Claim No: 288751

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Sparks v. Benteau, 2008 NSSM 3

BETWEEN:

LANCE TREVOR SPARKS

Claimant

- and -

MICHAEL BENTEAU and UNIVERSITY FIRST CLASS PAINTERS

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on January 29, 2008

Decision rendered on February 4, 2008

APPEARANCES

For the Claimant: self-represented

For the Defendants: Michael Benteau, president

BY THE COURT:

[1] The Claimant sues the Defendants for $1,800.00 for their alleged failure to honour their guarantee of a paint job done on his home.

[2] Before getting into the merits of the case, I want to comment upon two procedural issues that are commonly seen in Small Claims Court, especially though not exclusively where parties are representing themselves. I do this in the hope that it may assist other litigants.

Suing corporate officers

[3] The first issue is that the Claimant here has sued Michael Benteau personally, although his only connection to the claim is that he is the President of the corporate Defendant, University First Class Painters. There was nothing in the evidence that would suggest that he bears any personal liability in this matter, nor any credible theory offered by the Claimant as to why he was sued.

[4] In my experience, people who are sued personally without a legal basis tend to take it very personally, perhaps disproportionately so, and that sense of insult may tend to cloud their judgment and make it less likely that they will settle behind the scenes. Claimants who sue unnecessary parties also incur additional costs that they are very unlikely to recover. Sometimes it is done purely out of spite, though I do not think that was the case here. So it is generally not a practice to be encouraged, unless "piercing the corporate veil" is justified in law.

[5] In the case here, I will say at the outset that there is no arguable case against Mr. Benteau personally. He was only sued because he is the boss of the corporate Defendant, so to speak. Much more would have to be shown before personal liability would attach, and in the case here the claim against him personally must be dismissed.

[6] From this point forward I will refer to the corporate Defendant University First Class Painters (which is a trade name of University Contracting Corporation Limited) as simply “the Defendant.”

Evidence At Trial

[7] The other issue about which I will comment concerns the conduct of the trial. Mr. Benteau came to court with no live witnesses other than himself, and sought to have accepted in evidence a number of written statements by people - including an expert witness - who should have been brought as witnesses. Mr. Benteau claimed to have sought advice from court staff about whether or not he needed to bring witnesses, and was allegedly told that he could just bring statements. Although in the case here I find it hard to believe that our very knowledgeable court staff would have so misled Mr. Benteau, I do appreciate that people inexperienced in court processes could have a hard time understanding what is required of them.

[8] The basic problem with written statements is that they are pure hearsay. Put another way, they are second hand evidence, letters or documents stating what a person would say if he or she were in court.

[9] The Small Claims Court does have a more lenient standard for the admission of evidence, including hearsay, than do the higher courts, but when it comes to deciding crucial facts the only evidence that will suffice is sworn testimony by a live witness who can then be cross-examined. This is at least as true if not more so when it comes to expert evidence.

[10] To give an example here, Mr. Benteau sought to have the Court accept a "To Whom It May Concern" letter from a likely very qualified individual who was purporting to offer an expert opinion as to why paint was peeling on the Claimant's home. While such a letter might be accepted on a non-contentious point, the question of why the paint peeled is potentially central to the case, because the Claimant needs to prove that it was the result of faulty workmanship. It would be fundamentally unfair to the Claimant to admit such evidence and allow it to prove the contentious point, when he had no advance notice that it would be offered, and did not have the author of the letter present to cross-examine. The right to cross-examine has been a cornerstone of our system of justice for centuries, and while many self-represented litigants exercise this right sparingly, it is still a vital right. Having the witness in Court also would allow the Adjudicator to ask pointed questions that might help decide the issue.

[11] In the Supreme Court of Nova Scotia, as elsewhere, there are very strict procedural rules for admitting expert reports. They typically must be provided to the other party well before a trial, and the other party given the option both to demand that the expert be present for cross-examination and have time to arrange for his or her own expert report. If these rules are not followed, the reports will not be admitted.

[12] The question of admitting statements or even affidavits (which would normally carry more weight because they are sworn) instead of live witnesses is something upon which I have commented before. In the case of *L.A. Oakes Resource Systems Incorporated v. Metex Corporation Limited* (SCH Claim No: 284377), I stated the following, which I believe is relevant to the situation here:

> [6] The Small Claims Court Act sets out the powers of an Adjudicator to admit evidence:
>
> > **Evidence**
> >
> > 28 (1) An adjudicator may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
> >
> > (a) any oral testimony; and
> >
> > (b) any document or other thing,
> >
> > relevant to the subject-matter of the proceedings and may act on such evidence, but the adjudicator may exclude anything unduly repetitious.
> >
> > (2) Nothing is admissible in evidence at a hearing that
> >
> > (a) would be inadmissible in a court by reason of any privilege under the law of evidence; or
> >
> > (b) is inadmissible by any statute.
> >
> > (3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.
>
> [7] I believe it is fair to say that the general intent of these provisions is not to overburden the Court and its litigants, many of whom are unrepresented, with the technical rules of evidence that apply to one extent or another in the higher courts. However, this does not mean that anything goes in the Small Claims Court.

[8] The issue of receiving affidavits in lieu of hearing from live witnesses was considered in an appeal before Justice Murphy of the Nova Scotia Supreme Court in *Malloy v. Atton* (2004) 225 N.S.R. (2d) 201. In the case under appeal the Adjudicator had received affidavits, with no opportunity for cross-examination provided to the opposite party. In allowing the appeal and overturning the decision, the Learned Justice said:

> 13 I interpret [the Small Claims Court Act] as giving an Adjudicator the discretion to admit or exclude affidavit evidence, provided there is compliance with the rules of natural justice.
>
> 14 The Nova Scotia Civil Procedure Rules, although not directly applicable in Small Claims Court, may be consulted for guidance in the absence of an applicable Small Claims Court rule. Civil Procedure Rule 38.10 provides that the deponent of an affidavit to be used at trial may be examined, cross examined, and re-examined. Rule 31.04 provides as follows:
>
> > 31.04 (1) The court may by order permit,
> >
> > (a) any fact to be proved by affidavit;
> >
> > (b) the affidavit of any witness to be read at a trial; and
> >
> > unless the court otherwise orders, the deponent shall not be subject to cross-examination and need not attend the trial.
> >
> > (2) An order under paragraph (1) may be made on such terms as to filing and service of the affidavit and to the production of the deponent for cross-examination as the court thinks just.
>
> 15 I interpret that Rule as allowing the Court to receive affidavits when a timely request is made, so that the Court can by order establish terms with respect to filing, service, and cross examination sufficiently far in advance of the hearing to allow an opposing party to develop a response to the affidavit evidence.
>
> 16 The right to cross examine is a fundamental part of the trial process. It is a basic procedure in our court trial system that each party has the right to cross examine persons whose testimony is introduced. There will be situations where affidavit

> evidence will be accepted without cross examination, such as where the affidavit has been provided to the opposing party in advance and the affiant is not requested to attend, where the evidence is not disputed or does not address a crucial issue, or, as contemplated by Rule 31.04 where the Court makes an order. In my view no such circumstances arose in this case, where the affidavit was first provided late in the hearing, where a request to cross examine was rejected, and the evidence was sufficiently cogent to be referenced in the Adjudicator's decision.

> [9] The same reasoning applies here, with even greater force because of the magnitude of the case. The claim in Malloy was for a total of $812.00. The claim here seeks damages very close to the $25,000.00 maximum allowed in this Court. Up until very recently in Nova Scotia, and still in many Provinces, cases of this size are heard in Superior courts with all of the procedural protections and evidentiary rules. To relax such a fundamental rule of natural justice as the right to cross-examine witnesses in a case of this size would, in my opinion, be a gross failure to provide natural justice to the Claimant.

[13] The upshot is that litigants who propose to prove disputed facts by some method other than bringing live witnesses to court, must appreciate the problem that this poses, and cannot assume that such statements, letters, or even sworn affidavits will be accepted. At the very least the opposing party should be given plenty of advance notice of any proposed statements or affidavits, and an effort should be made to get consent to the filing of such statements or affidavits. If such cooperation is not forthcoming then parties will be on notice that something more is required than simply bringing such statements to court.

The Merits

[14] The basic facts of this case are these. The Claimant purchased a ten year old house in Dartmouth in 2005. He sought a number of quotes for a

partial paint job and eventually settled on a franchisee of the Defendant, Mike McDonah's Painting. Mike McDonah was a university student at the time. The agreed upon price was $2,700.00. The job was estimated to take about four days. The work was guaranteed by the Defendant (i.e. not by the franchisee) for two years upon the terms of a written guarantee contained within the contract.

[15] The job included both inside and outside elements. The outside aspects were mostly window frames, shutters and garage doors.

[16] For a variety of reasons, including rainy weather, the job stretched beyond four days into as much as six weeks. According to the Claimant and his wife, whose evidence is unchallenged, the crew showed up just about every day although on many days little or no work was done.

[17] The Claimant and his wife became exasperated with the interminable job and basically told the franchisee to stop short of finishing the inside work. They agreed on a reduced price of $2,200.00. The franchisee later had to sue the Claimant for part of that money because, after consulting a lawyer, the Claimant decided to withhold money on account of what he thought was substandard workmanship. The Adjudicator in that case allowed the full balance of the $2,200.00 on the basis that it was an "accord and satisfaction" that essentially resolved the dispute.

[18] The Defendant in this case seeks to avoid honouring the guarantee on a number of grounds, one of which is that the guarantee does not apply where the work has not been "paid for in full." It is my ruling that this argument must fail because the renegotiated price has been paid in full.

Had the Claimant known that anything less than payment of the full original price would prevent him from relying on the guarantee, I do not believe he would have made the deal that he did. If the guarantee were going to disappear, the Claimant should have been told at the time the price was renegotiated.

[19] The Claimant first became aware of problems with the exterior paint job well within one year of the work. Specifically he noticed peeling paint on the window frames, shutters and garage doors. In October 2006 he placed a call to the Defendant and was informed that since it was a seasonal business, someone would attend to deal with the problem in the spring of 2007. He was prepared to wait.

[20] Spring came and left with no sign of the Defendant. The Claimant was particularly anxious because he was getting married in July and wanted the house in good condition for the reception and family photos. He made more calls and was eventually told that he would need to speak to Mr. Benteau, the president of the Defendant.

[21] The long and the short of it is that several people came by to look at the problem, some of which attendances the Claimant knew about, but no one actually dealt with the problem. The position of Mr. Benteau at the trial was that guarantee work is done on a priority basis, and the Claimant's house simply did not make it to the top of the list for 2007. He stated that the problem would have been dealt with on a priority basis in the spring of 2008, had the Claimant not jumped the gun and sued him. I have a hard time believing that, because it is also clear that the Claimant's failure to

pay the franchisee in full and the subsequent court case were in Mr. Benteau's mind, and may have inclined him to refuse to do the work.

[22] Even so, the Claimant says that he has entirely lost confidence in the Defendant and wants to have the work done by someone else. He produced an estimate for a complete outside paint job costing $1,800.00 plus HST.

[23] Photos of the paint job introduced into evidence reveal significant peeling and blistering. There is no doubt that the result is quite unsightly and unsatisfactory. The only question is to what extent is the Defendant responsible.

The Guarantee

[24] The Guarantee in question reads as follows:

Guarantee of Satisfaction

• Two years on all workmanship.

• Painting is guaranteed against cracking and peeling resulting from our workmanship for a period of two years from the date of completion.

• We will fix only the specific areas that have failed.

• We will repair as according to the description of the original work.

• Guarantee work will be completed as soon as possible after notification of problem. For the best service, notification should take place before April 30th for the work to be completed in the upcoming season. Guarantee work reported after July 15 will be done in the following season.

• Please note that due to weather and operational conditions, guarantee work will be performed in July, August or September.

• The client should contact us as soon as possible if a problem results.

• This Guarantee is not transferable.

This Guarantee will not cover the following:

• Galvanized metal (and other metal surfaces) and plastic surfaces.

• Mold or fungus that results from environmental causes.

• Areas that are walked on.

• Work not paid for in full.

• Areas specifically stated in special conditions as impossible to guarantee.

• Baked on finishes that customer requests to be refinished.

• Varnished surfaces.

• Work for which customer supplies paint.

• Work subcontracted or worked on by any other contractor.

• Wallpapering

• Fences

• Areas that have a moisture problem causing the difficulty.

• Any work performed where a client has specifically requested scraping and painting without a primer application.

• Bubbles and blisters caused by inner coat adhesion problems.

• Areas where moisture pools on the surface.

[25] The Defendant points to several aspects of the guarantee that might preclude liability. Specifically it submits that the problem was not poor workmanship, but rather an unforeseen condition - i.e. loose older paint - that led to poor paint adhesion. It also says that part of the affected area is one where moisture pools, which is not covered under the guarantee.

[26] I am unable to accept any of these arguments. The customer relies on the painter to determine the extent of surface preparation that is necessary to allow for proper adhesion. It is well known that surface preparation can be the most time consuming part of the job, and it is likely where most corners are cut in the painting business. Guarantees would be meaningless if painters could do the minimum of surface preparation and later plead unforeseen conditions when the underlying paint peeled and blistered, or where the adhesion failed.

[27] I also reject the theory that pooling water is part of the problem. All of the surfaces are horizontal, except for the window sills which are very clearly sloped to allow for drainage. The Defendant posited that water can still pool on a sloped surface where there are irregularities on the surface. Even if this is true, there is no evidence that pooling water contributed to the problem given that paint is peeling everywhere, and the appearance of the sloped areas is identical to horizontal areas.

[28] I did not receive any admissible evidence that would displace the finding and the inference from all of the known facts that there was a failure of workmanship that has led to the current problems. The most obvious cause would be inadequate surface preparation, but it is not necessary that the Claimant establish the precise cause. It is simply more probable than not that defective workmanship caused the problems.

[29] I also find that the Defendant's failure to undertake any repair during the entire 2007 painting season was a total failure to honour the guarantee. Any reasonable person would interpret the guarantee to mean that the

work would be done within a reasonable time, and I find that it would not be reasonable to have to wait from October 2006 until May or June of 2008 to have faulty painting attended to.

[30] The damages that flow from a breach of this guarantee would be an amount reasonably required to repair the paint job.

[31] I do note that the guarantee specifies that “only the specific areas that have failed” will be repaired. Where there has been widespread failure, as here, it is difficult to conceive of how only the affected areas can be repaired without leaving an obvious patchwork effect. I take notice of the fact that it can be difficult if not impossible to match colours where there is to be a mixture of older and newer paint. The affected areas will need considerable scraping to ensure that the same problem does not happen all over again.

[32] The Defendant produced two estimates for completing the work. One was from an outside contractor and quotes $325 + HST. The other is internal to the Defendant and quotes $153.84.

[33] It is clear that neither of these quoted prices would cover the significant repainting that I find needs to be done. The Defendant stated with pride that his company has a good reputation and stands by its work. If that is the case, it should not want the Claimant’s house to remain in its current state as an example of its work for one minute longer than necessary.

[34] It is my finding that the only credible quote is that produced by the Claimant, which is for $1,800.00 plus HST. I note that the Claimant only

claimed $1,800.00 in his claim and I am always reluctant to grant more than is specifically asked for, because this is unfair to the Defendant. The judgment will therefore be for $1,800.00. There is no need for prejudgment interest as the money has not yet been spent. The Claimant is also entitled to his costs of $85.44, for a total judgment of $1,885.44.

Eric K. Slone, Adjudicator