IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Edwards v. Rowe, 2015 NSSM 42

Claim: SCD No.14-433734
Registry: Digby

Between:

Frederick H. Edwards

Claimant

– and –

Loraine Rowe

Respondent

Adjudicator: Andrew S. Nickerson, QC

Heard: August 20, 2015

Decision: September 28, 2015

Appearances: Alexander Pink, for the Claimant,
Hugh Robichaud, for the Respondent

FACTS

The Claimant testified that he had been involved in construction which he did on a part-time basis for 33 years. He says that he has had his own business for approximately 2 1/2 years. He says that the Respondent called in response to an advertisement placed in a local publication in the early part of 2014 and wanted a quote for her roof. He says he originally quoted $1478.45. The quotation included the following phrase "replace roof shingles and finish fascia ". This was to shingle one side of the Respondent's roof. He also says that he charged the Respondent for extras in the amount of $283.00 which was agreed to by the Respondent on the first day of the work. This work was started on 14 September 2014 and was finished approximately September 18. Exhibit 1 is a document dated July 22, 2014 entitled “Quote” totaling $1478.45 type written with a note for $283.00 in addition and the typewritten amount. This document also says “paid in full”.

He says that on the second day of work, the Respondent asked for additional work in respect of the replacement of soffit. He says that he did not give a specific quote but stated in his evidence that the Respondent knew that his rate was $25 an hour. He also says that the Respondent gave him $300 on account of this additional work. He says that later the Respondent called him and said I have a receipt marked paid in full and I want my $300 back. On October 22, 2014 the Respondent issued an invoice (Exhibit 2) in the amount of $708.12 dollars for the additional work broken down as follows:

36	1	Labor to install Flat Stock and Soffit	$25.00/hr	$900.00
0.4	2	Flatstock 24” x 30M, Polar White	$179.20	$86.02
0.5	3	Alum.Nails 1-1/4 White	$16.00/Lb	$8.00
	4	Received on Account	-$300.0	-$300.00
			Sub-Total	$694.02
			HST	$14.10
			Total	$708.12

This was his final bill and it was never paid. The Claimant now sues for this amount.

The Claimant says that his original quote did not include the installation of soffit or flat stock. He says he did not need to replace the drip edge in respect of the additional work as that was satisfactory. He says it was difficult to get the flat stock properly fitted under the drip edge in all places where there were older shingles.

The Claimant testified that he did not use tar or other adhesive to hold down the shingles as to do so would be to void the manufacturer’s warranty. This type of asphalt shingle has plastic strip on the back which is removed upon installation and is designed to adhere to the shingle below. In cross examination the Claimant denied knowing of any prevalent local practice of using tar or other adhesive to hold the shingles down. He says that some contractors do and some don't. But he believes it is inappropriate to do so because it would void the manufacturer's warranty. He stated that he had always done it without tar and he did in this job without problems.

He states that his original quote was to cover only one side of the roof and he did that for the quoted price. He said the additional funds were for doing the flat stock on the side that was not quoted and as well doing the soffit, which he says was a request additional to his quote.

The Claimant acknowledges that a number of shingles blew off in a windstorm shortly after he did the installation. He also suggests that there may have been a defective bundle of shingles. He says that he stands by his work and that if the Respondent had called him he would have attended the property and replaced the defective shingles at no cost. He states that the maximum cost to fix the problem and replace the defective shingles would have a value of approximately $300.

The Claimant also states that there were places where the flat board had come away. He stated it was extremely difficult to place this material where the old shingles were and that it was inadvisable to nail through the fascia which may result in leaks.

The Respondent testified that she contacted the Claimant in response to his ad and told him that she wanted to shingle one side of her roof and she wanted her soffit and fascia done. She says that she interpreted the words "finish fascia" in the quote to mean that fascia, soffit and flat stock were included. Nevertheless, she told the Claimant it was a good quote and he should proceed with the job. She testified that it took about two weeks to finish the job. She says that during the work she asked the Claimant on a number of occasions about doing fascia and was assured it would be done. The job was finished. She complained that the fascia and soffit were not done and she says the Claimant said he would come back. She says that he came back and told her it would be an additional $300 and would take one day to complete. She says with some hesitation she agreed and gave him the $300. This version of events is consistent with the Respondent's diary which was introduced as Exhibit 9.

She says that she insisted on an invoice marked paid in full, which was given before he had actually finished. Shortly after completion the Respondent says that she noticed shingles lifting every time there was a wind. In response to a question by the court, she stated that November 19 was the first time that she noticed that there were a significant number of shingles missing. She admits that she did not bring this to the attention of the Claimant and also that she had had no leaks as a result of the missing shingles. When asked how many shingles were missing, she responded that she did not know. She did not replace shingles or repair them even to the date of trial. The Respondent does not want the Claimant to fix the damaged shingles, but rather she wants the entire section of roof done by the Claimant redone.

The Respondent says that the first time that the Claimant mentioned soffit and fascia cost was when he said it would cost her $300 which she paid him. She acknowledged in cross examination that the word soffit did not appear on the original quote and that she does not know

what is meant by flat stock. She states that she had some soffit and fascia on hand but she understood the $300 would be the cost of the additional material required to complete the job. She says labour was not mentioned.

Christian Comeau, is a carpenter with 15 years' experience and does a lot of repair work. He said he has shingled 10 or 15 rooves. He stated that 2014 was a bad year for wind. He stated that the customary procedure in the Acadian shore was to use tar or other adhesive to glue the shingles down. He says that this is true despite the fact that the manufacturer recommends against this procedure and this practice voids the manufacturer's warranty.

Mr. Comeau examined the roof at the Respondent's house. He says the house is at a high spot which is very windy and that he would have used tar or other adhesive in that situation. He was asked by the Respondent if he would repair the Claimant's work. He said that he would not do so because he did not do the initial work. He considered the repair to be the contractor's responsibility and stated that you could fix sections and it would be a good job "if done right". He personally would not undertake to remediation of this job unless he was replaced the entire roof, because he did not do the initial work. His quote for doing the work was in excess of $3,000.

Mr. Comeau disagreed with the Claimant that the fascia should not be nailed.

ISSUES

What was the nature of the contract between the parties?

Did the Claimant breach the contract?

If the contract was breached what is the measure of damages?

SUBMISSIONS

The Respondent's counsel says the Respondent is left with a roof with missing shingles and poor quality workmanship. He says there were at least 21 shingles that were defective and that the poor quality work is devaluing the Respondent's property, which is of particular concern because she is trying to sell it. He stresses that the quotes state "finish fascia" and argues that the only reasonable interpretation is that it was to include all that was necessary for the soffit and fascia and flat board. He says that the Claimant assured the Respondent that all of this work would be done for an additional $300, despite the fact that she felt that the original quote

covered this. He argues that the only way to make the Respondent whole is to award her $2,530. He states that mitigation is not relevant because there was no actual damage by virtue of leaks.

The Claimant's counsel stresses that at worst there were 25 or 30 shingles on one portion of the roof that could have easily been fixed had the Claimant been notified of the concern. Mr. Pink argues that it would be imprudent of the Claimant to use tar or other adhesive because this would void the warranty. He says there may have been an initial misunderstanding as to the scope of the work but that was clarified when the Claimant indicated that there was additional work to be done and he required an additional $300 as an advance on the additional work which the Respondent agreed to. He submits that the Claimant's claim in the amount of $708.12 should be allowed less $300 for the cost of fixing the shingles which had blown off.

ANALYSIS AND DECISION.

I first state that I found the witnesses to be credible and reasonable people. I found that they all were attempting to give evidence in a truthful and straightforward manner to the best of their ability. The difference in their evidence primarily relates to their perspective and the lack of clear communication, which took place between these two parties. All witnesses were amply cross-examined but no material inconsistencies in their evidence were revealed. I am faced with the task of attempting to reconcile the divergent points of view in their evidence by trying to assess what an objective observer would have concluded.

I do think that the words "finish fascia" would have been taken by most objective observers to mean that what has been called the flat board, the soffit and fascia would be completed as part of the initial contract price. I also think an objective observer would have interpreted it to have only applied to the portion of the roof where the new shingles were to be placed.

I conclude that everything in the initial contract should be interpreted to mean the shingling of the roof sections that both parties agreed were to be redone and the soffit fascia and flat board for that section. I don't think it includes soffit fascia and flat board for the other section.

I have therefore concluded that what we might call the first contract was agreed to, completed and paid for.

We then come to what I suggest is a second contract. That is when the Claimant was on the job the Respondent asked him to do the rest of the soffit, fascia and flat board. It is difficult to

determine exactly what went on between these parties at that point, but I do note that the Claimant did not give the Respondent a written quote as to the additional work. I believe that what he communicated to the Respondent was that he would require an additional $300 for that work. He may well have intended that to mean solely in respect of materials, but it is not clear to me that he communicated that to the Respondent. Nevertheless, she agreed to give an additional $300 for this work.

A contract is an offer and acceptance. By not saying that the labour was in addition, I believe that the Claimant communicated that the $300 was the price of the job. I am not satisfied that merely saying “she knew what my rates were” is sufficient to justify holding otherwise.

As it has been stated many times before the courts, I am entitled to accept or reject all or any part of the evidence of the witness. I wish to make it clear that the Respondent’s diary (Exhibit 4) only confirms her impression of events; it does not provide evidence that her interpretation of events is accurate. I am evaluating the facts based on the whole of the evidence. The touchstone for fact-finding is to try to determine what is most reasonably logically probable. The burden is on the Claimant to prove his case; where there is an equal balancing the Claimant must fail. In the circumstances I don't think I can find either party’s interpretation is without some doubt, nevertheless I am required to apply the balance of probabilities standard and make a finding. I don’t think that the Claimant has established his version to any better degree than the respondent, and thus has failed in meeting his burden of proof. When I apply these principles, I must conclude that the Claimant made an offer to complete the work for $300 and was paid the $300. While my vantage point affords me a less than preferable perspective, this must be the factual finding as a matter of the application of these principles of law.

Undoubtedly the Claimant would disagree, and I want to assure him that I did not come to this conclusion lightly, but after careful thought. The essence of contract formation is an offer and an acceptance. The Claimant made an offer to do the additional work. The burden must be on the Claimant to make his offer clear and understandable to the Respondent. The Respondent accepted that offer as she understood it based on the communication made by the Claimant. The law is clear that this must be assessed objectively and not in accordance with his subjective intent of the Claimant.

With the greatest of respect to Mr. Robichaud, I think the doctrine of mitigation does apply. I don't think that the fact that the roof did not leak is sufficient to take it out of the operation of that doctrine. The Respondent had a duty to do what was necessary to prevent the damage getting

any worse. As early as November 19, she was aware of the problem and should have notified the Claimant and given him the opportunity to prevent further damage. As the record stands I cannot determine how much of the damage had occurred subsequent to that date. I have no evidence as to the value of the difference in damage as between the fall of 2014 and later, so the point is somewhat moot in any event.

I am unable to conclude that the evidence before me is sufficient to conclude that there is a "correct" method of installation as between using tar or other adhesives or not using them for the purpose of not voiding the manufacturer's warranty. Both seem to me to be reasonable judgments that competent carpenters may honestly disagree about. I don't have sufficiently compelling evidence to hold that the Claimant was negligent in doing the installation as he did, again on the balance of probabilities standard, keeping in mind that the burden of proof of this is on the Respondent.

I considered the fundamental principle that damages are to be compensatory; that is damages are to compensate the Respondent for her loss and no more. Clearly, she had some value in the roof as it was done and I accept Mr. Comeau's evidence that it could have been repaired appropriately. In my view, the Respondent could have been restored to what she had paid for by a timely repair. The cost of that repair is what she is entitled to. To award her more would result in betterment which has been often held is inconsistent with the compensatory principle. The only estimate of repair cost was given by the Claimant at $300. Mr. Comeau did not contradict this.

I therefore dismiss the Claimant's claim and award the Respondent the sum of $300 on her counterclaim.

Dated at Yarmouth this 28th day of September, 2015.

Andrew S. Nickerson Q.C., Adjudicator