Claim No: 299375

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Ali v. Blois Burns Excavation, 2009 NSSM 2

BETWEEN:

KIFAH ALI

Claimant

- and -

BLOIS RALPH WILLIAM BURNS, c.o.b. as Blois Burns Excavation,
SHAWN O'HEARN, c.o.b. as S.M. O'Hearn Contracting, and
HARRY PETERS, c.o.b. as Blois Burns Excavation

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on January 13, 2009.

Decision rendered on February 3, 2009

APPEARANCES

For the Claimant	Patrick Eagan, counsel
For the Defendant, Blois Burns	Michael Duggan, counsel
For the Defendant Harry Peters	self-represented

BY THE COURT:

Introduction

[1] The Claimant owns a home which he fairly recently built in Lower Sackville. In the spring of 2008 he was looking for someone to do some landscaping and to finish the driveway. He did some searching on the internet and found an advertisement by the Defendant Shawn O'Hearn ("O'Hearn"). He called and arranged to meet O'Hearn at the property. O'Hearn showed up with another man, the Defendant Harry Peters ("Peters").

[2] According to the evidence of the Claimant, he asked O'Hearn how much it would cost to do the landscaping and driveway work, and also asked him who he was working for. There was a brief negotiation which resulted in a $2,000.00 fee for labour only, with the Claimant purchasing all of the supplies directly.

[3] According to the Claimant, O'Hearn told him that he was an employee of the Defendant Blois Ralph William Burns, who carries on business as Blois Burns Excavation (hereafter "Burns"). This is a critical piece of evidence because the sole issue in this case is who is legally responsible for the substandard work that was eventually done.

[4] To make a long story short, an exposed aggregated driveway was constructed, which has proved to be so defective that it cannot be salvaged and will have to be removed. It is a liability to the property rather than an asset. As such, everything that the Claimant has paid for in labour and materials for the driveway is a total waste, and he will have to pay

someone to remove it just to be placed in the position that he was in before any of the work was done.

The parties

[5] The Claimant brought this action against all of Burns, Peters and O'Hearn. He was unable to serve O'Hearn, who appears to have left town, leaving behind unpaid bills[1] and substandard work.

[6] The suit against Peters is based on a theory that Peters was a partner of Burns. The evidence supports a finding that Peters had been affiliated with Burns in some capacity, but that he discontinued the business relationship shortly after this job began, and that moreover he had next to nothing to do with this job. He did not work on the Claimant's landscaping or on his driveway. I am unable to find on the evidence that Peters assumed any responsibility for this job, or that he held himself out as a partner of Burns at the relevant time, and as such the claim against him must be dismissed.

Burns's responsibility

[7] The issue then is whether Burns is responsible for the faulty work that O'Hearn performed.

[8] From the perspective of the Claimant, these are the facts that led him to believe that it was Burns with whom he was contracting:

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[1]For example, one young woman, who he hired to do landscaping, worked for more than a week on the project and was never paid for her work.

A. O'Hearn told him that he worked for Burns. Had the Claimant believed that O'Hearn was working for himself, it is questionable whether he would have hired him because O'Hearn was relatively young and inexperienced.

B. O'Hearn prepared a handwritten quote on a small piece of paper, which reads as follows:

> **Blois Burns Contracting**
> **I, Shawn O'Hearn, received $1,000.00 (one thousand dollars) as partial payment on Landscaping at 54 Falcon Crest Ct., April 30, 2008. (Signed)**
> ***Balance to pay after work completed including driveway.**

C. The Claimant made out his $1,000.00 cheque to Blois Burns Contracting, which cheque was cashed by Blois Burns Contracting.

D. During the project, the Claimant witnessed O'Hearn on his cell phone speaking to someone who was, by all indications, Burns.

E. On the day that the concrete was to be poured for the driveway, it was obvious that O'Hearn did not have enough men on site to work with the concrete, creating a risk that it would set before it was properly compacted etc. Shawn called Burns, who managed to

round up a few men on very short notice and showed up to do the work. Burns appeared to be the person in charge on that day.

F. Within a day or two, the result was visibly substandard and the Claimant started calling Burns. He left several messages for Burns, and vice versa. Burns promised that he would have someone there to look at it. In a voice message saved on the Claimant's telephone, Burns can be heard stating words to the effect that "nothing like this has ever happened to me before" and that he "wanted to make it right."

[9] Burns testified that O'Hearn had not actually ever worked for him but he had recently worked with Peters and he was considering O'Hearn as someone with whom he might work in the future. He stated that O'Hearn was not his employee and had no authority to contract in his name.

[10] Burns stated that he learned from O'Hearn that he had a potential job for which he needed a back-hoe. Burns was happy to put his machine to work and struck a deal with O'Hearn to split the revenue from the contract, $1,000 to each. He stated that he would normally rent the machine out for $50 or $60 per hour but was willing to allow O'Hearn to have this flat fee arrangement.

[11] He accepted the $1,000.00 cheque from the Claimant because he required a deposit on the use of the machine.

[12] Burns stated that he received a panicky call from O'Hearn on the day the concrete was being poured, and was simply responding to a plea for help.

He rounded up as many qualified guys as he could and tried to help. When the driveway proved afterward to be defective, he explained his communications with the Claimant as simply trying to be helpful.

[13] Burns testified that he believed the problem with the driveway was that the wrong type of concrete may have been used. This opinion was shared by Michael Sampson, one of the men who was called by Burns to help on May 30, 2008. He stated that he knew even while it was being poured that it was the wrong concrete. He testified that O'Hearn (not Burns) was the foreman in charge. I was not impressed with Sampson's evidence, and cannot understand how this individual could have stood by and not said anything as he allegedly watched the wrong type of concrete being poured.

Discussion and conclusions

[14] There is no real dispute that there was faulty workmanship, and that one or more persons would be liable for it. Although he was not served and therefore not there to speak for himself, on the available evidence O'Hearn would be legally liable as he was directly involved in the errors that were made.

[15] I am unable to find any fault with the Claimant himself. It was suggested that he might be partially to blame because he purchased all of the materials. This has no merit, as he was specifically instructed by O'Hearn as to what needed to be ordered and purchased. It makes no difference how the material was ordered or paid for.

[16] I have already found that Peters was not a contracting party. So the question is whether Burns is responsible, or put another way, whether O'Hearn was acting as Burns's agent. This brings into play the law of agency and the concepts of actual and ostensible authority.

[17] Essentially, a person may become liable as a principal if the agent has his actual authority, or if he has ostensible authority, sometimes known as agency by estoppel. The principle is well known to the law, and is exhaustively referenced in such sources as *the Canadian Encyclopedic Digest*, the following extracts of which set out many of the applicable concepts:

> §51 Agency by estoppel arises where one person has so acted as to lead another to believe that he or she has authorized a third person to act on his or her behalf, and that other, in such belief, enters into transactions with the third person within the scope of such ostensible authority. The first-mentioned person is estopped from denying the third person's agency and it is immaterial whether the ostensible agent had no authority or merely acted in excess of it.
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> §52 Hence where a person has by words or conduct held out another person or enabled another person to hold himself or herself out as having authority to act on his or her behalf, he or she is bound as regards third parties by the acts of such other person to the same extent as he or she would have been bound if such other person had in fact had the authority he or she was held out as having.
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> §70 In considering whether a person is bound by acts of an ostensible agent which are alleged to have been ratified, the distinction is to be observed between a ratification to be implied from conduct showing an intention to ratify and an estoppel to deny ratification as where, without a conscious intention to ratify, the so-called principal is estopped from denying that his or her conduct must be treated as a ratification.

> §79 The authority of an agent may be actual or apparent. Actual authority is of two kinds: express or implied. Such kinds of authority result from the express or implied consent of the principal that the agent should represent or act for the principal. Such consent is manifested by the principal to the agent. Apparent or ostensible authority results from a manifestation by the principal to third parties that the agent represents or acts for the principal.
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> §100 Whether any such implication can be made in the circumstances is a question of fact in each instance.
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> §136 An agent may bind the principal by acts done within the scope of apparent or ostensible authority, although those acts may exceed the actual authority as between the agent and the principal, the private instructions which limit that authority, and the circumstances that the acts are in excess of it, being unknown to the person with whom the agent is dealing.
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> §139 A person relying upon the acts of an agent as binding the principal must show either that the agent has been directly authorized by the principal to do what is relied upon, or that the agent has been employed by such party in such capacity as necessarily implies the authority to do so, or has been held out by the principal in some way as having it. Strangers to the actual terms of an agent's engagement, knowing only what the principal may be reasonably presumed to have authorized, may become entitled to say that the agent has been held out as having the apparent or ostensible authority of the principal for doing as he or she did.
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> §141 When the actual authority of an agent has been negatived, a plaintiff seeking to hold the principal liable on the basis of apparent or ostensible authority must show a holding out by the principal of the agent as such or some custom on which apparent or ostensible agency can be predicated. Where a party without antecedent authority assumes to act as agent for a named principal, the principal must disclaim the agency as soon as he or she becomes aware of the agent's actions and that third parties are acting in reliance upon the appearance of agency.

[18] Applying these concepts, clearly it would not render Burns liable just because O'Hearn said he was acting on behalf of Burns, and that he believed him. There has to be a basis to find that Burns either knew or

ought to have known that O'Hearn was representing himself as his agent, and that he did nothing to disabuse the Claimant of that knowledge, or actively led the Claimant to believe that the ostensible agent had his authority.

[19] On the evidence, I find that there was at least ostensible authority, if not actual authority, and that Burns is estopped from denying that authority. Although Burns plausibly might not have known about the handwritten quotation that bore his name, he ought to have been alerted by the fact that the Claimant had written a cheque to him in advance of any work being done. There is no evidence that the Claimant was told that O'Hearn was merely putting a deposit down on the back-hoe. He was asked for a down payment and he provided it.

[20] The subsequent events also bear out that Burns knew or ought to have known that the Claimant believed that he was contracting with him, and he had ample opportunity to dispute the agency. It was Burns who sprung into action when the project was short of workers, and it was Burns who dealt with the Claimant when the job turned out badly, without any qualification.

[21] If he were indeed just trying to help, as he stated, I would not want to discourage someone in his position from acting generously or altruistically. However, it is significant in my mind that in his communications with the Claimant, Burns never suggested that the Claimant should be looking to O'Hearn for satisfaction rather than to him. He was rather apologetic for the poor result and was clearly on record as stating that this had "never happened to me before." This is strongly supportive of the view that Burns understood that he had responsibility for this contract, and that he did not

try to evade that responsibility until it became clear how expensive it was going to be to rectify the problem.

[22] I do not doubt that as between O'Hearn and Burns things were rather loose and ill-defined, but it is also significant that the deal that Burns says he had with O'Hearn was to split the contract amount. He had a beneficial interest in the contract to the tune of 50%. This is certainly a lot closer to being a principal than merely a renter of a piece of equipment. It might even render Burns as a partner of O'Hearn in the contract, with resulting liability to the Claimant. The end result is the same. Burns is liable for the poor workmanship.

Damages

[23] The Claimant asks for $8,156.54, made up of:

A. $4,331.72 for the cost of materials put into the driveway;
B. $1,000.00 as the labour deposit
C. $2,825.00 to remove the existing driveway.

[24] All of the above elements of the damage claim are amply supported by the documentary evidence. The $2,825.00 amount for removing the concrete is actually one element in an estimate for removal and replacement of the driveway. It is possible that a stand-alone estimate for removal only might be different, but if anything it might be more rather than less than what it is in a package deal.

[25] As such the Claimant is entitled to judgment against the Defendant Burns in the amount of $8,156.54 plus his filing fee of $174.13. No other costs have been claimed or proved. I would not allow prejudgment interest in my discretion, as not all of the money has been spent.

Eric K. Slone, adjudicator