

Claim No: 281078

Date:20071026

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Superior Foundations Ltd. v. Masales, 2007 NSSM 97

BETWEEN:

Name Superior Foundations Limited Claimant

Name Bruce Masales Defendant

Revised Decision: The text of the original decision has been revised to remove addresses of the parties on March 26, 2008. This decision replaces the previously distributed decision.

DECISION

THE CLAIM

- (1) This proceeding was heard on September 12, 2007.
- (2) The Claimant, Superior Foundations Limited (Superior), claims the sum of \$6,535.00 from the Defendant, Bruce Masales (Masales).
- (3) On July 20, 2005, Superior, through its owner, Greg Giles (Giles), quoted a price of \$10,900.00 plus 15% HST for labour and materials to construct footings and foundation for an addition that Masales was putting on his home at 1928 Caldwell Road, Dartmouth, Nova Scotia.
- (4) The work was completed shortly afterwards and Superior issued an invoice to Masales on August 22, 2005, in the amount of \$10,900.00 plus HST of \$1,635.00, for a total of \$12,535.00.
- (5) Masales made a payment of \$6,000.00 on January 16, 2006, leaving a balance owing of \$6,535.00.

- (6) Superior also claims interest on the outstanding balance and costs of this proceeding.

THE DEFENCE

- (7) At the initial Court appearance on July 17, 2007, Masales was directed to file a Defence on or before July 27, 2007, and at that time, the proceeding was set down for hearing on September 12, 2007.
- (8) Masales failed to file a Defence.
- (9) The parties agreed to proceed with the hearing on September 12, 2007.
- (10) In evidence, Masales stated that his position was that since the work was done by Superior, he has had leaking in the basement area of his home causing damage to carpeting, mould damage, and other water damage. He also claims that the floor in the garage was not finished properly, leaving a rough finish in part of the garage. Finally, he claims for two lost days of work which he says were caused by delays in the completion of the project.

SUMMARY OF RELEVANT EVIDENCE AND FINDINGS OF FACT

- (11) Based on the quotation provided and the invoice submitted to Masales, Masales owes Superior the sum of \$6,535.00.
- (12) Dealing with issues raised by Masales in his defence, I have reviewed a series of photographs showing the basement area of the home.
- (13) The photographs show the following:
- (a) Water stains along the floor of the garage between the new section and the old section;

- (b) Removal of a portion of carpeting that Masales says was damaged by water leaking from the new section to the old section;
 - (c) Water staining where the old foundation meets the new foundation;
 - (d) Mould stains on the area of the wall near the doorway between the new and old sections of the basement;
 - (e) An area where water has been diverted into the sump pump located in the old section of the garage and an extension of the area where the sump pump sits in an attempt to further divert the water from that area;
 - (f) Areas showing what Masales claims is a rough piece of concrete near the garage door and what he alleges is a seam across the floor;
 - (g) Photographs showing what Masales alleges is a portion of the footings installed by Superior which was not squared off.
- (14) I accept that there were two separate delays in the project, the first caused when the footings were not built square and the second when Superior ran out of gravel when pouring the section of garage floor and the plumbers were delayed. On each occasion, Masales lost a day of work.
- (15) In regards to the rough section of the flooring, Masales testified that Superior ran out of gravel and could not complete an eight foot section of the flooring near the garage door, and I find that the photographs do support Masales' evidence that there is a rough patch of flooring and a visible seam.
- (16) Masales' major concern was in regards to the water damage. Giles testified that Masales was advised at some point while the footings and new section of foundation were being installed, that the existing drainage tile around the foundation of the home was plugged solid and that since the drainage tile around the new portion was to be connected to the original drainage tile, there was a potential for water problems around the foundation as the purpose of the drainage tile is to divert water away from the foundation to lower ground.

- (17) According to Giles, it is a common problem for older homes and, in many cases, new drainage tile is required when additions are being completed to existing foundations. Superior is involved in many similar jobs and has been in business for a number of years.
- (18) Giles stated that Masales told him that he was going to put new drainage tile in around the existing foundation. Giles also stated that some time later, after it became apparent that Masales had not done so, he told Masales that he could cut a hole in the new floor and an additional sump pump could be installed, however, Masales made it clear that he did not want a sump pump in that area as it would affect his intended usage of the addition.
- (19) Later on after Masales refused to pay the balance outstanding, there was a further conversation between Giles and Masales, at which time, Giles told him to dig a trench under the existing footing and divert the water to the existing sump pump. Masales in fact started to dig a trench of this nature.
- (20) Masales testified that he could not recollect having a conversation about installing new drainage tile or other options until after the work had been completed and he began experiencing water leakage.
- (21) He confirmed that the house is over forty years old and that the sump pump was present when he bought the home, however, the sump pump was used mainly for water draining from the washer. Masales did not deny that the sump pump had been used to remove water leaking into the basement area, and I find that there were water problems before Superior commenced the installation of the new foundation, although not to the same extent.
- (22) Giles has years of experience in this business and has installed numerous foundations. I accept his evidence that Masales was informed of the potential problems. Masales did not deny that the conversations occurred, but stated he could not recall when they occurred. I find that Masales was made aware that there were problems with the existing drainage at the time that the new section of foundation was being installed. I accept that it was explained to him that the drainage tile was plugged.
- (23) Masales had a specific budget in regards to the addition, and the cost of installing new draining tile around the old foundation was not a cost that he had anticipated. He was acting as his own general contractor and trying to cut costs where he could as many people do. Even as of the date of the hearing, the work associated with the new addition had not yet been completed.

- (24) Masales is now proposing that the existing sump pump be used to pump the water through pipes to be installed under the garage floor at a cost of \$1,200.00. This would require that a portion of the existing garage floor be cut out across the entire room and would not leave a smooth finish.
- (25) The burden is on Masales to prove on a balance of probabilities that the water damage that he has experienced since the installation of the new footings and foundation was caused or contributed to by the actions of Superior.
- (26) No expert evidence was submitted by either party in this case.
- (27) The City of Halifax inspected the drainage tile system installed by Superior and it passed inspection.
- (28) There is no evidence that the work that Superior did was in any way negligent or below acceptable standards. Giles and Masales discussed the potential water issue and how it could be resolved. Masales was understandably concerned about keeping the costs down as this was an unexpected expense.
- (29) Masales was upset primarily because he advised Superior of the water problem and they did not send anyone out to look at it. He was pleased with the work done by Superior and even stated in cross-examination that he would have paid the bill in its entirety if it had been submitted immediately afterwards.
- (30) On a balance of probabilities, I conclude that Masales has failed to connect the water problems to any negligent or improper or substandard work on behalf of Superior.

REDUCTION OF CLAIM

- (31) I will apply the following reductions to the amounts owing by Masales to Superior:
 - (a) \$407.18 for two days lost wages as a result of delays in the project requiring Masales to be at home;

- (b) \$500.00, including HST, for the rough finish to the garage floor and the visible seam in the area where Superior ran out of gravel and there was a delay in pouring the floor and it had to be poured in two separate pieces. No evidence was tendered by either party as to the actual cost to remedy the problem.
- (32) Based on the above findings, no allowance is awarded in respect of water damage or mould damage.

INTEREST

- (33) There is no evidence of an agreement that interest would be charged on outstanding accounts. There is no reference to any such agreement in the quotation provided by Superior to Masales and there was no evidence to that effect. Also, there is no reference to interest on overdue accounts on the invoice submitted by Superior to Masales.
- (34) There is no evidence therefore to support a claim for payment of interest on a contractual basis.
- (35) In the circumstances, it would be appropriate, however, to award pre-judgment interest from the date that the claim was filed, May 17, 2007, to the date of this decision at the rate provided for in the Small Claims Court Regulations.

COSTS

- (36) As success has been divided, I exercise my discretion not to award costs to either party.

JUDGMENT

(37) The Claimant shall have Judgment against the Defendant in the following amounts:

(a) \$5,627.82 (\$6,535.00 less \$907.18)

(b) Prejudgment interest of \$75.04

TOTAL \$5,702.86

Dated at Dartmouth, Nova Scotia,
on October 26, 2007.

Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)

