

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Torak v. Giffin*, 2020 NSSM 10

Claim: SCY No. ~~2000037~~

Registry: Yarmouth

Between:

THOMAS MITCHELL TORAK

CLAIMANT

– and –

BRITTIN GIFFIN and KATHY GIFFIN

DEFENDANTS

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: February 28, 2020

Decision: April 27, 2020

Appearances: The Claimant, self-represented
Franceen Romney for the Defendant

DECISION

Facts

[1] The Claimant claims the sum of \$5,420.50 which he alleges to be due for services rendered in the renovation of the Defendant's property at 5004 Sandy Point Rd., Jordan Ferry, Nova Scotia. The Defendants and Counterclaimants claim that the Claimant's work was defective and portions of the work needed to be redone, and in addition, claim that because the work was not completed in a timely manner, he had additional interest costs.

[2] I wish to make the parties aware that I carefully reviewed my notes and the exhibits. If I do not recite a particular piece of evidence it is not because I had not noted it, but rather because it is not pertinent to my decision.

[3] Mr. Torak testified that he visited the site prior to construction and ultimately, they agreed he would provide all construction labour at a rate of \$37 per hour. Materials were to be provided by the Defendants' accounts primarily at Wilson's Home Hardware but also at Woodworkers Home Hardware. The scope of the work was the renovation of cottage into a year-round residence. This included, among other things, finishing a basement, a second bathroom and associated plumbing, installing roof trusses, installing various windows, drywall and finish work and the installation of siding. He says that he was aware of the Defendant was obtaining financing, but was never provided with details. He says that the work commenced in July, 2018 and that he was paid for the first portions of this work. The Claimant acknowledged that he was not a "red seal" tradesman.

[4] In September, or early October, 2018 the Defendant became concerned with the progress of the work. The Claimant had engaged Luke Swim and Matt Jacklyn to assist him. These gentlemen left his employ in October. By this time, the Defendant was getting very discouraged and worried that the structure would not be ready for the winter months.

[5] On October 25, 2018 the Claimant presented invoices. The Defendant questioned the invoices and asked for a breakdown including time records. The Claimant testified that the prior invoices had not included time records. He insisted he had time records but these were not produced before the Court. The Claimant was dismissed from the job on November 16, 2018.

[6] The Claimant claimed that the "poly" vapour barrier was properly installed. He also claimed that the plumbing was properly installed. He also claims it was nothing wrong with the plumbing.

[7] Matthew Jacklyn testified that he worked on the site. He has no qualifications as a carpenter. He testified that the trusses that had been ordered were improper and had to be changed. He said he worked on the site from late July until mid October and worked

on average 30 hours a week. Testified that he never saw the Claimant write down his hours. He was paid in cash. He was the one who primarily worked on the roof since the Claimant did not work at height.

[8] Luke Swim testified that he did 98% of the framing. Mr. Swim also has no qualification as a carpenter. He also was paid in cash and never saw his hours written down.

[9] Mr. John Bedard works for an appraisal firm and had the responsibility of establishing the extent of work with respect to mortgage advances. He says that on August 24, 2018 he calculated the work to be 51% complete, on October 4 to be 61% complete, on November 15 to be 74% complete and on April 4 to be 100% complete.

[10] Michael Elliott works for the truss supplier took the measurements for the roof trusses. He testified that there were changes to the size. He indicated that the Claimant "decided" that he needed a higher pitch. He testified that it was the Claimant who made the decision.

[11] The Defendant Britain Giffin testified. It is 66 years old and was employed by the Department of Fisheries and Oceans. His intent was to renovate the cottage as a retirement home and had previously sold his residence. He rented a summer home near their cottage. In February 2018 the Claimant told him he could get a crew, it would be his last big job, and that he would be concentrating on this work. He suggested it would take about six weeks to do the job and it would be done by the end of September. The Claimant assured Mr. Giffin that he could "do everything". His evidence was that the Claimant quoted a rate of \$35 an hour.

[12] Mr. Giffin had previously arranged for materials to be supplied on his account at Wilson's home hardware and that the Claimant's invoices related only to labour. He says he was never told about the increase in the rate to \$37 or precisely what the other workers were paid or charged out at.

[13] Mr. Giffin testified that he did make some changes in that he wanted to get access the basement, add to storage rooms and add a window. He further testified that he repeatedly made it clear to the Claimant, that he did not want to stay in a second winter in the cottage he had rented, which was extremely cold and uncomfortable.

[14] By September Mr. Giffin and his wife were getting increasingly concerned about completion of the work. He was assured by the Claimant that the work will be completed by Thanksgiving. It was not. He was then assured the work will be completed by November 18, which was the end of his 120-day building period allowed by the mortgage. He was then assured that he would spend Christmas in the renovated cottage. None of this happened.

[15] On October 22 the Defendant says he was handed a "fistful of invoices". The Defendant counterclaims for additional interest which he had to pay to the suppliers as a result of not getting these invoices in a timely manner. On October 25 he was given a bill for \$2,100 which "seemed high". He asked for a breakdown of the hours. This resulted in him receiving a lower bill, but he was not provided with time records. The work did not progress as required and on November 18, 2018 Claimant was terminated. He found other workers to repair defects and complete the work.

[16] Mr. Giffin then discovered that there was water that appeared to be sweating into the basement. He reported this to his insurers, who declined coverage on the basis that "poly" was improperly installed. Mr. Giffin also discovered that a significant portion of plumbing was improperly installed as confirmed by his electrician.

[17] Immediately after dismissing the Claimant, Mr. Giffin engaged Al Acker, and experienced carpenter, for the month of November 2018 at a cost of \$987.50.

[18] John Waters lives across the road from the cottage in question. In November he observed that the work was going along extremely slowly. He offered to help his neighbour and assisted with insulation and painting at no charge. Due to the need to change defective plumbing he assisted with doing gyprock and painting and the moving of a wall.

[19] Darrell Swain, who is an experienced carpenter became aware of the Defendant's problem. Although he was in heavy demand, he managed to find some time and worked between March 2 and April 4, 2019. He framed closets in the upstairs bedrooms, hallway and hung doors, case stores did the baseboards he also repaired the windows which had not been properly installed amongst other things. The cost for his services is not claimed, but demonstrates how incomplete the job was.

Analysis

[20] I find that there was a verbal contract between the parties to perform construction labour. Materials were to be supplied by Wilson's Home Hardware and on occasion by Woodworkers Home Hardware. Labour was to be supplied on an hourly rate basis. It is not essential to my decision whether this rate was \$35 or \$37.

[21] Most concerning to me is the fact that the Claimant did not produce any time records whatsoever, and none of his employees was able to give any indication that any time records work were even kept. Certainly, none were produced before the court. The Claimant's evidence as to the keeping of records was vague and was not persuasive. Typically, I would review the time records and billings for the entire job, to ensure that the time and the charges lined up. As a result, I am unable to determine the accuracy of the Claimant's claim. The burden is on him to prove his claim, and I have absolutely no basis to determine whether he is owed for any hours or not.

[22] As in so many cases, I am called upon to assess credibility. This is never an easy task. In **Goulden v. Nova Scotia (Attorney General), 2013 NSSC 253**, Justice Stewart of the Supreme Court of Nova Scotia gives an excellent review of the principles which I must apply.

[20] Credibility. This proceeding also raises questions of credibility. The Supreme Court of Canada considered the problem of credibility assessment in *R. v. R.E.M.*, 2008 SCC 51. McLachlin C.J.C. repeated the observation of Bastarache and Abella JJ. in *R. v. Gagnon*, 2006 SCC 17, that “[a]ssessing credibility is not a science” and that it may be difficult for a trial judge “to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events” (*Gagnon* at para. 20, cited in *R.E.M.* at para. 28). The Chief Justice went on to say, at para. 49:

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things

about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[21] The assessment of the evidence of an interested witness was considered in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), where O'Halloran J. said, for the majority, at para. 11:

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[22] Such factors as inconsistencies and weakness in the evidence, interest in the outcome, motive to concoct, internal consistency, and admissions against interest are objective considerations going to credibility assessment, along with the common sense of the trier of fact: see, e.g. *R. v. R.H.*, 2013 SCC 22. It is open to a trier of fact to "believe a witness's testimony in whole, in part, or not at all": *R. v. D.R.*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8, at para. 93. I have taken these principles into account in reviewing the *viva voce* and documentary evidence in conjunction with counsel's submissions and the relevant law.

[23] I have carefully reviewed the evidence in light of these principles and have come to the conclusion that where the evidence differs, I prefer that of the Defendant.

[24] I am satisfied that the work was defective. There were many points upon which I did not find the Claimant to give a satisfactory explanation, particularly as to the defects alleged by the Defendant. I am satisfied that all personnel working for the Claimant had no qualifications and that the work proceeded at an inordinately slow pace.

[25] I am not prepared to allow the Claimant's claim and I will dismiss it.

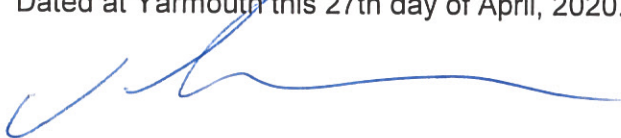
[26] As to the counterclaim I am prepared to allow the following amounts:

Damage to basement	5,913.79
Corrections of plumbing defects	1,500.00
Wages of Al Acker	623.86
Interest on Wilsons Home Hardware accounts	740.97
Interest on Woodworkers Home Hardware accounts	987.50
<u>TOTAL</u>	<u>\$9,766.12</u>

[27] Damages must be reasonably foreseeable and flow naturally from the nature of the contract. I am not satisfied that the Claimant can be held responsible for the increase cost of interest on the Defendant's mortgage. I don't think the evidence is sufficiently strong that the Defendant was made aware of the financial implications that would arise from his failure to complete within the 120 day period.

[28] I would allow costs in the amount of the \$66 filing fee. There also were subpoenas issued. I have no information as to costs or conduct money paid as to those. I am aware that as a result of the Covid-19 situation that Ms. Romney may not be able to file those with the court. Due to the Covid-19 situation I have no knowledge of when the parties will receive this decision. I will allow Ms. Romney 15 days from when she receives this decision to provide written submissions as to the costs associated with the subpoenas, and 5 days after that for the Claimant to provide his written comments, restricted to the subpoena costs only. Then I will issue an order.

Dated at Yarmouth this 27th day of April, 2020.



Andrew S. Nickerson Q.C., Adjudicator