IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *McMurphy v. RennDuPratt Design and Fabrication Inc.*, 2021 NSSM 26

Claim: SCY No. 491701
Registry: Yarmouth

Between:

John David McMurphy and Cheryl Lynn Clarke

Claimant

-and-

RennDuPratt Design and Fabrication Inc., Amanda Rennehan, Dustin E. DuPratt and Kelly DuPratt

Defendant

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: August 17, 2021

Decision: August 20, 2021

Appearances:
The Claimant, Solange Boudreau
The Defendant, Matthew Fraser

DECISION

Parties

[1] Prior to the hearing in this matter the parties had agreed that the Defendant Amanda Rennehan was to be removed as a Defendant. Consequently, the claim against her is dismissed. The documentation provided shows all transactions were made and invoiced in the name of the corporate Defendant. There was nothing in

the evidence that would indicate any personal liability on the part of either Dustin DuPratt or Kelly DuPratt. I therefore dismiss the claim as against those individuals and will deal with this matter only as it relates to the corporate Defendant.

Facts

[2] I found all of the witnesses to be credible in the sense that they were honestly attempting to tell the court what they understood to be true. The essential facts are not really in dispute. In my view, this case resolves primarily on the interpretation of the documentary evidence submitted. I will confine my decision essentially to that evidence, but I wish the parties to know if there is any piece of evidence that I do not mention in this decision it is not because I have not considered it. Its omission would be solely because it is not directly relevant to the core of the decision which I am about to render. I will not be making a decision as to whether or not there were in fact purple undertones to the paint used on the cabinetry in question, because, in my opinion, it is not necessary for me to do so. I did examine the photographs submitted by Mr. Fraser on at least three different devices as well as printed, and the colour seemed different on all. Photos are an unreliable method to determine an issue as to the details of colour. I will also not rule on whether the estimate of East Coast Cabinets is admissible as evidence, as that is not necessary for my decision.

[3] David McMurphy testified that he, and his partner Cheryl Clarke, engaged the corporate Defendant (which I will simply hereinafter refer to as the Defendant in this decision) to design and build a kitchen for them. He said that they wanted a custom professional job and wanted the Defendant's skills in creating a modern professional design. In May 2018 they contacted Defendant. They advised the

Defendant that they had purple in their bathroom and they found it very unappealing and wished to ensure that there was no purple in the work done by the Defendant. They met with Kelly DuPratt, who is qualified as an interior designer, at the Defendant's offices and began selecting materials and colours, not only for the cabinetry, but also for the countertop, crown mouldings and cabinetry fixtures. They indicated that they wanted a light grey surface for the cabinetry and noted Ms. DuPratt's desk, that had a grey colour of the shade they found attractive. Ms. DuPratt noted that that shade would be quite dark and showed them a swatch, which the witness said looked light grey, at her office. He stated he did not take the swatch home but trusted her as a professional. He did not recall looking at the swatch outside in natural light. He also said he did not know that he could ask for a test panel to be sprayed and then viewed at the installation site.

[4] M r. McMurphy testified that when the cabinets arrived, he and Ms. Clarke, told Ms. DuPratt they were not happy with the colour. Ms. DuPratt stated that the perception of the colour would change with different lighting and with the installation of the countertop and other items. She encouraged them to continue with the project and replace the lighting. He says that they have tried every kind of light bulb that would fit in their fixtures but none of them resulted in a colour satisfactory to the Claimants. The Claimants were then given a quote of $8,000 to replace the colour on the cabinetry. The Claimants felt abandoned and then the matter deteriorated and lawyers became involved.

[5] In cross-examination Mr. McMurphy acknowledged that they had in fact approved the colour in the Defendant' s office. He says that he does not recall meeting with Ms. DuPratt at the jobsite. Mr. McMurphy acknowledged the invoice and contract, which provided that for the kitchen, there would be a 50% deposit

and the 50% remaining would be payable at the time of delivery, and that the countertop required an 80% deposit with 20% payable at the time of delivery. He acknowledged that this contract was signed on September 11, 2018. He acknowledged that they had paid the sum of $10,781.23 on September 11, 2018. He also acknowledged that they had paid the balance of $14,604.77 on November 10, 2018.

[6] Mr. McMurphy also acknowledged in cross-examination that the contract contained a term which provided “the homeowner will be required to review the final installed project with a RennDuPratt representative and sign a checklist confirming the satisfactory installation and operation of all components”. He further acknowledged that the checklist had been signed on November 13, 2018 and that that checklist contained the following item which was checked off “all cabinetry is as shown/agreed in the design plans”. His evidence was that they did complain about the colour and did not believe that that phrase on the checklist included approval of the colour.

[7] Kelly DuPratt testified that she was not a shareholder of the company, bµt was a director of the company, and had the authority to bind the company. She also confirmed that she had attended design school and was a qualified in interior designer.

[8] Ms. DuPratt testified that she met with the Claimants a number of times in her office and went over the proposal with them. She stated that they did like the grey colour of her desk, but she felt that that would be too dark for their particular kitchen, so she presented the colour sample, manufactured by Benjamin Moore, which had several variations of shades of the same colour as her desk. She says

that she suggested, in effect, the same colour, only one or two shades lighter. The chosen one was called “Abalone”. She says that the Claimants liked the colour, and that she then took them outside to view the colour in natural light. She says that she provided the Claimants with a swatch of the proposed colour approximately 2" x 6" that they could take home and check at the actual installation site. She says that she did suggest that the Claimants update the lighting in the kitchen as that can affect the look, and that the Claimants wanted to brighten up the kitchen. She also pointed out that the colour swatch provided by Benjamin Moore described the Abalone colour as “never fail neutral”. Under cross-examination she did acknowledge that various paint mixtures can involve small amounts of colours which do not dominate.

[9] Mr. Dustin DuPratt testified primarily that he managed a team that did the building and the installation. He stated that he had converted the colour swatch for use for lacquer, checked it against the swatch and the two were identical. He said that the Claimants had signed off on the job and that the item in the checklist noted above, included all details of the installation including colour.

Analysis

[10] I find that there was a contract to install a kitchen and I find that the invoice/contract (which is the last document in the Defendants' documents) did constitute the contract. I find that the Claimants did agree to review the installation and to go through the checklist.

[11] It is to be noted that the installation took place by at least by November 10, 2018, the payment of the balance was made on November 10, and the checklist

was reviewed and signed off on November 13. Mr. Fraser makes the very powerful point that the Claimants had at least a day or two after the installation before they wrote the check and at least three days after that before they signed the checklist. This does raise a strong inference of acceptance.

[12] The basic principle of contract interpretation is language must be given is plain and ordinary meaning. In my view, the plain and ordinary meaning of "all cabinetry is as shown/agreed in the design plans" must include all aspects, including colour. There was no specific item on the checklist relating specifically to colour. This further strengthens my interpretation.

[13] I have considered the question of whether the Claimants unequivocally accepted the cabinets as delivered. I find that Mr. McMurphy did mention the colour at the time of delivery. I also accept that Ms. DuPratt did indicate that with the completion of the project and the changing of lighting the concern may well be satisfied. I am troubled by the fact that neither Mr. McMurphy nor Ms. Clarke made any kind of note on the checklist objecting to the colour, or document their objection in any other way at the time, which they easily could have done.

[14] I have also considered whether or not Ms. Du Pratt's comments about the completion of the job and lighting could constitute some kind of actionable misrepresentation. Despite M s. Boudreau's able argument that there was a reliance on M s. DuPratt's representation that colour may well be affected with the change of lighting and additional items, I am unable to conclude that this should be interpreted as an actionable misrepresentation, even if one assumes it was a misrepresentation. As I understand the law of misrepresentation, we are governed by **Queen v. Cognos Inc., [1993] 1 SCR 87** and the oft quoted passage from the

opinion of Justice Iacobucci:

> The required elements for a successful Hedley Byrne claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[15] I don't think the alleged misrepresentation qualifies on points 2 and 3. The evidence does not establish that it was untrue, inaccurate, or misleading that light can affect the colour. The evidence does not establish that the statement was made negligently. I also have doubt whether the Claimant's alleged reliance on this representation was reasonable, as required by point 4.

[16] It is an indication of acceptance that the Claimants actually paid the balance of the contract price after the cabinets were installed and they could clearly see the condition of them. The fact that the checklist was signed some three days later, without notation of a concern about the colour, weighs heavily against the Claimants. The Claimants could well have rejected the cabinetry upon delivery.

[17] It certainly is good commercial practice for a vendor to have a buyer sign off accepting the goods. In this regard I find that the Defendant took reasonable steps to ensure that the buyer was in fact satisfied and avoid disputes.

[18] All of this leads me to the conclusion, on a balance of probabilities, that the Claimants in fact accepted the cabinets as delivered. I have derived some comfort in this conclusion from **Canada (Attorney General) v. Borgo Upholstery Ltd.,**

2004 NSCA 5, I acknowledge that the circumstances in that case were different from the case at bar in that the Sale of Goods Act is not the statute primarily applicable in this case. Since this case involves a combination of both goods and services the Consumer Protection Act would probably be more applicable. However, since it is generally accepted that the Sale of Goods Act is, in effect, is a codification of common law, it does indicate a general principle of law that the law will not allow a claim based on defects discovered after the acceptance of the goods, if the defect was observable upon delivery.

[19] While I fully recognize that the provision of a kitchen can be a substantial purchase, this does not detract from the fact that I have to apply the legal principles which are applicable. While it is regrettable that the Claimants are not happy with the end product, and will undoubtedly be disappointed by my decision, I am unable to find a basis in law to allow their claim, on the evidence I have heard.

[20] For these reasons, I will dismiss the Claimant's claim.

[21] The Defendant counterclaims for the sum of $1,874.36 being the balance of the countertop. This counterclaim is troublesome. I have reviewed my notes carefully and I cannot find where in the evidence it was established that the countertop was actually installed and when. Therefore, I have no evidence as to whether the countertop was delivered or accepted. Clearly 80% of the quoted cost was paid. When I look at the Claim it claims only for the alleged defect in the kitchen cabinets. The only mention of the countertop is in the counterclaim. I have been unable to find a defence to the counterclaim in the court file.

[22] On the one hand it would be unfair for the Claimants to have paid a

substantial amount and not to have received the countertop. On the other hand, it would be unfair to grant judgement against the Claimants when the court does not have evidence as to the delivery and acceptance of the countertop.

[23] I have therefore concluded that the subject matter of the countertop, can arguably be said not to have been placed in issue before me for adjudication in this proceeding. I will therefore dismiss the counterclaim, without prejudice of the right of the Defendant to seek payment of the $1,874.36 or the right of the Claimant to allege non-delivery of the countertop, in a further Small Claims Court action. In my view, since the countertop was not really a live issue at the hearing, res judicata or issue estoppel would not likely apply, and the matter of claims arising out of the countertop could be brought before the court, subject to argument by counsel as to whether or not those legal principles apply. My hope is that counsel can resolve this counterclaim without the necessity of a further proceeding.

[24] I thank counsel for their helpful assistance in this matter.

Dated at Yarmouth this 20th day of August, 2021.

Andrew S. Nickerson Q.C., Adjudicator