Claim No: 325755

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Herbert v. Smith, 2010 NSSM 44

BETWEEN:

CATHY HEBERT and DARRYL DARCY

Claimants

- and -

DAVID SMITH

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 18, 2010

Decision rendered on June 8, 2010

APPEARANCES

For the Claimants self-represented

For the Defendant self-represented

BY THE COURT:

[1] This is a claim and counterclaim arising out of a contract by the Claimants to perform some home improvements for the Defendant.

[2] The Claimant Cathy Hebert operates a sole proprietorship known as Another Issue Resolved Renovations. The Claimant Darryl Darcy is Ms. Hebert's boyfriend or spouse, and actually performs the construction work. Strictly speaking, since he is not the contracting party he is not a necessary or even proper party to this action, though nothing turns on it. For sake of the narrative I will refer to the Claimant Cathy Hebert as "the Claimant," and to Mr. Darcy in his personal capacity.

[3] The Defendant and his wife own and live in a lakefront property in Dartmouth, Nova Scotia. It is actually a pair of semis, with the other being a rental unit.

[4] In late 2009 the Defendant was looking for a contractor to deal with some leaking in the area of his patio doors. At the time, many contractors were busy because of the time-limited home renovation credit being offered by the government. The Defendant testified that he had a hard time finding anyone to do the work.

[5] The parties entered into a verbal contract. The Claimant could not give a definite quote because it was not known what would be encountered once the Claimant started investigating.

[6] According to Mr. Darcy, once the door and some siding nearby was removed it was obvious that there was severely rotted wood that would need to be replaced once the new patio doors were installed and before any siding could be replaced. Photographs were placed in evidence which showed some of the rotten wood.

[7] It was at that time that the open-ended contract was agreed to, based on hourly rates which are not really in dispute.

[8] Apart from the work done to install the patio doors and deal with rotted wood, there was a separate agreement to cut down some trees. There is a dispute not only as to the amount owing for that work, but about how many trees were actually cut down.

[9] The amount claimed by the Claimant is $6,177.00, consisting of $5,160.00 for the main contract and $1,017.00 for the trees. The Claimant also seeks interest and costs.

[10] The Defendant claims that the work done by the Claimant was inadequate, and blames the Claimant for improper installation of the new patio doors, resulting in continued (or new) leaking. He also disputes the charges for tree cutting, and has counterclaimed for the amount of $940.13 (without much specificity) for new patio doors.

[11] There was a considerable gap between the facts as presented by the parties. Mr. Darcy provided his worksheets showing all of the hours that he and his assistant, Donny Young, worked, which backs up his claim. The Defendant took issue with this evidence. On many, if not most of the days that Mr. Darcy

has recorded, the Defendant simply states that neither Mr. Darcy nor Donny showed up at all.

[12] The choice for me to make is this. If the Defendant is correct - or even substantially so - then the Claimant has made a blatantly fraudulent claim against him, and has compounded the fraud by perjuring himself in this Court. If the Claimant and Mr. Darcy are correct - or even substantially so - then the Defendant must either be lying or is mistaken.

[13] I had a good opportunity to observe the parties in Court. Without passing any comment on Mr. Darcy's ability as a contractor, I found him to be fairly straightforward as a witness and detected nothing in his demeanor that would suggest that he has fabricated this claim. Ms. Hebert testified that she also kept track of his time, as she is usually at home and their home is just a few minutes away from the Defendant's property. Both of them seemed quite astounded that they were being accused of having essentially invented the hours that form the backbone of the claim.

[14] The Defendant, on the other hand, was extremely unfocussed in his evidence and gave me little confidence in his ability to recall and recount accurate facts. His wife's evidence added nothing of assistance.

[15] There is nothing inherently improbable about either account, and really nothing apart from the testimony that corroborates one account or the other. It comes down to credibility.

[16] In the final analysis, I am more inclined to the view that the Claimant and Mr. Darcy are essentially telling the truth and that the Defendant is either

confused or not being entirely fair and truthful. I find on a balance of probabilities that Mr. Darcy and his helper worked the hours that underlie the portion of the bill relating to the renovation work.

[17] As for the work cutting down the trees, the evidence of Mr. Darcy was that there were six large trees that had to be cut down and that the amount quoted was $1,017.00. He testified that considerable care had to be taken to get the trees down without damaging the house or any other property. He said that there would be no point doing this kind of work without a significant charge, because of the liability that he assumes doing the work.

[18] The evidence of the Defendant was something completely different. He stated that he had been having a casual conversation with Donny, and during that conversation learned that Donny heated his own home with wood. He says that he offered to allow Donny to cut down four trees in order for Donny to have the wood. The Defendant says that there was no agreement to pay the Claimant anything, but that he intended to "fix Donny up with a few dollars on the side." He further elaborated that he intended to give Donny $200.00.

[19] On the question of whether there are four or six trees, I believe this discrepancy can be accounted for by the fact that two of them were double trunks, which the Claimant counts as two while the Defendant only counts as one.

[20] Again I must decide between these two very starkly different versions. Donny Young was called to testify in rebuttal after the Claimant heard the Defendant's evidence. It was clear to me that Donny is a very unsophisticated individual, perhaps with a learning disability and with an acknowledged significant hearing problem. It is extremely farfetched that Donny would have fully

understood what the Defendant was proposing, or that he would have agreed to it on his own. It is far more likely that he would have deferred any serious discussion to Mr. Darcy. Even had the Defendant made a proposal to Donny which Donny appeared to accept, it would be unconscionable to hold the Claimant or Donny to any such agreement given the almost certainty that Donny would not have understood it completely.

[21] I am more inclined to the view that the Defendant has simply exaggerated the importance of some conversation he likely had with Donny, and has either forgotten or is simply downplaying the fact that he entered into a contract with the Claimant and/or Mr. Darcy.

The quality and value of the work

[22] In the end, there is still a question about the quality and value of the work. Based on the evidence, this is difficult to assess.

[23] The Defendant gave what was essentially hearsay evidence to the effect that Mr. Darcy had improperly installed the new patio doors, with the result that they leaked, were damaged and needed to be replaced again. He also testified that the work was never completed in the sense that the siding was never replaced. There is no suggestion that the work done to replace the rotten wood

was defective. There was a complaint about the amount charged for materials,[1] the validity of which I do not accept.

[24] Mr. Darcy testified that he responded to the Defendant when he reported that the doors were leaking again, and that he tested them with a hose. He believes that the doors are inherently defective and suggested that the Defendant (who purchased them himself) make a warranty claim to either have them repaired or replaced. As to completing the work, he says that there was no point replacing the siding until all the work was done and that there were also weather delays that account for why the work was not completed. He also stated that he was not prepared to complete the work when he was not being paid.

[25] This Court has a great deal of experience with claims arising out of renovation projects that take on a nightmarish quality for one or both of the parties. Sometimes the root of the problem is that people enter into vague arrangements that are difficult to unravel. Other times the work is done to something less than a workmanlike standard, though not necessarily so poorly as to discount the value of the work altogether. Often there is exaggeration from either or both parties. And sometimes there are unforeseen events that simply make the project more difficult than anyone might have anticipated.

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[1]The Defendant questioned whether the Claimant had exaggerated the material costs charged. Most of this seemed to focus on the materials in an initial bill that he had paid, and he claimed that the Claimant had never shown him the supporting invoices. He testified that he had verbally asked several stores how much it ought to cost to have some specified work performed, and that their estimates were much less than the Claimant had charged. The Claimant had not come prepared with the materials bills from the first invoice, because they had not anticipated that there was any issue. Mr. Darcy testified, and I accept, that no store or contractor could give a reliable estimate for materials without understanding the full scope of the work, which it is clear the Defendant did not fully appreciate.

[26] It is not the function of this Court to rubber stamp bills that are presented. I must feel confident that there is actual value to the work performed. Open-ended contracts to pay by the hour are risky, and to mitigate that risk somewhat there must be an implied term that the hours spent were reasonably required and that they were used to some useful effect.

[27] Often the Court can do no better than to estimate the value of the work performed on a global basis. In the case here, I am not fully satisfied that the amount of hours spent were required or that they produced any useful result. For the claim of $5,160.00 for work relating to the doors and siding, which includes labour and materials, I am allowing the global sum of $3,500.00.

[28] The claim relating to the trees also appears to be slightly inflated. There was no satisfactory evidence as to how that number was arrived at. I do know that the job took less than one day. The combined hourly rate for Mr. Darcy and Donny was $57.00 per hour. In my view, even allowing something to account for the liability undertaken, a fair amount for the tree removal is $500.00.

[29] I therefore allow the Claimant the sum of $4,000.00 plus costs of $158.68. The Counterclaim is not proved in any measure and should be dismissed.

Eric K. Slone, Adjudicator