

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Heavenly Stairs and Custom Interiors Limited v. 3303743 Nova Scotia Limited*, 2019 NSSM 57

Date: 20191104

Claim: No. SCP 488138

Registry: Pictou

Between:

Heavenly Stairs and Custom Interiors Limited

CLAIMANT

(DEFENDANT BY COUNTERCLAIM)

And

3303743 Nova Scotia Limited

DEFENDANT

(CLAIMANT BY COUNTERCLAIM)

Adjudicator: Raffi A. Balmanoukian, Adjudicator

Heard: September 11, 2019, in Pictou, Nova Scotia

Counsel: Daniel Boyle, for the Claimant/Defendant by Counterclaim
Hector J. MacIsaac, for the Defendant/Claimant by Counterclaim

Balmanoukian, Adjudicator:

[1] When a contract that specifies an inappropriate product, and should never have been attempted, is performed inadequately, who bears the loss?

[2] The claimant (“Heavenly Stairs”) is a contractor with a niche market in bespoke rails, stairs, and related endeavours. Its principal, Craig Young (“Young”), considers himself something of an “artist in wood,” preferring to work in that medium.

[3] I will narrate this case by providing an overview; I will then supplement it with the evidence of the specific witnesses where not otherwise covered.

[4] The claim, as filed, is for \$15,565.00, being the amount advanced by Heavenly Stairs to the Defendant. It says the Claimant received no value for this and, in fact, is out money because it had to remove and replace the work done by the Defendant.

[5] The Defendant counterclaims for lost profit, saying it was terminated without justification.

[6] Although the counterclaim is for some \$35,000, counsel confirmed that any amount in excess of this Court’s jurisdiction was abandoned.

BACKGROUND

[7] In October 2018, Heavenly Stairs was contacted by Glen Haven Manor, a seniors' home in New Glasgow, NS, to replace hallway rails (used for ambulatory assistance by its residents). These horizontal rails were affixed to the walls in various ways, depending on the type of wall construction in the area.

[8] Glen Haven had installed stairway rails – vinyl-coated steel – approximately 15 years before; these were shown in evidence to be coated with a dark vinyl coating and were described as being “in the same shape as the day they were installed.”

[9] Glen Haven thus sought to have the hallway rails replaced with a similar metal rail product, but with a white vinyl coating. This is a crucial difference which plays a pivotal role in this case.

[10] Heavenly Stairs, although not proficient in this type of work, bid on the job as specified by Glen Haven. Young conducted the relevant measurements and reviewed Glen Haven's specifications.

[11] There is, apparently, no established specifications for these types of projects for homes for special care; no Request for Proposals was issued; it is crucial to note that the specifications here were composed by Glen Haven.

[12] Young contacted Darren Martin, the principal of the Defendant; I will refer to him as “Martin” and to his numbered company as “Creative Metals,” which is its trade name. Young forwarded the specifications as composed by Glen Haven, requesting an expedited quote.

[13] Martin did so, and was commissioned with the job, essentially as a subcontractor.

[14] Both Young and Martin deal with the same supplier, Alku. Young testified that “I buy wood, he buys metal.” As a result, Young testified that he was not aware of Alku’s return policy on special orders.

[15] The white vinyl was such a special order, and required time to manufacture. The rarity of such an order will take its proper place in this decision.

[16] At some point, Heavenly Stairs advanced \$15,565.00 to Creative Metals, apparently to alleviate Creative Metals’ cash flow obligation arising from the Alku order.

[17] In due course, all of the required vinyl, some of the required rails, and the expected necessary brackets arrived. The balance of the rails was to follow and as it turns out, more brackets would eventually have been needed. Martin commenced work.

[18] It quickly became apparent that the outcome was not going to be to Glen Haven's satisfaction. Speaking globally, the objections took three forms:

1. The fixing of the rails to the wall, for which Glen Haven wanted to use the existing bracket footprint so far as possible, was not satisfactory – this, in turn, took the form of mixed screws/bolts (instead of a uniform appearance); brackets that were not firmly attached to the wall or were unkempt in appearance; and as a result of the new rails being more flexible than the old, not adequately rigid.
2. The rails were uneven along the walls in places; and
3. Most significantly to this dispute, the white vinyl was unsightly – it had a non-uniform application around the rails (which was described in the evidence as “bubbling”), it was discoloured in places, and most substantially, was not smooth or uniform or seamless at its cap or end of the rail. This was supplemented by complaints that the rail was ‘rusted’ in places.

[19] Creative Metals was made aware of these complaints. Martin says he would have addressed the brackets / flexibility in due course by adding additional support; painted or replaced the mismatched bolts (which were the ones previously used, to comply with Glen Haven's request to use the existing bracket footprint);

and that any discolouration or misconfiguration of the white vinyl was because it was the wrong product to use for this project – that despite trying different moulding and capping techniques, discolouration and “bubbling” were going to be inevitable.

[20] Eventually, Creative Metals was discharged from the job. Heavenly Stairs removed and replaced the offending metal rails, and completed the renovations with a modified wood design.

[21] Heavenly Stairs seeks its \$15,565 back. Creative Metals says no, and counterclaims for lost profit.

[22] Against that backdrop, I turn to the specific witnesses, and argument.

Kim Davidson

[23] Ms. Davidson, manager of Glen Haven, testified under the Claimant’s subpoena.

[24] She has been with Glen Haven for 13 years, starting as a cook and eventually being promoted through the ranks to her current position, which she has held for 2-3 years.

[25] Although she has managed 14-15 renovation/repair projects, including a major sewer backup, she has had no formal training in such matters.

[26] In 2018, Glen Haven decided it wanted to replace the horizontal hall rails, as I have outlined. Ms. Davidson was the project lead. She sought a product similar to the 15 year old stair rails, shown in evidence as Exhibit 1. She characterized these as “smooth and sleek,” resistant to wear, and capable of bearing both the weight of seniors’ reliance on them for stability, and having hands wrapped around them.

[27] Ms. Davidson spoke with Young, who conducted the relevant measurements and provided a quote of some \$53,000 (it was unclear whether this was inclusive or exclusive of tax). She wanted the work done before the end of the calendar year.

[28] Eventually, Ms. Davidson was advised that due to the delay in vinyl delivery, the project would run into 2019.

[29] Work started in January.

[30] Almost immediately, problems became apparent. Ms. Davidson testified that the rails were uneven, that the vinyl had “bubbles,” and that they were “completely unsatisfactory.” She reviewed Exhibit 2, which was a piece of sample rail. She referred to the “bubbles,” the rust on the underside, and that there was

“too much space between the anchors,” meaning that the rail would bend as I have described.

[31] Exhibit 3 was a bundle of photos, focusing on where one hallway had been completed. It shows uneven rails, rust, and malformed rail ends.

[32] This last point is worth a diversion for clarity. The rails are cut to length and the vinyl, once moulded over the rail (in a process I will describe later), formed and sealed over the rail end to form a cap. In Exhibit 3, these caps are discoloured and in some cases with a malformed seam and/or rust discolouration. This defect forms an important part of the story and will take its proper place in the evidence.

[33] Ms. Davidson contrasted this with the stair rails, Exhibit 1, which had “smooth end caps” without rough edges, and were “straight.”

[34] Young said he would speak to Martin about these shortfalls. Ultimately, the efforts were unsuccessful and, as stated, Creative Metals was discharged from the job.

[35] Ms. Davidson testified that she did not want the horizontal rails to be replaced with wood “because of wheelchairs and carts.” After the unsatisfactory results above, Young convinced Glen Haven to change products, and new maple rails were installed. Glen Haven was satisfied with this outcome.

[36] On cross-examination, Ms. Davidson could not compare the width or thickness of the old rails with the wooden ones.

[37] She confirmed that Glen Haven “wanted white” rails, that the walls to which the rails were bolted were of varied construction (wood, cement, Gyproc with studs), and that Glen Haven wanted the new rails to “sync” with the old ones, using existing points of affixation as far as practicable.

[38] She also knew that the white vinyl was a special order and would take at least a couple months. She denied knowing that it was not returnable. She knew that white would show more dirt than a dark covering, and that “we were OK with that.” She expected that daily cleaning would take care of that.

[39] She did not raise the rust issue with either Martin or Young.

[40] About 200 feet, out of a total project of 1800 feet, were completed before Creative Metals was terminated.

[41] Ms. Davidson confirmed that Mr. Martin dropped off “new rails,” using a different capping technique, in February 2019. These, too, were unsatisfactory.

[42] She discussed the uneven rails with Mr. Martin. His answer was that these followed the footprint of the prior rails’ brackets, and that he would add more

brackets as rigidity would require, later in the project. She confirmed on re-direct that there was “no rule” against additional brackets, only that they wished to maintain the existing bracket footprint as well.

[43] She stated that Martin’s response to the bubbling was that this “sometimes happens.” They did not discuss any alternate modalities.

On or about January 21, 2019, Ms. Davidson informed Mr. Young that the Martin work was unacceptable.

Craig Young

[44] Young has operated Heavenly Stairs for approximately 19 years. He completed a carpentry course in 1987-9 and has been “self-taught” since then. He knows Martin from the trade and from Northumberland Nova Scotia’s small community, but had not dealt with him commercially on a regular basis – Young testified that he had last done so in the early 2000s. So, when this contract came up for bid, Heavenly Stairs provided its bid (apparently by floor) but “subbed” the actual work to Creative Metals. Martin provided his brief quote of \$35,800 plus HST as exhibit 4. He pointed out that white vinyl was a special order which would take time, but did not reference any return policy or lack thereof.

[45] Young testified that his role, at this point, was to be a “go between” with Glen Haven and Martin, and that he was to oversee the specified work.

[46] The work, as noted, began in early January 2019; the problems I have outlined quickly became evident. Young testified that the rail “butt ends” were unsatisfactory, the rails were “bubbled,” and that wall brackets appeared to be missing or further apart than before. This last was not Young’s top priority as it could be addressed in due course. The rails were not “buffed of rust,” and the vinyl was not treated on the ends.

[47] Exhibit 5 is the proverbial “bucket of bolts.” This is a mismatched set of fasteners which were described to me as being from one bracket. Again, there is divergent evidence on how these were to be treated on a permanent basis.

[48] Exhibit 6 is the Alku catalogue. It does not specify a bracket spacing interval. It contains instructions at p. 286 on installation of the vinyl on the metal rails, including treatment with a product known as THF, or tetrahydrofuran. The safety data sheet was entered as Exhibit 8, indicating this as an industrial solvent. This was not used in the Glen Haven project; there was conflicting evidence of whether this would have done any good, given the rust/bubbling/discolouration issues at hand with the white vinyl.

[49] Young testified that when he was advised of Glen Haven's concerns, he texted and called Martin. Young testified that Martin agreed as follows:

1. That he would cut down on the re-installation delay;
2. That he would deal with the bracketing interval (sagging) later, and that
3. He would drop off another sample to Ms. Davidson; he said the supplier denied it was a "cheap product."

[50] By April, 2019, Young had taken the job "into my own hands." Glen Haven still preferred to have the white vinyl rails. However, this came to naught; the rails were removed and replaced. To Young's thinking, they now have "scrap value only" and that they would not be re-used "with my name on it" due to "inferior workmanship."

[51] On cross-examination, Young testified that his quote to Glen Haven was approximately \$53,000 and comprised only this work – in other words, he had an approximate \$17,000 mark-up on the subcontract; he also confirmed, as borne out by Exhibit 4, that Young supplied Martin/Creative Metals with the specifications on which to bid.

[52] Young stated that he was unaware of what, if any, difference in quality existed between white vinyl and black vinyl (and, on re-direct, he said he was unaware of what, if any, quality gap existed between the old vinyl – that is, the vinyl on the stair rails – and “new vinyl,” namely that in consideration in the case at bar).

[53] With respect to the sagging rails, Young testified that Martin told him “I’m not done yet,” and this would be addressed; and that the anchoring mechanisms to the wall (ie the assorted bolts and screws) may or may not have mattered depending on the specific bracket at issue – but that things never got that far before the contract was terminated.

[54] Young further confirmed that that the February 27, 2019 email references complaints respecting the product, not the workmanship.

[55] On examination by the Court, Young testified that new brackets would not have to be welded to the rails, but could be “tapped and screwed” – that is, they could be added as needed post-installation. He further confirmed that the new bracket footprint may be less sturdy than before due to gaps in drywall (that is, prior blocks behind the drywall may no longer be *in situ*).

Darren Martin

[56] Mr. Martin, the principal of the Defendant, testified that the example shown on Exhibit 1 (the stair rails) was a convex rail, vinyl on steel, and appeared to be from a different manufacturer. It is fair to summarize his testimony as “different inputs yield different outputs.”

[57] He further explained that the “special order” white vinyl comes in 100’ lengths, and as already outlined had to be ordered all at once. The steel, conversely, comes as 20’ flat bars and is cut to length. The brackets came as a separate component and, as will be seen, could be added to or returned as the circumstances required.

[58] Martin noted that the supplier, Alku, expressed surprised that he (or anyone) would order 2000’ of white vinyl; however, as he had no input on the specifications, he ordered what he was told. Martin did note at this point of his testimony that black vinyl is a “stock item” and thus returnable, but white is not.

[59] He did not discuss the difficulty in keeping white vinyl clean with Mr. Young, and stated that he had not sold or installed it before. Although he professed knowledge of the product and technique, on cross examination he stated that he “doesn’t order from the catalogue” for other products he knows by heart and that he “had no experience with white at all.”

[60] At present, the leftover vinyl is in Martin's shop, and to his thinking "it is theirs (Heavenly Stairs');" the leftover steel, being 40 lengths of 20', is also at his shop and is useable in other projects. Martin, however, "doesn't use that size" of steel rail. He stated that the rails, in his opinion, were "too thin" at 5/16", and that Valley View Villa (another seniors' facility in the area) "uses 1/2" in black." Martin, however, stated in cross-examination that he had never before done wall rails, only stair railing.

[61] The unused brackets were returned by Martin to the manufacturer, for which he was credited approximately \$1100, apparently tax-inclusive.

[62] According to Martin, the steel was "wiped down with hand cleaner" to remove "a bit of rust from when the steel was dropped off in the rain." There was, he testified, no mention of fasteners (that is to say nuts, bolts, screws) with Young. The ones he used were on site, or he brought his own.

[63] Martin disagreed that brackets could be "tapped and drilled" *ex post facto*, but instead that they had to be welded on before the vinyl was applied (which in turn had to be done before the rails were installed). It is unclear how he proposed to do so in the required places at the completion of the project.

[64] He went on to say that he put the rails “where he was told,” following the prior bracket footprints, and that if blocks in or on the wall needed to be replaced or re-sited, that was “not his job.” Any discrepancies in rail elevation (ie unevenness) was due to following that footprint and pre-existed Martin’s work. He stated that he would “have gone around and painted” the fasteners, if needed, that “it’s not as bad as they’re portrayed,” and that “it’s not that big a deal.”

[65] It is common ground that Young was not happy with the result, namely the rail ends and “bubbles;” Martin’s explanation was that the vinyl “didn’t cool properly,” and that he didn’t think the bubbles were a big concern. He stated on cross-examination that he “didn’t know” what caused the bubbles.

[66] The unsightly ends were a bigger factor, to his thinking, and all attempts to adapt the installation technique (such as pulling on the vinyl with soap and experimenting with different capping techniques) came to naught. He demonstrated the heating, cutting, and cooling technique to the Court, with the heating machine that he had available. He stated that “they” don’t sell “blowers” any more, and this “outdated technique” has been replaced with heat guns. He was unaware of this until he called to order a “blower” for this job.

[67] According to Martin, treatment with THF would not be effective as “it strips any sheen from white.” This statement was despite the lack of experience with white vinyl as recounted above, and there is no indication that this modality was tried.

[68] Creative Metals was released from the job “maybe a week later,” but Martin did not have an exact date.

[69] Martin’s claim is for lost profit, namely the \$35,800 plus tax, less the \$15,565 advanced, and also less the “five or six thousand” Martin would have paid his son, who was working on the job. He also, presumably, would have had some additional expense for extra rail as it was ordered, extra brackets (and perhaps fasteners) as those came on stream, and the employer portion of statutory benefits (CPP, EI, and vacation pay). Martin admits he “way underbid” the job, meaning his loss of profit would be reflected accordingly. He stated that there “was not a lot of money to be made on this job.”

ANALYSIS

[70] To listen to the parties, it is fair to summarize as follows:

- Glen Haven asked for the wrong product

- Heavenly Stairs, without any particular expertise in the field, bid on what it was told to do
- Creative Metals bid on what it was told, although with something of a proverbial “raised eyebrow” at the ask, but without reservation
- The results were unsatisfactory; the extent to which this was doomed to failure from the beginning is disputed
- Creative Metals wants to be paid for what it lost from being discharged from a job which, to its thinking, was being completed as specified
- Heavenly Stairs submits it got nothing for the money it advanced to Creative Metals – and in fact may be down from having to “re-invent the wheel” so far as the work had progressed.

[71] And so I begin by removing the subcontract from the equation. Let us suppose this had been a direct relationship between Glen Haven and the ultimate provider of labour and materials.

[72] If Glen Haven had “switched” with that provider from steel to wood because it had specified an inadequate product, what would have been that provider’s entitlement? In my view, it would have been entitled to charge for the difference

between what had been specified and what had been provided (ie steel versus wood), and for its throw-away costs to date, subject to two major caveats: a duty to mitigate (e.g. by returning or selling any surplus materials, if possible, and disengaging as soon as it became clear that the project was untenable) and subject to any allowances for deficiencies in the original job that were not as a result of faulty specifications (that is, deficiencies from subpar workmanship).

[73] It is not in evidence before me on what more, if anything, Heavenly Stairs spent or charged in switching from steel to wood, other than the advance to Creative Metals. In any event, despite the able argument of Creative Metals' counsel that the real issue should be between Heavenly Stairs and Glen Haven, the latter was not sued or joined in this action.

[74] In my view, the addition of Creative Metals into the mix does not change this fundamental analysis. Glen Haven (and through it, Heavenly Stairs) was entitled to call off the metal rail installation, and effect a substitute. As far as Creative Metals is concerned, there is no additional expense associated with this switch, as opposed to its claimed lost profit.

[75] Whether it is entitled to claim that lost profit, in turn, depends on whether it was doing what it was told, however inadvisable it may have been to tell it to do

so, in a good and workmanlike fashion. In other words, was it the specification that was botched, the job doing the contract to specifications, or both?

[76] In my view, the answer is “both.” Martin put considerable emphasis on his pride of craftsmanship, and it would have been quite in order for him to say, “I am not going to bid on this job as specified,” or alternately to say, “I’ll bid on it, but you get what you get and I’m not responsible for the dog’s breakfast that I’m quite sure is going to come out of it.” He did neither, but instead under time pressure (and without inspecting the premises) provided his quote in quite a brief and perfunctory manner.

[77] He also admitted that he had little to no experience either with white vinyl or with wall rails, and to his thinking to the extent that his work was inadequate, it was either inherent to the job or that it was not, in fact, part of his job or that in the case of fasteners and brackets it would be dealt with “later.”

[78] To cut to the last page, however inadvisable it may have been to specify 5/16” white vinyl rails, with the existing footprint, the evidence is clear that the job done on this was not good and workmanlike, but instead a compilation of buck-passing, excuses, rationalizations, and justifications. Glen Haven was right to

complain, and Heavenly Stairs was justified in terminating Creative Metals' engagement.

[79] So what of the advance made by Heavenly Stairs to Creative Metals? There is no indication that this was part of the original contract between them. Had Creative Metals sued Heavenly Stairs for its expenditure on labour and materials, I would have dismissed the claim for, as noted, Heavenly Stairs was justified in terminating the contract. It therefore follows that Creative Metals' claim for lost profit, however modest, must fail. I will deal with "whose materials" are on hand shortly.

[80] I also add that there is no evidence before me, aside from the indication of monies spent to date and the "five or six thousand" in additional labour, of what additional cost of labour and materials Creative Metals would have incurred to finish the job. As will appear, if (as I do) I accept that Creative Metals spent \$2,734 to install 200 feet of rail, completing the job would have involved far more than "five or six thousand" in labour costs. It may be that the additional labour (and materials) not be a straight lineal function, but I am inclined to agree with Mr. Martin's assertion that there "wasn't a lot of money to be made." It follows that although I do not have adequate evidence upon which to make any finding in

Creative Metals' favour on loss of profit, it is far and away less than the \$35,800 less the amount advanced.

[81] So what of Heavenly Stairs' claim for the return of the advance to Creative Metals? In my view, it does not automatically follow that Heavenly Stairs gets its money back.

[82] I say this as, in effect and on the particular facts before me in law, Creative Metals ordered the materials as Heavenly Stairs' agent. It was in evidence that, whatever one party or another may have understood with respect to Alku's return policy, this was a special order of both rail and vinyl, that would not have been brought in as a stock or inventory item. Creative Metals bought these items because Heavenly Stairs needed them for its contract with Glen Haven, which in turn was subbed out to Creative Metals. It would have been the same result if Creative Metals was asked to supply labour only with materials supplied by Heavenly Stairs, ordered directly on its account and credit.

[83] The evidence in Exhibit 7 was not challenged that Creative Metals' expenditure on labour and materials was \$15,597.85, inclusive of the remaining vinyl and rails, and before accounting for the \$1100 credit for returned brackets.

In Martin's words, the remaining materials "are yours," meaning Heavenly Stairs'. I agree.

[84] Martin indicated he had not accounted for the \$1100 credit "once he [Young/Heavenly Stairs] decided to sue me." This is understandable from an adversarial point of view, but is not correct in law.

[85] I have had some difficulty with the labour component. Martin claims that he spent \$2,734 on labour; it is unclear how much of this was a notional value based on his own time expended under his corporate alter ego, and how much was actual "cash out the door" to employees, including himself and his son. There is also no breakdown on how much of this was expended on inadequate or defective work, and how much can reasonably be attributed to "work that had to be done to demonstrate that the job had to change."

[86] I am sorely tempted to effect a Solomonesque solution and simply cut it in half. However, lacking Jedidiah's wisdom, I must find that the Claimant has not established, on a balance of probabilities, that this labour would have been a different or lesser amount, or different on a *quantum meruit* basis, had it been an "adequate specification, inadequately performed." As these expenditures were not

challenged, I accept them as they stand, with the exception of the returned brackets.

[87] Therefore, I dismiss the Counterclaim and allow the Claim as follows:

Advance: \$15,565.00

Less expenditures: \$15,597.85

Add: Returned brackets credited to Creative Metals: \$1,100.00

Total: \$1,067.15

[88] Creative Metals shall also make the remaining vinyl and steel available for pick up by Heavenly Stairs. I note there was no claim for storage costs or storage space. Should the parties be unable, through Counsel, to make appropriate arrangements for transfer or abandonment, I will to the extent of my jurisdiction remain seized to settle that matter.

[89] As neither party has been successful in any commercial sense of the word, each shall bear its own costs.

Balmanoukian, Adj.