

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: D'Sylva v. K.D. Roofing Limited, 2018 NSSM 9

BETWEEN:

ANDREA D'SYLVA

Claimant

- and -

K.D. ROOFING LIMITED

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on March 19, 2018

Decision rendered on March 23, 2018

APPEARANCES

For the Claimant self-represented

For the Defendant Deborah Hawkins
General manager

BY THE COURT:

[1] This case concerns alleged deficiencies in a roofing project.

[2] The Claimant owns a house in Halifax, which has both a sloped, shingled roof, as well as a portion of flat roof over part of the building. In 2016 the Claimant decided to have the entire roof replaced, not because it was failing but because it was getting old and the Claimant wanted to be proactive.

[3] The Defendant is a roofing company operated by Ken Hamilton.

[4] To put the facts succinctly, the Claimant experienced leaking in the area of the flat roof after the roofing job was completed, and had Mr. Hamilton come out several times to take a look. Mr. Hamilton suspected that the Claimant's problems were caused by lack of insulation in the attic space, leading to condensation. He advised the Claimant to consult a ventilation expert. The Claimant was dubious that ventilation was the issue, since there had never been leaking prior to the roof replacement. On the last occasion when the Claimant called Mr. Hamilton in January 2017, with water dripping into her home during wet and slushy weather, Mr. Hamilton simply failed to come. At that point the Claimant concluded that she would likely have to look elsewhere for advice and a remedy.

[5] The Claimant eventually obtained advice from a qualified expert and contracted with another roofing company to replace the flat roof. In this Claim she seeks the cost of having these things done.

[6] The principal line of defence put forward by the Defendant was that the Claimant ought not to have gone elsewhere, but that she should have invoked the 10-year warranty on workmanship that the Defendant provided.

[7] Before deciding whether or not to give credence to this theory, I must make a finding concerning the communications between Mr. Hamilton and the Claimant. Their two versions of the events are a bit different. According to the Claimant, Mr. Hamilton was convinced that the Claimant's problems were caused by condensation (and not leaking) and was essentially dismissive of her complaints that there was something wrong with his roofing job.

[8] According to Mr. Hamilton, he was merely suspicious that there might be a ventilation problem, and he was waiting for the Claimant to consult a ventilation expert prior to deciding what might need to be done to resolve the problem. He believed that he and the Claimant were "working together" on the problem, and he was taken by surprise when she hired another roofing company to replace her roof. He believes he could have repaired it at a fraction of the cost.

[9] I found the Claimant's evidence to be much more credible than that of Mr. Hamilton, and I prefer it in every respect where it differs. Her recollection seemed very clear. She did initially look to Mr. Hamilton for a solution, but found him to be dismissive and unresponsive. Her actions in hiring an outside expert are consistent with the frustration that she felt trying to get Mr. Hamilton to take responsibility.

[10] Mr. Hamilton's evidence was not compelling. The notion that he was "working with" the Claimant to find a solution does not accord with what was

actually happening. I believe his dismissive attitude was tantamount to a statement that he was not taking responsibility for his warranty, and the Claimant had no reasonable choice other than to look elsewhere.

[11] Even so, on September 25, 2017, after receiving the report of her expert Karmen Brison, the Claimant sent a detailed letter to the Defendant attaching the report and reciting all of the emails and conversations that had occurred, as she recollected them. She explicitly asked him if he agreed with her recitation of events. Implicitly, she was asking him what he was prepared to do about it.

[12] One would have expected someone eager to carry out his warranty obligations to have read the letter, contacted the Claimant and become involved in correcting the problems which were identified. Instead, by his own admission Mr. Hamilton did not even read the letter and did not respond. His stated reason for ignoring this correspondence was because he believed that the Claimant was just putting herself in a position to take him to court.

[13] That excuse does not jive with someone who believed that he was working together with the Claimant to find a solution to her problem, and to give her what she had contracted for. As I see it, ignoring this letter was tantamount to an outright denial of the warranty claim. It was his last chance to play a constructive role, and he blew it off.

[14] As such, I cannot find any fault with the Claimant's approach to the Defendant's warranty. Even so, the written warranty (which he called a Guarantee) is not exhaustive of the Claimant's rights. She is entitled in law to

have the roofing job performed in a workmanlike manner, both at common law and under the provisions of the *Consumer Protection Act*.

[15] As for the merits of the claim, the Claimant called two expert witnesses who agreed that there were deficiencies in the Defendant's construction of the flat roof.

[16] The initial inspection was by Karmen Brison, who made his assessment on June 7, 2017. He made several comments in his written report, which are damning of the Defendant's work:

8. Review of the perimeter of the modified bitumen roof system, revealed many problems with the installation and are considered inadequate, when compared to typical good roof industry practices and roof system manufacturer's recommendations.

9. The first deficiency, in the perimeter edge detail, is the lack of wood blocking required to provide a roof insulation stop. The insulation stops provide two primary functions at the roof edge:

1. provides a wood nailer for the roof membrane flashings to be secured to;
2. It provides a wood nailer for the gravel stop sheet metal flashings to be secured to.

The roofer of this installation did not turn the roof membrane down over the roof system at the edge of the roof and simply torched the roof membrane to the sheet metal flashing and left the roof system wide open underside of the sheet metal edge. This condition is the recognized mechanism of failure and primary cause of the roof leaks experienced by the owners. It also explains why there was no roof leaks prior to this inadequate roof edge installation carried out by the roofing contractor in July 2016.

[17] Mr. Brison went on to illustrate the problems that he identified with both photographs and drawings.

[18] There were aspects of the installation that Mr. Brison was unable to see because his was a nondestructive investigation. He was concerned about several items that were thought to be missing, including a cover board typically installed over the foam insulation, and a vapour barrier over the plywood deck and underside of the new roof, the presence of which would have prevented moisture getting to the actual plywood and from there into the house. He went on to recommend that the roof be corrected and brought into line with minimum standards set by the Canadian Roofing Contractor Association recommendations.

[19] The Claimant sent this report to Mr. Hamilton, as mentioned, and after having received no reply, she began to assemble a number of quotes from other roofing contractors. In each case she asked the roofing contractor to quote on a minimal repair, as well as a complete reinstallation. She ultimately decided to hire Evolution Roofing, and instructed them to remove the entire flat roof and replace it in a manner consistent with good practice.

[20] The principal of Evolution Roofing, Andrew Gauthier, was called as a witness to support his written opinion dated November 2, 2017, wherein he set out his view of the roof that he had removed and replaced. I quote some of his report:

During the investigation we noticed that there had been no wood stop installed under the perimeter metal flashing and the polyiso insulation was exposed under the metal flashing, this is not typically the way... It was also apparent that no vapour barrier was installed under the insulation.... It was evident that the membrane was not torched properly as there were several areas where the poly film was not burned off between the base ply and the cap sheet ply in which the membranes were not welded properly,

once the membrane was removed we saw several areas on the polyiso insulation that were wet, and in our opinion was the areas of the roof leaks as stated above... There was no wood stop at the perimeter encapsulating the insulation, this is standard practice as it serves as a nailer to attach the metal flashing. Once the insulation was removed we found an existing rotten membrane with several areas that were deteriorated, and no vapour barrier installed ... In conclusion, it is our opinion that the roof leaks were caused by improper installation of materials for this roof system:

Improper membrane welding

Lack of a vapour barrier

No wood stop at perimeter

Improper installation of metal flashing at perimeter

[21] Based on Mr. Gauthier's observations, it is obvious that some of the noted deficiencies could not have been corrected merely by repairing the roof, but rather that it required removal and replacement.

[22] At trial, Mr. Hamilton heard both Mr. Bryson and Mr. Gauthier describe the proper practice for installing a flat roof such as this. He did not take issue with their opinions, but maintained rather improbably that much of what these two experts describe was optional, or perhaps only best practice, and that there were other equally acceptable practices, which he followed, and as such there was nothing wrong with the roof that he installed - or at least, nothing that could not easily have been fixed such as by adding the wood stop after the fact.

[23] The facts pretty much speak for themselves. Prior to the Defendant creating the new flat roof, the Claimant experienced no leaking into her home for a period of approximately 15 years. Almost immediately after this roof was replaced, problems began which pointed to deficiencies in the new roof. Mr.

Hamilton's insistence that there was a ventilation problem, and not a roofing problem, does not ring true, but sounds like a deflection of responsibility. I do not accept his view that he was "working with the Claimant" to find a solution. I found both Mr. Bryson and Mr. Gauthier to be knowledgeable expert witnesses, and I accept their assessment that the roof job performed by the Defendant was deficient. As such, the Defendant breached the contract and is liable in damages.

[24] The total damages claimed are summarized in the exhibits. I allow the cost of replacement of the roof by Evolution Roofing in the amount of \$6,555.00, plus expert fees for Mr. Brison and Mr. Gauthier in the amounts of \$966.00, \$690.00 and \$180.00.

[25] The Claimant has sought \$240.00 for the repainting of her living room and kitchen ceilings where there are watermarks. This head of damage was not supported by any evidence, such as an estimate, but it is a given that some repair will be necessary. I allow \$100.00

[26] I do not allow charges she has claimed for interest on her line of credit, but I will allow prejudgment interest on the \$6,555.00 at the statutory rate of 4% from November 1, 2017 to the date of this order, which I calculate and round off at \$100.00.

[27] The Claimant is also entitled to her filing costs of \$199.35, and bailiff's fees of \$132.25.

[28] To summarize, the following amounts are allowed:

Replacement of roof by Evolution Roofing	\$6,555.00
Expert report by Karmen Brison	\$966.00
Expert witness fees to Karmen Brison	\$690.00
Expert witness fees to Andrew Gauthier	\$180.00
Painting	\$100.00
Interest	\$100.00
Filing fee	\$199.35
Bailiff	\$132.25
Total allowed	\$8,922.60

Eric K. Slone, Adjudicator