Claim No: SCCH - 474848

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Awara v. Mader*, 2018 NSSM 68

BETWEEN:

MAHMOUD AWARA and MANAL ELNENAEL

Claimants

- and -

LARRY MADER and MADER'S ROOFING & MASONRY LIMITED

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on July 30, 2018

Decision rendered on September 27, 2018

APPEARANCES

For the Claimants	self-represented
For the Defendants	Geoff Franklin Counsel

BY THE COURT:

[1] The Claimants are seeking damages in the amount of $25,000.00, arising out of a contract to place a new roof on their luxury home in Halifax. The claim as presented would actually exceed that amount but the Claimants abandon the excess to remain within the jurisdiction of the Small Claims Court.

[2] The contract was with the Defendant Mader's Roofing & Masonry Limited (hereafter "MRML"), although this claim is also brought personally against Larry Mader based upon allegations that he gave negligent advice.

[3] This case raises some familiar themes. Most critically, as I have observed many times, claimants who seek substantial damage awards bear the burden of proving their claims with admissible, cogent evidence that renders their legal and factual theory more probable than not. Conjecture, no matter how elegantly or articulately framed, will not do.

[4] It is my experience that self-represented parties, no matter how intelligent or expert in their own fields, often fail to marshal the evidence that might allow them to succeed. There is an element of that in this case. But it is not my function to seek out other or better evidence. I must decide the case on the basis of the evidence presented.

[5] The other familiar theme concerns credibility. Parties and their witnesses may testify and appear outwardly to be sincere and telling the truth. In fact, both sides may appear equally truthful, yet be telling opposite stories. In such cases, the court must rely on common sense and measure the evidence against the inherent probabilities. In the end, one party's evidence may be eclipsed by

another seemingly credible version testified to by the other party. That will happen where that other party's evidence is more in harmony with other facts or inherent probabilities. It does not mean that I am finding the first party (whose evidence is not accepted) to have lied under oath. It is just that the system requires that I choose one version over the other. Of course, I may accept some of a party's evidence but not some other aspect of it.

[6] Which brings me back to this case.

[7] The Claimants bought the subject property in 2013. Before committing to the purchase, they had a routine home inspection done by a reputable home inspector. I will refer to that report later.

[8] The home has a four sided "hip" roof with two rounded dormers, one in the front and one on the back. These dormers are known variously as "eyebrow" or "tunnel" dormers. The one on the back is rounder and more tunnel-like, while the one in front has a more gentle curve.

[9] In August 2015, the Claimants sought out a quote to replace the roof. They did not believe that the old roof was failing; it was just at the end of its useful life and the Claimants wanted to replace it before it created any problems.

[10] There was no evidence to suggest that the Claimants sought out competitive quotes. It appears they checked out the Defendant MRML and were satisfied that it did good work.

[11] One of the main issues in this case concerns the scope of the work that the Defendant MRML undertook. And there are stark differences between the two versions of events that led to the giving of a quote, and its acceptance.

The Defendants' version

[12] I begin with the Defendant Larry Mader's version of events because it contains many factual allegations that the Claimants, and specifically Dr. Awara, simply deny.

[13] According to Mr. Mader, back in September 2015, he and Dr. Awara discussed the two dormers and the fact that they were not shingled, but rather had a rolled bitumen material on the surface. He says that he told Dr. Awara that such dormers do not lend themselves to shingles if there is too extreme a curve. He says that he and Dr. Awara specifically discussed the rear dormer, and that Dr. Awara mentioned that he had plans eventually to change the configuration of the rear part of the house where the dormer sat above a deck. He said that they agreed to remove the rear tunnel dormer from the discussion, because it was in decent shape and might have to be redone if the rear configuration changed. Also, Mr. Mader believed that the windows in the dormer area were built too close to allow for proper flashing without removing some of the windows, which Dr. Awara was unwilling to do. He says that the front dormer had a gentle enough curve to allow shingling.

[14] As such, Mr. Mader says that he prepared his quote with specific exclusion of the rear dormer. The job was priced accordingly.

[15] Mr. Mader testified that the colour of the rear dormer is light brown and quite distinct from the charcoal grey shingles of the new roof. He testified that it should have been obvious to the Claimants immediately after the job that the dormer had not been re-roofed.

[16] Mr. Mader also testified that Dr. Awara had taken him down to the basement of the house, part of which was directly under the rear dormer and the rear deck. He looked at the ceiling and saw a lot of staining and even some loose drywall tape, which suggested that there had been leaking going on for years. He says that he pointed this out to Dr. Awara. He says that he believed the leaking was likely coming from the flat roof underneath the deck, which was never in the conversation about this roof job until 2017 when he received a call from Dr. Awara stating that there was some leaking coming from the area of the flat roof.

[17] In this 2017 discussion, Dr. Awara wanted his advice. He put Dr. Awara in touch with a carpenter named Neil Saulnier who could remove the rear deck to expose the flat roof and allow changes to be made. He says that he recommended that Dr. Awara install a “Dura-Deck” system which would take the place of both the flat roof and the deck, but that Dr. Awara was not interested in that system. He then suggested that Dr. Awara consider building a sunroom over the back deck, which would tie in with the dormer and keep water from getting onto the deck and flat roof underneath. As far as he understands, the Claimants went through with this work but it appears that the contractor who built the sunroom was unsuccessful in creating a perfect seal between the sunroom and the dormer, which would explain why there is still some leaking getting into the house.

The Claimant's version

[18] According to Dr. Awara, he met briefly with Mr. Mader to discuss replacing the entire roof on the home. In his mind, this included both dormers. He testified that he did not take Mr. Mader on a tour of the home, and specifically that he did not take Mr. Mader down to the basement. He also testified that the existing roof had never leaked, to his knowledge until sometime in 2016, and he denied that there was any drywall staining or loose drywall tape in 2015. He basically accuses Mr. Mader of completely fabricating his evidence on this point. As evidence corroborating his version, he points to the inspection report of 2013 which made no mention of any leaking, or stained drywall in the basement, which one might have expected to be mentioned if there had been leaking "for years" as Mr. Mader suggested. I note that the inspector in 2013 noted some discolourations on the basement carpet, which could have been caused by water staining.

[19] He also denied that there was any discussion in 2015 about possibly changing the deck or rear dormer, and that there was no reason why he would have excluded it from the quote. He expected a completely new roof, and in particular he expected the rear dormer to be shingled consistent with the rest of the roof. He has recently received estimates from other roofers who see no impediment to shingling the rear dormer.

[20] He testified that he continued to believe until sometime in 2018 that the rear dormer had been re-roofed, and that because of the angle the rear dormer is not visible from most of the property at ground level. He says that he never

noticed the colour difference between the dormer and the rest of the roof until early 2018 when he was taking a closer look at the roof because of problems with leaks.

[21] Dr. Awara denied that he had discussed with Mr. Mader any plans to modify the rear dormer area in 2015, and that he fully expected the tunnel dormer to be shingled.

Other evidence on point

[22] Chris Williams also testified for the Defendants. He was the supervising foreman who was involved in the project in 2015. He recalled that he discussed the issue of the tunnel dormer with Mr. Mader, who told him that they were not doing it "because the customer is undecided." At the conclusion of the job, he recalled that he walked around the property with Dr. Awara and specifically noted to him that the contrasting colours between the dormer and the rest of the roof "didn't look too bad." Mr. Williams testified that the dormer roof is quite visible from some parts of the property, though not from some vantage points.

Findings on this issue

[23] Both parties' versions of the discussions in 2015 cannot be correct. Either Dr. Awara is forgetting or omitting significant parts of his dealing with Mr. Mader, or Mr. Mader is testifying to events that simply did not occur.

[24] Unfortunately, there is not much in the way of documents or other objective evidence to corroborate one version over the other. The written quote is equivocal, as I will discuss later.

[25] I have struggled with this determination. Dr. Awara seemed sincere and his evidence did not suffer from any internal inconsistencies. On the other hand, the evidence of Mr. Mader and Mr. Williams sounded equally credible. None of these individuals can be seen as unbiased.

[26] In the end, as I am unconvinced that the Claimants' version of these events is more credible than that of the Defendants, I am obliged to find that the Claimants have not met their burden of proof.

The written quote

[27] The written quote for the roof is equivocal. It appears to be the practice of roofing companies to set out in the body of the quote the quantity of materials that the job will require. This is a strange practice, as these numbers have nothing obviously to do with the eventual quote which is set out in gross dollar terms. Here the total estimated cost was $14,531.00 plus HST, for a total of $16,279.40.

[28] In the materials section, Mr. Mader appears to have struck out as "Not Applicable" a section of materials that includes "Aluminum Jack Stacks, Roll Modified SBS 250 Cap, Rolls Base Sheet #180, Plates and Nails, Drill Tec Screws, Dec Fast Plates, Drains and Ft. Gravel Stop." He testified that these would have been the materials needed to re-do the modified bitumen roof, and

that by excluding them he was making clear that the tunnel dormer was not included.

[29] Dr. Awara testified that he did not read anything into these exclusions, but that he was more focussed on the fact that at the top of the quote Mr. Mader had written in “Two Eyebrow Dormer.” He says that he expected both dormers to be shingled, so that even if he had seen the exclusion for bitumen elements, it would not have meant anything to him.

[30] Mr. Mader says that the notation “Two Eyebrow Dormer” was just a description of the house directed to his foreman and work crew.

[31] As I have stated, I believe the document is ambiguous. I do not believe an ordinary person reading it would have any basis to conclude that one of the dormers was excluded. Most people would ignore the materials list, not really caring how many bundles of shingles or pounds of nails were being estimated.

[32] The written words “Two Eyebrow Dormer” are more supportive of the Claimants’ view, but they are hardly conclusive.

[33] In the end, I do not believe the written quote clearly specifies that the entire roof was to be redone. The “Not Applicable” portions clearly show that Mr. Mader did not intend to re-do either dormer with rolled bitumen, and this was certainly the understanding communicated to Mr. Williams. I believe Mr. Mader quoted the price with that excluded, whether or not the Claimants fully understood what was being quoted.

[34] There is no reason why the Defendants would exclude the rear dormer, assuming that the Claimants wanted it done. This is work that they routinely do. There is no reason to believe that Mr. Mader deceptively excluded the rear dormer in order to make his price more attractive.

[35] In order for the Claimants to establish a breach of contract, they must show that the Defendant(s) promised something that they did not deliver. At worst, the parties were not *ad idem* on the scope of the work, but in a situation where there was no meeting of minds, the contract is voided (if possible). The law does not permit one party to have all the benefits of an ambiguous contract based on their unilateral perception.

[36] Where it is not feasible to void a contract, i.e. because it has been fully performed, and in the absence of fraud or misrepresentation, that type of relief is not possible. The most that a claimant might expect is an abatement, assuming that there was some evidence that he overpaid on the contract. There is no evidence here that the price was unfair for the amount of work done.

[37] As such, I find that the Defendants were not in breach of contract for failing to re-roof the rear dormer.

[38] Some, though not all, of the Claimants' theories rest on this premise.

Current leaking

[39] There is leaking occurring from somewhere near the rear dormer. The Claimants say that this was first noticed in early 2016 and blame the Defendants' roofing job.

[40] The Claimants' current theory is that this leaking is attributable to the failure to re-roof the rear dormer. However, back in 2017 (when they say they were unaware that the dormer was not re-done) they attributed the leaking to the old flat roof and deck, which led to the building of the sunroom. They now allege that the entire project of building the sunroom was unnecessary.

[41] The Claimants hired an individual named Terry Gordon to inspect the roof and produce a report. Mr. Gordon appeared in court to testify.

[42] Mr. Gordon has been a home inspector for 24 years, and he has taken additional courses in infrared thermography, a technique which uses an infrared camera to detect areas of moisture hidden behind structures. He produced a report in February 2018, supported by photographs.

[43] His examination found areas of moisture within the walls and in the ceiling, though he did not express an opinion as to how serious this was.

[44] Much of the narrative of his report focusses on the question of whether or not the rear dormer ought to have been re-roofed at the same time as the rest of the roof. He believes it ought to have been. With respect, his opinion on this point is not grounded in any expertise. He may be expert in construction techniques, but he has no credentials to address the contractual question of whether or not the contract was intended to include the rear dormer.

[45] Mr. Gordon could not say with any certainty where the water was getting in. He appears to have focussed his attention on the seams between the new roof shingles and the old bitumen roofing on the rear dormer. He appears not to

have appreciated that the rolled bitumen extended well into the area of the shingles, acting as a type of flashing that would cause water to roll off. These are not open seams, despite what the photographs may superficially suggest.

[46] In the end, he could not offer any opinion that implicated the new roof. There is no evidence that the new roof is failing. He could not rule out the proposition put to him by the Defendants' lawyer, that the area of the sunroom was the source of leaks.

[47] In the end, there is insufficient evidence to establish that the roofing done by the Defendants was defective, in any way, and that aspect of the claim cannot succeed.

Negligent advice

[48] The Claimants allege that Mr. Mader was personally negligent in recommending that they build a sunroom. Since the building of the sunroom did not apparently stop any of the leaks, they say that the sunroom was a large, unnecessary expense, and they seek to recover the cost of the sunroom from Mr. Mader personally.

[49] The Claimants say that Mr. Mader was negligent in failing to inspect the roof (for leaks) before recommending the sunroom.

[50] There are many things wrong with this theory.

[51] First of all, and most fundamentally, it is far from an established fact that the source of the leaks was somewhere other than the flat roof and deck area.

[52] Secondly, it appears that the Claimants took advice from several people about how to deal with the rear deck, including not just Mr. Mader but Neil Saulnier and Chris Williams.

[53] Thirdly, the sunroom suggestion was not aimed at just dealing with leaks, but was a solution to making the deck much more usable year-round.

[54] Lastly, Mr. Mader's initial recommendation was to use Dura-Deck to replace the old flat roof and the deck, and he only moved to the suggestion of the sunroom after Dr. Amara rejected the idea of Dura-Deck.

[55] Claims in negligence require a Claimant to establish a duty of care, a standard of care and a breach of that standard leading to damages. I find it impossible to find in the Claimants' evidence any substantial amount of those elements.

[56] Mr. Mader was not paid for his advice. It was offered gratuitously. Had he been hired to give advice and paid for it, one might have been able to establish a duty and standard of care.

[57] Mr. Mader's area of expertise is in roofing, not construction generally and certainly not in the area of sunroom enclosures.

[58] The idea of a sunroom was simply a helpful suggestion which was offered in good faith by Mr. Mader, who believed (and continues to believe) that the old deck and flat roof were causing leaks. That belief has not been shown to be false.

[59] I find that the Claimants have failed to establish a cause of action in negligence or negligent misrepresentation.

[60] Given that the Claimants have been unable to prove their claims, I do not need to address arguments made by counsel for the Defendant concerning time limitations.

[61] Nor do I have to assess their damages with any particularity. On the face of it, and assuming that all of the Claimants' theories were accepted, there are damages that exceed $25,000.00.

[62] In the result, though I have sympathy for the problems that the Claimants are dealing with, the Claim must be dismissed in its entirety.

Eric K. Slone, Adjudicator