

SCCH 349623

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

Cite as: *Allain v. J.L. Clements Construction Ltd.*, 2012 NSSM 40

BETWEEN

**Doris-Ann Allain**

**CLAIMANT**

-and-

**J.L. Clements Construction Ltd.**

**DEFENDANT**

**Heard: October 13, 2011 and December 12, 2011**

**Decision: March 6, 2012**

**Adjudicator:**

**David TR Parker**

**ORDER**

**Counsel: Tiffany L. Robertson represented the Claimant**

**Donald L. Shewfelt represented the Defendant**

This hearing was held in Halifax and the Province Nova Scotia on October 13, 2011

December 12 2011 with submissions provided thereafter to this court.

**Pleadings:**

**The Claim:**

The Claimant stated that she hired the Defendant to do renovations to her premises including demolition, structural and finish work in the kitchen, main floor powder room and stairwell of the premises. The contract price was for \$17,800.00 plus tax. The Claimant stated that in May 2009 she advanced the Defendant \$5000.00 in July of 2009 she made an additional advance payment in the amount of \$10,000.00. The Claimant stated that the Defendant never performed the work as contracted to complete or at all. The Claim was for \$15,000.00 plus costs and prejudgment interest.

**The Defence:**

The Defendant stated that the contract was for \$23,052.00 and that the Claimant varied the contract throughout the course of the contract. The Defendant stated that the Claimant's actions frustrated and breached the contract. The Defendant stated that as a result of the Claimant's actions, the work and value provided exceeded the \$15,000 advanced by the Claimant. The Defendant stated that the work provided, up to the breach or frustration by the Claimant amounted to \$16,728.31. The Defendant makes a counterclaim for \$1,728.31.

**Analysis:**

The Claimant did advance the Defendant \$15,000.00 as pleaded. There was a contract between the parties outlining a number of items that the Defendant was to do. This included the upstairs apartment and the downstairs section of the home of the Claimant.

The Claimant in her testimony said she was only dealing with the downstairs of the home. The amount of work to complete the scope of the work in the contract for the downstairs portion of the home was \$17,800.00 plus tax. The upstairs apartment was contracted out at \$2,600.00 plus tax. The Defendant did work on the upstairs apartment and after it was finished the Defendant was called upon to clean up the mess in the upstairs apartment and do work on the upstairs apartment to allow the Claimant to rent out the apartment. I will return to this point later in the decision.

The Defendant started to do some work in the apartment downstairs where work was already commenced in the stairwell. These stairwell renovations were renovations performed by a friend of the Claimant. The pictures of the apartment downstairs as well as apartment upstairs and the testimony of the various witnesses showed the apartments were a "pigsty" to say the least. The Defendant in his evidence stated that he attempted to complete the work but when he went back into the apartment downstairs he continually had to clean up messes or work around the untidy state left by the tenant.

### **Witnesses**

Doris-Ann Allain

Ms. Allain owns the property in 2002 and moved into the property in 2005 with her boyfriend. In 2007 she decided to renovate the property and talked to Shane Clements her boyfriend's son at that time about working on the property. In April of 2009 Shane faxed the Claimant the scope of the work he would do and the cost, which was \$17,800 plus

tax. The Claimant said she asked Shane to start to work around June. She said she gave him \$5000.00 to get started. The Claimant said she received no other scope of work from him. The Claimant said the defendant never discussed any other scope of work, nothing regarding the upstairs or anywhere else. The Claimant said she handed over \$5000.00 to the Defendant's wife Alana and at that time she was still living in the property with her boyfriend Bill Clements. It was about that time her relationship with Bill Clements start to break down. She said in 2008 Bill Clements wanted to rent the downstairs. It was Bill Clements' idea to rent the premises. The Claimant said she still had an office in the basement and went to work in the office once a week but as conditions deteriorated it was once a month. With respect to the property the Claimant said the walls were torn down, electrical wires were hanging and some pink insulation was exposed. The Claimant said Bill Clements would not let her in to the premises. The Claimant said she called Shane Clements who told her he was working for the school board and he would do it on weekends. The Claimant said she told The Defendant's father Bill Clements that she wanted her money back it was dragging on for a year. On July 24, 2009 the Claimant said she gave Shane Clements \$10,000.00 and that he told her he was going to work on it and she thought he was working on the home but weeks later nothing was done. She said when Bill Clements was asked to leave the property she found that some work was done but nothing finished. She said Bill threatened her in October 15, 2010 and the police came and this is when I saw the property. The Claimant then went on to describe what she saw; garbage was all over the place, neighbors were complaining and beer cans were everywhere. The Claimant said that the Defendant told her he was not doing the work as it was a mess in the home. The Claimant said she had to hire another contractor, change a

support beam, do drywall and electrical. The Claimant said Bill Clements was into drugs and he moved out.

On cross examination the Claimant said she cannot recall that the plumbing and electrical was ever brought up. I did not see it written on the quote. She indicated that she never got an electrician at the time nor did she get a plumber. The Claimant did acknowledge that the quote received from the Defendant did in fact state plumbing and electrical services/materials were not included.

**Bill Power:**

Mr. Power was a friend of the Claimant's for about 14 years. He said he was familiar with the property after the Claimant purchased it and he saw the property 2009. He said he did some painting and that he was asked to take out the stairwell. He said he encouraged her not to take out the stairwell however he did take out the risers, stair treads and stairwell. He did nothing else and that was in September 2009. He said he charged her \$100 and did it as a friend.

After doing this work he said he went back to the place six months ago and he peeked in the window. He described the place as a mess full of dog feces and he took 30 industrial bags out. He helped deal with the mess for about five or six hours. He said his niece cleaned the upstairs it took her 2 1/2 days. His niece would not touch the downstairs however. He said there was no drywall and wires were hanging everywhere. On cross

examination he said it was a pigsty and it stunk of dog feces. He said nothing was up to code it was sitting on cylinder blocks and it was a two-story home he said everything started falling in on itself. He said the dogs were in the house when Bill Clements was there and when Bill Clements moved out he left the place in a disgraceful state. He said that he used to work in construction but he would not or could not work at that place in those conditions. He said the walls had no drywall it was just a skeleton. There was debris in the basement and he said that the door in the main entry is a mess.

**Ronald Loughran;**

Mr. Loughran **was** the witness of the Claimant who was brought in as an expert witness in residential renovations and went through the scope of work that the Defendant was to do for the Claimant.

I shall go through the scope of the work and Mr. Loughran's comments on same are italicized.

**Demolition:**

Remove both walls in hallway-*this work was completed*

Remove bathroom wall-*this was not removed*

Remove all existing flooring outside of master bedroom-*that was done*

Disposable materials-*no comment made*

**Structural:**

Install post and beam, right side of Hall-*could not tell*

Install post and beam, left side of Hall-*could not tell*

Frame bathroom wall and door-*this was framed in*

Frame closet off of bedroom-*this was done*

**Drywall and taping:**

Repair several areas throughout Main floor- *drywall not completed and no taping done*

New bathroom wall-*drywall up but not taped or anything*

New closet off of master bedroom-*yes this was done but not deep enough*

Repair wall damaged by Stringer-*could not see*

**Trim and doors:**

Install new closet door in master bedroom-*cannot remember if this was done*

Install new baseboard throughout-*not done*

Installed exterior garden door-*done but interior trim not done so incomplete*

**Powder Room:**

Remove vanity-*not done*

Remove existing bathtub-*not done*

Install pedestal sink-*not done*

**Kitchen:**

Install cabinets-*not done*

Install countertop-*not done*

**Stairwell:**

Remove existing stairs-*not done*

Install treads and risers, skirt boards etc.-*Not done*

Stain and verathane-*not done*

Install railing-*not done*

Nosing-*not done*

**Flooring:**

Install slate throughout, excluding master bedroom-*not done and no prep work done.*

Mr. Loughran stated "I would say 40% was completed and that would not include electrical."

Mr. Loughran did provide evidence of what the cost would be to complete the scope of work referred to above.

Demolition-\$850.00

Structural/drywall and taping \$5920.00

Powder Room-\$2830.75



Kitchen \$15,212.50

The plumbing and electrical has not been done and Mr. Loughran indicated that that would have to be done prior to his proceeding with any work. It is noted in the original contract between the Claimant and Defendant the plumbing and electrical service materials were not included within the scope of the work. One of the complaints the Defendant had was that he had difficulty completing the work he was doing because the Claimant refused to get electrical and plumbing done which was necessary in many instances in order to proceed with the work.

**Shane Clements:**

Shane Clements, the Defendant said that his father Bill Clements came to him about doing renovations the Claimant had started. He said demolition was done, bath started, stairs done and there were things done or rather halfway done on the property. He said they outlined things they wanted done.

He said he received a \$15,000.00 and that he was called upon to do the upstairs which he quoted for \$2600 plus tax. He said the downstairs was half done and that he would get to the point where the electrical and plumbing had to be done before he could do anything further. The Defendant said that the Claimant never did get an electrician and the Defendant ended up getting a plumber as the Claimant never did.

The Defendant said while he waited for the electrician and plumber the Claimant wanted more done upstairs. The Defendant said that he completed the upstairs while waiting for the plumber and the electrician. He said the tenant downstairs, his father Bill Clements was destroying the property and made it impossible to do the work. He said he attempted to clean up the work and told the Claimant that she had to get things under control. He said it was a renovation contract and moved into a maintenance contract

The Defendant said that a patio outside was done by him some months before and he never received any money for that at the time. He said the cost of doing that patio was \$1500.00 and it was to be taken out of the \$15,000.00. He said he ripped off the drywall and put in insulation. When showed pictures of the debris the Defendant said this was not his debris. He said the contract was frustrated because the bulk of work was completed and we have no control over the property and the messes.

The Defendant said because renovations were not going to be completed he offered to pay back \$3000.00. The Defendant said that the Claimant told him if he cleaned up the place that would cover the \$3000.00 and as result the Defendant had a dumpster set up and cleaned out the garbage.

**Alena Clements:**

Alena is the spouse of Shane Clements she said she prepared the scope of work. She said they waited five months for electrician. She said they would just clean up the place and when they went back it would be a mess again.

**Conclusion:**

It was very difficult to determine what the cost was of the work that was done in the downstairs apartment. There is no question from the Claimant's witness that some work was done. The information provided by Mr. Loughran was not that helpful in making an assessment of how much work was done by the Defendant and the cost of same. There was obviously some work done by the Defendant and while his invoices were not dealt with to determine exactly what was done upstairs and downstairs I do accept the fact that some work was done downstairs and some work was done upstairs. I accept also the fact that the work done upstairs was contracted out at \$2600 plus HST, that is \$2990.00. The Defendant was able to show the work that was done upstairs and the pictures that the Claimant provided, were from a time well after the work was completed by the Defendant. These pictures show the destruction and mess left by the tenant which I accept occurred after the Defendant did the work. This is supported by the testimony that the Claimant wanted the upstairs cleaned by the Defendant. The Defendant said that he would walk away from the job and pay the Claimant \$3000.00 for work he was unable to complete downstairs. The Defendant's testimony was that the Claimant wanted the upstairs cleaned up and instead of the Claimant accepting the \$3000.00 as suggested by the Defendant, the Claimant asked him if he would clean it up for \$3000.00. The Defendant said he accepted this and proceeded to clean the mess up.

With respect to the work done downstairs Mr. Loughran indicated in a general statement that he felt 40% of the work was done. The scope of the work that was to be done amounted to \$17,800.00. Taking that as a base figure and accepting Mr. Loughran assertion that would amount to \$7120.00 worth of work completed by the Defendant. The Claimant during the first hearing cannot recall any contract with respect to the upstairs however during the second hearing because of the evidence presented to her; the Claimant was able to confirm that work was to be completed. Assuming that is the case then the total amount of work completed would be \$7120.00 + \$2600.00 which would amount to \$9720.00 plus HST of \$1458.00 for total of \$12,636.00. Therefore, accepting the Defendant received \$15,000.00 that would leave a shortfall of \$2364.00. This would fall in line with or at least rationalize the figure of \$3000.00 the Defendant said he would return to the Claimant. I am assuming here that the Defendant came up with the figure of \$3000.00 as a general allowance for the overpayment received by the Defendant on work that was completed by him. There is also the patio which the Defendant said he did previous to this main work at a cost of \$1500.00 which he never got paid for by the Claimant. I accept the fact that the Defendant did some work on the patio however the costs for the work that was done is not supported except by the statement of the Defendant. Also I accept the fact that the place was in an absolute mess while the Defendant was try to work on the place. The Claimant could not even get into her own place because of Bill Clements. I am not clear what the issue was with Mr. Bill Clements but there were certainly sufficient evidence produced by the Claimant to show the untidy, destructive and disorderly state that the home was in well Bill Clements was a tenant. As

a result of all the above and the evidence that I have before me it is impossible to tell with exactitude the cost of the work that was done but I accept that what was done was very close to the amount that the Claimant paid the Defendant. It is also impossible to accept the Defendants counterclaim for the same reasons. The only other thing that I will mention is that the Claimant would not succeed in the claim to have someone else come in and do the work and charge it to the Defendant. Much of the condition that the house was in was not due to the Defendant's work but rather as a result of the tenant the Claimant had in her home. There was no evidence of where Bill Clements is but possibly that is a landlord-tenant dispute that this court does not have original jurisdiction over. Therefore I shall dismiss the claim and dismissed the counterclaim and make no order as to costs.

Dated at Halifax this six day of March 2012