IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citaton: *Kirby v. Scotia Structures Inc.*, 2016 NSSM 62

Claim No: SCCH 447943

BETWEEN:

Dr. R. Lee Kirby and Patricia M. Kirby **Claimants**

v.

Scotia Structures Inc. **Defendant**
c.o.b as "Archadeck of Nova Scotia"

Sara Kirby appeared on behalf of the Claimants;

Maurice Meagher appeared for the Defendant.

Decision Rendered on November 28, 2016

Editorial Notice: Addresses and phone numbers have been removed from the electronic version of this judgment

DECISION

This decision has been filed beyond the sixty days required by the *Small Claims Court Act*. The particular time line has been held to be directory rather than mandatory by the Supreme Court of Nova Scotia in *Towle v. Samad*, 2013 NSSC 260. Nevertheless, the parties have doubtlessly been anticipating this decision. Their patience has been greatly appreciated.

Both parties have made very thorough submissions and provided the Court with extensive documentary evidence. I am indebted for their very thorough and able submissions. Both parties should be assured that I have read and considered all evidence, even if some of it has not been fully referenced in these reasons.

Background

This is a claim for breach of contract arising from the renovation and construction of an extension to a cottage. The cottage is located on Mosher's Island Road in Glen Margaret and is owned by the Claimants, Dr. and Mrs. Kirby. The work was performed by the Defendant, Archadeck of Nova Scotia, which is a business name registered to Scotia Structures Inc.

Dr. Kirby contacted the Defendant to prepare a quote for the work to be done. Mr. Maurice Meagher attended to the cottage on behalf of Archadeck. The work desired included, among many things, modifications to the roof and flashing to lead water from the roof to the gutter and down spout.

Issues

Was the contract breached, either through its specific wording or through the provisions of the *Consumer Protection Act*?

If so, what is an appropriate level of damages?

The Evidence

Dr. Ronald Lee Kirby testified that he and his wife purchased a cottage in 2001. In the fall of 2008-2009, they decided to renovate the cottage by installing a screened in porch and hired the Defendant to do the work. They experienced water leaking in the roof which they first thought was the result of a problem with the eavestrough. In 2013, he hired Pat McCarthy Renovations Limited who hired Jason Francis as a subcontractor. He replaced and reinstalled shingles and the cricket which solved the problem.

Dr. Kirby entered into evidence a bundle of documents and photographs which included the initial contract for the renovation and several e-mails regarding follow-up work. With the documentation for the initial contract, it shows the layout of the roof.

Dr. Kirby testified that once the work was completed, he and Cindy Winters, who worked for the Defendant, performed a walk-through and both of them noted several deficiencies and concerns identified. Ms. Winters confirmed these issues in an e-mail. There was also a request by Dr. Kirby for some wiring and installation of glass panels for an additional charge. Following this there was a follow-up e-mail from Dr. Kirby on December 29, 2008. Ms. Winters replied on January 8, 2009 regarding the deficiencies.

There was discussion regarding a final payment, specifically, whether it was appropriate to pay when there were deficiencies still outstanding. The Defendant's reply was that the work was substantially completed and any claims could be made under the warranty.

In the course of the e-mails, Dr. Kirby stated the following on January 29, 2009:

"I will drop off a check for $2399.21 with the understandings that 1) I have not yet checked on whether the punch list has been completed satisfactorily, and 2) that any remedies required will be dealt with under the warranty."

Ms. Winters replied:

"As well, if you have any warranty concerns with regard to the project build, we will definitely honor."

On May 6, 2009, Dr. Kirby e-mailed Ms. Winters expressing his satisfaction with the project. He added the following:

"However, there are a few items that require a little attention. I hope that you can help us with them:

1) When it is raining, there is water that falls over the south-facing sunroom door. If you pour a bucket of water on the roof above the door, it drains nicely into the gutter. However if you pour the bucket on the roof of the cottage that drains down onto the sunroom roof, water runs around the corner and bypasses the gutter. Not sure what the solution is-at least some caulking, but possibly a little flashing-you know better than I would..."

There were several other items on the list, although these appear to have been subsequently addressed.

After several e-mails regarding appointments to come address the issues, Dr. Kirby heard from Brian Grabka to discuss the issues with the eavestrough. As of September 8, 2009 the eavestrough was still problematic. On February 1, 2010, Ms. Winters and Dr. Kirby exchanged e-mails regarding follow-up of the issues. It is clear this was the only remaining issue.

On February 9, 2010, Ms. Winters e-mailed Dr. Kirby and stated the following:

"The gutter issue has been resolved.

He put silicone on the areas you had indicated were dripping. We found a frozen badminton birdie the top of the downspout which cause a blockage and resulted in the open water. Please keep in mind for future, that the gutters will need to be kept clean of debris in order for them to work properly."

Dr. Kirby's response:

"Re: the gutter, sorry about the birdie. Must have been one of the grandkids."

The next correspondence occurred on June 11, 2013. Dr. Kirby e-mailed the Defendant and stated the following:

"The only significant problem with the addition was that, during rainstorms, water would bypass the gutter above the South door and drip down on and in front of the door. The door warped and did not close properly. Water splashed through the screen door and the floor of the addition was wet for several square feet inside the door. Your contractors were down a number of times attempting to identify the problem and solve it, but nothing seemed to work so we gave up call you back about it.

In the opinion of the roofer and contractor, the problem was in the way that Archadeck had joined the old and new roof lines-that come down and form the Valley. A recommended stripping off the roof., Installing and ice and water shield, replacing the felt, replacing the shingles and installing a new drip edge."

Dr. Kirby indicated that the cost of that job was $3681 and was looking for reimbursement from the Defendant.

The Defendant refused as there had been no notification in over three years.

Dr. Kirby testified that he did attempt to contact Mr. Meagher and the Defendant in the intervening years, but to no avail. He gave up on trying to have the deck repaired by Archadeck.

Under cross-examination, Dr. Kirby acknowledged that there were no written communications between him and the Defendant. Any communications were verbal.

In redirect examination, Dr. Kirby indicated that Pat McCarthy's project was a larger one and while they were in attendance, he spoke with Jason Francis regarding possible solutions to the dripping on the roof. He gave them the go-ahead to do the work which solved the problem.

Jason Claude Francis has been a roofing contractor for 21 years. He is self-employed as a roofing contractor and has five full-time employees. He was contacted in 2013 by Pat McCarthy's Renovation to perform some roofing work at Dr. Kirby's cottage. While he was there, he was asked by an employee of McCarthy's, Sean, to look at the water problem. He reviewed the exhibits and identified the area of the house where the problem was taking place, namely, the low portion of the roof on the side facing the ocean. He described the portion of the roof leading to the gutter as having a low slope. Specifically, it is a 2/10 pitch meaning the rise in the roof is approximately 10°. He indicated that the asphalt shingles on their own are not sufficient to allow for a runoff for anything below a 3/12 pitch. He observed the cricket and found it was installed inadequately. He placed an "X" on the photograph were this occurred. He believed that the low slope into the drain would back off were problems arise as it would not run off quickly enough. He described a process by which existing roofing was stripped all the way to the peaks. The surface was prepared around the gutter area. The shingles were heated and banded together. He ran a membrane through the cricket. He believes that you need at least 12 inches on the upper side to prevent the water from running back into the flat areas between the crevices. The asphalt would deteriorate away, exposing the wood and resulting in mold.

Maurice Patrick Meagher is the owner of Scotia Structures Inc., which carries on business under the name of "Archadeck of Nova Scotia".

Mr. Meagher described the process used to install the roof. He recommended the installation of a cricket to steer the water to the drain. He presents his clients with very comprehensive retainer packages including a "Custom Room and Design Proposal".

In addition, he referred to a blank warranty form which is referenced in the contract. This document was not signed or given to the Claimants. Paragraph 1 states as follows:

"This warranty is in lieu of all implied warranties of merchantability and fitness for intended use unless applicable state law provides otherwise. The builder warrants to the purchaser that the arch deck structure (the Product) constructed and pleaded on, the following coverage so long as the purchasers the owner of the product:

Defects in materials and workmanship for a period of 12 months (such as splitting, severe warpage or cupping, and leaking roofs),..."

Mr. Meagher submits that the water problem was noted in 2008/2009 and a badminton birdie was identified as the problem. He heard nothing further until four years later. He sent the contractor to the premises and contractor removed the birdie and checked the membrane. He confirmed that there was no additional work done on the structure in the three years prior to the hearing. He did not recall which subcontractor performed the work. He was told the water bypassed the gutter, but he did not believe the caulking would address the capacity problem. He does not recall receiving e-mails or phone calls from Dr. Kirby after 2009. He acknowledged the contract referred to a 5-year written warranty.

The Law and Findings

In interpreting the terms of a contract, the leading case is from the Supreme Court of Canada in *Eli Lilly v. Novapharm Ltd.*, [1998] 2 S.C.R. 129, where Justice Iacobucci stated the following for the majority of the Court:

"The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination....
...Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face....
...However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words."

I find the "Custom Room Design & Construction Proposal" was provided to the Claimants to show the work that was to be done. The Claimants relied on in and entered into the construction contract and formed part of it, subject to any amendments. On the final page appears the following:

"5 year written warranty on structure and workmanship by Archadeck."

There is no reference in the contract to a one-year warranty. Thus, I find the one-year warranty does not apply. Looking at the language of the document, it describes a 5 year warranty on workmanship. In my opinion, the notifications were well within the timelines. In this contract, the Defendant was obliged to provide a five year warranty on its workmanship. Accordingly, it is liable to pay damages.

If I am wrong in that finding, then reference is made to section 26 of the *Consumer Protection Act*. The applicable portions state as follows:

Implied conditions or warranties

26 (1) In this Section and Section 27, "consumer sale" means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale

(a) to a purchaser for resale;

(b) to a purchaser whose purchase is in the course of carrying on business;

(c) to an association of individuals, a partnership or a corporation; or

(d) by a trustee in bankruptcy, a receiver, a liquidator or a person acting under the order of a court.

(2) In this Section and Section 27, "purchaser" means a person who buys or agrees to buy goods or services.

(5) There shall be implied in every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skilful and workmanlike manner.

It is clear that this is a consumer sale of renovation services. Specifically, I find this was a contract for the provision of a new "screened-in" deck, including roofing.

In reviewing the contract, I find that there was initially a problem with water running behind the gutter such that it splashed through onto the deck. Furthermore, I accept the evidence that the water did not run to the gutter but through a gap between it and the roof. This was identified by Dr. Kirby shortly after construction and arrangements were made for its repair. Part of this was attributable to the capacity of the gutter. Following an inspection in 2009/2010 by the Defendant, a badminton birdie was found in the gutter. It is clear from his correspondence, Dr. Kirby accepted that explanation.

I find however that did not remedy the problem in full. Water continued to run behind the gutter. However, it is not clear to me why Dr. Kirby did not document the issues as extensively, particularly where he was purporting to act under the warranty. He may well have contacted the Defendant after being told it was the badminton birdie, I find it was simply not as much of a problem.

The *Consumer Protection Act* extends warranties by implying certain terms in every contract, regardless of what is actually in writing. The question to be determined is whether the work was performed in a "skillful and workmanlike manner".

In reviewing the evidence, I find the cause of the problem was the result of a small portion of the roof being inadequately aligned such as to permit proper drainage water off the roof. I find the work performed by Mr. Francis remedied the problem. Considering the size of the job and the

efforts expended by the Defendant and their workers, the deficiency is relatively modest. Nevertheless I find it is a sufficient breach of the Act to render the Defendant liable.

Damages

The Claimant is seeking $3681.00, the cost of the roofing repair performed by Mr. Francis. Given the passage of three years, it may not have been as problematic as it once was. It was clearly an annoyance, but I am not satisfied it warranted replacement to that extent. There was no evidence corroborating the need for that work. Indeed, there was no photograph of the refinished job. In summary, I find this was an annoying defect arising from the breach. I am satisfied that Dr. and Mrs. Kirby are entitled to compensation, but not to the full extent sought. Accordingly, I award them 50% of what they are seeking or $1840.50.

Costs

I award costs of $99.70 as filing fee.

Summary

In summary, I find the Defendant liable to the Claimant as follows:

Damages	$1840.50
Costs	$ 99.70
Total	**$1940.20**

An order shall issue accordingly.

Dated at Halifax, NS,
on November 28, 2016;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)