

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Hawa's Electric Limited v. Elias JeBailey*, 2021 NSSM 17

2021

Claim No. 498882

BETWEEN:

HAWA'S ELECTRIC LIMITED

Claimant

- and -

ELIAS JEBAILEY dba CROSSFIELD RIDGE INVESTMENTS

Defendant

Hearing Dates:

March 10, 15, 23, and 24, 2021

Appearances:

Claimant – Alison Godwin, Barrister & Solicitor

Defendant – Self Represented

DECISION

[1] This is a claim for \$11,700, plus HST, interest and costs, which is said to represent the unpaid balance of a fixed fee construction contract for electrical work. The Claimant supplied the electrical labour and materials for a three floor, 24-unit, apartment building which the Defendant built.

[2] In his written Defence, the Defendant states simply, "*Contract failure. Extortion.*" He goes on to counterclaim for some \$33,000 stating, "Contract failure, interest, costs." No other particulars were provided in that document.

Summary of Witnesses' Evidence

[3] **Joseph Hawa** is the principal of the Claimant and is himself a Red Seal electrician. He has been in business for some five years and does both commercial and residential work with upwards of 17 or 18 employees, both journeymen and apprentice electricians. While he is often

on the job sites, there would typically be a site supervisor who is a journeyman Red Seal electrician.

[4] In response to questions about quality control generally, he indicated that Nova Scotia Power Inspectors have to sign off at several stages of a construction project including the rough-in and final.

[5] Turning to the matter at hand, Mr. Hawa was referred to Exhibit 1 which is the booklet of documents for the Claimant and firstly, Tab 1. This was a quote from the Defendant dated January 17, 2018, for \$130,000, plus HST, totalling \$149,500. The quote refers to “wiring the building as the drawing.” When asked what drawing that referred to, he stated that those were the original or initial drawings to which there had been not much change but, the drawings that were later given to him on site, had lots of changes.

[6] Tab 3 of Exhibit 1 contains the Construction Contract Agreement between the parties. It appears to have been dated and signed on February 21, 2018. Article 3.3 states that the *Contractor* scope shall contain the deliverables outlined in the electrical quote dated January 17, 2018. Additionally, there then follows a series of 18 bulleted items, the first of which reads:

- *Contractor will carry out electrical work, supply, and install all electrical materials and fixtures as outlined in the latest revision of the electrical drawings by “Electec Engineering.”*

[7] The contract price was \$130,000, plus taxes. In Article 1.3, the work was to commence by March 1, 2018, and attain substantial performance by July 1, 2019.

[8] Mr. Hawa was referred to an email of August 23, 2019, from Mr. JeBailey to Michael Maddalena, the lawyer for the Defendant and cc'd to Mr. Hawa. It was around that point in time or perhaps two or three weeks before that that Mr. Hawa had gone off site. This, he testified, was because of payments that were behind as well as that Mr. JeBailey was apparently soliciting the Claimant's employees to do “side jobs.” Mr. Hawa appeared to have been quite exorcised about this. Following that August 23, 2019, email there then followed a series of letters between legal counsel including a letter of August 29 from Jamie MacNeil on behalf of the Claimant to Michael Maddalena, a letter of September 4 from Patrick O'Neil on behalf of Mr. JeBailey to Mr. MacNeil, a letter of September 6, 2019, from Jamie MacNeil to Patrick O'Neil.

[9] The next significant written correspondence appears to be the email of November 25 from Mr. JeBailey to Jamie MacNeil and Michael Maddalena, I will make further comment about this email further on in these reasons. For present purposes I note that Mr. Hawa was questioned about the reference in that November 25th email to “deficiencies and contract deliverables yet to

be complete.” And also the certifications yet to be issued for fire alarm, CO testing and final Nova Scotia Power inspection. Mr. Hawa indicated that the only thing to his knowledge at that point was related to lighting on an outdoor pole which he indicates was completed in mid-December, 2019, or possibly January 2020.

[10] On March 3, 2020, Jamie MacNeil, counsel for Mr. Hawa wrote to Mr. JeBailey indicating that more than 60 days had passed since substantial completion and that therefore the holdback of \$11,700 would be released. Mr. JeBailey responded on March 3 to the letter stating that Mr. Hawa had been negligent in completing the work with due diligence and the he would not be releasing the holdback.

[11] By letter dated March 4th, Mr. MacNeil requested documentation and specifics of the deficiencies or unfinished work. Mr. JeBailey responded on March 16 that he was not interested in mediating and goes on to state, “*Should your client wish to see any evidence whatsoever, it will be through a Small Claims Court procedure.*”

[12] Mr. Hawa was asked and he again stated that he had never received any deficiency specifics or list. He stated that he did do some “warranty work” but never had specifics or an opportunity to remedy alleged deficiencies. He also stated that he never received any electrical engineer report(s).

[13] Mr. Hawa was asked about the electrical drawings done by Electec Engineering. He stated that the only copies he received until August 2018 were the ones dated November 2, 2017 (02/11/17). These, he says, were the ones that he had when he did his quote of January 17th and when he signed the contract on February 21, 2018. Perhaps the most significant change between the first version and the subsequent versions is the change on drawing E-850 was where the service was changed from 125 amp to 250 amp with changing transformer(s) from 112.5 KVA to 225 KVA. He stated there were other changes as well although he did not provide specifics.

[14] On cross-examination Mr. Hawa acknowledged that certain of the bullets, including bullet 9 dealing with exterior wall mounted lights and bullet 13 dealing with two exterior light poles, are consistent with the revised drawings and are not consistent with the original drawings.

[15] Mr. Hawa also acknowledged that he received an email of March 6 from Mr. JeBailey. That email appears to have revised electrical drawings attached but while Mr. Hawa confirms he received the email he says he did not receive the attached PDFs.

[16] When asked about leaving the site in August 2019 he said that he did that for a big reason – Mr. JeBailey was offering his workers side jobs behind his back and made them offers.

[17] He was aware that the intended occupancy was October. He stated that all units had power by November 6th.

[18] When asked why it took a year to issue an invoice for the extras Mr. Hawa indicated that he did not know what all the additional would be. That first extras invoice was issued in April, 2019.

[19] As to the involvement of electrical engineer, Mr. Hawa stated that he did get one call from someone at the engineering firm who raised the issue of the strapping of wires and they discussed that over the phone. He heard nothing further after that from the engineering company.

[20] With respect to an electrical engineering report of November 27, 2019, he stated that he never received a copy of that and was not copied on any email which had that report attached to it.

[21] In light of the lack of detail or particulars in the notice of counterclaim, Mr. Hawa was permitted to give rebuttal evidence. In that testimony, he spoke about the typical chronology of finish work and electrical. He stated that the drywall would go up, the trim, then paint, before the electrical can do switches and plugs. With respect to temporary power, he stated that the agreement was for a tripod to the first floor so that all trades can use it. It was not specified that each floor have its own power. He referred to a text of October 5, 2018, which was a list that he provided to Mr. JeBailey, it being understood that Mr. JeBailey was responsible to acquire those materials for the temporary power.

[22] Mr. Hawa emphasized that he was ready to do the power through the underground service in September of 2018 but Mr. JeBailey said wait until spring and he did in fact wait until May or June of 2019. That was nine months of delay attributable to Mr. JeBailey. He disputed that he did not have workers on site in June, July and August of 2019. He stated that specifically June 11th the crew was on site and the pad for the transformer had failed. On June 19th his crew was on site dropping lights and on July 25th, working on outside lights. In August 2019, he stated that they were set to go in but the kitchens were not ready. The fire alarm work was delayed because that had to follow the elevator installation. The transformers for the individual unit heaters were delayed in coming in and therefore there was at least a month delay for that.

[23] He was referred to a November 13th text dealing with some deficiencies and stated that all those were remedied. With respect to the intercom, Mr. Hawa stated they do not have a "ticket". He stated that this was discussed between him and Mr. JeBailey and his company's responsibility was to provide power and attach the fire alarm. He stated that they did their side.

[24] With respect to the email of November 27th from Mark Joudrey of Electec, he stated that he has never seen the email or an attachment. All that he received was the text. He stated that two of the items on the Mark Jodrey email were not his responsibility, number 8, nor number 9. However, he states that they were all done otherwise the inspection would not have been completed. With respect to the vaporizer hookups, they were never in discussion about doing that. He stated that the bulk of the work is in the rough-in and that in his estimation that was 80% of the work.

[25] When referred to the list of November 26th which was the text and which he did receive, he stated that all of that was done. If it had not been done there would have been no permit from Nova Scotia Power.

[26] On cross-examination he was asked why the building was not energized once the pad was installed in May or June instead of October 2019. Mr. Hawa stated that it was up to the owner to contact Nova Scotia Power and that as well, the electrical room had leaks and there was no approval for that on two or three occasions. He also again stated that the fire alarm needed to be attached to the elevator and therefore the elevator had to go before the fire alarm was completed. He stated that his company did install the heat pump disconnects. Mr. Hawa stated that he left the site at the end of August not early August or end of July.

[27] With respect to installing the sensors, Mr. Hawa said that when they went to the site, Mr. JeBailey said he did not want those. Mr. Hawa also stated that his company installed the exterior lights and that based on photo 17, he could not see what allegedly had been done.

[28] With respect to the engineer, Mr. Hawa stated that he deals with Nova Scotia Power, not the engineer. He stated that because Mr. JeBailey changed to a bigger heat pump they needed different disconnect switches.

[29] **Kathy Cox** is a superintendent at the subject premises. She originally started as a contract cleaning. She did cleaning in October 2019 before the tenants moved in. Initially there was no power in the halls which made it difficult to vacuum. She stated that she remembered the elevator contractor, the fire alarm and sprinkler service were waiting for power. She also stated that she had a list of tenants that were intending to move in and while everything was ready there was no power in many of the units. She only ever saw two electricians on site and certainly never a team of six – seven. She stated that she had to call several times about plugs not working and in the case of her own unit it had no heat initially. As she explained, apparently her heater was tied into a light so that when she turned the light off, the heater also went off. This was apparently remedied by Jeremy, another electrician hired by the Defendant. She stated that tenants began to move in in early December.

[30] **Michael Adams** is a certified Red Seal electrician with some 12 years of experience who works for Hawa Electric. He worked on the subject property. He stated that for the most part he was only involved in the rough in and typically there would be two journeymen and an apprentice and sometimes Mr. Hawa would be onsite. He confirmed that Nova Scotia Power do not pass inspections if there are any significant deficiencies. Absolutely not. While he was not there for the final inspection by NSP, he stated unequivocally that there would not be deficiencies if there was a final inspection as NSP goes in and checks outlets and lights.

[31] He was asked about doing “side jobs” by Mr. JeBailey. He stated that that indeed happened two or three times and he refused in each case. With respect to delays he said that there was some because there was no strapping on the ceiling and in some cases walls yet built.

[32] Another issue that he was questioned about was the lack of strapping and he indicated that the building had “RC Channel.” Mr. Adams stated this was the first time he had seen that and it makes the job of an electrician “brutal” not having strapping. He also referred to the fact that there was a wall missing in the entrance area. He again confirmed that Mr. JeBailey had asked him at least twice to do side jobs for a few hundred dollars. It was in one case to wire heaters. He again confirmed that he refused the request but did tell Mr. Hawa about the request.

[33] **Ethan Al Rybihi** described himself as a “partner” of Mr. Hawa and has 13 years’ experience in the electrical business, three or four years with the Claimant. He watches jobs and monitors the progress. He stated that if there were any deficiencies raised they would deal with it right away. He does not recall any delays from their side. He stated that he went through the whole building and the carpeting, paint and kitchens were not finished. The electric work however was finished according to Mr. Al Rybihi. He stated that with respect to the drawings that they had agreed on one plan and when the job started the whole drawings changed. He said that at the time Mr. JeBailey had said, “don’t worry, he’d fix us up.”

[34] **Rosalee Bragg** is a resident of the subject premises. She stated that she applied for residency early and was watching the progress of the building as it was being constructed. She previously lived nearby and had a friend who was one of the contractors. She stated that she was supposed to be moving in in November but had to move to Newfoundland for a few weeks because she could not get into the building. On cross-examination Ms. Bragg stated that she was told that she should be able to move in by November but October would have been a “long stretch.”

[35] **Anthony Goth** is a self-employed general labourer and utility person. He lives about a kilometer from the building in question. He secured some part time work including, it would appear, general clean up and security and some other “small jobs.” He testified that the building

was fully energized in mid to late November 2019. It seemed to him to be a little late and there was no power to the elevator at that point and some units had no power. With respect to the quality of the electrical work, he stated that his team had to install some lighting units and he also saw thermostats being rewired. He recalls that the elevator install personnel were waiting for the electrical to go in.

[36] **Elias JeBailey** is the Defendant. He has a Professional Engineer designation in addition to being a Property Developer although he did state this was his first development that he had done on his own. I understood that his family has done several other developments and that he has had some involvement and experience in those. Mr. JeBailey started by pointing out that there were several items that were explicitly in the written contract of February 2018 which are only in the 2018 drawings and are not in the 2017 drawings. In any event, he stated that an electronic copy of the revised drawings was sent to Mr. Hawa on March 6, 2018. He also stated that he physically gave a copy of the 2018 drawings to Mr. Hawa about three weeks before signing the contract and that they discussed some of the changes at the Starbucks in the Hydrostone. Apparently, this was where these two individuals would sometimes meet. Mr. JeBailey stated that Mr. Hawa did not raise the issue of the change until more than a year later when he was getting close to getting tenants. He stated that Mr. Hawa should have raised it earlier because at the stage he raised it he was in an “uncomfortable position.”

[37] Mr. JeBailey reviewed the invoices that he had received from the Claimant and pointed out that the first four invoices represented approximately 72% of the contract cost. He then reviewed various items which he said were not completed as of April 2019 and that this represented approximately 50% of the work left to be done. He noted that this does not include the extras invoices which were invoice 128 and invoice 295. With respect to invoice 295, Mr. JeBailey pointed out that there should have been a credit for the original tap box.

[38] The original completion date in the contract was to be July 2019. Mr. JeBailey stated he paid all invoices promptly up to April 2019. He went on to state that it was not until August of that year that Mr. Hawa brought up the issue of extras and Mr. JeBailey advised that there was no issue. And in any event, Mr. JeBailey's position was that he wanted the work done before he paid further. Mr. JeBailey stated that Mr. Hawa also stated that he would hold up the CO2 and fire alarm certifications. Mr. Hawa was basically saying he wanted payment before he finished the work. Mr. JeBailey stated that there was pretty much no work done between May and September of 2019. The final electrical work was done in November, 2019.

[39] To corroborate Mr. JeBailey's claim for delay he referred to the invoicing he had from the drywallers and painters which at the latest appear to have been in August therefore, in Mr. JeBailey's view, showing that the finish work had been done. He stated that they were ready to move tenants in for November 1st but not able to until December 1st because the electrical was not finished. If he had had the electrical work they easily could have moved the tenants in. Mr.

JeBailey referred to signed leases he had and showed the calculations for the lost month of rent for some nine leases. With potential extras for parking and storage the amount claimed under this heading is \$14,235.

[40] Mr. JeBailey then referred to the other area of his counterclaim – failure to complete scope of work (\$5,947.08), deficiencies (\$9,268.57), and work completed by Defendant (\$3,507.50).

[41] Mr. JeBailey again stated, on cross-examination, that in August Mr. Hawa wanted extra money and said he would not do the fire or CO2 certifications. And, over the phone, Mr. Hawa told him that he was leaving the job site. Mr. JeBailey again stated that he had given the new drawing to Mr. Hawa before the contract was signed. He stated he did this on the same day that he received them and that this would have happened at Starbucks where they had met three or four times.

[42] He confirmed that there was an 11 or 12 week delay between the September 6 letter from Mr. MacNeil and the November 25th email from Mr. JeBailey. He stated that they had had a discussion and that Mr. Hawa had sent his guys back in but then in mid-October they stopped showing up as frequently. Mr. JeBailey stated that the Claimant did come back on site once after December 2019 to attend to the wiring of a heat pump but it was not done satisfactorily so ultimately that was done by Jeremy Clowater. Mr. JeBailey stated that he did email Mr. Hawa (in January 2020) to come back but there was no response.

[43] With respect to the leases, he stated that they were mostly signed in August for November 1st occupancy. No one actually moved in before December 1st. Mr. JeBailey also referred to the elevator being done later than otherwise would have been the case because of the delay in the electrical work.

[44] When asked why, if there were such issues with the Claimant, he had not intervened earlier, Mr. JeBailey said the biggest reason was that the electrical permit was in the Claimant's name and to have changed that would have meant "breaking the permit" and getting NS Power in and a new contractor and that could likely have been a delay of three or four months.

[45] **Mark MacGuire** is an Installation Supervisor for Thyssen Krupp Elevator who supplied and installed the elevator at the subject property. He confirmed that the elevator installed on this site required three phase power. The plan had been to do the install in December, but this did not occur until the new year.

Analysis

[46] The Claimant is seeking \$11,700, plus HST, its position being that it has complied with the terms of the contract and is owed the balance of the fixed fee price.

[47] The Defendant's position is very much the polar opposite to the Claimant. The Defendant asserts that there were delays, uncompleted and deficient work, and a great deal of time spent by its own forces for work that should have been completed under the scope of work in the contract. Its counterclaim is for some \$33,000, although it recognizes that this amount exceeds the Court's monetary jurisdiction of \$25,000.

[48] The principals of the two parties are, respectively, Joe Hawa and Elias JeBailey. The business relationship appears to have been fairly typical in the early stages but appears to have become progressively more adversarial in or about August 2019 and through to early 2020 when Mr. JeBailey refused to pay the final amount outstanding.

[49] My impression was that Mr. Hawa felt that he had been misled with respect to the changes in the drawings that in his view at least, occurred between the period when he bid on the proposal and signed the contract and the time period when he began work. In addition, he appears to have taken great offence that Mr. JeBailey had directly solicited some of his employees to do side jobs, this latter issue having surfaced in or around August 2019.

[50] For his part, Mr. JeBailey apparently felt that Mr. Hawa and his company were not devoting sufficient time to the project. Secondly, and perhaps most significantly, he felt he was unfairly pressured to have Mr. Hawa finish the job and to make the payment that he made to Mr. Hawa in November 2019. His explanation for continuing with the Claimant company was that its name was on the permits and at the point in question if he had changed electrical contractors it would most likely only have led to additional delays in the completion. Nevertheless, he felt that he had been "extorted," which is the exact word he used in his pleadings.

Claim Amount

[51] I will start with the Claimant's claim and, specifically, the amount thereof. As noted previously, it is in the amount of \$11,700, plus HST. However, as I will explain, I have concluded that the amount actually should be \$13,000, plus HST, that is, \$14,950 (\$13,000 + HST = \$14,950).

[52] My calculation in this regard is based on a careful review of the submitted documents, both the invoicing and the payments. A summary of all of the invoices submitted by the Claimant to the Defendant is as follows. As will be seen, the total amount of all the invoices, inclusive of HST, is \$171,723.75:

Invoice Date	Invoice Number	Amount with HST
July 29 2018	797457	\$ 14,950.00
Jan 20 2019	295867	\$ 23,000.00
Feb 25 2019	295887	\$ 46,000.00
April 7 2019	126	\$ 23,000.00
Dec 16 2019	384	\$ 42,550.00
Sub total		\$ 149,500.00
April 8 2019	Extras 128	\$ 6,325.00
Oct 5 2019	Extras 295	\$ 15,898.75
Grand Total		\$ 171,723.75

[53] The evidence regarding payments is not disputed. It shows the following:

Payments

Date	Amount
Sept 27 2018	\$ 13,455.00
Jan 24 2019	\$ 20,700.00
Feb 27 2019	\$ 41,400.00
April 15 2019	\$ 20,700.00
April 15 2019	\$ 5,692.50
Nov 25 2019	\$ 54,826.25

TOTAL

\$ 156,773.75

[54] As will be seen, the total amount of payments is \$156,773.75. The difference between the total invoices of \$171,723.75 and \$156,773.70 is \$14,950.

[55] This figure of \$14,950 agrees with 10% of the original contract amount of \$130,000, plus HST, being \$13,000, and with HST, \$14,950. I note that in the email of November 25, 2019, from Mr. JeBailey, he states that he is paying the full balance of invoice 295 and the holdback from invoice 128. These are the two extras invoices which means therefore, that ultimately and effectively the holdback of 10% was only applied to the invoicing on the original contract amount which, as already stated, was \$130,000.

[56] In that very same email Mr. JeBailey states that the amount of the holdback left on the contract is \$11,700, which he then confirms in response to an email from Mr. MacNeil that it is \$11,700, plus HST. That amount is not accurate.

[57] In his evidence, Mr. JeBailey said that there was no holdback on the very first invoice. That statement was also not accurate but I believe this is what led Mr. JeBailey to think that as at November 25, 2019, the remaining holdback was \$11,700, plus HST. The fact is the first invoice was in the amount of \$13,000, plus HST, for a total amount of \$14,950. The payment made on September 27, 2018, was \$13,455, which is the after-tax amount of the invoice less 10%, i.e. $\$13,000 - \$1,300 = \$11,700 \times 1.15 = \$13,455$.

[58] The preceding analysis indicates that the outstanding balance of the invoicing less the payments is \$14,950. I so find.

Counterclaim

[59] The Defendant's counterclaim comprises four separate elements as follows and I use the wording in the Defendant's counterclaim summary which was in binder 1 of the documents filed by the Defendant:

1. Failure to complete contract on time by five months as per contract	\$14,235.00
2. Failure to complete scope of work as per contract	5,947.08
3. Failure to Remedy Deficiencies	9,268.57
4. Work completed by Defendant	<u>3,507.50</u>
Counterclaim total	\$32,958.14

[60] I will review each of these four in turn.

1. Failure to complete contract on time by five months as per contract

[61] I am dismissing this counterclaim in its entirety. The reasons for this follow.

[62] First, as stated by counsel for the Claimant, the original date for substantial performance of July 1, 2019, had come and gone and essentially was “off the table.” In saying this, given the other evidence of other work that was going on and was still yet to be done, it is clear that there would have been no possibility of the electrical work being completed by July 1, 2019. The point was also made that the failure to substantially comply by July 1 cannot be attributed to the electrical contractor. It is also pointed out that there was a significant delay by the Defendant in having the transformer pad installed. As I understood the evidence, this was upwards of nine months of delay.

[63] Then there was the delay, again attributable to the Defendant, between early September and late November when there was no response to the lawyer’s letter of September 6th.

[64] Perhaps most fundamental in considering this aspect of the counterclaim is that the Defendant has not met his burden. He bears the burden of proving on a basis of probabilities that it is more likely than not that the Claimant was solely responsible for the one month delay in the tenants moving in.

[65] This is a significant amount of money for consequential damages. In order to find in favour of the Defendant I would need more evidence about the whole project’s state of completion vis a vis actually accepting tenants and preferably from a third party, independent witness. I do not think having painting or drywalling invoices from August prove that.

[66] The preceding would, in my view, be sufficient to dispel any claim for lost revenue due to delay on account of the Claimant. In addition however, the facts here and, in particular, the

email exchange on November 25, 2019, support a finding that the Defendant is estopped from claiming damages for delay given that communication of November 25, 2019.

[67] As noted in the summary of evidence, the Claimant had gone off site sometime in August 2019. This led to the email of August 19th from Mr. JeBailey as well as a series of letters between legal counsel through to early or mid-September. This was a lull in that communication until November 25th when Mr. JeBailey sends the following email:

Email of November 25, 2019, 11:01 a.m. from Elias JeBailey to Michael Maddalena and James MacNeil

Good morning Gentlemen,

I am emailing to confirm the following:

- 1. A bank draft has been prepared for Hawa`s Electric in the amount of \$54,826.25. Joe will be picking up the draft shortly. The draft payment covers:
 - a. The contract balance of \$37,000.00 less hold back + HST. Note that there are still deficiencies and contract deliverables yet to be complete; both parties are aware.*
 - b. The full balance of Invoice 295.*
 - c. The holdback from Invoice 5 128.**
- 2. The amount of holdback left on the contract is \$11,700.00 which will be held for 60 days after completing all work per NS Builder's Lien Act. This is the total amount left on the contract.*
- 3. Jamie – please confirm with Joe that you have received this email as once the draft is deposited, Joe is responsible for handling over all pertinent certification required for building occupancy (Dec 1 2019). This includes but is not limited to, fire alarm certification, CO Certification, and final inspection report by NSP. Note that there is a due diligence to send all certification promptly to allow time for inspections and ensure the safety of the tenants when they move in on the 1st of December.*

Should there be any questions please do not hesitate to contact the undersigned.

*Best regards,
Elias JeBailey*

The following response came from Mr. MacNeil in about an hour:

Email of November 25, 2019, 12:03 p.m. from James MacNeil to Elias JeBailey and Michael Maddalena

Elias – I have confirmed everything with Joe and he will provide all documents. One clarification the holdback amount should be “plus HST”; please confirm.

*Best regards,
Jamie*

Mr. JeBailey replies that that same day:

Email of November 25, 2019, 3:11 p.m. from Elias JeBailey to James MacNeil and Michael Maddalena

Absolutely, 11,700.00 dollars plus hst

*Best,
Elias JeBailey*

[68] This series of emails of November 25th constitutes a significant piece of evidence in this case and, as I will elaborate on, in my view it constitutes in law a waiver or estoppel by representation that prevents the Defendant from now making a claim for delay.

[69] An objective reader of the email of November 25th from Mr. JeBailey would infer from the contents thereof that any outstanding items were somewhat minor and within the amount of the holdback mentioned in that email. That conclusion is not dispelled by the communications that followed the November 25th email and which were sent by Mr. JeBailey to Mr. Hawa. Indeed, they affirm that general understanding. I refer here to text message of November 26th from Mr. JeBailey to Mr. Hawa as well as the January 5, 2020, email from Mr. JeBailey to Mr. Hawa

[70] Notably absent from this was any suggestion that Mr. JeBailey had, or would be, or even might be pursuing a further claim against Hawa's Electric for delayed tenancies. In my view that constitutes a representation by omission when considering all the circumstances here including the email of August 23 from Mr. JeBailey where he states that he will be leasing units on October 1, 2019, refers to some items that were yet to be completed, and states that should Mr. Hawa fail to complete, he would be suing for the delays.

[71] In ***Can-Euro Investments Ltd. v. Industrial Alliance Insurance***, 2009 NSSC 20 (CanLII), Beveridge, J. (as he then was) stated:

*[136] It is my view that the doctrine to be applied whether it be called waiver or promissory estoppel or variation of the contract or simply binding promises, stems from the words of Lord Cairns in **Hughes v. Metropolitan R. Co.** (1877), 2 App. Cas. 439 at p. 448:*

... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results--certain penalties or legal forfeiture--afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of

leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

[72] So, even if the Defendant would otherwise have had a claim for delay, I would find that by the November 25th email, he cannot later seek to enforce those rights. This view considers the communications in August and September, that there was an impasse in that period, and that this was effectively a resolution of that impasse. I also note that the Claimant, as a result of this payment, apparently did what it needed to do to complete the fire alarm certification, the CO certification, and the final NSP inspection. All of these things had to happen before tenants could move in and the Defendant facilitated all of this.

[73] Given all of this, it would be inequitable to allow the Defendant to enforce his strict rights regarding a claim for lost tenant revenue having regard to the dealings that had thus taken place between the parties.

[74] For all of these reasons, I would dismiss this portion of the Defendant's claim.

2. Failure to complete scope of work as per contract

[75] Under this heading, the Defendant is claiming five separate items as follows:

Item	After Tax
Telephone intercom	\$ 1,463.61
East Side Exterior Lighting and Fan Switch	\$ 1,454.75
Astronomical Timers and Sensors	\$ 941.03
Temporary Lighting, Plugs, Panels, and Breakers	\$ 1,538.17
Heat Pump Disconnects	\$ <u>549.52</u>
Total	\$ 5,947.08

[76] I deal with each of these in turn.

Telephone Intercom

[77] In Article 3.3 of the contract, the third bullet reads:

Supply and install telephone access intercom system.

[78] Against this, Mr. Hawa testified that this item was discussed between himself and Mr. JeBailey and, as I understood his evidence, it was agreed that this would not be the responsibility of Hawa's Electric. In fact, Mr. Hawa stated that his company does not have the "ticket" to do that type of work. In support of this, I note that Mr. JeBailey was invoiced by and apparently paid Total Install Video by invoice dated February 16, 2018. This was right around the time of the signing of the original contract. If he had not agreed that this would be his responsibility, the question that arises is, why would he have ordered that material. Also, I note that this item is not in any of the "deficiency lists" between August 2019 and January 5, 2020. There are eight such lists which for completeness I enumerate as follows:

- August 23, 2019, email from JeBailey to Hawa and Maddalena
- October 9, 2019, email from JeBailey to Hawa
- November 13, 2019, text from JeBailey to Hawa
- November 14, 2019, email from JeBailey to Hawa, with attached email of November 7th from Bob Rundell of Rundell Engineering;
- November 26, 2019, text from JeBailey to Hawa
- November 27, 2019, email from Electec Engineering/Rodney Bona to JeBailey (Note: this email was not copied to Mr. Hawa)
- December 6, 2019, email from JeBailey to Hawa
- January 5, 2020, email from JeBailey to Hawa

[79] In light of the evidence, I am disallowing this item.

East Side Exterior Lighting and Fan Switch

[80] The contract and apparently the drawings make reference to exterior lighting but I found the evidence was somewhat confusing with respect to how many Mr. JeBailey was saying were not complete. I note in the January 5th email it refers to an exterior light over the northeast exit door, from which I understood there to be one light in question. I also note that photo 18 shows one light above east exit installed by Jeremy. The invoice of September 10, 2010, from Jeremy refers to, "put light in front building" and to fix fan in 2nd floor bathroom. I also note that bullet 9 of the contract refers to "install" but not supply exterior lights. Based on the preceding, I find that it is appropriate to allow for the labour only for the installation of one light by Jeremy Clowater. That is, four hours at \$50 per hour, being \$200. I will allow that amount.

Astronomical Timers and Sensors

[81] Under the contract, the Claimant was required to wire and install exterior lighting and underground parking lighting. The claim is for materials but I do not see that that is called for the scope of work. However, I note that Jeremy Clowater appears to have installed both of these as shown by the invoices of May 19, May 29, and July 13, which total nine hours. While this is dealt with in another section of the counterclaim, I will deal with it here and allow the \$450 for the counterclaim.

Temporary Lighting, Plugs, Panels and Breakers

[82] Under the contract, bullet 12, it states that the Claimant was to, “provide temporary service, lighting, and panels throughout the project.” The word, “provide,” is ambiguous. I note particularly that in many of these bullets refer to “supply and install,” which is unambiguous. “Provide,” in this context, can either mean supply and install, supply, or install. Given that it is ambiguous and given that the contract was drafted by the Defendant, I apply the rule of *contra proferentem* and find that it refers only to the installation.

[83] I also note that Mr. JeBailey asked Mr. Hawa in October 2018 to send a list for the temporary power and lights and Mr. Hawa complied. While there is an email of October 9, 2018, from Mr. JeBailey, I note that this item was not on any of the “deficiency” lists after August 23, 2018. In any event, I find that the interpretation of the contract does not require the Claimant to have paid for the materials and therefore this item is dismissed.

Heat Pump Disconnects

[84] This is said to be required under bullets 7 and 8 of the contract. In evidence was that the heat pump disconnects were installed by the Claimant. This counterclaim is for materials cost only. Bullet 7 refers to wiring only, and bullet 8 refers to supplying and installing switches, plugs and wiring as per drawings. It is not clear that that would include heat pump disconnects. Further, I was not referred to any part of the drawings which would make that clear and in my review of the drawings I did not find any such mention.

[85] Based on the preceding, I disallow this part of the counterclaim.

3. Damages for Failure to Remedy Deficiencies

[86] This comprises the following items:

Item

After Tax

Electrical Closets Engineer Remedy	\$870.42
Exterior Lights Engineer Remedy	\$2,386.25
Mechanical Equipment Hook Up (Grounding and Vaporizer)	\$4,071.00
Exterior Stair Light Wire, Central Heat Pump Breaker, Disconnect, and Deficient Lights	\$640.90
Electrician Labour Hours (26hrs)	\$1,300.00
Total	\$9,268.57

Electrical Closets Engineer Remedy

[87] Of relevance to this section is Article 3.3 in the first bullet of the contract. This reads:

3.3 The *Contractor* shall perform all work per the Canadian Electric Code (CEC). The *Contractor* scope shall contain the deliverables outlined in the electrical quote dated January 17, 2018. Additionally, the following shall be required by the electrical *Contractor*:

- *Contractor* will carry out electrical work, supply and install all electrical materials and fixtures as outlined in the latest revision of the electrical drawings by “Electec Engineering.”

[88] With respect to the electrical closets it was not shown in evidence that Hawa’s work did not comply with either the drawings or the CEC. I note that the November 27th list prepared by Electec was not sent to Hawa.

[89] I also note that photo 12 and accompanying comments state that fire stopping was not under Hawa’s scope of work.

[90] I disallow this item.

Mechanical Equipment Hook Up (Grounding and Vaporizer)

[91] Under this counterclaim it is stated that electrical engineers required in its November 27th email that all propane piping needed to be grounded. I also note that this was in the November 26th text which was sent to Mr. Hawa. Bullet 10 of the contract appears to the relevant item and it reads as follows:

Electrical wiring for all mechanical equipment per drawings. This includes boilers, pumps, heaters, ventilation equipment, elevator/elevator accessories, etc.

[92] It is not clear on that wording that it includes propane tanks or vaporizer. Further, it was not pointed in the evidence where, if at all, this was in the drawings. Based on my review of the drawings, I could not find it.

[93] Based on this evidence, the Defendant has not proven that this was within the scope of work and therefore I disallow this claim.

Exterior Lights Engineer Remedy

[94] This was part of the Electec November 27th list which stated, "MD wiring not acceptable use RW90 or other cable rated for outdoor use."

[95] As already noted, this list was not sent to Hawa.

[96] As in the previous item, it was not shown that the wiring used by Hawa did not comply with either the drawings or the CEC. While it may be evident from my comments, the fact that the electrical engineer, after the fact, says something is or is not acceptable, does not mean it is necessarily not acceptable for purposes of the contract that the parties have entered into.

[97] Nowhere in the contract do I see that it is a contractual term that the Claimant was to comply with any directions from the Electrical Engineer. What it was required to comply with were the terms of the contract, the drawings, and CEC. And, to repeat, nowhere has it been shown that this wiring did not comply.

[98] And, moreover, I understand that Nova Scotia Power would have approved this wiring.

[99] For these reasons, I disallow this part of the claim.

Exterior Stair Light Wire, Central Heat Pump Breaker, Disconnect, and Deficient Lights

[100] My review of the contract, I find that the contractor is not responsible for the materials in question here. However, I will allow the claim of labour for Jeremy Clowater of five hours, that is, \$250.00, as shown in his August 9, 2020, invoice.

Electrician Labour Hours

[101] I have already determined that I will allow \$900, with respect to Jeremy Clowater's services under this and the previous subheading. I note that the amount of the claim for Mr. Clowater is \$1,300 but the invoicing I have in Binder 2 indicates 18 hours for the five invoices which, at \$50 per hour, is \$900.

4. Work Completed by Defendant

[102] This item is for \$3,507.50 inclusive of HST and is for work the Defendant says he himself did, for which he charges at \$75/hr and for two labourers to install light breaks in 50-75% of the units.

[103] Starting with the light bulb installation, I cannot see where that would be included in the scope of work. The Defendant has not shown where it falls under the terms of the contract. I disallow that.

[104] I would mention as well on this particular item what appears to be significant over-reach. The Defendant says he had two labourers working for five days to install light bulbs in 50-75% of the units. By my calculation that works out to 6.6 hours per person per unit to install light bulbs. That is not credible and is the sort of evidence that causes one to be skeptical of the rest of the evidence put forward by the party.

[105] After removing the lightbulbs installation, the balance is \$1,437.50, which works out to 16.6 hours at \$75 per hour.

[106] In recognition that all general contractors do some work themselves, and to account for some degree of over-estimation, I reduce that to 10 hours. I will allow that but at the Jeremy Clowater rate of \$50/hr, for a total under this head of damages of \$500.

Summary - Claim and Counterclaim

[107] As discussed above, I am allowing the claim in the revised amount of \$14,950, inclusive of HST. For the counterclaim, I am allowing the amount of \$1,400. The net amount payable by the Defendant therefore is \$13,550.

[108] The amount I have allowed for the counterclaim is clearly much less than what was sought. The reasons for that are specifically set out in the previous sections of these reasons. However, some general comments are in order.

[109] First, a defendant who makes a counterclaim becomes, in effect, a claimant and has the burden to prove to the Court that what he or she is claiming is supported by the law and the evidence, which, as in any civil case is subject to the standard of proof on a balance of probabilities.

[110] The Defendant put forward a position before this Court which was very much at odds with the position communicated in his email of November 25, 2019. As I stated above, any objective reader of the email of November 25, 2019, would infer that the outstanding items which, according to the wording in that email the parties were aware of, were relatively minor and probably within the holdback amount. That hypothetical reader would be quite surprised to subsequently learn that there was actually a counterclaim amount totalling approximately \$33,000.

[111] Given such an extreme shift in position, any judge or adjudicator is going to be particularly vigilant in his or her consideration of the items comprising such a large counterclaim.

[112] Mr. JeBailey refers to and seeks to rely on the specific articles of the Contract as well as the referenced drawings. His counterclaim items are based on what would presumably be described as his strict legal rights arising under the written Contract. One of the articles of the Agreement, which was not mentioned or relied on before me, is Article 6.3 of the contract which reads:

6.3 The Owner through the Consultant shall promptly give the Contractor Notice in Writing of observed defects and deficiencies which occur during the one year warranty period.

[113] The relevant Consultant here would have been Electec Engineering as referenced in Article 1.1 of the Agreement. No such notice in writing was given by the Defendant in this case.

[114] To the contrary, when requested in March 2020 by the Claimant's lawyer to provide written particulars, the Defendant responded by stating that he was "*not interested in mediating,*" and then goes on to state that "*should your client wish to see any evidence whatsoever, it will be through a Small Claims Court procedure.*" The Defendant is in breach of the terms of the very same agreement which he seeks to strictly rely on.

[115] I would make the general observation and take notice based on many proceedings in this Court and otherwise that there are very often disagreements between contractors and owners about the scope of work and to what extent there are defects or deficiencies in the work. In practice, very often compromises are made and to use common parlance there is often a great deal of give and take between parties. This sometimes ends up with what people refer to as an

“agreement to disagree,” but most significantly, some form of resolution reached which allows a successful completion of the project.

[116] This is essentially what happened here in November of 2019. Clearly, there were significant disagreements between the parties which appear to have reached the breaking point in August 2019. Lawyers were involved, communications were passed, and after a delay (which appears to have been of Mr. JeBailey’s making), a resolution reached whereby Mr. JeBailey paid for the extras invoices which had been billed up to date but held back the 10% of the original contract amount.

[117] Based on that, Mr. Hawa proceeded to provide all the necessary signoffs and paperwork for the fire alarm certifications, CO certification and final inspection by Nova Scotia Power. This was a critical step and allowed the tenants to move in as of December 1, 2019. There was some continuing work to be done which according to that email both parties were aware of. Unfortunately, there was no listing of that given at the time, although on January 5th there is a nine item list which appears to have subsequently been dealt with, mostly, if not entirely by Jeremy Clowater.

[118] On any level of analysis what happened in November 2019 taken by itself would be seen as positive as it facilitated the important step of allowing the parties to move to the next step, substantially complete the project, and allow tenants to move in and income to start flowing to the owner.

[119] From a policy point of view the law should support these types of arrangements made during a construction project. When there is a partial settlement and a representation that, objectively viewed, there is a limited amount of incomplete work and/or deficiencies of which the parties are aware, the party who has made such a communication should not later be able to go back and strictly enforce the terms of the original contract.

[120] In an earlier section I refer to the doctrine of promissory estoppel and have ruled that with respect to the claim for the loss of rent, it would apply to estop the Defendant from making such a claim. This was in addition to the other reasons I referred to disallow that part of the counterclaim.

[121] However, I have not applied that doctrine to the other parts of the counterclaim. Nevertheless, the rationale supporting that doctrine and what I have referred to as the policy underpinnings, do, to some extent inform my approach to analyzing the claims put forward by the Defendant in his counterclaim.

[122] In the hearing there was much emphasis placed on the issue of the revised drawings and there was significant conflict between the parties' evidence about when the revised drawings were given to Mr. Hawa. Ultimately, I did not find it necessary to make a factual determination on this issue because Mr. Hawa was compensated through his extras invoicing which Mr. JeBailey agreed to pay as clearly shown in the email of November 25, 2019. Objectively read, Mr. JeBailey voluntarily agreed to pay the extras invoices as a settlement, a sort of "make peace."

[123] In his written pleadings and in his evidence JeBailey uses the term "extortion", I consider that an significant overstatement of the reality. Certainly he could not, in my view, claim duress or undue influence. And that this had been left to the final moment to deal with, was in a large measure due to his delay in the period September – late November.

[124] For his part, Mr. Hawa's repeated statements in the evidence that he received no statement of deficiencies defies credibility. In an earlier paragraph, I enumerated the various lists that had been circulated in the August 2019 – January 2020 period. All but one of these had been sent to Mr. Hawa. Perhaps of most significance was the email of January 5, 2020, which appears to be the most recently issued list. While for the reasons given above, this did not comply with Article 6.3, it does nevertheless show that Mr. Hawa had received objective notification of what remained to be done. There was next to no evidence that his company addressed these items.

[125] As I have already indicated. It appears that most or perhaps all of the items referred to in January 5th, 2020, email were ultimately completed by Jeremy Clowater. I have awarded all of the costs associated with Mr. Clowater's services. Based on the evidence, it totals \$1,400.

[126] Given the mixed results in this case and otherwise exercising my discretion, I am not allowing any costs or prejudgment interest.

ORDER

[127] It is hereby ordered that the Defendant pay to the Claimant the sum of \$13,550.

[128] There will be no costs or prejudgment interest.

DATED at Halifax, Nova Scotia, this 7th day of June, 2021.

**MICHAEL J. O'HARA
ADJUDICATOR**