

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Nielsen v. Barteaux, 2007 NSSM 18

BETWEEN:

NIELS NIELSEN

Claimant,
Defendant by Counterclaim

- and -

WAYNE BARTEAUX

Defendant,
Claimant by Counterclaim

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 29, 2007

Decision rendered on May 30, 2007

APPEARANCES

For the Claimant - Terry Degan, counsel

For the Defendant - self-represented

- [1] The Defendant performed some residential drywall work for the Claimant based upon a verbal contract, the terms of which are in dispute. The claim as filed is for \$2,417.34, being slightly more than the amount that the

Claimant was obliged to pay when his property was subjected to a Builder's Lien by the Defendant's drywall supplier.

- [2] the Defendant has counterclaimed for \$1,650.00 which he claims is the amount still unpaid on the contract, even taking into account the third party payment made by the Claimant to satisfy the lien.

- [3] The Claimant testified to his understanding of the agreement, which was that he would pay the cost of materials plus \$0.18 per square foot of drywall installed, HST included. He testified that he attempted to get the Defendant to put the agreement in writing in the form of a simple memorandum, which he (the Claimant) prepared. His evidence was that the Defendant refused to sign it. The Defendant did not recall having ever seen the unsigned memorandum.

- [4] The job was a relatively small one and lasted only about a week. The Claimant was not entirely satisfied with the work, but paid in full what he believed he owed and was content to leave it at that.

- [5] The Defendant was extremely vague as to his understanding of the terms of the agreement. He could not say what the cost per square foot was supposed to be; nor could he say how many square feet had been installed. He testified that it was his practice to charge by the square foot at various amounts, depending on the job. The \$0.18 amount was within the range that he typically quoted, though he did not agree that this was the amount applicable to this job. He says that his labour charge was to be \$3,670, but could not say on what basis it was calculated.

- [6] The Claimant testified that he paid three sums, as requested by the Defendant, namely cheques for \$2,079.30 and \$5,180.00 plus cash of \$1,000.00, for a total of \$8,259.30. He was able to produce the cancelled cheque for \$5,180.00 but not the one for \$2,079.30, although he did produce a bank statement showing such a cheque having gone through his account. The Defendant acknowledged having received the \$5,180.00 cheque but not the other. The Defendant testified that the Claimant paid him cash of \$279.30, not \$1,000.00.
- [7] The Claimant called a witness who was there when the cash changed hands, but he could not recall the exact amount.
- [8] I am inclined to accept the Claimant's evidence that the \$2,079.30 cheque was to the Defendant, and that the cash paid was \$1,000.00. The amount of the cheque is consistent with the figure of \$279.30 (being the agreed cost of a particular materials order) with additional labour added on in even dollar amounts. This is also corroborated by some handwriting on the original invoice which appears to calculate a final balance owing.
- [9] I also found the Claimant's evidence overall to be more credible and consistent. I found the Defendant evasive and vague except where it suited him to be definite. Wherever they conflict I am prepared to accept the Claimant's evidence over that of the Defendant.
- [10] What later occurred is that the drywall supplier, Acadia Drywall, had not been paid by the Defendant and it placed a lien on the project for \$4,285.68 plus interest and costs. The Claimant retained a lawyer and eventually succeeded in negotiating a payment of one-half the lien amount,

namely \$2,142.84, to Acadia, which cleared his property of the lien and left Acadia to collect the balance from the Defendant directly. The Claimant testified, and I accept, that the lien created problems with his financing and cost him extra interest charges during the time it took to sort it out. He also incurred legal costs to negotiate the settlement with Acadia.

[11] I reject the Defendant's notion that the contract was for any more than the Claimant had already paid him, and I thus dismiss the Counterclaim. If the Defendant had actually intended to charge more, he was, in my opinion, extremely careless in not providing a written quote that would have removed all doubt. His invoice for \$3,670.00 plus HST rendered after the fact is meaningless without some prior agreement to support it. Nor could I even accept it as a reasonable value of the work on a *quantum meruit* basis (assuming there were no meeting of the minds) in the absence of some evidence of the amount of drywall supplied and a suitable price per square foot. As stated, I find that the Claimant paid in full according to the verbal contract, and then had to pay more because the Defendant failed to pay his own supplier.

[12] In a more perfect world, the Claimant would have held money back from the Defendant until the expiry of the lien period, but I take judicial notice of the fact that this is not always done in small construction projects. The Claimant's failure to hold back does not absolve the Defendant of his responsibility, in any event.

[13] The claim as filed was for \$2,417.34. It is far from clear how that number was arrived at. I am satisfied that the Defendant is ultimately responsible for the cost of discharging the lien, namely \$2,142.84. That leaves \$274.50. I accept that there were additional damages, including the legal

costs and additional interest - all of which would exceed \$274.50. I was not asked, nor would I have been inclined to amend the claim to a greater amount than that claimed, since \$2,417.34 was what the Defendant came to court in jeopardy of having to pay.

[14] In the result there will be judgment for the Claimant in the amount of \$2,417.34. He is also entitled to his filing fee of \$80.00 plus cost of service of \$68.40, for a total judgment of \$2,565.74.

Eric K. Slone, Adjudicator