Claim No: 340788

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Maynard v. Cragg, 2011 NSSM 13

BETWEEN:

DAVID MAYNARD

Claimant

- and -

TED CRAGG

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on March 1, 2011

Decision rendered on March 2, 2011

APPEARANCES

For the Claimant self-represented

For the Defendant self-represented

BY THE COURT:

[1] The Claimant performed carpentry work for the Defendant at a property that the Defendant was renovating in Halifax. There is no issue concerning the quality of the work. The only live issues concern the applicable hourly rate and the number of hours worked.

[2] The Claimant contends that he quoted a price of $25 per hour, plus HST, and that he worked 152.5 compensable hours, for a total of $4,384.38.

[3] The Defendant says that the agreement was $25 per hour, inclusive of HST, and has calculated the Claimant's hours at 145.5, for a total of $3,637.50. The difference is 7 hours, and in dollar terms $746.88.

[4] Like so many contracts of this type, the arrangements were verbal and not everything was explicitly discussed. As such, there is no conclusive version of what was agreed to, and certain terms may have to be implied.

[5] On the question of hours worked, the Claimant submitted rough handwritten notations of his hours, and on this he bases his claim. Unbeknownst to him, the Defendant's spouse, Catherine Colville, was on site at all times meticulously keeping track of the time being put in by all of the workers on this project, and her records differ slightly from those submitted by the Claimant. Most of the difference can be attributed to the fact that the Claimant charged for his breaks, which were usually about 15 minutes taken twice a day. The Defendant contends that he never agreed to pay for breaks, and his records do not include that time. There are also a few days when the Defendant's records show the Claimant leaving slightly earlier than his own records would suggest.

[6] Neither side contended that there was an express understanding about breaks. The Claimant agrees that he cannot charge for lunches, but believes that paid breaks should be implied.

[7] In my view, there is no prevailing understanding in the non-unionized construction sector that breaks should always be paid. That is a matter of negotiation. I cannot imply such a term into the contract. A term will be implied when most people would agree that something is so obvious that it is simply understood. If you asked ten people whether breaks are paid, you would probably find a significant difference of opinion. Some would say “yes,” others “no.”

[8] On the evidence, I am satisfied that the records kept by the Defendant are far more reliable than those kept by the Claimant. The Defendant’s spouse appears to have been meticulously tracking these times, almost down to the minute. The Claimant most likely was keeping track more approximately, which is probably the common practice, but which must give way in the face of the situation here. I must say that I do not believe the Defendant was being dishonest or trying to take advantage in any way. It is just that his records are less accurate than those of the Defendant.

[9] I also place no weight on the fact that the Defendant did not produce the original handwritten records on which he based his case. It was entirely proper and to be expected that he and his spouse would distill those records into the typed version that were placed into evidence.

[10] The question of HST is a more difficult issue. The Defendant and his spouse insist that there was a verbal agreement that the Claimant would be paid $25 inclusive of all applicable taxes. The Claimant insisted that he never agrees to include HST and that he did not do so here.

[11] The Defendant insists that he did not know that the Claimant had a business. He thought he was just dealing with an individual. In fact, the Claimant operates a proprietorship called Maynard Custom Reno.[1], and has a business and HST number from Canada Revenue Agency.

[12] The Defendant also testified that other people or companies with whom he dealt were quoting prices with HST included, although there were no documents admitted to corroborate that statement.

[13] The Defendant had to know that the Claimant was an independent contractor and not an employee. There were no employee deductions. When someone is operating as a contractor, they have an obligation to charge HST unless there is an exemption. It does not matter whether they operate under their own name or as a company.

[14] I am satisfied, on a balance of probabilities, that there was no clear agreement to include HST in the Claimant's price. The HST is not and has never been a hidden tax. In the economy generally, it is added on to the base price of goods and services. While the Defendant and his spouse may have believed that this was the agreement, I do not accept that the Claimant agreed to this. If

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[1] "Maynard Custom Reno." is the name on his business card and letterhead, although his registered name with the Registry of Joint Stocks is "Maynard Custom Home Renovations."

the parties were not of the same mind, then the question would become one of determining what is fair under all of the circumstances, and it is my finding that the rate of $25 per hour, plus HST, is fair overall.

[15] I also note that the Claimant had agreed to wait to be paid until the Defendant received a mortgage advance, which meant that this was a slightly better deal for the Defendant.

[16] Accordingly, the Claimant is entitled to 145.5 hours X $25, plus HST, minus the advances he received and minus the value of a nail gun that the Defendant paid for. The net amount is arrived at below:

145.5 hours X $25	$3,637.50
HST @ 15%	$545.63
Less advances	($1,800.00)
less cost of nailer and connector	($450.44)
net owing to Claimant	$1,932.69

[17] I am not prepared to award any prejudgment interest, in light of the fact that there were real issues concerning the amount owing, the Defendant appeared to be quite willing to pay what was owing and had tendered a cheque for what he believed was the right amount, and also in light of the Claimant's clumsy and provocative attempt on his invoice to charge interest to the Defendant at an exorbitant rate.

[18] The Claimant is entitled to his costs of $89.68, for a total judgment in the amount of $2,022.37.

Eric K. Slone, Adjudicator