

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Budgell v. MC Sales and Marketing, 2011 NSSM 36

Between:

Ronald Budgell

FIRST CLAIMANT

- and -

New Day Construction Company

SECOND CLAIMANT

- and -

MC Sales and Marketing

DEFENDANT

---

**DECISION AND ORDER**

---

Adjudicator: David T.R. Parker

Heard: May 3, 2011

Decision: June 3, 2011

Counsel: Self-represented Claimant

Rubin Dexter represented the Defendant

Parker:-this case came before the Small Claims Court in Halifax and Province of Nova Scotia on May 3, 2011.

Pleadings:

The Claim:

This claim was for work completed and materials supplied on two job sites one at Porters Lake and the other at Chester, Nova Scotia. The work involved construction of two insulated concrete forms for buildings at the worksite.

The Defence:

The defendant stated that the claimant was contracted to provide footings and foundations and install concrete forms and provide on-site supervision to two separate sites. The defendant stated that the work was completed not in a workmanlike manner, it was substandard and completed in a negligent manner. The defendant alleges the claimant failed to follow or comply with the proper installation procedure for the installation of insulated concrete forms ("ICF")

The Counterclaim:

As a consequence of the non workmanlike, substandard and negligent work performed by the claimant, the defendant was required to repair and complete the two construction projects at a cost to the defendant of \$16,506.05 all of which the defendant claims along with costs and prejudgment interest.

This was simply a case of the claimant being unable to prove his claim on the balance of probabilities and the defendant through its own witnesses proving that the defendant did nothing to cause the problems which occurred to the footings and frost wall and instead showing on the balance of probabilities that the defects which the claimant acknowledged as occurring were a result of the actions of the claimant.

Before proceedings began at this hearing the procedure Of the Small Claims Court was reviewed by the court particularly for the benefit of the claimant who stated at the outset that he was unfamiliar with the court proceedings. After reviewing the pleadings with the parties and asking if there were any amendments to the pleadings the claimant was advised by the court of the procedure that would be followed in the hearing. It was explained to the claimant what elements he must prove in order to succeed in his claim and that the proof of the claim was determined on the balance of probabilities. It became evident as the trial proceeded that the claimant and his witnesses were unable to provide any factual foundation for the claim. The frost walls in this particular case which were constructed by the claimant ended up not being plum and therefore had to be replaced in part in order to support the building upon which the foundation would be placed. The claimant attempted to show that this defect in the frost wall was caused not by himself but by the work of the excavator in backfilling around the frost walls under the supervision and direction of the defendant. The claimant had no foundational evidentiary support and suggested that this was a theory which the court should accept based on the claimant's experience in the construction industry. The claimant also provided no information on his

experience as a contractor, whether he was certified or qualified to do ICF construction and the only supporting information he provided the court was his employee who had only done ICF construction once and that being this particular job plus an engineer who had not visited the site at any time.

The defendant, was able to show through its main witness, the general contractor that the footings were not correctly installed in the beginning, that the wall was never plum prior to the excavator doing the work. The excavator who was a witness for the defendant explained to the court how he backfilled and that it was in conformity with the existing code regulations and with best practices of the trade. The claimant was not on-site when the backfilling took place and as I indicated earlier he felt this must have been what happened and based it on a theory and e-mails between himself and Pierre Brideau. Pierre Brideau was not in court to provide evidence and the information in the e-mails was objected to as hearsay by defendant counsel. I note here before the trial began I explained to the claimant that any affidavits or documents authored by someone who would not be appearing as a witness would be given little weight if any if challenged by the opposing party and there was no additional factual support for same. The claimant accepted this and chose to continue with the trial. Notwithstanding counsel's objection the e-mails were admitted into evidence and while I gave Pierre Brideau statements little weight I have referred to them to see if there was any support for the claimant's theory that the cause of the frost walls not being plum was due to the excavator backfilling improperly. This theory about improper backfill methods was the only theory of the claimant.

However the e-mails from Pierre Brideau indicates more than one

possibility. The e-mail of July 17, 2010 at 3:05 PM from Pierre Brideau stated:

*"I believe three factors cause the wall from coming out of plum in this section we saw yesterday, one was the fact that the braces were anchored in gravel, two was the fact that the wall was backfilled on the inside only and compacted fill to add to this pressure on the wall and lastly the weight of the brickledge could have been enough to pull the brace out of plum due to the fact that it was braced in gravel. I can send you details of braces being anchored to heated concrete slabs if you want."* And in a further e-mail on even date at 4:45 PM in response to an e-mail from the claimant, Pierre Brideau stated: *"this sounds like it was well braced so I would therefore say the backfilling and compacting would then be the culprit to the wall being pushed out of plum."* Again on even date at 7:53 PM Pierre Brideau e-mails the claimant stating: *"the other factor that did not help that installers situation was that he was braced in gravel and he admitted the braces got pulled right out of the gravel."*

These e-mails do not support the one theory explanation of the claimant. They are also contrary to the evidence of the excavator who the claimant acknowledges was a professional and would not compromise himself if the walls were not plum when he began his excavation backfilling work. The excavator however said there were serious difficulties with the frost wall. The excavator also told the court that he was advised by the employee of the claimant that the claimant wanted the excavation backfilling done as quickly as possible in order to avoid the poor job. The other factors which do not support the claimant's theory were the cracks in the Styrofoam forms which

are indications that the wall is not plum. The claimant suggests these pictures of cracks in the Styrofoam were taken after the frost walls were re-excavated and the backfill was removed. This is contrary to the evidence of the defendant general contractor and the excavator. All of the above refers to the first job site at Porters Lake and the claimant disputes the amount of time spent rectify the problems in the second jobsite. That is the only contentious issue in the second jobsite. However the work that was done was not refuted as not being required to be done to rectify the problems. There is no substantial basis in which to refute the claim of the defendant other than a blanket statement from the claimant saying that he could have done the work a lot quicker. The amount of the claim to rectify the problem was \$26,524.41 supported by the invoices of the defendant and claimant by way of counterclaim. Of that amount the claimant subtracted the invoices in the claimant's claim in the amount of \$8149.95 leaving an amount outstanding of \$18,374.46. Counsel for the defendant suggested that part of the work that was completed by the claimant was acceptable and that is why there was a reduction of \$8149.95. Further the defendants counsel said they were only prepared to submit the claim for \$16,506.05 being the original amount they claim. The facts would support a greater claim however if not for this court to change the amount being claimed to a greater amount.

It Is Therefore Ordered that the claimant Ronald Budgell carry on business as New Day Construction Company pay the defendant the following sums:

\$16,506.05  
\$ 179.36 costs  
**\$16,685.41 total**

It Is Further Ordered that the claim against the defendant be dismissed with no order as to costs