IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Greg Brown Construction Ltd. v. MacIntyre, 2023 NSSM 90

Date: 20231208
Claim: No. 524025
Registry: Sydney

Between:

Greg Brown Construction Ltd.

CLAIMANT

And

Judith MacIntyre

DEFENDANT

Adjudicator: Raffi A. Balmanoukian, Adjudicator

Heard: December 4, 2023 by Teams videoconference

Counsel: Greg Brown, corporate principal, for the Claimant
Judith MacIntyre, defendant, appearing personally

By the Court:

[1] A popular home inspection service begins its report template with the phrase, “the perfect house does not exist.” Many is the time this Court is faced with the truism of that statement. This is one of them.

[2] Ms. MacIntyre commissioned the Claimant to build her home. They signed a sort of contract – really a list of specifications – for $247,447. Over time, as is often the case, specific items were added or deleted to reflect availability, cost, or taste. Various amounts were paid – including two substantial cash payments of $42,445 and $25,000. The defendant signed a list of “extras” totalling a net of $12,931.24 (Claimant’s Exhibit 8), but not the final invoice setting forth other extras, and the balance due (Claimant’s Exhibit 5).

[3] The Claimant says a net balance of $12,872.58 remains outstanding. The Defendant says that between alleged mathematical errors and defects, she has already overpaid. She has had some, but not all, items of which she complains remediated by third parties. The Claimant says it would have done so, but also says that its (in house) warranty only comes into effect when it is paid in full.

[4] The Claimant's principal, Greg Brown, testified. He went through the original quote, the extras, and in particular the landscaping (not included in the original quote), the last of which was done on a "cost plus" basis. He testified that there were no problems with payment until the time came for the final 'squaring up', at which time the Defendant claimed deficiencies for "this and that." He went further to say that he discounted the final bill to reflect some returned lighting and for an abatement to landscaping.

[5] On cross-examination, he was challenged on Exhibit 4, which was a $72,000 progress draw and $12,931.24 in extras to date. The Defendant thought items were added twice, but it became clear that they were not.

[6] He testified that he left "three-quarters of a square" of siding and a bundle of shingles on the back deck, and leftover flooring and paint in the house's utility room.

[7] There was significant discussion about whether taps that were either not supplied or not used were credited. I will return to this at disposition.

[8] It also became clear to me, in response to questions from the Court, that the extras were charged on a net, not a gross, basis. For example, if the original quote

contemplated an item would cost $100, and it was upgraded to a $150 substitute, the charge for extras was $50 (plus tax) not $150.

[9] He denied knowing of a pot light that was “hanging out” and was somewhat equivocal about his responsibility – he admitted that as general contractor it would fall under his rubric, but that the electrical work had been subcontracted. In any event, he said that he would take care of such matters but reiterated that “his” warranty was only upon payment in full. As I will discuss, regardless of the fact that can and probably usually would result in a chicken-and-egg of “pay me - do the work first – not until you pay me,” that position is both commercially unreasonable and legally indefensible. As a result, the Defendant is entitled to an offset or compensation for the value of the deficiencies or work not completed.

[10] He was also cross-examined on some missing electrical plates and unspecified (and unquantified) electrical problems.

[11] There was also discussion about a pantry door, and about a painted black door in substitution for a factory-painted one. He testified that he was never called about a problem with the former, and that the latter was approved as a cost-savings measure (a factory ordered black door being substantially more expensive).

[12] Michelle Brown, spouse of Mr. Brown and the Claimant's office administrator, testified. She was, by far, the most organized and coherent witness.

[13] Her review of the Claimant's exhibits explained their math. It boils down to this:

a) Original quote (which excluded fill and landscaping, among other things: $247,447.00

b) First draw: $102,501 (paid in full, balance for quote $144,946; in addition there was $42,445 in cash, for a quote balance of $102,501)

c) Second draw: $72,000 (leaving a balance for quote of $30,501) plus $12,931.24 for extras to date. This was paid.

d) Third draw (substantial completion per their terminology, although whether it was so in law is questionable): $25,000 (balance for quote $5,501); this was the second cash payment.

The Claimant then did a final reconciliation (ex. 5) bringing forward the $5,501, adding electricals ($1150.58), landscaping (at that point, $9,960) and deducting shutters and plumbing ($365.70 and $945.88 respectively), for a tax-in balance of $15,000. The Defendant signed off on a list of extras (ex. 8) for the $12,931.24

referenced above), but not the extras noted on Exhibit 5. These were electrical (driveway and garage feed) and landscaping ($9,960) less shutters ($365.70) and plumbing ($945.88).

[14] The Claimant then offered to reduce the landscaping amount to $6,221, reducing the claimed balance of $15,000 to $12,872.58 ($15,000 - $11,454 [$9,960 plus tax] plus $6,221; no abatement was on that account for the shutters and plumbing.

[15] The Defendant refused that amount; and here we are.

[16] Greg "Nick" MacDonald testified for the defendant. He is a landscaper of 16 years' experience. He testified to rocks and weeds "galore" in the fill and though he admitted the yard had been well-leveled, the fill was deficient and required a tandem load and 60 sods to remediate. The driveway (which originally, at least, was not included in the quote) was "a mess" with rocks, stumps, and potholes.

[17] He was paid $500 for soil, sod, and labour.

[18] Peter Joseph Hawkins Jr., the Defendant's cousin, testified as to various repairs he did in and to the property. These included adding moulding to the front and back door, leveling and caulking the bathroom shower, tightening doors,

adding quarter-found and caulking, and adding scrap asphalt to potholes in the driveway. He was paid "in coffee" since "you don't charge family." There was no cross-examination.

[19] Thelma Beaton is the Defendant's friend and, at times during the hearing, something of her spokesperson (it took considerable effort to keep all parties testifying and questioning during the respective times for same). Her understanding was that the property was to be "turn key" and reiterated the Defendant's belief that she has already overpaid, not counting the $1200 she says she spent on fixtures and not counting remediation. She said the Defendant "did not take the plates off" the electrical fixtures. There was no cross examination.

[20] While I have no doubt as to the sincerity of Ms. Beaton's testimony, it is essentially third-party and argument, bordering on oath-helping.

[21] Ms. MacIntyre testified last. She feels she was "taken advantage of," and complained of how few labourers were on site from time to time; she had to pay someone to "do" the pantry (and exhibited photos of missing paint); the painted door shows white cracks through the paint job; she also said she didn't pick out the windows and that no extras (siding, roofing, etc.) was left behind. The driveway (not in the original quote) was billed at $9,960 (later reduced) against a quote of

"two or three thousand." She said that the Claimant asked for the two cash payments, against Mr. Brown's testimony that the cash was essentially "how it came."

Analysis and findings

[22] I am satisfied, and so find, that the balance on the original quote was $5,501. I am also satisfied that the $1,150.58 for electrical and $6,221 (as reduced) for landscaping is reasonable. I say this taking into account the Defendant's comment that it was estimated at "two or three thousand." I found that her evidence on this point was vague (as was much of her testimony) and not supported by any other evidence, such as a competing quote.

[23] Exhibit 6, which calculated the $12,872.58 claimed as being the $5,501 plus $1150.58 and $6,221 is fully appropriate to that extent. It does not deduct the $365.70 for shutters and $945.88 previously used to calculate the Claimant's original final bill of $15,000. While this may fairly be taken as a way of attempting to put all matters to bed, there is a mixing of apples and oranges in changing the landscaping bill, but not deducting the returns/substitutions/omissions.

[24] I have reviewed the evidence, such as I have it, of the deficiencies. In short, whether the Claimant is or is not willing to address them prior to being paid in full, they are its responsibility, and if its view of its obligation is "not until I am paid," it must bear the consequences of third parties doing so, subject to the Defendant's obligation to mitigate, and to act reasonably and in good faith.

[25] I am satisfied that the pot light and plate switches require attention; these are minor items.

[26] The $500 for landscaping remediation, which I got the impression was something of a moonlighting job, is more than fair.

[27] The Claimant should not have the benefit of a cousin who "will work for coffee." The fair value of that labour should be deducted. I have no evidence of what that would be in the open market, but I do have evidence of the work performed. I will do the best I can in an holistic fashion.

[28] The remaining electrical work, its scope and cost, was not in evidence – it was only asserted that "there's still work to be done."

[29] Of the $1248.90 paid by the Defendant for a sink, grates, and faucets, I allow $459.00 for the sink and grates (Defendant's exhibit 12). The balance is for the faucets, which if allowed would be double-counting the credit I noted above.

[30] Taking into account the general dissatisfaction (including pantry paint) of the Defendant, the fair value of work provided by friends/relatives, the $500 paid for sod/fill and the inevitable “this and that” that comes from new construction, and doing the best I can, I am satisfied to a civil standard that a $1500 credit for remaining items is fair and reflective of such evidence as I have. There is no evidence of HST being paid or payable on this, and had the Claimant done the work, it would have been entitled to payment for the “contract as performed.”

[31] I am not satisfied that there were any substantial materials that were taken away by the Claimant.

[32] To summarize, the balance due is:

a) Balance from original contract: $5,501.00 (HST included)

b) Electrical: $1,150.58 (HST included)

c) Landscaping (net): $6,221.00 (HST included)

d) Credit for shutters: ($365.70) (HST included)

e) Credit for plumbing: ($945.88) (HST included

f) Credit for sink and grate: ($459.00 + HST = $527.85)

g) Credit for other deficiencies/remediation: ($1,500.00)

h) Total: $9,533.15

[33] I express my disapproval at the large quantity of cash exchanged, which presumably attracted FINTRAC due diligence if and when deposited. Given the public nature of this decision, I expect that this will be (or has been) fully accounted for to the relevant taxation and other authorities at the appropriate times.

[34] The Claimant has been substantially successful. I award prejudgment interest at 4% from May 16, 2023 (the date of the Exhibit 6 reconciliation) to the date of release of this judgment, pursuant to Regulation 16 of the Small Claims Court Forms and Procedures Regulations, NS Reg 17/93 as amended. I also award the Claimant the cost of filing and of service, if provided to me by receipts or affidavit within ten days of release of this decision.

Raffi A. Balmanoukian, Small Claims Court Adjudicator