

Claim No: SCBW 458777

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Fancy v. Midtown Construction*, 2017 NSSM 11

BETWEEN:

MURRAY FANCY

Claimant

- and -

MIDTOWN CONSTRUCTION

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Bridgewater, Nova Scotia on April 3, 2017

Decision rendered on April 11, 2017

APPEARANCES

For the Claimant

Self represented

For the Defendant

Carson G. Robar, owner

BY THE COURT:

[1] The Claimant seeks damages against the Defendant, a contractor, who did work on his house.

[2] In his Statement of Claim, certain facts are asserted. I say “asserted” because there is a real question in my mind as to what has actually been proved, as I will elaborate upon later.

[3] Some of the facts are not controversial. On November 20th, 2014, the Claimant applied for a grant from Housing Nova Scotia to fund roofing repairs to his house in South Brookfield. The Claimant says he qualified for this grant because he is 68 years old, battling cancer and has an income of less than \$21,000 a year.

[4] The Claimant sought three quotes. The lowest bidder was Midtown Construction, at a quoted price of slightly more than \$7,000.00. Other bids were \$2,000.00 or so higher. An “Invitation to Bid” form used by Housing Nova Scotia sets out in some detail the work to be performed and the structures to be replaced or repaired. The end result was to be a completely re-shingled roof, with other components (such as flashing, gutters, sheathing) to be repaired or replaced as required. That form is dated August 24, 2015, some nine months after the application was first made.

[5] Midtown Construction is a registered trade name of Carson Robar. On September 21, 2015, Mr. Robar and two of his labourers arrived at the Claimant’s house with material to start the contract. The work proceeded on that

day, including work on the porch, and resumed several days later on several further days. The Claimant says he noticed that they were only replacing half of the roof sheathing, and not all of it as the Claimant believed would be done. The Defendant told the Claimant that the contract only required them to replace sheathing that was deteriorated, and that not all of it needed replacement. The Defendant confirms that this was his view, and there is no evidence to the contrary.

[6] The Claimant says that the weather turned cold before the job could be completed, and the Defendant said that they would be back to finish the job when the weather got better. The Claimant says that on the strength of this promise, he signed a completion form which allowed the Defendant to be paid by Housing Nova Scotia. The Defendant says that there was a very small amount of work to be completed, and that the Claimant seemed to be happy with the work done.

[7] The Claimant says that over the winter and through the spring and summer of 2016 he called the Defendant numerous times to see when they would be back to complete the job. He says his calls were not returned. The Defendant denies receiving messages.

[8] The Claimant now complains that the non-completed work has caused major damage to his home. He says that the roof gutters were never adjusted and the rain washed out the gravel under his front steps. He says that the cement is now cracked, and that water has gotten into his basement and ruined much of the sprayed insulation on the basement walls. As a result of this water, he claims that costly repairs will have to be done. These facts are denied by the Defendant.

[9] The Claimant specifically claims that the Defendant failed to perform the contract in the following respects:

- a. He says that the Defendant was to replace all roof sheathing under the roof shingles, and he only replaced half of it. [As per the wording of the contract, sheathing was only to be replaced if deteriorated.]
- b. He says that the Defendant failed to replace all deteriorated roof sheathing and fascia boards, and that the old sheathing was not primed or painted as per contract. [The Defendant says that they replaced the wood that was deteriorated.]
- c. He says that the rain gutters were never removed, repositioned or reinstalled, as stated in the contract. [The Defendant testified that he did not need to adjust the rain gutters because the level of the roof did not change and the gutters were properly positioned to catch the rain coming off the roof.]
- d. He says that the proper flashing was not used under the shingles at the joint and wall sections between the porch and main house. [The Defendant did not specifically address this allegation.]
- e. He says that the ridge vent was not installed for the entire length of the main roof beam. [The Defendant did not address this allegation in his testimony.]

[10] The Claimant first sought to have his dispute resolved through the Better Business Bureau, which organization told the Claimant that it only acts to mediate disputes where both parties agree, and where there is no response from a company such as the Defendant, at most it may give that company a poor rating.

[11] Perhaps in response to the BBB complaint, or perhaps simply because there had been a prior promise, the Defendant sent a worker to the Claimant's home to do a few hours of trim painting. The Claimant says that some of the wood that he painted was wood that was supposed to be replaced. The Defendant disagrees with that allegation.

[12] The Claimant has obtained two estimates for work that he says needs to be done as a consequence of the alleged failure of the Defendant.

- a. There is a handwritten quote from Gabriel Masonry dated December 20, 2016 for \$11,500.00, which is hard to read, but appears to include a combination of concrete work on the steps and basement, and replacing or repairing rain gutters and wooden parts of the roof structure.
- b. There is a handwritten quote from Maple Lane Construction dated December 27, 2016, totalling \$13,800.00, for replacement of a concrete step, digging out and replacing rock under the steps, sealing foundation walls, removing and replacing rain gutters, removing soffit and fascia, scraping and painting and other finish work.

[13] Neither of the quoting contractors appeared in court to testify. On neither of the quotes is there any opinion expressed as to why this work is needed, or what caused the home to be in the condition that it is in.

[14] The Claimant offers as his theory that the damage was caused by heavy rains that ran down the side of his house (rather than being captured by the rain gutters) and that this water froze and thawed, cracking concrete structures and otherwise causing damage to his basement. It should be noted that none of his other complaints about the adequacy of the roofing job, even if true, would explain the problems that he now complains about.

[15] The Claimant appears to be sincere in his belief that the Defendant “ruined” his home, and seeks damages to have the work done as quoted by the two contractors.

Evidence problems

[16] This is the type of case that is very challenging for adjudicators. As much as we take pride in our court’s ability to provide inexpensive and timely “access to justice” - which is an issue that has caught the attention of governments and courts across the country - we are limited by the necessity to reach decisions based on evidence that is both admissible and probative. Judges of the Supreme Court of Nova Scotia (considering appeals from our judgments) have repeatedly reminded us of this obligation. We can relax the rules of evidence, but not so much that we cease to be a court of law.

[17] On the face of it, proving a case such as this one would require some compelling evidence. In similar cases that I have heard, the parties have come to court with knowledgeable witnesses, including expert witnesses, some of whom have drafted careful reports setting out their opinions. Repair estimates, when relied upon as evidence of a deficiency are usually presented by the person giving such estimate, with commentary on why the work appears to be required. Often there are before and after pictures to demonstrate how damage occurred in a particular time.

[18] Defendants are in a slightly different position, because they can only respond to what a Claimant puts forward, but they also often come well-prepared with detailed evidence.

[19] Here, the Claimant testified about what he believes happened. He has no experience or credentials in construction matters. He has a heart-felt belief that he has been taken advantage of, but not much else of substance. He brought photographs which he believes demonstrate his case. Several of them pertain to issues that were not part of the contract, such as parts of his porch or deck which he complains were not painted. The contract was for a new roof, although it does appear that the Defendant replaced some rotting wood on the porch with pressure-treated lumber, which he says should not be painted.

[20] Some of the Claimant's photos show water running through his basement, but it is impossible to tell where it is entering the basement, or why. Others show close ups of the gutters, but there are no distant shots to give some context.

[21] The two handwritten estimates which the Claimant acquired are not only difficult to read, but were unaccompanied by their authors, and are - at best - hearsay evidence of what it would cost to do work that the Claimant asked them to quote upon. They are not evidence of why the work is necessary, and not evidence that the roof repairs done by the Defendant were faulty and caused damage.

[22] When asked why he had not brought any of the contractors to court, the Claimant said that he could not afford to pay them for their time, which is no doubt true, but still the Claimant's case suffers because these people were not there to give their observations. The fact that the Claimant cannot afford to pay witnesses is an explanation, but the result was that he was in court with nothing to replace the value that such witnesses would have brought.

[23] The Defendant also came to court with written statements from people who could have been called as witnesses. The Defendant explained that one of them, his own employee, was busy with another job. The other is from an individual who claims to have been involved in construction for 40 years, and who believes that the Claimant's water problems have been going on for many years.

[24] What neither the Claimant nor the Defendant seemed to understand is that written documents or signed statements, without the actual witnesses in court, are extremely weak forms of evidence, to the point of having almost no value. Where such documents concern facts not really in dispute, the court will typically accept them, but where they concern the disputed facts in issue, they carry almost no weight. The reason is that a witness who has something important to

say must do so on the witness stand, and be subjected to questions from the opposing party and the court. As once observed by a prominent person, cross-examination is one of the most powerful methods for getting at the truth.

[25] In the result, I am asked by the Claimant to award damages in the amount of about \$12,000.00 (a substantial sum of money!) on the basis of little more than conjecture, or speculation. I have no doubt that he believes that the Defendant's work was deficient, and caused massive damage, but he has not proved his theory to be true.

[26] While I may have the vague sense that the Defendant may not have done all that he ought to have done, it is a huge stretch to find that he was negligent or in breach of contract, to the extent that he caused \$12,000.00 worth of damage to the Claimant's home.

[27] The contract was for a new roof. The Defendant constructed a roof. The Claimant admitted that the roof does not leak. The only other way that the Defendant could be responsible for water damage would be if the water, or most of it, was simply not getting into the eaves troughs. The Defendant testified that he did not need to adjust the existing eaves, because the new roof was at precisely the same level as the old roof.

[28] None of the other complaints, such as non-replacement of sheathing or an incomplete ridge vent - even if true - could possibly cause water to get into the basement. The Claimant conceded that the roof does not leak.

[29] As every homeowner knows, or should know, eaves troughs or gutters can malfunction in a variety of ways, and water can penetrate a basement in a number of ways. Eaves can get clogged with leaves or other debris. A down spout can shift and water fail to divert away from the foundation. Weeping tiles around the home can fail to drain water away from the house. All of these possibilities (and others) exist here. The contract did not oblige the Defendant to deal with these issues.

[30] One objective piece of evidence takes on a greater significance, given the vague and anecdotal character of much of the other evidence. That is the confirmation signed by the Claimant on November 2, 2015. It is a preprinted document which asks the homeowner to confirm a number of things, including that “all work was completed according to the approved plans and specifications” and done to the homeowner’s “complete satisfaction.” Based upon this document, funds were released to Defendant.

[31] When asked why he had signed this document, the Claimant was vague and evasive. He insisted that the Defendant had agreed to complete the work after the weather improved. The Defendant conceded that there was a bit of painting that could not be done because of the cold. But the time for the Claimant to have complained that the work had not been completed was at the time he was asked to sign the document.

[32] In the result, I find that the Claimant has not proved that the Defendant is responsible for the damages to his concrete step, foundation or basement, and I must dismiss the claim.

[33] I would add that the dismissal of this claim does not affect whatever warranty obligations the Defendant may have for the work that he performed.

Eric K. Slone, Adjudicator