SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Balloutine v. Monk*, 2023 NSSM 65

Date: 20230929
Docket: 511355
Registry: Halifax

Between:

Charbel Balloutine and Widian Balloutine

Claimants

v.

Robert (Rob) Monk Real Estate cob as Red Fern Builders

Defendant

Adjudicator:	Darrell Pink
Heard:	September 27, 2023, in Halifax, Nova Scotia
Decision:	September 29, 2023
Appearances:	Claimant, Self-represented Defendant, Self-represented

By the Court:

[1] The Claimants are residents of Beaver Bank, Nova Scotia who relocated to Nova Scotia from New Brunswick in 2018. The Defendant is a homebuilder, who has constructed dozens of new homes in the province.

[2] In 2017, the Claimants contracted with the Defendant build them a new home. A standard form Agreement of Purchase and Sale (APS) for Turn Key New Construction was signed on October 27, 2017. Anticipated completion was in the summer of 2018. Delays occurred. The Claimants took possession on December 14, 2018. The closing of the purchase occurred in January 2019.

[3] The APS incorporated several documents including Schedule B - house plans and Schedule - building specifications.

[4] As the house was built changes from the original plans were required. The elevation drawing from the house plans[1] indicated there would be two to three steps leading to a deck and the front door. As the house was placed on the property, it was higher than shown on the elevation so seven steps led to the deck and front door[2].

[1] Exhibit 1/p 29.
[2] Exhibit 1/p 47

[5] The elevation drawing indicated the area under the deck would be covered by a lattice screen. The Defendant installed no screening below the deck. The cost of installing that screening is the bulk of the claim against the Defendant.

[6] The plans required the house to have a stone/brick veneer and siding made of Allura Cement board. Schedule D[3] required the Claimants to select the stone and siding materials. They chose a deep brown colour scheme for the house.

[7] For reasons not explained, the front door, indicated to be a double door in Schedule D, was changed to be a single door. As installed it was painted a dark brown, the same colour as the front facing garage door, immediately to its right.

[8] Schedule D required the decking material at the front of the house to be 'composite – colour tbd' and the railings around the deck to be 'Century Rail Aluminum'. The decking and the rails have the dark hue of the exterior.

[9] The building plans require 'supply doors and windows as per schedule'. Schedule D requires the windows 'to match House plan'. The window trim colour is consistent with the other exterior colours.

[3] Exhibit 2

[10] Schedule D is silent regarding other exterior doors installed on the right and left elevations at ground level. These doors were not painted by the Defendant, giving rise to the second part of the claim, the costs of painting them.

[11] On October 14, 2019, the Claimants emailed the Defendant with a list of deficiencies. Nineteen items are noted, including failing to paint two entrance doors and complete the front porch 'as the base has been left completely uncovered'.

[12] The construction contract included a new home warranty from by Lux Residential Warranty Program. The Claimants reported to the warranty company on alleged defects. A conciliation report dated March 5, 2020, by Lux indicated what deficiencies were covered by the warranty and what were 'contractual matters', not covered by it. The Lux Report[4] indicated failure to complete the area under the porch and failing to paint two entrance doors were not warranted items and needed to be addressed with the Defendant under the contract.

[13] Shortly after receipt of this report the COVID 19 Pandemic was declared. There were delays in completing the warranty work, as workers would not enter

[4] Exhibit 1/p 41.

others' premises to make repairs. Neither the warranty nor the contractual work required access to the inside of the Claimants' home.

[14] On May 20, 2020, the Defendant emailed the Claimants regarding the warranty work. He committed to complete the listed items. The email stated, "As for the 'contractual' issues, we can deal with some of those at the same time but the purpose of this email is to satisfy the lux home warranty requirements.(sic)" In his testimony, Robert Monk indicated he placed the words 'contractual' inside inverted commas to indicate he did not agree these were his obligations. He did not communicate that position to the Claimants.

[15] On June 26, 2020, the Defendant attended the Claimants' home to address the outstanding warranty items. The Claimant, Charbel Balloutine, testified on that day the Defendant committed to return to complete the two contractual items. Mr. Balloutine says subsequently multiple requests were made and the Defendant promised to complete the work. He never refused to do so or said the work was not for his account.

[16] Robert Monk denies that any promises were made. His view was the contract did not require him to paint the doors. The Claimant says the Defendant provided paint samples for this purpose. The Defendant denies doing so, noting the

pictures of the paint samples indicate they were from Home Depot but that they were not provided by him, though he says he attended Home Depot many times to deal with items required for the Claimants.

[17] The Defendant explained that the drawings were not to be relied upon precisely as changes occurred during construction that required changes. In particular he says, despite the drawing showing skirting below the deck, there was no requirement to cover that area. When shown photos of neighbouring houses where the area under the deck was enclosed, he says that is because those homes did not have the quality of stone veneer under the deck that the Claimants' house has. He said the house having been higher than the contractual drawings showed (seven or eight steps rather than three) meant the finish with exposed posts supporting the deck was all that was required. He agreed there is nothing in writing to support this assertion.

[18] Throughout his testimony, Robert Monk noted on several occasions this contact was done 'four-five years ago' and his recollection on small items was not very clear. His recollection of what was required of him was refreshed by the Lux Warranty Report. He stated he did what 'Lux tells me to do'. He did not have good recall of the details of this contract. There were few written materials to refresh his memory.

[19] Given this was one of several projects being undertaken by the Defendant and he has little specific recollection of details; given it was unique and special for the Claimants, their detail and clear recollection in outlining the evidence supporting their claim; the praise offered by the Claimants for the overall work of the Defendant and their substantial satisfaction with construction quality, and the absence of animosity toward the Defendant, where there is a disagreement between the recollection of the parties, I favour the evidence of the Claimant, Charbel Balloutine. In particular I find the Defendant provided the Claimant with a paint samples consistent with the overall colour scheme of the house's exterior and he committed to have the doors painted.

[20] I find the contract required the Defendant to finish all exterior areas. The Building Specifications required the windows to be finished. Though a change was made, the front door was painted as part of the contractual work. The drawings required doors and windows 'as per schedule'. Given the colour for the two exterior doors is not specified, I imply a term in the contract that they are match the other exterior finishes. In implying a term into the contract, I rely on the principles and approach outlined by the Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619. It would be open to the parties to otherwise agree, but the contract did not contemplate this one aspect of

the exterior of the home would be unfinished. Implication of a contractual term gives efficacy to the arrangement between the parties.

[21] What covering was to be installed under the deck? The drawings call for lattice. The Claimants felt the exposed brick veneer and the wooden posts under the deck were not in keeping with the overall aesthetic of the house. The Defendant says nothing was required because placing the home on the property varied from the drawing, so it was sufficient to have exposed stone veneer and posts under the deck. There were no notes or any communication from the Defendant to support this interpretation of the contract documents.

[22] The Claimants expected the Defendant to close-in the area adjacent to their front stairs. When the Defendant failed to do so, after waiting for COVID restrictions to be lifted, they arranged for Kent Homes to install vertical wood slats under the deck to achieve what they believed was the intended finish. Mr. Balloutine noted composite material was required for the deck, which he believed covered the area under it. Mr. Monk stated it would be unusual to use composite boards for the underdeck enclosure. He noted the structural support for the deck is wood and only the deck flooring is composite.

[23] I find the contract drawings require the area under the deck to be enclosed by the Defendant. The drawings show lattice. The Claimants chose to install wooden slats. That was a choice they made, though it was not what the contract provided.

[24] The cost of the work done by Kent Homes to enclose the deck was $3255.26. The estimated cost to paint to doors is $875. In addition the Claimant seeks $113.55 for the costs of materials to maintain the wooden enclosure.

[25] The Defendant says it would be difficult for him to estimate the cost of installing lattice. He then threw out a cost of $500, which was not substantiated. He also said the cost of painting two doors, provided by the Claimants was high. He did not give a value, as he maintained the contract did not require him to paint them.

Findings

[26] The contract between the parties is the APS including the schedules. Based on the contract, the Defendant was obligated to enclose the area below the deck with lattice or a comparable material approved by the Claimants. The contract did not provide that the enclosure be made of wooden slats which were installed by the Claimants. By using this material, the Claimants enhanced the quality of the

enclosure beyond what the contract required. They mistakenly believed that composite materials would be used for that area. I accept the interpretation of the Defendant that only the decking was to be composite and it was to be placed on a wooden structure.

[27] The Defendant breached its contractual obligation by installing no material under the deck. Reflecting on the costs incurred by the Claimant for wooden slats ($3255.36) and the quick estimate for lattice of $500, I fix the damages for the Defendant's breach of contract for failing to install a below deck enclosure about mid-way between these numbers at $1875.00.

[28] The second breach of contract by the Defendant arises from its failure and subsequent refusal to paint the exterior doors. Failure to do so on a house with a value over $600,000 appears to be petty. The Claimants had a pride of ownership and an appreciation of quality they exhibited in their choices for their home. The Defendant ought to have painted the doors the colour the Claimants requested. Leaving the two side doors unpainted breached an implied term in the contract.

[29] I accept the evidence of the Claimant that the estimated cost to have a professional painter attend the property, likely on more than one occasion, is $875 and I fix the damages for the Defendant's breach of contract at that amount.

Limitations of Actions Act Defence

[30] In its filed defence, the Defendant asserts the claim is statute barred by the *Limitations of Actions Act.* The Defendant bases its assertion on the date of closing and suggests that is when the time for commencing a claim begins to run. He is wrong on this. The APS and the warranty that is part of it, establishes a series of continuing obligations that do not end when title to the property passes. Nor is the time frame for a claim for breach of contract tied to other legislation, such as the *Builders Lien Act*.

[31] The relevant provisions of the Limitations of Actions Act are in s. 8

> General rules
>
> **1** **(1)** Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) …
>
> **(2)** A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[32] In contract law the date of discovery is when a claimant is aware of or ought to be aware of a defendant's breach of contract. See MacCulloch *v. McInnes,*

Cooper & Robertson, 1995 NSCA 81 and *Cassie v. Metcap Living Management Inc*., 2020 NSSM 17.

[33] In *Metcap Living Management*, Adjudicator O'Hara reviews how discovery of a breach of contract is addressed. He states at para.45

> Against this, the Claimant submits that she did not discover she had a claim for unpaid minimum wage until she was informed about that by the Director of Labour Standards in early 2017. With respect, I find that submission unconvincing. I refer to the case of *Smith v. Parkland Investments Limited*, 2019 NSSC 74, where Justice Jamieson made the following comments (para 64):
>
> > "Discoverability" means knowledge of the facts that may give rise to the action. The knowledge required to start the limitation period running is more than mere suspicion but less than exacting knowledge. The discovery of the claim does not require that Dr. Smith knew her claim against the Town was likely to succeed. The limitation period runs from when Dr. Smith had or ought to have had knowledge of a potential claim. The discovery of additional facts at a later date does not postpone the discovery of the claim.
>
> [46] Similarly, in the Ontario case of *Jogosky v. Corporation of the Town of Huntsville*, 2010 ONSC, the Court stated (para 26):
>
> > A plaintiff does not need to know the precise cause of injury before the limitation period starts to run or the full extent of the loss suffered. Such a threshold for the commencement of a limitation period "places the bar to high." Instead, a plaintiff need only know enough facts to base its allegation against the defendant.
>
> [47] This statement was quoted with approval in the *Parkland* case at para. 79.
>
> [48] These statements of principle support my conclusion that **the limitation period** with respect to the alleged failure to pay minimum wage **commenced on the date that the Claimant received advice of what her pay was. At that stage she had the subjective knowledge and the objective knowledge of a reasonable person, of the facts giving rise to the potential claim.** (Emphasis added)

[34] Applying that approach, the question is when did the Claimants know the Defendant had breached the contract by failing to install the deck surround and paint the doors. Because there was a continuing obligation of the Defendant to address and rectify defects identified in the Lux Warranty Report as well as his non-warranty contractual obligations, and because he acknowledged those continuing obligations, the Claimants could reasonable expect the Defendant to meet the contract requirements after he emailed them on May 20, 2020. He returned to the home on June 26, 2020 to effect the warranty repairs.

[35] I accept the Claimant's evidence that on that date the Defendant assured the Claimants he would return to address the two contractual items that remained outstanding. The Claimants followed up with the Defendant through calls to him. They expected he would return. Not until several months later did they reluctantly accept the Defendant would not meet his obligations and they began to look for options. Given that the Pandemic was in full flight, everything took longer and was far more complicated than before COVID.

[36] The Defendant maintains he had no intention of doing any additional work. If that was the case, an email or other clear communication was all he required to provide to them to make his position clear. If he believed he had no further

contractual obligation, business sense would tell him to advise his clients accordingly.

[37] The Defendant's breach of contract became known to the Claimants later in the summer of 2020 when they 'discovered' the Defendant would not return to do any further work.

[38] They commenced this claim on July 4, 2022, a date that is within the two year limitation period set by s. 8 of the *Limitations of Actions Act.*

Conclusion

[39] I find in favour of the Claimants and order the Defendant pay to the Claimants:

1. Damages for breach of contract - $1875 + $875 = $2750
2. Costs: Filing the Claim - $199.35
3. Service - $125 (Claim) + $143.75 (Evidence) = $268.75

Total - $3218.10

Darrell Pink, Small Claims Court Adjudicator