Claim no. 296144

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Century 21 Classic Realty Ltd. v. Eye Catch Signs Ltd., 2008 NSSM 82

BETWEEN:

CENTURY 21 CLASSIC REALTY LTD.

Claimant

- and -

EYE CATCH SIGNS LTD.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on October 16, 2008, further submissions received October 17, 2008 and October 31, 2008

Decision rendered on December 18, 2008

APPEARANCES

For the Claimant Blair MacKinnon, counsel

For the Defendant Ian Dunbar, counsel

BY THE COURT:

[1] This claim seeks $8,635.46 plus interest and costs for repairs claimed to have been necessary to a sign constructed by the Defendant for the Claimant.

[2] The Claimant owns a commercial building on Wyse Road in Dartmouth, which it calls “The Real Estate Mall,” out of which it conducts its own business and leases units to tenants.

[3] In 2005 the Claimant decided to construct a large outdoor sign for the Mall and eventually contracted for same with the Defendant, which has a reputation for creative signs. The initial quote for the sign, was $42,500.00 plus HST. The eventual bill made some adjustments to that price, which are not material to this case.

[4] The sign was constructed in late 2006 and completed in early 2007.

[5] The design has several components. There is a large LED display which shows the time of day or other information. Below that, on the main column of the sign, there is an area for nameplates for each tenant. It is that portion of the sign that has provoked this legal action.

[6] The original design called for an illuminated pylon, which would back light the individual tenant nameplates by shining through the stencilled plate, creating a “white on black” effect. When tenants changes, it would be relatively easy to change the sign by creating a new nameplate for the tenant.

[7] The sign was delivered and looked great, until the nameplates began to warp when they became heated by the sun. It is an inescapable conclusion that the design had failed adequately to take into account the expansion and contraction of the nameplates. The effect was not pleasing and the Claimant was not happy.

[8] The Defendant responded with a design change to work around the problem, which instead of creating the white on black effect, did the opposite. The solution was to affix individual black letters to the light box.

[9] The Defendant now takes the position that the sign actually met the required standards, and that its repair efforts were done strictly out of goodwill and not as an admission that the sign was defective.

[10] Although the effect of the fix is reasonably pleasing to the eye, the Claimant is not happy, for a number of reasons which were articulated in a letter dated April 11, 2008. The major complaint concerned the expansion and contraction problem, while there were several more minor complaints including a spelling mistake in one of the tenant's names. With the nameplates no longer being used in favour of direct lettering, there are also problems with the way the frame looks. Also, parts of it are more exposed to the weather because the metal frame which was designed to contain the nameplates is essentially empty.

[11] The Defendant has not been willing to do major repairs, with the result that the Claimant has obtained estimates to redo the sign and hopefully achieve something closer to what it originally contracted for.

[12] The President of the Defendant, George Jeha, who testified at trial, was not involved in the original design and quote. The employee who gave the quote and oversaw the project was Hugh Bray who was later dismissed for reasons that were not specified at the trial. Mr. Jeha steadfastly clung to the position that, although the plates expanded and contracted with heat with an unappealing result, there was no defect in the design. He testified that he would have felt justified in charging the Claimant for the modifications which were undertaken, although he did not do so out of customer goodwill.

[13] I reject his evidence and position entirely.

[14] I find that the sign had an inherent defect in design, which resulted in the nameplates being unable to withstand expansion and contraction without deforming and becoming unsightly. The Claimant relied entirely on the expertise of the Defendant. Viewed one way, the Defendant failed to deliver what it promised under its contract. Viewed another way, it has breached its warranty. All of its efforts to come up with a viable solution were appropriate regardless of the theory of liability, but the end result is not quite satisfactory nor is it what the Claimant contracted for.

[15] The Defendant had refused to do any more work, although it somewhat limply indicated at trial that it should be given the opportunity to do its own warranty work rather than have to pay for someone else to do it.

[16] I do not accept that under the circumstances the Claimant should be obligated to work with the Defendant. It is entitled to damages

representing the cost of repairing the sign, subject to the caveats that it is not entitled to impose a standard of perfection; nor is it entitled to commit economic waste by insisting that something which is serviceable be converted at disproportionate cost into something that is simply more of what it wants.

[17] The Defendant submits that the measure should be diminution in value rather than the cost of repair, and argues that there has been no proof that the value has actually been diminished.

Repair estimates

[18] At trial the Claimant presented one estimate and called as a witness the individual, Doug Mattatall of Mattatall Signs, who prepared it. The estimate includes a basic solution at a “base” amount with a higher amount for a solution using a higher end product.

[19] The base estimate is $4,730.00 plus HST. If the Claimant were to opt for “1/8 inch aluminum with backfilled white acrylic” panels rather than standard lexan, it would increase the quote by $364 per panel, plus HST, for a total of $7,642.00 plus HST, for a total of $8,635.46. This latter amount is what is claimed in the action.

[20] Mr. Mattatall was quite confident that his methods would solve the problem and give the Claimant something much like what was originally intended. I do note that Mr. Jeha was dubious that Mattatall’s solution would work properly, but on balance I prefer the evidence of Mr. Mattatall.

[21] The Defendant also argued that the higher-end panels would represent a betterment, since the panels it had originally delivered were of a lesser quality.

[22] The original drawings and specifications for the sign presented to the Claimant by the Defendant talk about “aluminum & mechanically fastened acrylic, illuminated letters.” Lexan is a synthetic, plexiglass like product. It appears to me that what the Defendant had promised was much closer - if not identical to - the more expensive of the two quoted materials than to the lexan. By accepting lexan the Claimant would be getting something less than what the Defendant had originally promised.

Post-trial evidence

[23] The day after the trial, counsel for the Defendant wrote to the court and advised that he had become aware of a second company that had been consulted by the Claimant and had quoted on sign repairs, Tremblay Signs. Attached to the letter was a quote dated April 9, 2008, proposing a solution that would cost $2,780.00 plus HST. The Defendant was critical of the Claimant for not bringing this quote to the attention of the court.

[24] The questions for me to decide are these:

A. Should I admit this as evidence, essentially re-opening a case that had been finally argued and closed a day earlier; and

B. If I do re-open the evidence, what weight if any should this evidence receive.

[25] The Defendant has cited jurisprudence from the Nova Scotia Court of Appeal to the effect that the decision whether or not to admit the evidence is essentially a “balancing of prejudice.” I accept that as an appropriate test.

[26] In the circumstances of this case, where the evidence was brought to the court’s attention so soon after the trial, and where it was something that the Claimant obviously knew about but had decided not to raise, there is very little prejudice to the Claimant. On the contrary, the Defendant is potentially more seriously prejudiced by exclusion of the evidence.

[27] Counsel for the Claimant responded to this evidence by a letter dated October 31, 2008. He takes the position, and rightly so, in my opinion, that there was no obligation to introduce this evidence under the circumstances. The Tremblay quote proposes a completely different solution, to which I will refer further below. Had it merely been a lower quote for the same fix that Mattatall proposes, arguably the Claimant should have raised this lower quote because it has an obligation to mitigate its damages. It would have to explain to the court’s satisfaction why it wanted to go with a higher quote.

[28] However, in my opinion, the two quotes are for very different things. Tremblay proposes to:

> “Cut out the aluminum face section, fill in the gaps and replace the white acrylic with white Plexiglas. This 3/16" Plexiglas will sleeve into the existing side frames and be secured on the bottom with an H-Bar section fastened to the bottom panel. Instead of the aluminum

cross bars, we will use pressure sensitive vinyl to delineate the name panels. The panels will be painted to match existing."

[29] This is not at all like what Mattatall proposes, and it is critical to this case that Mattatall's plan would give the Claimant something very close to, if not precisely, what the Defendant promised in the first place. Tremblay's plan would result in something quite different that would look quite different.

[30] It is not for me to make an aesthetic decision for the Claimant, to say that it should accept a black on white effect when it bargained for white on black. I am sensitive to the principle that I should not sanction a costly and wasteful solution that is out of proportion to the problem, but I do not believe that is the case.

[31] I am also sensitive to the need to avoid allowing a betterment without deducting such betterment from the assessed damages. In the case here, I do not think there is a betterment. At best, the Claimant will get something very like what it was promised in the first place.

[32] If the Defendant is correct in its prophesy that the Mattatall solution will not work, the Claimant could well end up with a fiasco on its hands, but it will no longer be this Defendant's problem.

Result

[33] In the result, I find that the Defendant breached its contract by designing something that was faulty and unsuitable. It was given every opportunity to rectify the problem, but did not do so to an appropriate degree when it had

the chance. The Defendant has established to my satisfaction that a reputable contractor is willing to undertake the rectification for the sum of $8,635.46, which will result in the Claimant receiving something very close to what the Defendant promised in the original contract. I find that the measure of damages is accordingly $8,635.46. The Claimant is also entitled to its filing costs of $174.12. This is not an appropriate case for prejudgment interest because the work has not yet been done.

Eric K. Slone, Adjudicator