

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Skinner v. Armco Capital Inc.*, 2024 NSSM 22

Date: 20240311

Docket: 519714

Registry: Halifax

Between:

Aaron David Skinner and Elise Marie Skinner

Claimants

-and-

Amrco Capital Inc.

Defendant

Adjudicator: Eric K. Slone

Heard: December 14 and 20, 2023

Counsel: Andrew Christofi, for the Claimants
Andre Goguen, for the Defendant

By the Court:

[1] In late 2020, the Claimants purchased from the Defendant a new home being constructed in the Beechville area of Halifax, with projected completion in early 2021. They are happy with the home but very unhappy with the landscaping.

[2] Because the house was ready for occupancy in the winter, the Claimants moved in and it was agreed in writing in an undertaking signed February 11, 2021, that the Defendant would complete the landscaping, which both parties understood to mean within a reasonable time, which in practical terms meant that coming spring or summer.

[3] The Defendant is a well-known and reputable home builder and developer in Nova Scotia. It subcontracts some of its home building to outside companies. In this case, the home was built by a company called Amara Developments (“Amara”), which in turn subcontracted the landscaping to Bedford All Season Services (“Bedford”).

[4] The home is one of three singles in a row that were constructed at the same time. The subject home is a corner lot.

[5] The Agreement of Purchase and Sale promised a *“landscaped yard with 4” topsoil and sod at front, up to 10 feet from foundation per side and up to 20 feet from foundation at rear.”*

[6] When we speak of landscaping here, we are referring to a lawn only. There was no provision for trees, shrubs or garden beds.

[7] Before going into further detail, an observation must be made. By the time the case came to a hearing more than three years after it was put in, based on photos taken before the onset of winter, this lawn looks decidedly sub-par. It is not something in which anyone can justifiably take pride. The inference is there to be drawn that this lawn was poorly constructed to begin with. Admittedly, some of the unsightliness can be attributed to the fact that the 10- and 20-foot limits of the sodding did not reach the sidewalk on one side, leaving large areas at that margin looking completely rough. It is also possible (as suggested by the Defendant) that the lawn has not been properly watered and maintained, though there was no specific evidence to support that possibility.

[8] It is of some interest that the Agreement of Purchase and Sale incorporated by reference a set of restrictive covenants that apply to this development. Paragraph 9 of the covenants reads as follows:

The Grantee will not permit the condition of the surface of the lands, or part thereof, to be in such a condition as to be below the standard of landscaping of the surface of lots which is normally found in a first-class residential neighbourhood. The Grantee shall be responsible for landscaping between the curb and the street line abutting the lands. The front and side yards shall be fully landscaped and the rear yard shall be fully landscaped for a minimum distance of 20 feet from the rear of the building.

[9] The document provided to me does not specify who is the Grantor or Grantee. In that respect it is a bit confusing, and it is of dubious enforceability. It appears to me, however, that the standard of landscaping is far below that which would be expected in a first-class residential neighbourhood. Someone is not living up to the spirit of that covenant.

The evidence

[10] Perhaps the best place to start is to quote from an email sent by Mr. Skinner to the Defendant on July 4, 2021, which was less than 72 hours after the work was done:

We had our lawn installed Friday, July 1st (and possibly into the weekend) while we were away. To say it was not done to a high standard would be an understatement. Given the attention to detail and the standard that was shown to resolve very minor issues on closing day, we are quite surprised and upset. There was absolutely zero landscaping done. Every scrap of building material that was left on site had soil and sod installed over it.

Every stone or rock that stuck out now has a sod lumped over it. Every undulation that was left on the property during the course of building it is now amplified by the lawn on top of it. I doubt there is a single place on the lawn with 4 inches of top soil below it. All of the edges are completely unfinished, there are corners missing out of where sod was supposed to be installed. Nothing was done about the water shut off. and the turquoise pipe around it remains. It's not installed to 20 feet past the house in the back, and to top it all off, a glove, cigarettes and a lighter was left by the crew on our step.

Everything that they could have messed up during this installation was messed up. All I expected was a gradual slope from the sidewalk to the house and from the driveway to the neighbours driveway as any reasonable person would expect. Instead I got a mess that would be pretty difficult to mow and would [cost] thousands upon thousands to do properly. If I had known this was going to be done, I would have had the property landscaped myself.

This will need to be addressed and done properly. I have already notified my real estate agent and will get the lawyers involved if necessary. Pictures are attached.

[11] Mr. Skinner testified that from the moment they returned from their trip to

New Brunswick to find the lawn having been installed, it was obvious that there was something very wrong. The ground was so uneven that their young children could not safely run around without tripping. The Claimants are upset that they cannot use the lawn in a normal way.

[12] The pictures attached to that email included several showing Elise Skinner using a ruler in various locations, measuring the depth of topsoil and showing it to be far less than the 4 inches promised. Measurements ranged between one (or less) and two-and-a-half inches. There would have been no opportunity for the soil to have compacted to any such degree in such a short time.

[13] The grading issue that Mr. Skinner refers to in the email is the fact that there is a marked drop-off between the Claimants' land and that of their nearest neighbour. The Claimants believe the slope to be almost 45 degrees, though from the photos it appears that it may be a bit less than that. Nevertheless, it appears somewhat awkward.

[14] The Defendant's response to this complaint was friendly at first, but ultimately amounted to a denial that there was anything wrong with the grading or the sodding of the lot. Various people were sent out to meet with the Claimants, some of whom appeared to commiserate and even promise to "fix" the problem, though there was nothing said in writing that could amount to an admission of responsibility.

[15] Some minor repairs were undertaken in late July 2021, and again a year later (after much correspondence and discussion) but this did not address the Claimants' concerns to any substantial degree.

[16] The lawn has been looked at, and quoted on, by several contractors. Nobody (apart from the Defendant) with any expertise is on record as saying that the job was done properly or looks as it should.

[17] There are estimates obtained by both sides for replacing the lawn. I will address those later.

[18] The Claimants proffered what I will term a quasi-expert report from an individual named Lyle Mailman, who was an acquaintance of Mr. Skinner from earlier hockey playing days. Mr. Mailman's main credentials are that he has experience in commercial lawn care and maintenance, and he has completed a course at the Nova Scotia Community College in Horticulture and Landscape Technology.

[19] I allowed Mr. Mailman to testify, over the objection of counsel for the

Defendant, and found his report quite helpful and his testimony convincing.

[20] In the somewhat relaxed context of the Small Claims Court, I have accepted testimony or statements from quasi-experts many times in much sketchier circumstances. In this case we have a clearly experienced and knowledgeable individual who produced a helpful and lucid report, and who testified and made himself available for cross-examination. That qualifies him to express an opinion, to which I may give as little or as much weight as I feel it deserves. Although his impartiality was questioned by the Defendant, I found him to be fair and balanced.

[21] Mr. Mailman inspected the property in the fall of 2023. In his report, which he elaborated upon in his testimony, he stated the following:

When attending the property, it appears that sod was placed with minimal topsoil added to smooth the lawn. Many uneven mounds and depressions observed and surface was uneven to walk on. This causes water to pool and not drain down the swales according to the Lot Grading Plan and Certificate.

[22] He describes how he went on to probe the lawn in a grid pattern 2 feet apart over the entire lawn using a measuring tape and metal rod to probe and measure the depth of the soil. He concluded that 90% of the lawn had topsoil depth under 1 inch, while only about 10% of the lawn had a topsoil depth over 1 inch. He described the cause of such a condition:

This would happen if the landscaper didn't use a tractor (mini excavator/skid steer) after the construction grading and before spreading topsoil. This and soil preparation, raking, would remove rocks from appearing at the surface, garbage, mounds and depressions wouldn't be present, and create a smooth and even surface.

[23] His opinion was that 4 to 6 inches of topsoil spread evenly with a landscape rake is a minimum for a well prepared and smooth base. He found that rocks and garbage were visible through the surface of the lawn. Topsoil, he said, should be 4 to 6 inches above those obstacles.

[24] He allowed for the fact that there would have been some soil compaction over the two years since the lawn had been installed, but in his opinion, it would not have compacted that much so to explain why there was so little topsoil left in 2023. One of his conclusions was that even allowing for 50% compaction, he believed that the lawn was placed originally with probably no more than 2 inches of topsoil. In his opinion, there are too many exposed rocks and other debris to allow for proper growth of the lawn.

[25] Mr. Mailman reviewed the landscaping estimates obtained by the Claimants

from Edmonds's Landscape and Construction, Earthworx and Tracey's Landscaping. In his opinion these were all reasonable quotes.

[26] The Defendant called as witnesses its president, Steve Darrow, as well as Irfan Alkasem, the president and owner of the builder Amara. The latter testified that he has used the same landscape company for many jobs and has never had a complaint about soil depth.

[27] He testified that if one measures close to the perimeter of the sodded areas, there would inevitably be less than 4" of topsoil because the sodded area has to be tapered to the non-sodded portion; otherwise, there would be a sudden drop in level. (This explanation ignores the fact, of which I take notice, that with inadequate soil over rocky terrain, the sod will never take properly. The way to compensate for that would be to dig out some of the rock and poor soil and replace it with quality topsoil.)

[28] Mr. Alkasem did not accept the validity of the three repair/replacement quotes, which he believed to be inflated.

[29] He also testified that he believed the landscaping met the standard contained in the Restrictive Covenants.

[30] The Defendant also called Mr. Zaid Al-Jabour, the manager of Bedford. He testified that his company placed a minimum of 4" of topsoil. He was part of the crew that installed this lawn. He said that his company has done over 1,000 houses like this, without complaint. He wondered whether the homeowners had done intensive watering for a week or two after the lawn was installed. He also wondered whether they had been adding soil and fertilizer every few months to keep the ground healthy.

[31] I note that Mr. Skinner testified that they were never given any instructions by the Defendant or Bedford about watering or maintenance, although they knew enough on their own about the need for watering.

Discussion

[32] I found the Claimants and their witness to be credible. The July 4 email from Mr. Skinner captured the situation perfectly. This was a poor landscaping job, which has left the Claimants with a lawn that I would describe as very poor. I find that the landscapers did not adequately break up and excavate the area before adding topsoil, and they then placed too little topsoil over the ground before placing sod. The result was a lawn that was uneven, and which did not grow well.

[33] It may well be that Bedford has received few if any other complaints, but the result here speaks for itself. I simply do not believe that they used 4" of topsoil here.

[34] The poor landscaping job is a breach of contract for which the Defendant is responsible.

[35] The measure of damages is the cost to provide a lawn that meets the specifications of what was promised.

[36] As mentioned, the Claimants obtained three separate estimates for landscape repairs. In each case, the estimate was from a reputable landscaping company.

[37] In April 2022, the Claimants were in contact with Edmonds, a well-known landscaping company in the Halifax area. They did not give a fixed price without a more detailed scope of work but estimated that it could cost easily \$10,000.00 plus HST, and perhaps as much as \$15,000.00 plus HST.

[38] In March 2023, the Claimants obtained an estimate From Tracey's Landscaping Limited. This one is more detailed and adds up to \$12,524.00 plus HST. It is that company's opinion that the amount of topsoil should be 6 inches rather than 4 inches, so to an extent it could be said offering something better than promised in the contract.

[39] The last of the three estimates is from a company called Earthworx. They essentially proposed to remove all existing grass in the front, sides and rear of the property, and to do some adjustments to the subgrade prior to installing soil to improve the drainage on the property. They then proposed to install, compact and grade new topsoil to an average compacted depth of 4 inches. They would then supply and install new sod. The price quoted was \$10,500.00 plus HST. In a separate email, they suggested that the Claimants budget an additional \$2,000.00 to \$3,000.00 for excavation and removal of rocks to make sure that the lawn sat on a proper surface.

[40] The Defendant produced an estimate from a company called Personal Care Landscaping, which totalled \$4,686.37. There is not a lot of detail in the quote, but it appears to cover the same scope of work. This quote is what one would call a wholesale price, rather than the quotes given directly to the Claimants which were more in the nature of retail quotes. It is not known whether that company would extend that price to the Claimants. In fact, it is not known whether any of the quotes would still be honoured a year or more later.

[41] In my view, the quotes obtained by the Claimants are all credible. The

Edmonds quote is the most expensive. The other two are slightly below. Counsel for the Claimants invited me to use the mid-point of the three estimates, which is about \$15,000.00 including HST.

[42] I discount the Personal Care quote as there is no reason to expect that the same price would be offered to a retail client. It is also suspiciously low compared to the other quotes before the court.

[43] Since the work has not actually been done, the best that the court can do is to award damages, and thereby supply the Claimants with a fund which would hopefully be adequate to allow them to obtain a lawn that matches what they were promised. It is possible that they will have to dip into their own resources in the event that they want to exceed the original specifications, such as by adding additional topsoil or extending the lawn to meet the sidewalks.

[44] I assess damages at \$15,000.00 inclusive of HST. The Claimants are also entitled to the \$199.35 cost of issuing this claim.

ORDER

[45] In the result the Defendant is ordered to pay to the Claimants the sum of \$15,199.35.

Eric K. Slone, Small Claims Court Adjudicator