2006 Claim No. 257817
Date: 20060424

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Martin Developments Ltd. v. D'Arcy, 2006 NSSM 22

BETWEEN:

Name: **Martin Developments Limited** **Claimant**

- and -

Name: **Thomas D'Arcy and Mildred D'Arcy** **Defendants**

Appearances:

Claimant: Louis Wolfson
Defendants: Shawn D'Arcy

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on October 20, 2006. This decision replaces the previously distributed decision.

D E C I S I O N

[1] This matter was heard in Halifax on January 16th and February 8th, 2006. Following the hearing written submissions were filed with the last submission dated March 1, 2006. This is a claim for the balance allegedly owing on a building contract.

[2] The amount claimed by the Claimant is $13,704.98.

[3] The Defendants deny that the amount of $13,704.98 is owing. As well, the Defendants counterclaim for various deficiencies they allege with the construction and renovations to their home at 340 Bedford Highway, Halifax. At the beginning of the hearing counsel for the

Defendant amended the counter-claim by deleting the items referenced in paragraph 10(a) and 12 of the Counter-claim.

Facts

[4] I will not recite the evidence in extensive detail but will provide a summary of the salient evidence.

[5] Sometime in March, 2005, or prior to then, the Defendants entered into discussions with the Claimant company with respect to a renovation project that the Defendants wished to have carried out on their personal residence at 340 Bedford Highway. It would appear that the discussions were primarily between the Defendant, Thomas D'Arcy and Bill Martin for the Claimant Company. Mr. D'Arcy and Mr. Martin had known each other for a number of years from playing recreational hockey together. These discussions led to a written contract dated March 24, 2005. This document comprises a little less than one page and states, in part, as follows:

> *Work Description:*
>
> *Renovate the existing sun room as shown in the drawings provided by the owners - $25,000.00.*
>
> *Complete renovation to the kitchen including all new cabinets and partial removal of the wall joining the kitchen and sunroom - $15,000.00.*
>
> *The work described above will be completed in a good and workmanlike manner for a total of $40,000.00 plus HST.*
>
> *Any additional work not described will be charged at $37.00 per hour plus material.*
>
> *Payment schedule: 10% deposit upon agreement; an additional 20% when the job is started with billing done on a bi-weekly basis until completed.*
>
> *Martin Development Limited*_____
>
> *Customer Acceptance* _____

[6] It appears that the job proceeded on the basis contemplated in the agreement as $4,000.00 was paid at the time of signing the contract and a further $9,000.00 was paid (roughly 20%) at the time of the beginning of the work in late May or early June. Within the very early days of the work, it was discovered that there was a great deal of rot in the addition and accordingly, the scope of the job changed. Billy Martin and Tom D'Arcy had discussions about how that would impact the cost of the project. The indications were that the project would now cost $70,000.00. The project did proceed.

[7] Apart from the March 24th document, no other written document was prepared concerning contractual terms or amendments.

[8] The work continued with apparent agreement between the parties through June, July and August, 2005. The Claimant introduced various exhibits including Exhibits "C-1", "C-2", "C-3" and "C-4" which contained copies of the invoices which were submitted to the Defendants. According to the terms of the written contract, invoicing would be done on a bi-weekly basis and that appears to have taken place. In tabular form the invoice dates and payments are as follows:

Invoice Dates	Payment	Total Payments to date
March 24, 2005	$4,000.00	
May 31, 2005 (20%)	$9,000.00	$13,000.00
June 15, 2005*	$10,500.00	$23,500.00
June 28, 2005	$20,000.00	$43,500.00
July 13, 2005	$20,000.00	$63,500.00
July 21, 2005	$10,000.00	$73,500.00
August 10, 2005	$11,342.63	$84,842.63
August 25, 2005	$10,253.68	$95,096.31

NOTE -No invoice was introduced for this June 15 date but based on the immediately preceding and immediately succeeding invoices, there would have been an invoice in the amount of $10,500.00 issued at or around that date.

[9] As noted, as at the August 25th, 2005 invoice date the total to date was $95,096.31 and this is the total amount paid to date..

[10] Sometime in the late July, the Defendants asked for a further estimate or quote to complete the work. At that stage they had received invoicing of some $73,500.00 up to and including the invoice of July 21, 2005. Discussions took place between the two Defendants and Mr. Bill Martin at which, according to Mr. Martin he indicated that there would be additional invoicing of $20,000 - $22,000. This evidence is roughly consistent with that given by Tom D'Arcy who indicated that they sat down at the table out back and he asked Mr. Martin what would be the further cost and Mr. Martin indicated $17,500.00. Mildred D'Arcy testified that after the $70,000.00 estimate/quote that Mr. Bill Martin then quoted $90,000.00. While these figures are not exactly the same, they are sufficiently close and, for present purposes, nothing turns on the discrepancy as they all seem to indicate that in late July a further figure of approximately$90,000.00 was communicated by Mr. Bill Martin to the Defendants.

[11] Work did continue with the acquiescence of the Defendants. As shown in the summary of payments above, invoices were issued on August 10th and 25th for $11,342.63 and $10,253.68 respectively. I will note at this point that the invoices dated August 10th, 25th and September 15th, 2005 are all framed in a style indicating "Total Cost To Date". The earlier invoices on the other hand up to and including July 21st, 2005 simply state "Progress Draw on Renovations".

[12] At the point of the August 25th invoice being issued, the job was still not complete. At this stage the Defendants had become very concerned about the mounting costs of this project. This was particularly so given the financing they had arranged for this and the fact that they were now having to cash RRSP's to pay the invoicing. The relationship between the Defendants and Mr. Bill Martin took a decidedly negative turn at around this point. In early September Tom D'Arcy had discussions both by telephone and otherwise with Bill Martin requesting a figure to conclude the work. Mr. Martin told him it would be $2,500.00 but he should allow for $5,000.00 in his budget. This is confirmed in Mr. Martin's evidence as well

as the D'Arcy's evidence. When the final bill was issued it was actually for $11,919.61 (under date of September 15, 2005). As well, another charge of approximately $1,800 has been added to result in the claimed amount of $13,704.98.

[13] The Defendants have refused to pay the last invoice and that has lead to this proceeding.

Analysis

[14] The principal submission on behalf of the Claimant is that at the point that the significant rot was discovered, the relationship between the parties was pursuant to the wording in the written contract that reads: "*any additional work not described above would be charged at $37.00 an hour plus material*". The Claimant characterizes this as a "cost plus contract". The Defendant's submission on the other hand is that at the point where the rot was discovered and discussions took place with respect to tearing down the first level of the addition, a new fixed price contract was formed for a price of $70,000.00.

[15] As will be discussed, I have difficulty with both of these positions.

[16] I start with the written contract of March 24, 2005, which, according to the parties was signed by both sides, although the tendered exhibit - C37- was an unsigned version.

[17] The legal position at the beginning of the contract and prior to the discovery of the significant rot is fairly and accurately summarized in Defence counsel's brief as follows (p.2):

> "*...applying the objective test (reasonable person test) to the surrounding circumstances, it would be found that the intentions of the parties at the time of the formation of the contract was that it was to be a fixed price contract and was to have legal effect. The work to be performed was certain in terms with a specified fixed price stated. The evidence, I suggest, further shows that all parties believe that they had entered into a fixed price contract at the time of the formation of the written agreement. It is clear from the evidence that the work to be performed and the price to complete that work was stated under the written contract.*"

[18] The nice legal question engaged in this case is what legal characterization is to be placed on the relationship once the significant rot was discovered. As noted above, the Claimant submits that the contract then changed to a "cost plus" contract.

[19] Mr. Wolfson refers to Goldsmith on *Canadian Building Contracts* 4th ed. for a definition of cost-plus contract as follows:

> *"A cost-plus contract is one in which the owner agrees to pay to the contractor his actual direct cost of doing the work plus a stipulated percentage for overhead and profit"*

[20] In *Black's Law Dictionary* (5th) the term is defined as follows:

> ***"Cost-plus contract:** One which fixes the amount to be paid the contractor on a basis, generally, of a cost of the material and labour, plus an agreed percentage thereof as profits. Such contracts are used when cost of production or construction are unknown or difficult to ascertain in advance."*

[21] The Claimant's invoices have been calculated by totaling the hours for the workers on site employed by the Claimant and calculating those hours at a rate of either $37.00 per hour (or, in some cases, $28.00 per hour). To that has been added the actual costs (without markup) of the various suppliers such as Pierceys, etc. and sub-contractors engaged on the project. This appears to be consistent with and contemplated by the written document of March 24th 2005 which contains the following:

> *"Any additional work not described above will be charged at $37.00 per hour plus material."*

[22] The term "cost-plus" contract was mentioned several times by Bill Martin in his evidence and appears to a well-known and commonly used term within the construction industry. It is not clear to me whether the manner in which the invoicing here was done would be strictly viewed

as a cost plus contract; it does appear to be similar and I will refer to what has occurred here a cost plus type of contract.

[23] There is no particular magic in the term "cost plus". Using the term does not obviate the requirement to show agreement of the parties as to the basis of the billing or that the previous agreement as to some portion of the project had changed. To the point here, there was no evidence of discussions between the parties that this would now be a purely cost plus type of contract once the rot was discovered.

[24] There is no question that when the rot was discovered the scope of the contract changed significantly. Equally, there is no question that the deck and the electrical panel and some of the other work was not originally contemplated in the document of March 24, 2005. However, there was no evidence to indicate the that the original scope of work referred to above, i.e. renovating the existing sunroom as shown in the drawings provided by the owners for $25,000.00 and providing a complete renovation to the kitchen including all new cabinets and partial removal of the wall joining the kitchen and the sunroom, was replaced by a cost-plus type contract. There was no evidence that the fixed fee contract for $40,000.00 plus HST was discharged and there was no basis to conclude or assume that it had been discharged as the Claimant seems to have concluded.

[25] In the definition of cost plus contract in *Black's* there is reference to such contracts being used where it is difficult to estimate the cost to complete the project. I note that the March 24th document refers to drawings provided by the owner and it was my overall impression that the plans for the work to be done to the sunroom and the kitchen under the March 24th agreement were quite specific and detailed. I see no reason that the original project to renovate the existing sunroom and complete the renovation in the kitchen became any more difficult to estimate than it was originally. Even if it had, it seems to me that the contractor here is bound by the original fixed fee contract. In order to discharge that and replace it with a purely cost plus basis contract, I would expect something in writing and, failing that, some very clear

evidence of the parties' intentions (objectively viewed). No such evidence was before the Court.

[26] In stating this, I would emphasize that I take the approach that the discussions between the parties as well as the manner in which they proceeded is to be viewed by applying the objective test. That is to say, in its most simplest, what would a third party (or the proverbial fly on the wall) have understood to be the terms of the contract had they been present during the discussions between the parties hereto.

[27] The work contemplated under that contract for a fixed price of $40,000.00 plus HST could and indeed was apparently still performed according to the terms thereof. The additional work: i.e., tearing down the first storey and rebuilding it and, further on, installation of the deck *et cetera*, was be pursuant to the $37.00 per hour plus materials.

[28] Dealing with the Defendant's position, I am not convinced that the discussions that took place amounted to a formation of a new contract for a fixed price of $70,000.00 as suggested by counsel for the Defendant. Counsel's statement of the evidence of Mr. Bill Martin is somewhat at variance with the Court's. Even if I only relied on the Defendant's evidence, I certainly did not get the impression that they viewed this as a fixed fee contract. Of course, nothing was in writing after the original document of March 24, 2005.

[29] Moreover, even if I concluded that it was a fixed fee contract, then the subsequent figures which were quoted, i.e. $90,000.00 (approximately) and $2,500.00 - $5,000.00 to finish the contract, would have to be viewed as amendments to that fixed fee contract. In all events, I am not convinced that it is a fixed fee contract. Rather, it is my view that the proper characterization of the evidence is that the original contemplated work was subject to a fixed fee contract, the additional work was subject to a cost plus type of contract with, conceivably, a maximum amount. I have no doubt that two parties could validly enter into a contract with the charges to be based on a cost plus type of basis but, subject to a "upset" price or a

maximum price. As well, I am aware of no reason in law that there could not be a fixed fee contract for some portion of the work and a cost plus type contract for the balance.

[30] I also mention the issue of the deck. It was clear from the evidence that the deck which was built according to the specifications and design of the D'Arcys was quite elaborate and, consequently, quite expensive to construct. It seems to me somewhat inconsistent to suggest that there was a fixed fee contract for the additional work when the homeowner is designing and directing elaborate work and expensive work which had not been originally contemplated. Clearly the deck must have been done on a cost plus type of basis.

[31] It was noted earlier on in these reasons that the parties were friends and had known each other through playing hockey together for a number of years. I would infer from this that this may have led to some lesser due diligence on both sides in terms of documenting the agreement. With hindsight it is apparent that the basis for the further billing ought to have been specifically laid out in writing at the time of the discovery of the significant rot.

[32] As stated above, it is my view that the correct way to characterize this project is as a fixed fee contract for the original contemplated work relating to the sunroom and kitchen, with the additional work to be on the basis of the $37.00 per hour plus material. This characterization for the additional materials is, in my view, a type of cost plus contractual basis, although not exactly the same as the definitions referred to above.

[33] It is clear that the Claimant herein issued its final invoices on the basis that the entire contract was a cost plus type of contract. The earlier invoices were issued on the basis of a fixed fee contract. The Claimant's entire invoiced amount is calculated and based on a cost plus type of approach for the whole job. And, of most significance is that there is no way to differentiate between the work that fell under the original fixed fee contract and the work that was additional work.

[34] From an accounting or a costing point of view, the Claimant should have separately identified the work and materials which related to the original scope of work to which it had committed to do at a fixed fee of $40,000.00 plus HST. In a separate set of records the Claimant ought to have accounted for the additional work which it was doing on the basis already described. In the absence of that type of information, there is no way of knowing how much of the time and materials charges related to the $40,000.00 fixed fee contract; therefore it is impossible to know how much of the time charges, materials, and sub-trades related to the additional work and, consequently, whether anything further is owing to the Claimant at this point.

[35] It may well be that had the Claimant brought forward evidence of the type of records described in the previous paragraph that it would still be owed something for the additional work. No such evidence was presented. As always, the Claimant bears the burden to prove its case, and if the Court is left unable to determine if anything is owing, then the claim must fail.

[36] For the above reasons, I would dismiss the claim.

[37] Although not necessary, I will go further. If the Claimant had been able to demonstrate that the additional work (for clarity, the work outside of the original scope of work) when costed on the basis of the $37.00 per hour plus costs would still leave an amount outstanding, I would then have had to consider whether or not the estimate of $2,500.00, but "budget for $5,000.00" was a binding contractual term. In my view it was a binding statement. While the earlier figures of $70,000.00 and then $90,000.00 could be seen as mere estimates and not legally binding (or alternatively, could been seen as binding estimates which had been agreed to be modified by the D'Arcys), it seems to me that at the point of the final impending invoice, it was clear that the D'Arcys were looking for a binding figure. Referring again to the objective standard, I would conclude that the objective bystander would conclude that the D'Arcys were seeking a firm "worse case scenario" to conclude the work and when Mr. Martin came back with the $2,500.00 figure (but budget for $5,000.00) it should have been

clear to Mr. Martin that they were seeking a final figure. In other words, a figure which would be binding.

[38] I do not feel it necessary to engage in an analysis of the submissions regarding negligent misrepresentation as it is my view that the matter can, as outlined above, be concluded on the basis of the principles of contract law.

[39] I also would not be inclined to proceed with an analysis pursuant to *quantum meruit*. *Quantum meruit* would apply if there is no contract. As I have concluded, there was a contract or, perhaps more accurately, two contracts. One portion of the work was pursuant to fixed fee and the other was according to a type of cost plus basis, but in my opinion, subject to a "cap" or "upset" price. The Claimant has presented its case on the basis that the entire work provided was in accordance with a cost plus basis. As is clear, I do not accept that characterization. According to the characterization I accept as a matter of law, the Claimant has not made its case on the evidence. There is no basis to proceed under *quantum meruit*.

Counterclaim

[40] The Defendants raised a number of items by way of counterclaim which I will deal with here.

Leak in Basement

[41] It appears that this leak was caused through the negligence of the Claimant. An invoice was tendered from Bremners in the amount of $122.95. I will allow that counterclaim amount. There does not appear to be any other invoice amounts tendered into evidence for this item.

Window in Bedroom

[42] There was a fair amount of evidence on this item. At the end of it, I am uncertain as to how the Claimant is seen to have erred or failed in its duty to the homeowner. The Counterclaimants (the D'Arcys) carry the burden of the counterclaim and in my view they have not met the burden on this issue. I am not prepared to allow anything on this account.

Hardwood Floors - Scratches and Gouges

[43] On this point the evidence did seem to conflict as between that of Ms. D'Arcy and that of Mr. Horne. Mr. Horne's evidence was that he acknowledged there was a dent in the floor as a result of the fridge being moved but that it was fixed. He did not have any knowledge of any other scratches or dents or gouges. I consider Mr. Horne to be a credible witness. I also consider Ms. D'Arcy to be credible but, as she and Tom D'Arcy bear the burden on this issue, I find that it has not been met and I disallow that claim.

Thermostat

[44] I accept the evidence that the thermostat was broken as a result of the activities of the Claimant. Exhibit D30 indicates that the D'Arcys paid $71.30 to replace the thermostat. I will allow that amount.

Kitchen Cupboards and Back Splash

[45] There was evidence about scratches and problems with the back splash. I accept Mr. Horne's evidence that the top of the back splash should be caulked and I am not otherwise convinced that this counterclaim item is made out.

[46] However, the D'Arcys did have to have a replacement door and drawer as shown on Exhibit D34 and I allow that amount of $91.00.

Leaking from Bulkhead

[47] While I fully accept that the D'Arcys experienced this leaking, I am not satisfied that the evidence shows, on a balance of probabilities, that this is somehow attributable to the Claimant. I disallow this counterclaim item.

Summary and Disposition

[48] For the reasons given above, the Claimant's claim is dismissed.

[49] The Defendants' counter-claim is allowed in the total amount $285.25 and it is hereby ordered that the Claimant pay to the Defendants the amount of $285.25.

[50] There shall be no costs payable by either party.

DATED at Halifax, Nova Scotia, this 24th day of April, 2006.

Michael J. O'Hara
Adjudicator

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