

**SMALL CLAIMS COURT OF NOVA SCOTIA**

**Citation:** *Demone v. Dudka*, 2023 NSSM 79

**Date:** 20231102

**Docket:** 523135

**Registry:** Annapolis Royal

**Between:**

Christopher Alistair Hugh Demone (Demone Excavating)

*Claimant*

v.

Mike Dudka

*Defendant*

**Adjudicator:** Andrew S. Nickerson, K.C.

**Heard:** October 18, 2023

**Decision:** November 2, 2023

**Appearances:** Christopher Demone, self-represented

Mike Dudka, self-represented

**By the Court:**

[1] I wish the parties to know that I have carefully reviewed all of the written material supplied and my notes of the oral evidence. If I do not mention a particular piece of evidence in this decision it is not because I have not considered it, but because I have found it does not directly bear on my decision. It will be apparent from my decision that a detailed analysis of the oral evidence, or extensive credibility findings, are not required to dispose of this case. In my view, the photographic evidence along with the evidence not in dispute, clearly lead to my conclusions.

**Facts**

[2] The parties had prior dealings with respect to the installation of a septic system. There was discussion in the evidence at trial regarding various payments and alleged overpayments with respect to the prior work. I am not going to address that because the claim, as filed with this court, specifically relates only to the lawn.

[3] In the summer of 2022, the parties discussed the installation of a lawn and the Claimant quoted a price of \$10,000 plus tax. The Defendant expressed concerns that he was waiting for a mortgage and did not presently have the funds

to pay for the lawn. For reasons which are not entirely clear to me from the evidence, the Claimant decided to proceed to install this lawn. There is evidence that the Claimant understood that payment would not be expected until April 2023. The Claimant presented an invoice to the Defendant dated July 14, 2022 in the amount of \$11,546, which breaks the price down as \$10,040 plus \$1506 for HST. The claim states that the Claimant has received \$5,500 of this amount and the parties do not dispute this. The Claimant also presented an invoice from his soil supplier, Meisner excavation 2020 Limited, directed to him for the supply of topsoil delivered to the Defendant's property in the amount of \$7,295.60.

[4] The Defendant claims that the work was completely defective and of no value. In his counterclaim, the Defendant seeks \$10,000.

[5] In the spring of 2023, the Claimant sought the balance of payment and was met with various complaints about the quality of the lawn. The Claimant alleges that he had heard nothing of any problems prior to that point. The Defendant says that he did not raise problems because the problems were not observable until the spring and summer of 2023.

[6] The Defendant provides extensive photographic evidence of what he claims are the defects in the lawn. He also complains of lack of drainage and water

pooling under his deck. He points out that there are various rocks that remain un-removed. In response to being presented with these photographs the Claimant, to some degree, acknowledged that the grass was not growing properly, but alleged that it would have grown if the Claimant had watered the lawn properly. In response to this the Defendant says that he did water the lawn as directed.

[7] The Claimant also stated that he would have come back and put in the drain and raked and reseeded the lawn if he had been paid.

### **Analysis**

[8] It is clear, in my view, that both parties understood that what the Defendant was seeking was to have a lawn installed. I am satisfied that the Claimant understood that was what the contract required. This would naturally include appropriate grading and drainage for the area to function as a lawn. This would not be expected to be perfect, but would be expected to meet some reasonable standard commensurate with a reasonable understanding of what a lawn entailed from an objective standpoint.

[9] I acknowledge that when one is dealing with horticultural installations it is understandable that there are contingencies that are dependent on the quality of soil, the quality of seed, the appropriate care, and the factors of weather. The

quality of soil and the quality of seed were in the Claimant's control, and he is expected to use reasonable skill and knowledge in that regard. The Claimant has provided no reasonable explanation for the complete failure of these factors.

[10] I am satisfied on careful examination of the extensive photographs provided, that the state of the Defendant's property cannot objectively be said to be a lawn. It would appear to me that the grass growth is very sporadic, and covers, at a maximum, half of the surface area. The photographs clearly show the pooling of water under the deck and the existence of various rocks around the deck, that appear not to be there for any discernible reason.

[11] I am satisfied that the evidence shows that the Defendant did not get anything remotely near what could have been expected for a lawn. The result has virtually no value to the Defendant. I conclude that the Claimant has fundamentally breached the contract and failed to deliver anything that could be described as a lawn by any reasonable objective standard.

[12] On the other hand, I am not satisfied that the Defendant, by the Claimant's breach, has been placed in any worse position than if the work had never been done. I am therefore satisfied that the Defendant has not established the counterclaim in the amount of \$10,000 that he seeks.

[13] Because of the fundamental breach of this contract, the parties should be put back in the position they would have been had the contract not been made. I will therefore order that the Claimant to repay the \$5,500 which the Defendant has paid. I will not order costs.

Andrew S. Nickerson, K.C., Small Claims Court Adjudicator