

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Weber v. Bernardi, 2017 NSSM 67

Claim: SCAR No.457427
Registry: Annapolis Royal

Between:

KEVIN WEBER

CLIAMIANT

– and –

LINDA K. BERNARDI

DEFENDANT

Revised Decision: This decision has been corrected on December 20, 2017 and replaces the previously released decision.

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: January 11 and 25 , 2017

Decision: February 21, 2017

Appearances: The Claimant, self-represented
The Defendant, Michael Lowe

DECISION

Facts

This matter involves a dispute with respect to the amount due for the provision of services in installing the electrical requirements for a newly constructed home. This was a lengthy trial with extensive evidence. I wish to assure the parties that I have reviewed all of my notes and all of the exhibits. I am going to review the evidence and make my findings of fact but I want the parties to know that if I do not mention a particular piece of evidence in this decision it does not

mean that I did not consider it. I will review the facts most salient to the result which I have determined.

The defendant initially requested the claimant to provide a quote. There was a prior quote which was not satisfactory to the defendant and the parties did not proceed on. However dated October 30, 2014 the claimant produced a quote in the amount of \$18,673.72. This quote was accepted by the defendant. The operative part of the quote reads as follows:

To supply & Install:
200 Amp Combination Generator Panel. Complete with
30 Amp Flanged Inlet. Underground Cable to the pole.
All devices, telephone, & cable according to blueprints
provided and the Canadian Electrical Code.

Nova Scotia Power Inspections & Permit included in quote
Including trench inspection.

**Owner to supply light fixtures

***50% of total Quote due upon completion of Nova Scotia
Power Inspection of Trench and Rough-In Inspection.

***** Balance of Quote due upon Final Inspection from
Nova Scotia Power

I have quoted this wording because part of my task will be to ultimately determine what is included in this description.

In addition, the claimant also put forward an invoice in the amount of \$3478.09 which he asserts as being extras to the contract. I set forth the operative part of that invoice as follows:

Nov. 11/14 – Roughin electric heat in bonus rm., roughin lights,
Plugs & heat above pantry & stove plug
Nov. 12/14 – Roughin valance lights & potlights
Apr. 1/15 – Relocate switches by washer and dryer
Jun. 17/15 – Relocate switch in kitchen & relocate valance lights
Remove & replace bathroom lights
Dec. 9/15 – Remove fasteners in roughin boxes in both kitchen
and pantry for brick layer. Run new feed to microwave
and wine cooler
Jan. 19/16 – Relocate potlights over fireplace
Jan 28/16 – Run low voltage wire to cabinet light

I have not included the list of materials since as will be seen later in the decision it is difficult to determine precisely how to value certain items of work.

The claimant Kevin Weber testified that he has been a licensed electrician since 1990 and has engaged in that business ever since. He said that he did not have an electrical blueprint but did acknowledge that he had seen a general building plan which had various coloured markings on it indicating general guidance as to the electrical layout. He also notes that he is required to make all electrical installations according to code. He said that he spent the day laying out the job with the defendant during which many changes were made. He expressed concern that he was never provided with a proper kitchen layout

He says that he commenced work and completed the rough in, obtained luminary inspection from Nova Scotia Power and was paid \$9500 on his quote.

He then says that he had to make a number of changes after the rough in and inspection due to requests of the defendant which were not included in his original quote. These included light plugs and heat above the pantry which the claimant considered to be a “void space” which was not included in the original plan. He also says that the defendant requested the following additions or changes:

- electric stove plug
- valence lights over the cupboards
- relocation of switches in the room for the washer and dryer
- relocation of switches in relation to the valence lights
- changes to the dishwasher plugs and pantries
- changes to pot lights
- running of another wire in the kitchen because other trades had cut off an electrical supply line

He said that these changes would not have been necessary had the defendant not changed the original layout. He says that he obtained final inspection from Nova Scotia Power January 29, 2016 which completed his obligations to the defendant. He says he rendered his account on February 15, 2016 and after not being paid eventually communicated with the defendant, providing her a copy of the invoice in April 2016. Without detailing the back-and-forth correspondence the defendant ultimately declined to pay because she did not feel that the job was complete.

In cross-examination he stated that he has not been back in the house after the January 29, 2016 inspection. In his opinion the project was complete when Nova Scotia Power gave its final inspection. He testified that there was a plug behind this sink that did not pass inspection and consequently he had to put a blank cover on it. He denies that he told the defendant that he would come back and fix it and states that he told her that he may be able to get another inspector to pass it. Mr. Weber denies that part of the contract was the provision of the light at the shore and in the driveway. He alleges that the defendant only told him about it after he priced the job. He said that he did provide wiring from the panel box out through the side of the house so that these items could be installed. He says that he told Ms. Bernardi that both these items would be an extra cost. He reiterated that he had to change things because Ms. Bernardi had changed cabinetry after the electrical had already been roughed in.

Mr. Weber was challenged as to the light and fan combinations throughout the downstairs. He acknowledged that these fixtures required programming both at the remote and at the fixture. He further stated that he did not program these items as he did not consider it part of his work. He stated that the only thing to be included in the bonus room was to be lights. Adding a fan was to be at added to cost. He stated that he tested all smoke detectors personally and that they were all working. He was challenged as to a phone power outlet and a phone jack in the pantry. He stated this was to be an extra.

He addressed lighting in the room above the pantry and stated this was not part of the original plan. He reiterated that in his view the defendant was adding "as she went". He stated that he had to remove switches in the kitchen and other areas for the bricklayer, extend wires and realign the boxes due to changes made by the defendant. He stated that the switches in the room containing the washer and dryer were placed as close to the door frames as possible and that it was not his responsibility that the defendant chose a washer and dryer that would partially cover these. He also denied that he had agreed to install a projection TV and states that he made it very clear to the defendant that that was not work that he would undertake.

My basic assessment of the evidence of Mr. Weber is that he was truthful, at least from his perspective. I do not think he intended to mislead the court but it is clear to me that he found the defendant, in his view, to be quite demanding and unreasonable in her requests. He formed the view that she was making repeated changes and was not showing respect for the fact that this would alter his work and result in extras. I believe this clouded his attention to his communications with Ms. Bernardi. I will say more about their interaction later in this opinion. I

make no finding as to whether or not he made comments that were suggestive of the defendant's financial position as I do not consider these to have been malicious even if they were made, nor do I consider it particularly helpful in making a just decision.

Allen Bent who is a contractor of 37 years' experience was called by the claimant. He performed general labour on the defendant's job. He testified that she had made many changes after the plans. He also testified that the light at the shore was not on the plan which he had. Although he stated that some of these changes would have affected the electrical work, he was not an electrical contractor and I am not prepared to accept his evidence in that regard.

The defendant, Linda Bernardi testified that she was the general contractor with respect to the home that she was constructing. She says that she designed the house and has experience having renovated two homes as well as other projects.

She stated that she had a set of plans and produced them to Mr. Weber and reviewed them with him. She insists that there was a light to the shore and in the driveway. She said she was only to provide the fixtures, the projector and the excavation necessary to install the lights in the driveway and at the shore.

She testified that no changes including changes to the stairs or front entrance way had any effect on electrical. She says that Mr. Weber always knew that she was using "decor" coverings for light switches etc. She expected that the job would include everything required for her home and described that she expected a "complete" job. She says that she paid 50% of the quote when the rough in inspection was complete promptly. She says that the final inspection by Nova Scotia Power was not what should determine the completion of the project. She declined to pay because, in her view, the house was not completed as the claimant promised. In an email dated May 19, 2016 she stated what she required to be completed in order to have the job considered complete. Her list at that time is as follows:

- installation of light to the shore
- installation of driveway light
- installation of second plug in kitchen pantry to code
- under cabinet task lighting and the over cabinet lighting rectified
- all fans and fan lights to operate properly
- ... and the list goes on

She says that all that was provided for the light in the driveway and at the shore was the wire going through the wall ready to be extended to these lights. She says that the kitchen plug needed to be relocated in order to meet code. She stated that the cabinet lighting is not corrected properly in that when one bottom light was put on the top light came on and vice versa. Her evidence was that the fan/light fixtures on the main floor all came on with one switch and were not properly programmed for the remote. She said the communication wires were not properly installed in that at one place there was a jack but no electrical outlet in which you could plug the phone's power supply. She also discovered later that a number of the fixtures were not secured properly to the wall. She said that the "bonus room" was always supposed to be a separate circuit and that this was visible on the plan. It was to have full electrical fixtures as it was to be a finished room of approximately 33' x 16'.

She ultimately hired another contractor, namely Jason Chesley, to complete the electrical work to her satisfaction. Exhibit D-5 is a report of Jason Chesley together with his invoice for the performance of this work and is in the amount of \$3,258.68. While the work is detailed in the report the invoice simply states labour and materials but does not break it down into the various items. Exhibit D- 6 is Mr. Chesley's estimate for the installation of the two outdoor lights in the amount of \$880. Exhibit D-7 is a quote from the excavator to open up trenches for these purposes.

The defendant does acknowledge that it was appropriate for the claimant to charge for: a plug for the kitchen stove, relocation of two switches in the kitchen, replacement of two bathroom fixtures, wire in the wine cooler/dishwasher and the relocation of two pot lights above the woodstove. She also claims that she should be given credit for various items that were not performed because she had eliminated them during the work. These were for inside lights, installation of projection TV, one heater in the upstairs room, outside peak lights, and three outside wall lights. She says that these items have a value of \$310.50 including tax. She also claims that the claimant disturbed drywall in three locations at a cost of \$150 per repair.

She states that the court should conclude as follows:

Original amount owed	\$ 18,673.72
Less payment dated February 16, 2015	\$ (9,500.00)
Less work by others to complete	\$ (6,903.21)
Less credit for eliminated work	\$ (310.00)

Less cost of gyprock work	\$ (517.00)
Balance owing to the claimant	\$ 1,443.51

As with the claimant, I found the defendant, Ms. Bernardi, to be sincerely attempting to tell the truth as she understood it. In my view much of the difficulty in this matter arose from a lack of clear communication between these parties. I am convinced that in many of their discussions there was in fact no clear mutual understanding between them. Each of them proceeded with their own understanding assuming that the other agreed. Perhaps the most striking example of this is what was to be meant by the project being “complete”.

I heard the evidence of Shannon Arenberg. He is a licensed electrician who is employed by Jason Chesley. He has worked for him for over three years and did the work on the residence under discussion. He attended court under subpoena.

Mr. Arenberg found that the smoke detectors in the upstairs office and bonus room had no AC power and they had to run a new power line for that purpose. He also found many of the light boxes in the home were loose and some not supported at all. By this I understood him to mean not the boxes mounted in the wall but the way the fixtures were actually connected to those boxes. In one case there was a ceiling light not supported at all which he had to repair. He found that the dishwasher in the laundry room was applied by a 20 amp counter plug which was contrary to code and he had to run a new feed from the panel to correct that. He also found that the counter plug above the dishwasher was behind the sink which is also a code violation and he had to run a new feed for that as well. He found that the wine cooler was supplied from a 20 amp counter plug which is also a code violation and he corrected that. All DIP switches for the five ceiling fans had to be changed in order to make the ceiling fans work correctly. He had to readjust the cabinet lighting in the kitchen so that the switches work properly in the sense that the one switch would control the upper lights and the other switch the lower lights.

As a result of noting these deficiencies he investigated the entire house. This resulted in changing phone jacks, running a full-time power to the ceiling fan in the bonus room, installing a switch plug in bedroom number three, adding a new 20 amp GFI outlet in the laundry room, running a new phone jack for the laundry room and adding a panel plug for communications.

He said that he did not see any signs of tampering of any of the electrical work by other workers. He said that usually on the final inspection the job is expected to be complete but occasionally

inspectors miss things and that there is a lot of trust between the inspectors and electricians. He stated that it is not unusual that there not be electrical drawings and in this particular case he did not see a plan or make reference to it. He noted that there was a wire run to the outside for the light post outside. In his view the job was not completed. He freely acknowledged that he is an electrician and not an inspector.

I found Mr. Arenberg to be straightforward and factual and to be reporting to the court only those things which he actually observed and found. My impression was that he did not favour either side and was doing his best to be completely helpful to the court. I also found Mr. Arenberg to be knowledgeable and diligent about his trade. Viewing him, as I do, as a neutral witness I am prepared to place great reliance on his evidence. Where there are differences between the parties and I can resolve the difference from Mr. Arenberg's evidence, I will rely on Mr. Arenberg.

Jason Chesley also testified under subpoena. He confirmed that Mr. Arenberg does work for him. As far as the house itself he understood that there were things that needed to be fixed but he did not attend to this or examine it himself. He did prepare exhibit D-6 which is the estimate to install the exterior lights. He confirmed that this does not include fixtures which would be supplied by the defendant. He confirmed that the wire extending outside was proper. He expected to do this work in the spring when the weather permitted. I also found Mr. Chesley to be truthful and reliable but his knowledge of the situation is quite limited.

Law analysis and law

This is a contract case. The Court's task is to interpret what the actual agreement was and then determine what extent it was fulfilled and what, if any, damages flow from any deficiency. I have noted above that the claimant and the defendant seem to have different interpretations of what they had actually agreed to. The law of contract directs me to determine what a reasonable person would conclude that the agreement consisted of, based primarily on the document agreed to by the parties with very minimal interpretation from the circumstances only where absolutely necessary. I will review each of the claims and counterclaims and express my opinion with respect to each of these, keeping in mind that I am obligated to primarily interpret the agreement in a manner that a disinterested fair and reasonable party would understand what the parties had agreed to by looking at the document.

I also want the parties to understand that when a court determines a fact it does so on the standard of the "balance of probabilities". This means that the court must make a determination

of what is most likely and logically probable based only on the evidence before it. Often there is conflicting evidence and it is frequently possible that either version is correct but the court must make a choice based on this standard of proof. Sometimes the scales only tip ever so slightly but that is what must be given effect to.

I conclude that the attaining of a final inspection by Nova Scotia Power is not determinative that the contract has been fulfilled. The essence of the contract is to supply and install electrical services to “all devices, telephone and cable according to blueprints provided in the Canadian Electrical Code”. I view the reference to the Nova Scotia Power inspections as primarily setting a timetable for payment which does not diminish this primary obligation to perform the work.

In my view the installation of a light to the shore and installation of a driveway light are not clearly shown on the plans. These items are not mentioned in the description of work. I do not think these items would be within the contemplation of the average person engaging a contractor to complete the wiring of a house. I believe these would have to be more particularly specified in the contract for me to allow them. On this item the burden of proof is on the defendant and I don't think she has proved it on the balance of probabilities. I deny the counterclaim for those items.

I find that some smoke detectors had no AC power and that needed to be rectified. In this regard I prefer the evidence of Mr. Arenberg over that of the claimant.

I find that the workmanship was not to the standard expected in respect of properly connecting light fixtures to the boxes as described by Mr. Arenberg and that the claimant must accept responsibility for their correction. I come to the same conclusion with respect to the dishwasher in the laundry room, the counter plug above the dishwasher, and the plug for the wine cooler.

I find, again on the basis of Mr. Arenberg's evidence, that it would have been included in the expected scope of work for the electrician to set up the DIP switches for the ceiling fans. I am also satisfied that the switches for the cabinet lighting in the kitchen was a defect in workmanship that needed to be corrected.

I think that some credit should be given to the defendant for various items eliminated; however quantifying that is extremely difficult given the material that I have before me. Although it is hearsay I do consider the defendant's evidence sufficiently reliable as it is the only evidence I have and the claimant did not convince me otherwise. I am prepared to allow a deduction of \$310.50 in respect of this item. The Claimant did reasonably effectively challenge the cost of

Gyprock repairs. I consider the cost of Gyprock repairs claimed to be excessive and I allow \$300.00.

I also agree that the claimant should be given some credit with respect to the extras acknowledged by the defendant. Again however, the evidence is not really clear as to how I can place a monetary value in this. Mr. Weber's claim for the extras does not break down the items by the cost of each item. I conclude that the work in the bonus room and room above the pantry and possibly some other items were included in the original contract. The bonus room clearly was a room which was livable and one would normally expect that would have the usual electrical services. Given the fact that I have no breakdown, I must make a judgment with respect to this. Considering the items which the defendant acknowledges were extras and my best but imprecise estimate as to probable breakdown, I am of the view that the items I have rejected might represent approximately half of the bill for extras. I regret that my allocation is somewhat arbitrary but this was the risk that the claimant ran by not providing a detailed breakdown. Therefore I am going to allow \$1,750 for the bill for extras.

This brings me to the counterclaim. I am prepared to allow Jason Chesley's invoice in the amount of \$3,258.86 as being the legitimate cost of repairing the deficiencies which I have found to be approved.

The results of my analysis and findings are as follows:

Original amount owed	\$ 18,673.72
Extras allowed	\$ 1,750.00
Less payment dated February 16, 2015	\$ (9,500.00)
Less deficiencies	\$ (3,258.86)
Less items eliminated	\$ (310.00)
Less cost of Gyprock work	\$ (300.00)
Balance owing to the claimant	\$ 7,054.86

Considering the case over all, with the exception of the issues with relation to the exterior lights at the shore and in the driveway, the defendant has had substantial success. In the circumstances I will exercise my discretion and not award costs.

I wish to thank both parties for the way they presented the case, generally respectfully and with a focus on the issues.

Dated at Annapolis Royal, NS, this 21st day of February, 2017.

Andrew S. Nickerson Q.C., Adjudicator