IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Ensor v. Sherry Hill Farm*, 2021 NSSM 1

Claim: SCY No. 499517
Registry: Yarmouth

Between:

ERIC G ENSOR

Claimant

-and-

SHERRY HILL FARM and SHERRY THOURBURN IRVINE

Defendant

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: December 9, 2020
Decision: January 12, 2021

Appearances: The Claimant, self-represented
The Defendant, self-represented

DECISION

Facts

[1] This matter was heard by videoconference on December 9, 2020. At the outset, I want to make clear to the parties that I have reviewed all of the written material provided to me and my notes of the oral evidence. If I do not mention a particular item, it is because it relates to something beyond my jurisdiction, or I did not consider it relevant to the decision which I must make. It should not be taken that I did not consider it. I will therefore only lay out the facts, as I have found them, which relate directly to the issue that I must decide. The parties should be aware that no court is able to determine facts with absolute certainty. The standard of proof which is applied, is referred to as "the balance of probabilities". This phrase has been described by many courts but it essentially means what is most likely based on the admissible evidence before the court.

[2] The Claimant testified that he had had been previously engaged by the

Defendant for some other work, but the events that this case relate to began when the Claimant gave an estimate on April 19, 2019 in the amount of $24,269 in respect of construction of a kitchen. Work on this was not started until July 15, 2019. A deposit of $10,000 was paid and then later a further $5,000.
Shortly after the work began the Defendant requested a number of other items of work to be performed, including door frames, baseboard mouldings, the installation of floors, a cabinet in the laundry room, as well as a number of other items, including a bedroom and a room that the Defendant intended to rent. In addition, the Claimant says that modifications to the kitchen plan were made. He says that when he left the work in December 2019 the only kitchen items left incomplete were custom doors for the refrigerator and dishwasher and some trim on the microwave. He says that he had put temporary doors on the refrigerator and dishwasher.

[3] The Claimant says that he billed monthly for the work completed each month and was paid until November 2019, when the Defendant indicated that she wished to have an alteration in the method of payment. She wanted the Claimant to complete the work without monthly payment, because she said that she needed the work completed in order to obtain mortgage financing, and that she would pay him when that was accomplished. The Claimant says that he did not agree with this arrangement, but nevertheless did continue to work for approximately a further month. In December he was left owing $14,288.10 and refused to continue. Mr. Ensor insisted that the work he had done in the kitchen was worth at least $15,000 and that he wanted to be paid for the outstanding amounts relating to the additional work that he had done.

[4] The Defendant states that she chose Mr. Ensor because she understood that the quality of his work was extremely high. She states that she accepted the quote and paid the Defendant $10,000. Later a further $5,000 was paid.

[5] She says that on November 12, 2019 she approached the Claimant asking for a change in the payment schedule. She acknowledges that the Claimant insisted that he wanted to be paid. On the basis of that, the Claimant did, in fact, continue to work. She claimed that he had accepted this arrangement. She says that when she received the bill from him on December 21, 2019, she was shocked.

[6] The Defendant does acknowledge that she did want a lot of other work done on her home and she does not say that his work was not of good quality.

[7] It is common ground that the parties met on January 19, 2020 to see if they

could resolve this. Mr. Ensor wanted security for payment and proposed that he take a tractor worth approximately $35,000 as security. The Defendant declined to do this.

[8] There are other allegations between the parties. On Mr. Ensor's part these relate to the conduct of the Defendant while he was working there. On Ms. Irvine's part they relate to the conduct of Mr. Ensor's wife and relating to the conduct of Mr. Ensor in contacting the Defendant's brother and her banker. Those matters are not within the jurisdiction of Small Claims Court. As such, I should not make any comment and they do not influence my decision in this case.

[9] In addition, there were some concerns raised by Mr. Ensor's with respect to the use of his tools that remained at the property and the return of those tools. I cannot rule on this aspect as it is not included in the claim filed with the court.

[10] The Defendant called Robert Blakeney. He was involved with the roofing on the Defendant's property. His evidence only established that there was a lot going on and a lot of work being done by Mr. Mr. Ensor on the interior of the house. Mr. Patrick Macaire also testified. He stated that he came to live at the house and performed a lot of work completing the things that were left uncompleted. He stated he does not know Mr. Ensor.

[11] In the documentary evidence there is a quote from Mr. Emile LeBlanc with respect to the value of the work done by Mr. Ensor on the kitchen. This is the only evidence that touches on the amount and value of the work that Mr. Mr. Ensor performed with respect to the kitchen. Mr. LeBlanc did not testify. Because of this I cannot evaluate exactly what items were, and were not, included in his quote. It is true that the Small Claims Court has significant latitude in accepting evidence that would not be strictly admissible in the Supreme Court. However, that does not mean that the quote provided by Mr. LeBlanc is to be accepted on its face. I have extreme difficulty in relying on this quote. This is because I don't have Mr. LeBlanc's evidence to explain the quote, and perhaps more importantly, because he was not called, the Claimant had no opportunity to cross-examine him. It simply leaves me unable to know what was done, or not done by Mr. Ensor relating to the items stated in the quote. Therefore, I am unable to place reliance on this quote.

Submissions

[12] The Claimant states he had done all of the work to the best of his ability and had put in a great deal of effort. For this he expected to be paid. He states that he

put in more than the value of the $15,000 in relation to the kitchen.

[13] The Defendant says that she does not object to the invoices based on the hourly rate and material, but rather believes that she did not get $15,000 worth of work on the kitchen. She asked me to adjust the bill for the value which she did not receive. She states that she asked for the terms of payment to be changed and that the defendant, by his conduct and continuing with the project should be held to have agreed. She also asks me to direct that Mr. Mr. Ensor return to her two drawers and a tea trolley top.

Analysis

[14] Despite the apparent unpleasant interactions between the parties, I found them both to be respectful of the court and to be telling the truth from their perspective. My overall impression is that these are both honourable people who got into this dispute due to lack of clear communication. I wish to make it clear that my responsibility is to apply the law. I must analyse this case on the basis of legal principles alone. The bad feelings between these parties are regrettable, but do not affect my task.

[15] I am satisfied that initially there was a contract to perform specific work in relation to the kitchen at an agreed cost. However, it is apparent that that contract was never fulfilled and was, in effect, abandoned by the parties shortly after the work started. Nevertheless $15,000 was in fact paid and the Defendant is entitled to receive work of that value in respect to the kitchen. Mr. Ensor says that that value was provided.

[16] As I have indicated above, I don't really have clear evidence favouring the Defendant as to what the value of the work done on the kitchen is. The court has no expertise in this regard and must rely on knowledgeable witnesses in order to make that assessment. Unfortunately for the Defendant she did not provide a qualified witness to give an opinion as to the value of the work done. I have reviewed the photographs and considered the evidence given. Clearly a substantial amount of work was done. On that basis, I am satisfied that if there is any shortfall in terms of the value of the work done, it is not so obvious that I am able to evaluate it without a witness knowledgeable in carpentry or construction to assist me. Providing such evidence is the responsibility of the parties. The court has no investigation power.

[17] It is a fundamental principle of law that the party who makes an allegation

must prove it. The documentary evidence provided by Mr. LeBlanc is not sufficient to establish what the Defendant claims. It is possible that the Defendant did not get the full $15,000 worth of work, but the evidence simply doesn't establish that. I can only act on evidence; I can not speculate.

[18] In my view, shortly after the commencement of the work the parties essentially entered into a new kind of arrangement. The arrangement was that the Claimant would do the work as directed by the Defendant, would keep track of his hours and materials, would invoice monthly and would be paid monthly. That is in fact what happened until November 2019.

[19] The fundamental basis of contract law is that there must be an offer and an unequivocal acceptance of that offer. It is insufficient for one party or the other to believe or assume that the offer has been accepted. This principle applies to the formation of the contract as well as to any alterations to the contract. It is true that acceptance can be evidenced by conduct, but I don't think the evidence in this case establishes that the Claimant agreed to the Defendant's payment proposal by his conduct. There were ongoing discussions.

[20] These parties found themselves in this dispute because of a lack of clear communication and a clear common understanding. I am satisfied that they are both people of goodwill, but they were not careful to put things in writing, or to otherwise ensure a clear meeting of the minds. Such *ad hoc* dealings leave both parties vulnerable to making assumptions and thus ending up before a court. In this case, it is not an easy task for a court to determine exactly what was in fact agreed to, because the evidence is not clear that there was a consensus between the parties on many aspects. The Claimant was not sure what was being asked of him on a day- to-day basis. The Defendant established a payment regime and then when she wanted to change it, she did not get the Claimant's unequivocal agreement; she made the assumption of his agreement.

[21] Based on the evidence before me, and I emphasize that, I am unable to find that the Defendant did not get $15,000 worth of work with respect to the kitchen. I have reviewed the accounts and hours and materials list of the Claimant, and I am satisfied that the other items charged for are reasonable and fair.

[22] As a result, I will grant judgement to the Claimant in the amount of $14,288.10. In addition, I will allow the filing fee of $199.35. The Defendant was served by the Claimant directly and therefore I award no costs in respect of service.
[23] I have discretion as to whether or not to award interest. I am not going to

award interest on this claim, because in my view the Claimant was as much at fault for not making the arrangements for payment clear as was the Defendant.

[24] I will also direct that the Claimant, if he has not already done so, to return the two drawers and the tea trolley top to the Defendant. I will not include this in my initial order but if these are not returned, I reserve the right to issue a supplemental order.

Dated at Yarmouth this 12th day of January, 2021.

Andrew S. Nickerson Q.C., Adjudicator