Claim No: SCT 478617

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Stewart v. Lands Best Friend Landscaping*, 2018 NSSM 90

BETWEEN:

JOHN ROBERT STEWART

Claimant

- and -

LANDS BEST FRIEND LANDSCAPING

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Truro, Nova Scotia on October 15, 2018

Decision rendered on October 19, 2018

APPEARANCES

For the Claimant	self-represented
For the Defendant	Jamie Uhlman, owner

BY THE COURT:

[1] The Claimant seeks a refund of the $2,415.00 that he and his wife spent having their half-acre lawn hydro-seeded on or about May 23, 2018. The Defendant is in the landscaping business and performed the work in question.

[2] There is a counterclaim by the Defendant for $1,207.50 for work done in an effort to salvage the original grass seeding.

[3] Hydro-seeding is a process whereby grass seed is mixed with water and a specialized mulch - which resembles cellulose - and is sprayed on the lawn. The idea appears to be that the mulch assists the seed in remaining undisturbed and moist while it germinates.

[4] The sequence of events here is well documented in exchanges of emails between the parties. The process began with the quote in May 2018, which was accepted and, as noted, the application of hydro-seed was done on May 23, 2018. The Claimant was sent information about how to care for the lawn in the days and weeks following the application of seed. Most importantly, the instruction was to water the area thoroughly on a daily basis, at least when it was not otherwise raining. There is also an instruction not to mow the lawn too early, because this disturbs the germinating seed.

[5] On May 30, 2018, the Claimant and his wife were concerned that after one week they had not seen any growth at all. They emailed the Defendant and asked if they should be concerned. The response that same day was that there was no need to panic, as seed germinates in 7 to 14 days, and also it had been cool weather which also slows down the germination process.

[6] On June 2, 2018, the Defendant emailed the Claimant saying that some of his other lawns were starting to germinate, and wondering whether the Claimant had seen any progress. The Claimant responded that he was not able to look because it was too wet and soggy to walk there.

[7] On June 5, 2018, the Defendant came by to look at the Claimant's lawn and remarked "it's slow, only a few seeds germinated so far. Give it another two weeks and we'll reassess it and go from there."

[8] On June 6, 2018 the Claimant expressed concern and disappointment, but was prepared to be patient.

[9] The Defendant became convinced that extremely low temperatures on June 9 and 10th may have damaged the seed which was in the early stages of germinating. These days included nighttime frosts that notoriously played havoc with agricultural products in various parts of Nova Scotia. He offered and the Claimant agreed that he could apply another application of hydro-seed to fill in spots that he believed might have been damaged by the cold weather. He used one tank of seed, whereas the original application used two full tanks.

[10] By early July, there was little to no grass growing anywhere and the email exchanges began to become less friendly. At one point, the Defendant accused the Claimant and his wife of not watering diligently. This accusation was vehemently denied by the Claimant, who insisted that they had been watering diligently in accordance with the instructions.

[11] The Defendant also accused the Claimant of disturbing the seed by mowing the area. The Claimant admits that at one point he did do a mowing, but that he had done so carefully. He noted that it was necessary after so many weeks of not mowing to do something to control the rampant weeds in his lawn.

[12] In the end, the Claimant is left with a lawn with rampant weeds and nothing more than the odd patch of new grass to be seen. He is looking to have a refund, and plans to strip his lawn and start all over next spring.

[13] The Defendant in the correspondence offered various ways that he could be part of the solution, but adamantly refused any refund. Instead, he is counterclaiming for the second application of hydro-seed which, at the time, was done in an effort to salvage the original job.

[14] The Defendant says that he did everything right, and that his method was no different than that which he has used many times before, including on other lawns this growing season.

[15] The Claimant says that he did everything right, in the sense that he paid over $2,415.00 for a new lawn, and followed the watering instructions diligently.

[16] On the evidence, I find it hard to fault the Claimant for having decided to take a mower to his weeds, as this was already many weeks after the hydro-seeding had been done, and I also accept the Claimant's evidence that the mowing did not appear to disturb the hydro-seeding material which was well adhered to the ground.

[17] So why did this process not succeed? It is difficult for the court to come through with any answer that has not occurred to the parties themselves. The lawn appeared to have been properly prepared in advance of the hydro-seeding. There are pictures showing the application of topsoil which was a necessary precondition for the successful receiving of the seed. If it had not been adequate, one would have expected the Defendant to have noticed and not gone through with hydro-seeding an unsuitable surface.

[18] I believe the Claimant when he testified that he and his wife watered the area diligently, as instructed.

[19] It is theoretically possible that the batch of seed was faulty, although given the evidence of the Defendant that other lawns using the same material have succeeded, this seems pretty unlikely.

[20] Of all the explanations offered, the most probable one, in my view, is that of frost damage. It is well known that there were heavy frosts much later in the year than usual in Nova Scotia that severely damaged agricultural crops, especially low-lying ones such as blueberries. It is easy to believe that grass seeds just in the early days of germination might have been particularly susceptible to freezing. It is noteworthy that these frosts occurred more than two weeks after the hydro-seeding was done, and clearly the seeds had not advanced as far as they should have, perhaps slowed by cold weather in the days before the killer frost.

[21] One could say that these frosts were an Act of God or a naturally occurring circumstance, but that does not in itself answer the question as to who

bears the responsibility. The nature of this contract was that the Claimant agreed to pay for a new lawn. He did not pay narrowly for the act of having his lawn hydro-seeded. Implicit in this contract was that there would be a result.

[22] The written contract/estimate does not in and of itself contain any warranty. However, I believe that there are warranties which would apply to this work as found in the *Consumer Protection Act*, and in particular those found in section 26(3) and (5):

> 26 (3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:
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> (a) a condition that the seller has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
>
> (b) a warranty that the purchaser shall have and enjoy quiet possession of the goods;
>
> (c) a warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made;
>
> (d) where there is a contract for the sale of goods by description, there is a condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description;
>
> (e) where the purchaser, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the purchaser relies on the seller's skill or judgement and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, a condition that the goods shall be reasonably fit for such purpose; provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

> (f) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, a condition that the goods shall be of merchantable quality, provided that, if the purchaser has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;
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> (g) in the case of a contract for sale by sample
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> (i) a condition that the bulk shall correspond with the sample in quality,
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> (ii) a condition that the purchaser shall have a reasonable opportunity of comparing the bulk with the sample,
>
> (iii) a condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample;
>
> (h) a condition that the goods are of merchantable quality, except for such defects as are described;
>
> (i) a condition that the goods, whether bought by description or otherwise, are new and unused unless otherwise described;
>
> (j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale.
>
> (4) For the purposes of clause (h) of subsection (3), it is not necessary to specify every defect separately, if the general condition or quality of the goods is stated with reasonable accuracy.
>
> (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.

[23] The contract for the seeding of the lawn includes elements of both a sale of goods and a sale of services. The *Consumer Protection Act* provides that goods sold shall be “durable for a reasonable period of time,” and that they

should be “fit for the purpose intended,” and that services shall be performed in “a skilful and workmanlike manner.”

[24] The parties here may both be seen to be innocent, in a moral sense, but the law has typically looked to place the burden upon the party best able to shoulder that burden. In the case of a sale of goods or services where no positive result is obtained, the law has generally regarded the seller as the one better able to shoulder the loss. For the seller, paying for the occasional failure is part of the cost of doing business. For the customer who may contract this type of service once in his lifetime, it would be perverse to say that he bears the risk of frost damage and that his investment is lost.

[25] Another way to analyse this situation is to say that there has been a total failure of consideration. The Claimant paid $2,415.00 and received nothing of value in return.

[26] In the result, I find the Defendant liable on the basis of implied warranty, or failure of consideration, and order that the amount paid, namely $2,415.00 be refunded.

[27] The counterclaim has no merit, in my opinion, as there was never an understanding of any kind that this might be charged at some point in the future. I have no doubt that the Defendant acted in good faith and sincerely tried to salvage this lawn, but for reasons that will always remain somewhat shrouded, it did not succeed. Accordingly, the counterclaim is dismissed. The Claimant is also entitled to his filing costs of $99.70, for a total judgment of $2,514.70.

Eric K. Slone, Adjudicator