

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Dodge v. Ramar Construction Ltd., 2016 NSSM 16

BETWEEN:

MARK PORTER DODGE

Claimant

- and -

RAMAR CONSTRUCTION LTD.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on February 16, 2016

Decision rendered on May 6, 2016

APPEARANCES

For the Claimant

self-represented

For the Defendant

Shawn Marchand, manager
Chris Marchand, manager

BY THE COURT:

[1] The Claimant is a homeowner in Fall River, Nova Scotia. The Defendant company (“Ramar”) is a well-known builder and developer in Nova Scotia.

[2] In November 2003, the Claimant hired the Defendant to put an addition on his house. The job was completed in January 2004.

[3] Part of the job was to install a roof on the original structure and on the new addition. The specifications for the roof, contained in the written contract, stated:

Roofing strip old roof and supply and install new 25-year shingles 3 tabs to new and old roof, ice guard/tar paper/galvanized nails/white drip edge and ridge vent

[4] Approximately 11 years later, on February 14, 2015, the Claimant experienced water leaking into one of the upstairs bedrooms in his house. This leaking spread and became progressively worse.

[5] The winter of 2014-5 was a bad one for snow and ice in Nova Scotia. On February 17, 2015, the Claimant removed a build-up of ice on his roof. Further inspection by him revealed that there was ice on the underside of the soffits. Inside the attic, water was running down from several places. He became convinced, given the way the water was running, that ice had to be getting under the shingles (and presumed tar paper) and entering through the joints between the plywood sheets. He opened up an insurance claim on February 20, 2015, reporting that there was considerable damage occurring inside the home, primarily to flooring and some drywall.

[6] The Claimant's insurer hired a restoration company to do some clean up and repair in early March. Unfortunately, by three weeks later there was more damage discovered, with warped floors in places. The insurance company insisted that the root of the problem be detected and repaired, or the Claimant's insurance coverage would no longer apply, and no further remedial work inside the home would be undertaken at the insurer's expense. It was clear to the Claimant (and an obvious conclusion) that the source of all the leakage was the roof, and that the entire roof should probably be replaced.

[7] The Claimant obtained several quotes, and eventually selected Mader's Roofing, a reputable roofer. Its quote was \$7,000.00, including HST. As they commenced removing the old roof, on or about May 13, 2015, they reported to the Claimant that there was no tar paper under the shingles. The Claimant referred back to his contract and confirmed that the roof was supposed to have tar paper.

[8] The Claimant tried to contact the Defendant and, after several attempts spoke to Shawn Marchand. He acknowledged then (as he does now) that the failure to install tar paper was contrary to the contract. However, he took the position (then, and as now) that the lack of tar paper did not cause or contribute to the ice damming problem.

[9] The Defendant questioned then (as it does now) why the Claimant chose to use another roofer, rather than allowing Ramar itself to make good on its original agreement. The Claimant explained that he had not originally suspected that Ramar had done anything wrong, and simply sought out a reputable roofer.

By then, Mader's was already contracted to do the roof and was into the job. The Claimant says it would have made no sense to terminate the contract with Mader's, as this would have placed him in breach of contract and in jeopardy of having to pay them some or all of the contracted amount. Mader's eventual bill was \$7,576.73, which included the original quote of \$7,000.00 plus \$851.00 to cover the replacement of eight sheets of plywood that needed to be replaced, less \$274.27 for nine returned bundles of shingles.

[10] The Claimant conceded on cross-examination that tar paper is not required by the Building Code, but he believes that it would have added an extra layer of protection. In particular, if the tar paper is installed properly it will cover up the open joints between sheets of plywood and make it harder for water or ice to infiltrate.

[11] Shawn Marchand is one of the grandsons of the founder of the company, and he testified on behalf of the Defendant. His view was that (a) the lack of tar paper was not the source of the problem, and (b) that it was premature for the Claimant to have replaced his entire roof. Also, he believes the Claimant ought to have consulted an expert to determine whether the problem was the lack of tar paper.

[12] Mr. Marchand also insisted that had his company been allowed to do the re-roofing at its cost, it would have been much cheaper. He says it would have cost them about \$3,500.00.

[13] Mr. Marchand conceded that his company had made a mistake, and before these court proceedings were brought they tried to negotiate some compromise with the Claimant, to no avail.

[14] The Defendant sought to introduce a written expert opinion, from professional engineer Lawrence White. The Claimant objected, as he had not been given any advance notice. I cautioned the Defendant that a written expert report is given limited weight, especially on a critical issue, without the expert being available to be cross-examined. In the end, the hearing was adjourned to give both parties the opportunity to consider their options. The Defendant was given the option to bring Mr. White to court. The Claimant was given the opportunity to obtain his own expert. Both opportunities were declined.

[15] The thrust of Mr. White's opinion is that the absence of tar paper would not have prevented ice damming.

[16] The Claimant filed some articles taken off the internet that suggest the opposite. I cautioned the Claimant that such evidence also carries limited weight. However, it would have been instructive to have Mr. White explain why his view is different from views that are evidently held by other ostensible roofing experts. I cannot say whether, in the end, Mr. White would have stood by his view or, at least, allowed that it was a matter of some controversy.

[17] In the result, I fall back on a simpler set of questions:

- a. Was the Claimant justified in replacing his roof?
- b. Was the absence of tar paper a factor in replacing the roof?

[18] In my view, there is sufficient evidence, as well as logic, to the effect that the presence of tar paper might have avoided, or at least reduced, the leaking caused by ice damming. It seems logical to me that if ice gets below the shingles, absent tar paper, when it starts to melt it will quickly find the cracks between the plywood and infiltrate the roof structure. If it gets under the shingles and hits tar paper, upon melting it would have to find the seams between the lapped layers of tar paper and further infiltrate to find the seams between the sheets of plywood. Although tar paper is not as impermeable as a moisture barrier, it is designed to repel water.

[19] I find as a fact that the use of felt paper, or tar paper, (whether perforated or not) is standard practice in the roofing industry - whether or not it is mandated by the Building Code. If it did not serve a purpose, it would not be used. Since the main purpose of a roof is to keep water from entering the structure, I conclude that tar paper plays a role in protecting the structure.

[20] I believe the Claimant was entirely justified in replacing his roof. He risked losing his insurance coverage had he not done so. I accept that he had no reason to call the Defendant before he found out that the roof lacked tar paper, and by then he was fully committed to Mader's Roofing. It would have been financially irresponsible to fire them partway through the job.

[21] The Claimant seeks the cost of the new roof as well as his \$2,500.00 deductible which he paid in connection with his insurance claim, for a total of \$10,076.73, plus costs.

[22] As stated, I reject the Defendant's argument that it is not responsible for the replacement of the roof. I also reject the argument that the Claimant failed to mitigate his damages. It would have made no sense to stop Mader's from continuing with the job, in the hope that Ramar might have done it cheaper.

[23] The only argument that the Defendant makes, which has some force, is that of betterment.

[24] This is a contract claim. The measure of damages in contract is to place the innocent party in the position he would have been in, had the contract been properly performed.

[25] Placing the Claimant in the position he would have been in, had the contract been properly performed, dovetails with the issue of betterment. As of 2015 when the problems started, had the contract been properly performed in 2004, the Claimant would have had an 11-year old roof performing adequately. How does the court place him in that position, given all that actually occurred? He now has a one-year old roof performing adequately, which, all things being equal, will last him into the future long after the old roof would have had to be replaced anyway.

[26] As such, allowing a reduction for betterment makes sure that he is not overcompensated. Indeed, it is the only possible way of applying the proper measure of damages.

[27] This is far from an exact science, but my approach will be to reduce the claim for the new roof by 11/25 - namely 11 years out of the assumed maximum lifespan of 25. This factor reduces the \$7,576.73 to (rounded) \$4,243.00.

[28] The Claimant should also recover his insurance deductible of \$2,500.00. This is an amount that he should never have had to pay, had the original roof been constructed appropriately.

[29] The Claimant is accordingly entitled to damages in the amount of \$6,743.00 plus his costs of \$199.35.

Eric K. Slone, Adjudicator