheas should have to pay any more than the best quoted price they had. Put another way, they should not have to pay a premium because of the Defendant's mistake.

[19] But there are other factors. One is the fact that the roof is two-tone, and therefore not as professional a job as they had a right to expect.

[20] The other factor is that the Defendant used the lien as an unfair lever to extract payment, resulting in cost and inconvenience to the Claimant and his family. Although those costs were not specifically quantified, I am satisfied that they were considerably greater than the several hundred dollars that I might otherwise have awarded McCarthy's for its work on the basis of *quantum meruit.*

[21] It is my finding that, in all of the circumstances, there is no injustice in allowing the Claimant to retain the value of the work done by the Defendant, without payment. I find that the entirety of the payment made under protest should be returned.

[22] There will accordingly be judgment for $1,483.82 plus the $85.44 cost of issuing the claim. There was no proof offered of any additional allowable costs. The total judgment will therefore be for $1,569.26.

Eric K. Slone, Adjudicator