Claim No: 432506

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Mother Hubbard's Kitchens v. Optimum Construction Ltd., 2014 NSSM 79

BETWEEN:

MOTHER HUBBARD'S KITCHENS

Claimant

- and -

OPTIMUM CONSTRUCTION LIMITED, JOHN RHYMES and DON MacMILLAN

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on December 2, 2014

Decision rendered on December 5, 2014.

APPEARANCES

For the Claimant	Gail Holohan, part owner and employee
For the Defendant Optimum	John Rymes, owner
For the Defendant John Rhymes	Self represented
For the Defendant Don MacMillan	Justin Morrison, counsel

BY THE COURT:

[1] This case concerns a bill for slightly more than $16,000.00 for the design and building of custom kitchen and dining room cabinetry. The bill has not been paid. The sole question for the court is which of the three named Defendants is liable for this amount. The Claimant says they all are equally responsible.

[2] The Defendant Optimum Construction Limited concedes that it is responsible, and says that it has not paid because of financial problems. The other two individual Defendants deny responsibility.

The parties

[3] The Claimant Mother Hubbard's Kitchens (sometimes referred to as "Mother Hubbard's") is a Dartmouth-based company that designs and manufactures custom kitchens and other installations. The company is owned (at least in part) by Leo and Gail Holohan. Gail Holohan works in the business as, among other things, a salesperson.

[4] The Defendant Optimum Construction Limited (hereafter "Optimum") is a Nova Scotia company that operates as a general contractor. The owner/operator of Optimum is the Defendant, John Rhymes (incorrectly identified in the Claim as John Rymes.) The style of cause is amended to include the correct spelling of Mr. Rhymes's name, and he is referred to hereafter as "Mr. Rhymes."

[5] The Defendant Don MacMillan (“Mr. MacMillan”) is a resident of Dartmouth, Nova Scotia, and together with his wife is the owner of a residential property (“the MacMillan home.”) Mr. MacMillan is 88 years of age.

The facts

[6] In or about October of 2013, the MacMillans’ home suffered a major fire. The damage was extensive enough to require the interior to be gutted. As would be expected, the property was insured and the insurer, Aviva Canada, undertook to cover the loss.

[7] A company called Specialized Property Evaluation Control Services Limited (SPECS) was given the responsibility to assess the amount of the loss and arrange to put the reconstruction contract out for tender. This process resulted in the Defendant Optimum receiving the contract to repair the damage for the total amount of $179,825.50.

[8] Part of that contract included the reconstruction of the kitchen cabinets and also some built-in cabinets in the dining room.

[9] Optimum clearly planned to subcontract out a lot of the work, including the kitchen and dining room cabinets. It is not clear what allowances were in the contract for these items, and it is not clear what Optimum would have done to source cabinets, left to its own devices. As it turned out, Mr. MacMillan, sometimes with his wife and at other times with his daughter, became impatient and started going around to kitchen design stores to see whether they could supply what Mr. MacMillan had in mind to replace what was lost in the fire.

[10] Mr. MacMillan clearly understood that any choice of kitchen supply business would have to be approved by Mr. Rhymes on behalf of Optimum, as that company was the contractor.

[11] Mother Hubbard's was one of the places that Mr. MacMillan visited, several times, without his daughter accompanying him. He spoke with Gail Holohan on what he believes was his second visit, and explained the situation to her. She was able to convince him that Mother Hubbard's could supply the cabinets that he was looking for.

[12] He told Gail Holohan that Optimum was the contractor and that the cost was being covered through insurance. She advised him that there was a process required to have Optimum approved for credit, as it was not one of Mother Hubbard's existing customers. Mr. Rhymes, it would appear, made a visit to Mother Hubbard's on May 20, 2014 to fill in a Credit Application form.

[13] According to notations on that form, Mother Hubbard's approved Optimum for credit on May 21, 2014.

[14] On May 22, 2014, Mr. MacMillan attended Mother Hubbard's and was presented with a document. By then he and Ms. Holohan had gone over all of the design features that Mr. MacMillan wanted. All of these details were contained in the document presented to Mr. MacMillan, who signed and initialled the document in several places.

[15] It is the position of the Claimant Mother Hubbard's that, in so doing, Mr. MacMillan legally obligated himself as a Co-Purchaser, with joint responsibility to pay the account. It is the position of Mr. MacMillan that he did not understand that he would be incurring any legal or financial liability, and that he was simply giving his approval for the designs and specifications. I will return to, and resolve, this issue below. I will also refer to that document as the "contract document."

[16] On some later date, Mr. Rhymes also attended at Mother Hubbard's and signed the contract document, and added his initials in several places.

[17] The contract document, as presented to both Mr. MacMillan and Mr. Rhymes, contained three pages. The cover page begins with the words:

> "On acceptance and confirmation of the Approved Plan, and all of the foregoing and having agreed to the Terms and Conditions of Schedule "B" above, Mother Hubbard's Kitchens and the Purchasers have signed below please initial." (sic)

[18] The cover page goes on to state the contract price and method of payment (cheque/debit) and then asks the parties to initial in three places, indicating that they had reviewed and understood Schedule A (Purchase Agreement), Schedule B (Terms & Conditions) and "My Plans & Agree to the Design." Where initials are asked from the "client" there are initials of Mr. Rhymes, and <u>not</u> Mr. MacMillan, and even then only to signify that he had reviewed and understood Schedule A and the Plans, but <u>not</u> Schedule B. The reason for that exception was that Schedule B was not part of the contact document, on that day, and (as confirmed by Ms. Holohan) no Schedule B was ever actually shown to Mr. MacMillan or Mr. Rhymes.

[19] Below, on the first page, there is a place where the Purchaser and Co-Purchaser are asked to sign, signifying that:

> "On the acceptance and confirmation of the above Mother Hubbard's Kitchens and Purchaser/Co-Purchaser have signed below in acceptance."

[20] Mr. Rhymes and Mr. MacMillan signed as Purchaser and Co-Purchaser respectively.

[21] The second and third pages of the contract document are the Schedule "A" referred to, called the Purchase Agreement. It names the "client" as Optimum, and shows Mr. MacMillan as the "ship to address." The balance of the document consists of specifications, with places for the client's initials. Mr. MacMillan signed or initialled in those places.

[22] As noted, there was no Schedule B attached to the contract document. It is clear that Schedule B would have been an important and integral part of the agreement, from the point of view of Mother Hubbard's. The Schedule B placed in evidence is a full page of single spaced fine print, containing a number of definitions and terms of the contract. Without it, the contract as a whole makes little sense. Most critically for this case, it states:

> 2. If there is more than one Purchaser/Owner, the obligation shall be joint and several.

[23] Schedule B also includes, among other things, some limitations on liability, terms of the warranty, and a provision that would give Mother Hubbard's the right to enter the property and remove cabinets, in the event of non-payment.

[24] It is not my place to speculate on what might have been the case, had Schedule B been attached to the other three pages, as it was doubtless intended to be. There might have been issues about whether Mr. Rhymes or Mr. MacMillan actually read that schedule, and whether or not some or all of the terms could be enforced. These questions are academic because Schedule B was simply missing. In one sense, it was an incomplete contract. However, the more apt characterization is that it simply is a three-page contract that must be interpreted with reference to the contents that are actually there.

Personal Liability of Mr. MacMillan

[25] Dealing with the potential liability of Mr. MacMillan, his counsel raises a number of legal defences, any of which would exonerate him from personal liability. Those defences (as I understand them) are *non est factum*, lack of *consensus ad idem*, and lack of clear terms.

[26] Looking at the contract document as it stands, Mr. MacMillan is described as a Co-Purchaser on page 1, which is a term that is not defined. On the part of the document that is described as the "Purchase Agreement," the "client" is noted to be Optimum, with Mr. MacMillan only as the "ship to address." Most of that schedule is concerned with details of the design and product details. It says nothing about legal or financial responsibility. In my view, reading the three-page document, as a whole, one would not conclude that the co-purchaser is undertaking financial responsibility. At best it is ambiguous.

[27] Where a contract is ambiguous, the court may look to the extraneous circumstances. The reality was that this kitchen was being rebuilt by a contractor with funds to be derived from an insurance policy. The homeowner's involvement was to select and approve the design and production. He would not have had any expectation of incurring financial responsibility.

[28] Had anyone suggested to Mr. MacMillan at the time that he might be targeted for recourse in the event the contractor did not pay, he would have dismissed that proposition as ridiculous and he would not have signed. He testified to this effect, and his testimony makes perfect sense. Why would he incur a financial risk? He would have told Mother Hubbard's to work it out with the contractor and, possibly, his insurance company, and to leave him out of it.

[29] Legally speaking, I do not need to rely on *non est factum* or lack of *consensus ad idem*. I do not need to look at Mr. MacMillan's advanced years. I simply find that the contract is (at best) ambiguous and that - interpreted with the aid of extrinsic evidence - it does not support the interpretation that the Claimant propounds.

[30] I also note that, as the creator of the document, Mother Hubbard's bears the burden of having it construed with the benefit of the doubt given to the other party. The legal doctrine of *contra proferentum* provides that, where an agreement or contractual term thereof is ambiguous, the preferred meaning should be the one that works <u>against</u> the interests of the party who supplied the wording. I find that this contract does not clearly impose liability on Mr. MacMillan, and as such he is not personally liable for the cost of the Claimant's work. The claim against him must be dismissed.

Liability of Mr. Rhymes

[31] The above analysis does not entirely dispose of the claim against Mr. Rhymes personally. Were I to look only at the contract, I would be forced to the same conclusion as pertains to Mr. MacMillan. But there is more.

[32] A few days after the signing of the contract, on Wednesday, May 28, 2014 Mr. Rhymes was sent a letter confirming the approval of credit, and he was asked to sign to indicate acceptance of certain terms. This letter reads (in part):

> Optimum Construction Ltd.
> John Rymes
> 15 Wedgewood Ave
> Timberlea, NS B3T 1M6
>
> RE: APPLICATION FOR CREDIT
>
> We are pleased to advise that your application for credit has been approved for $15,000.00, based on the following terms:
>
> 1) We accept payment by cash or cheque only. Visa payment is not accepted due to the special contractor discounting reflected in your contract price.
>
> 2) Accounts are due and payable in 30 days from invoice date. Contracts are invoiced on the day the product is delivered and installation begins. If payment becomes past due, a service charge of 2% per month will be charged to your account.
>
> 3) Credit privileges will be automatically suspended should the applicant's account become past due.
>
> In the interest of good business practice, it is desirable to clarify credit terms to avoid misunderstandings. Our primary responsibility is to help our customers experience good service and we wish to spend our time and energy towards that end.
>
> **I/we acknowledge that in order to receive credit privileges that I/we provide my/our personal guarantee that monies will be paid by me/us on behalf of Optimum Construction Ltd.** (Emphasis added)

Please sign below as acceptance of these terms:

Name (print) John Rhymes
Name (signature) *John Rhymes* (signed)

[33] The Claimant argues that this document imposes personal liability on Mr. Rhymes to make good on payment, in the event that Optimum did not pay. Mr. Rhymes says that he did not read the document carefully, but that he understood it to be signed on behalf of Optimum and did not intend to bind himself personally.

[34] The question of whether or not Mr. Rhymes read the document carefully is irrelevant. Normally, if someone signs a document he or she is agreeing to its terms, as those terms are (clearly) stated. Of course, there are exceptions such as where someone may be actively misled about the meaning of a document, or otherwise taken advantage of. But nothing of the sort happened here. Mr. Rhymes is a mature, experienced businessman who should know enough to read what he is signing. If he did not do so, then he ran the risk that he was agreeing to something that he might not like.

[35] I find that this document is valid as a guarantee. It is amply supported by "consideration" in the sense that he was getting something out of it, namely a contract for the benefit of his company for which he or it might not otherwise qualify.

[36] There is also a certain justice to holding Mr. Rhymes personally responsible. On the evidence, he ran his company on a "cash flow" basis, which means that he took the proceeds from this contract to rebuild the MacMillan home and used it to pay other bills, leaving the Claimant and other

subcontractors unpaid. The decision to use those funds accordingly was the decision of Mr. Rhymes, and it is a decision for which he will have to answer personally.

[37] In the final result, the Claimant is entitled to judgment for $16,107.20 plus $193.55 in costs to issue the claim, as against Optimum Construction Limited and John Rhymes. The claim against Don MacMillan is dismissed.

Eric K. Slone, Adjudicator