Claim No 307789

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Binns v. Habitat for Humanity HRM, 2009 NSSM 37

BETWEEN:

EDWARD WILLIAM BINNS

Claimant

- and -

HABITAT FOR HUMANITY HRM

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 6, 2009, written submissions received May 16, 2009 and May 25, 2009

Decision rendered on July 21, 2009

APPEARANCES

r the Claimants	self-represented
For the Defendants	Cynthia Scott Counsel

BY THE COURT:

Introduction

[1] The Claimant is an experienced self-employed businessman with some twenty years in various aspects of the construction industry.

[2] Habitat for Humanity HRM is the local chapter of the well-known non-profit organization which works in various places in the world to provide affordable housing. Its work is supported through a number of sources, including charitable donations, fundraising efforts of a small number of staff and paid suppliers, volunteer work and community partners. As laudable as its mission, however, it is also a legal entity that enters into contracts which it must respect as much as would any other enterprise, commercial or not.

[3] The case here primarily concerns a written contract that the parties entered into on April 9, 2008, hiring the Claimant to perform a role as Construction Manager. The Claimant says that the Defendant failed to honour the contract and that he has suffered financial losses for which he seeks recovery.

The contract

[4] The contract document is more like a signed job description, and it clearly sets out the responsibilities of the Construction Manager. The relevant provisions, for my purposes, are, under Primary Duties and Responsibilities:

Oversee the entire building process of one home in the Millwood Subdivision to R-2000 standard; and four homes in Spryfield

[5] Under the heading compensation, it states: *"You will be compensated first and foremost by the joy of working with Habitat and helping a family move into their first home. Financial compensation will be $6,000 per unit to be paid in full on the day of the home dedication."* As will be discussed further below, there are many things the contract simply does not address.

[6] The document is signed by the Claimant and on behalf of the Defendant by Anne Connolly, (then) Build Coordinator, and Deborah Eaton, (then) Executive Director.

The facts leading to the claim

[7] The original Millwood home was completed in early 2008, without any apparent difficulty, after which it was generally anticipated that the Spryfield homes were to be built later that summer. For no fault of the Claimant, the Spryfield project was postponed at least twice and eventually cancelled. The Claimant says that he kept himself available throughout that time, because he had contractually committed himself, and missed out on other income-earning opportunities. He claims $24,000.00 in damages.

[8] It is a peculiar feature of this case that for much of the relevant time, the people running the Defendant did not appreciate that they were contractually bound to the Claimant for the Spryfield homes. There had been some personnel changes, and the Executive Director at the time the

contract was signed, Ms. Eaton, had apparently taken it upon herself to amend the originally drafted contract (which was just for the Millwood house) to include the Spryfield houses. Ms. Connolly, who was at the interview meeting in her capacity as Build Coordinator, and who had not seen the redrafted contract, testified that Ms. Eaton brought to her attention only one change on the final page of the agreement, which reflected an increase in the agreed compensation from $5,000 to $6,000 per unit. This was the only change that was specifically brought to Ms. Connolly's attention and she, incorrectly, understood this was the only change.

[9] Ms. Connolly soon thereafter replaced Ms. Eaton as Executive Director and inherited the responsibility for managing, among other things, the contract. She persisted for some considerable time in her general understanding that, if and when the Spryfield homes were ready to be built, the Claimant would be the logical choice and hoped he would make himself available. It is fair to conclude that Ms. Connolly and the Defendant generally did not appreciate that there could be economic consequences to continuing or cancelling any continued relationship with the Claimant.

[10] Insofar as the original Millwood home was concerned, he contractual relationship was not purely governed by the signed document. There was a side deal agreed to, where the compensation was paid out over the course of the construction rather than in one lump sum at the end. There were also some meals provided on site (by volunteers) and a mileage allowance paid. None of that was in the written contract.

[11] The Spryfield homes were to be a four-unit structure on a piece of land that was being purchased for the purpose. Construction was to begin in July 2008. In the meantime, after the Millwood home had been completed the Defendant hired the Claimant on a separate contract to do some additional work. Ms. Connolly testified that this was in part to keep him busy, as she did not want to lose him.

[12] The problems with the Spryfield project first became known in about late May 2008, when it was discovered that the land could not accommodate the planned building due to setback deficiencies. The Claimant was privy to information through his attendance at meetings or otherwise, as attempts were made to try to redesign the building and, later, to look for other land.

[13] By sometime in or about late June 2008, it was known that there would be no Spryfield building going on until early 2009 at the earliest. Ms. Connolly testified that she advised everyone (including the Claimant) that they could "jump ship" if necessary, and move on to other things. She acknowledges that she was still unaware at that time that the Claimant had a written agreement for those units.

[14] The Claimant testified that he considered abandoning the Defendant but made the decision to keep himself available.

[15] Discussions ensued throughout the early part of 2009. Ms. Connolly advised the Claimant that there were anticipated budgetary problems with the 2009 building project, and that there would have to be certain concessions made. Specifically she advised the Claimant that the price

per unit would have to be reduced from $6,000 to $5,000, that there would be no meals or mileage allowance, that the construction period would be extended from 12 to 20 weeks, and that there would be no weekly draws. She later relented on the $6,000 to $5,000 reduction, but held firm on the other issues.

[16] It should be observed that this negotiation was taking place in a bit of a legal fog considering that the Defendant did not know there was a legally binding contract governing the relationship, while the Claimant was attempting to negotiate for himself benefits that he had enjoyed before, but which were not provided in the formal contract.

[17] The exchange of positions and demands is found in an exchange of emails through early 2009. Some of the statements which I find significant are these:

> February 8, 2009; Anne Connolly
> "..... the build is slated to start June 8 and go for 20 weeks. ... It looks like we will have to go back to the original budget of $5,000 .... and no travel expenses [and no lunches]. ..... So, more work - less pay - still interested!!???"
>
> February 10, 2009; Bill Binns
> "....I don't think that will cut it. I lost out last year with the build being cancelled ...."
>
> February 10, 2009 ; Anne Connolly
> "I totally understand Bill - unfortunately ... we just do not have the funds this year."
>
> February 10, 2009; Bill Binns
> "We have a contract that laid out one home in Millwood and four homes in Spryfield at $6,000 per unit. It was made quite clear that the build was to be 12 weeks in duration for the Spryfield homes. That is $2,000 per week for 12 weeks. This was also to include lunch supplied daily and travel

allowance. Now your telling me that the build is 20 weeks long at $5,000 per unit, which is $1,000 per week and no lunch and no travel allowance. This is not acceptable. I have a legal opinion on this matter and will proceed to court if that's what it takes.

February 13, 2009; Bill Binns
"I'll take your silence and the rather quick removal of my name from the web site staff as an indicator that you prefer the court to settle our contract.

February 13, 2009 ; Anne Connolly
(Offered to meet with a mediator)

February 13, 2009; Bill Binns
"I would like to come on board four weeks prior to the build start and run for 24 weeks at $1,000 per week paid each Friday ...."

February 14, 2009 ; Anne Connolly
(Discussed need to ask board to approve extra $4,000) ".... regarding your receiving a weekly draw, this will have to be on a bi-weekly basis."

February 16, 2009; Bill Binns
"Unfortunately, I'm out monies because I kept myself available to honor my commitment to Habitat. When the discussion was taking place to lengthen the build, it was made clear that the purpose was to bring in more money and fully expected to be paid the extra time. I think it's time you paid out the contract and we can go our separate ways.

February 16, 2009; Bill Binns
"I gave you a more than reasonable offer and your response is for me to agree not to pursue reimbursement should the build be cancelled again? So, you cancel the build and where am I? Farther down the road and out more money by making myself available to you again.... [Y]ou have not me your part of the bargain. You owe me $24,000.00."

February 19, 2009 ; Anne Connolly
"We are prepared to continue on with you as per the signed agreement .... You will be reimbursed according to the terms of the agreement, which are as follows: Financial compensation will be $6,000 per unit to be paid in full on the day of the home dedication. The contract does not provide for lunch or reimbursement for travel. If you are unable to continue with us under the terms as agreed, we are prepared to release you from the contract. .....[T]he agreement does not stipulate any time line for the completion of the Spryfield homes ...."

February 21, 2009; Bill Binns
"…. I have a huge pile of e-mails and the established practice to support travel allowance payments and daily lunch provided. Once again, I will offer to work the build for $1,000.00 per week, no travel, no lunch. This will run for a twenty four week period ….. I will be paid every Friday."

February 23, 2009 ; Anne Connolly
"As far as payment is concerned ... financial compensation will be $6,000 per unit to be paid in full on the day of the home dedication as per the signed agreement - there will be no further discussion on this issue.

February 23, 2009; Bill Binns
"You leave me no choice but court."

Discussion and findings

[18] The Claimant says that the Defendant simply took the contract away from him, which was a breach of contract, and therefore must pay the stipulated consideration.

[19] The Defendant has made a number of alternative arguments in its defence, including arguments that the contract was only payable upon completion of the work, or that it was legally frustrated. The Defendant has also argued that the Claimant has failed to mitigate his damages.

[20] I view the matter somewhat differently. It is trite that for a breach of contract claim to succeed, there must have been a binding agreement that one party breaches. It can be a written agreement, an oral one, or an agreement containing elements of both. But the terms have to have been agreed upon.

[21] In the unusual circumstances here, for much of the time there was a written agreement underlying the discussions, which the Defendant was

unaware of while the Claimant was advocating for an expanded or enriched version of the deal. If the position of the Claimant is that there was a deal that provided for lunches, travel expenses, a 12-week build, weekly draws etc., then he must be contending for a contract that goes far beyond the written agreement as none of those things are contained in the April 9, 2008 document. There is also nothing therein that states that the build will occur in 2008, or even 2009.

[22] Where a written contract is skeletal, as here, the court will imply reasonable terms to fill in the gaps, but where there is doubt about those terms they must either be rejected or the conclusion may be drawn that there was no finality to the contract.

[23] On all of the evidence, I am unable to conclude that there was ever a binding contractual commitment to add these additional terms (i.e. lunches, travel, number of weeks, weekly draws etc.) to the written contract. It may be true this was the practice during the 2008 Millwood build, but that did not in itself commit the Defendant to those additional terms, particularly where those running the Defendant were actually unaware that there was a written contract for the Spryfield project.

[24] Those terms were never agreed to and never became part of any contract.

[25] If the Claimant were simply advocating for his written contract to be adhered to, then he has the fundamental problem that on February 23, 2009, when the Defendant evidently woke up to its potential obligations under the written agreement, he was offered those precise terms and refused them. In my view, he expressed an intention not to be bound by

that written contract and as such he cannot expect the Defendant to be bound.

[26] To summarize, I find that there was never a binding agreement which included all of the terms under discussion, and that the Claimant released the Defendant from the strict terms of the written agreement by refusing an offer to adhere to the strict terms thereof.

Damage issues

[27] Given my finding on liability, it is not strictly necessary for me to consider the issue of damages and whether the Claimant has mitigated his losses. However, in the event that I am wrong about liability, some further guidance is offered.

[28] Although not strictly an employment contract, the contract here involves personal service and the Claimant cannot be in two places at once. This is the type of contract where the legal obligation would be on the innocent party to attempt to mitigate his loss.

[29] The evidence on damages altogether was rather thin. The Claimant based his case on the bare bones of the contract - namely $6,000 per unit times four equals $24,000.00. There was some evidence that the Claimant has done other remunerative work during the time since the contract was in force, and it is a fair assumption that he can find some additional remunerative work to replace the income that he would have received if he were occupied with the Habitat project later in 2009. As such, he cannot expect simply to receive that income without accounting for it against his

damages. Had I been required to assess damages, I would have been inclined to discount the $24,000 figure by a percentage amount to reflect the likelihood that the Claimant's losses will be much less than that.

[30] In the end, the claim must be dismissed.

Eric K. Slone, Adjudicator