

SCT 269025

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Cullip Construction v. Vipond Inc., 2007 NSSM 85

Between:

CULLIP CONSTRUCTION

CLAIMANT

-and -

VIPOND INC.

DEFENDANT

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: December 4, 2006

Decision: January 22, 2007

The parties appeared and service was in accordance with the Rules and Regulations of the *Small Claims Court Act*.

The claim was in the amount of \$3,455.75 for "unpaid account resulting from a contract extra requiring rock breaking on site at Scotia Recycling".

The defense was that the Claimant's bid did not qualify that rock excavation if

encountered was extra.

The Defendant Company also counterclaimed for \$2,829.48 for "repair of water line ripped out by excavator and delays due to wrong equipment and handling of gravel".

The Claimant gave a quote for doing work for the Defendant who was contracting out work the Defendant was doing for a third party. The work involved excavation and the agreement between the parties did not mention that rock excavation would be an extra.

The Claimant who was familiar with the area did not foresee rock being an issue; however, they ran into rock which had to be removed to complete the job. The Claimant contacted the Defendant and told them they had encountered rock and the Defendant gave the Claimant the go-ahead to have it removed. The third party refused to pay the Defendant for it. They said in a letter to the Defendant, "there was no mention of cost overruns at the time of issuing our purchase order and given the probability of running into rock in your business is quite likely they did not feel obligated to cover the extra costs."

The Defendant in turn refused to pay the Claimant as they were not being paid by the third party, Scotia Recycling. The Claimant's employee, Rick Hepburn, who was in charge at the site, gave evidence that rock is always an extra. This testimony, along with the Defendant's letter to the Claimant stating, "We know there should be an extra and normally is not problem to get paid" tips the scales in favour of the Claimant's assertion. It would appear the Defendant is simply denying payment to the Claimant because the third party is denying payment to the Defendant. The Defendant uses examples of contracts where it states that rock excavation will be an extra. I have not given those contracts sufficient weight to say it should have been included in the contract before this Court, for two reasons. First, they are different contracts and involve different criteria and, secondly, they deal with contracts in areas where the contractor is likely to encounter rock. For all these reasons the Claimant should be paid for the extra.

With respect to the counterclaim, the Defendant provided a memorandum dated

04/12/06. The Claimant admits it broke a copper line but the Claimant said they offered to fix it but the Defendant said they would fix it. They also said the Town ultimately fixed it. There are discrepancies in the invoice and the notes provided to the court by the Defendant. As well, the claim involves court time and travel expenses. I am not convinced this was a claim that existed except for the fact that the Defendant was being sued by the Claimant. There is also conflicting testimony and evidence on who fixed the problem and the costs associated with the problem. Notwithstanding that, I am prepared to accept that some time was exerted on fixing the pipe ruptured by the Claimant and I will refer to the notes of the Defendant and its memorandum of costs and allow four (4) man hours at \$70.00 per hour or \$280.00.

Both parties will have their costs.

IT IS THEREFORE ORDERED that the Defendant shall pay to the Claimant the following sums:

	\$3,455.75	
	\$ 80.00	Court Costs
Less	\$ 280.00	Counterclaim of Defendant
Less	<u>\$ 53.00</u>	Court Costs of Defendant
	\$3,202.75	Total

Dated at Truro, this 22nd day of January, A.D., 2007.

David T.R. Parker
 Adjudicator of the Small Claims
 Court of Nova Scotia