IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *R.A.E. Properties Inc. v. MacKinnon*, 2024 NSSM 27

Date: 20240521
Claim: 524281
Registry: Cape Breton

Between:

R.A.E. Properties Incorporated (Raymond Embree)

Claimant

-and-

Ron MacKinnon

Defendant

DECISION

Adjudicator: Raffi A. Balmanoukian, Adjudicator

Heard: December 27, 2023, by Teams

Counsel: Raymond Embree, corporate principal, for the Claimant
Ron MacKinnon, for himself, as the Defendant

By the Court:

[1] Floors are generally flat. In this case, they are not.

[2] The owner blames the installer. The installer blames the manufacturer, the hardware store, and the owner. The manufacturer said "not my circus, not my monkeys," and denied warranty coverage. Neither it nor the hardware store are parties.

[3] The corporate claimant is the owner of two duplexes. Although the claimant filed ostensibly as corporation and individual, all indications are the contracting party is the corporation. I will refer to the Claimant in this decision as referring solely to R.A.E. Properties Incorporated.

[4] The Claimant says that it had to replace all of the floors almost immediately, as buckling and other defects caused (it says) by faulty installation made them unusable and perhaps dangerous, and that this replacement (along with other damage and compensation to tenants for their inconvenience) exceeds the $25,000 jurisdiction of this Court. The Claimant sues to that limit.

[5] I have concluded that although the floors were installed improperly, and the defendant is liable for the implied condition in the contract that work be performed

in a competent fashion (or alternately, is liable for negligent installation), these damages are reduced (only) by limited certain amounts for reasons to be discussed in the course of this decision.

[6] Mr. Embree testified for the Claimant. He was away when the Defendant rendered his first, but not the second, bill; he was adamant that he could be contacted at any time by text/phone, and that the Defendant knew this. Although he was anxious to have the project completed (as tenant occupancy was pending), he did "not have a gun to the head" of the Defendant and that he wanted the job done correctly. He said he "never would have told him [the Defendant] to continue" if he knew that the flooring was buckling during the installation process.

[7] He further testified that although he asked the Defendant not to install quarter-round, he did it anyway and the Defendant's reaction was "I don't give a f*** what you do with it."

[8] He denied dismissing the Defendant, saying instead that Mr. MacKinnon and his crew "packed up and left."

[9] When problems arose with buckling and chipping, a representative of Next Floor attended to view at least some of the projects (in all, there were two duplexes – thus, four kitchens, four baths, and two living rooms). An owner of Value Check

also attended. Next Floor's conclusion was that the floors were laid incorrectly – there should be a ¼" cap at the edges, and there were none (photographic evidence was introduced to like effect). In addition, the cabinets were not installed over the laminate, and excessive adhesive left no room for 'floating' expansion. Finally, T-molds were glued on both sides (resulting in the same type of rigidity) and there was no caulk around the bathtubs, resulting in leakage and required floor replacement.

[10] Receipts (which were left to the Court to evaluate and add) were presented in evidence, but not for the plumbing work. As well, receipts for $1200 in grocery gift cards were presented, which the Claimant said was tenant compensation for inconvenience. There was no evidence that this was anything more than a goodwill gesture, laudable though that may be.

[11] Although it was submitted by the defendant that none of the boxes contained installation instructions, I was presented with photographic evidence that the boxes of flooring contained a red-lettered notice that "[T]his is a floating floor. Expansion space is required. See the installation instructions." The claimant's evidence was that both 2020 and 2023 editions of available instructions provided for the required perimeter gap; the 2023 edition had a change respecting installation over a floor system.

[12] On cross-examination, the Claimant testified that he had no texts or calls while he was outside Nova Scotia. On questioning by the Court, Mr. Embree testified that although Mr. MacKinnon had done flooring work for the Claimant before, it was the first time doing so with this product.

[13] Carl MacVicar testified for the Claimant. He has 35 years' experience with flooring. He inspected the properties at Value Check's request (having had no prior exposure to Mr. Embree). He testified that the "failed floors" were too closely laid together; that there was inadequate or no expansion room where sealant had been applied; and although there were "a few" gaps in the flooring, it was "tight in spots." There was no flooring under the cabinets. He removed and installed new flooring.

[14] On cross-examination, Mr. MacVicar testified that the flooring was "tight against the drywall" in spots; in others, quarter-round covered the gaps. He testified that it "looked like [the floor] was trying to move" at a 90 degree angle. While not necessarily tight against the cabinets, it had been siliconed in place.

[15] He installed a different glue-down flooring. He testified the old flooring had no salvage value.

[16] Mr. MacKinnon testified on his own behalf. He read his filed defence, under affirmation. His inquiry included checking with the owners of Value Check as to any specific installation instructions (he was told there were no special instructions, and Mr. MacKinnon said none were in any of the boxes – he testified that usually instructions are in every seventh box); that his concerns arose during installation but that the owner was away; and that he installed the flooring under "time constraints" due to expected tenants. He also included assertions that he was effectively dismissed, accused of overcharging in the past, and that another local person with the same flooring had similar issues. The essence of his defence is that he did a proper job and that the flooring issues are that of the product, not his workmanship; and that he had to do the work without waiting for the Mr. Embree's return. He claims that Next Floor's denial of liability is par for the course and to be expected of a manufacturer. He could not speak to whether the person to whom he spoke at Value Check had any expertise in flooring.

[17] The Herbert St. property was finished in February 2022, the Kyle Hill one in June, 2022. Mr. MacKinnon testified that he was under "time constraints" based on when the properties were expected to be let. For example, cabinets were installed after the flooring, and he left space for these. He said that as a result, he was not privy to any need to cut the flooring back for them.

[18] He testified that the flooring was “hard to lock together” and tended to buckle as they were working. He claimed he could not flag this issue to Mr. Embree as he was away on a trip.

[19] He went on to say that Mr. Embree did not want quarter-round on the Kyte property, but he did it anyway to cover a half-inch gap at the baseboards.

[20] When called to cut back the flooring around the cabinets, Mr. MacKinnon took the position that he had been dismissed (as noted above) and that in effect it was now for someone else to do. He said it was “not my responsibility” and that the parties would not do business again.

[21] Finally, he testified that when flooring of this type is installed over concrete, there should be a 6 mm vapour barrier, but that this is not allowed in Canada; the implication being that this flooring should not be sold or used for the type of construction at issue in these proceedings (being over concrete or a subfloor over concrete). He blamed “moisture from concrete.” He asserted that the 2023 instructions refer to such a vapour barrier, and that the flooring was never intended to be installed in kitchens or baths.

[22] He disputed the extent to which the flooring was glued down, or glued on both sides of transition strips.

[23] On cross-examination, he reiterated that he did not attend to complaints as "our business was done" and that Mr. Embree had "his own people." He also reiterated that he continued working on the project despite problems with the flooring, as Mr. Embree was away and time was of the essence, and that he "did what [he] was hired to do."

[24] Frank MacLean testified for the Defendant. Although not qualified as an expert (he testified that he has 29 years experience but no formal training), he opined that his review of the flooring was that it was not waterproof on the bottom so it creates a moisture trap; and that "flooring reps are out for the company" so a denial of responsibility is to be expected from them; and their "job is to not pay out."

[25] On cross-examination, he confirmed that the Defendant was "not literally fired, it's just a form of speaking." He testified that in his view, their responsibility was discharged by looking for instructions and consulting with Value Check. He also denied that the floor was buckling but was "wavy" as it was being laid. He saw no need to call Next Floor.

[26] In summary, the Defendant submitted that the flooring is inherently unsuitable for the location of installation, and that the 2023 difference in

instructions corroborates this. The Claimant submitted that the installation is defective, and that it should have been remediated by the Defendant.

[27] I listened to the parties, and reviewed their materials, with care. My findings are these:

- The flooring may not have been optimal for the location, this was or should have been manifest to an experienced installer in short order, with an associated responsibility to bring it to the owner's attention and to proceed beyond initial work only on clear instructions (and absolution of responsibility for material-related shortcomings) to do so.

- There were no impediments on contacting Mr. Embree during the jobs, including his brief absence to attend a hockey game in Alberta. I note that the evidence was this was the only absence in a job that extended over several weeks.

- There was at least a warning, if not detailed instructions, on the flooring boxes that gaps were needed.

- The Defendant's characterization of dismissal, and consequent absolution from responsibility, is at best convenient and at worst an abdication. Regardless of whether he considered himself discharged or not, he remains responsible for any defects in workmanship,

- An inquiry of "someone at the store" in the absence of knowledge of that person's expertise, is an inadequate inquiry in the absence of instructions.

- I make no comment of whether there is or could be a claim over against Next Floor for any product liability, particularly if it is true that Code restrictions in Canada make it an unsuitable product for certain floor bases (e.g. concrete or subfloors over concrete). They are not a party to these proceedings, nor did the defendant seek to add them.

- Similarly, I found that the Defendant's disrespect for the flooring representatives' job and scope of inquiry was cavalier and dismissive, rather than illustrative. It was in the nature of the old "what do you do? / deny the claim" law firm advertisement that may be within the memory of certain readers.

- I place no weight on the assertion that the same flooring system failed in another location. The written evidence from one Charlie MacKinnon (who did not testify and was not subject to cross-examination) is that it was installed over an in-floor concrete slab, which is a different system than one at issue in these proceedings. I also have no evidence of expertise (aside from his statement of lengthy experience as a carpenter).

- I find that the Defendant took an equally convenient view of the time constraints as it did with his alleged "dismissal." He may indeed have been told to get the job done quickly due to pending tenancies; however, there were four units (and 12 rooms) and it was not appropriate to "keep calm and carry on" when it was clear early on that the flooring system had problems. I find the Defendant's primary motive was to finish the job and get paid, and then if things didn't work out, it was to be someone else's problem.

- There was an implied term of the Defendant's engagement that the work would be done in a workmanlike fashion; or at the least, that the Claimant would be made aware as it became apparent that either the product or its placement in these apartments' environment was inappropriate.

- I further find that the photographic evidence of adhesive, lack of gaps, and failure to caulk around water sources was faulty and defective, and both a breach of the implied terms of the contract for service, and negligent.

- I therefore find the Defendant wholly liable for the damages to which I will now turn; to reiterate, if the Defendant seeks contribution or indemnity from Next Floor, that is beyond the scope of these proceedings.

[28] I have added together the receipts claimed. As noted, the plumber is not among them. I also do not allow the $1200 “goodwill” gift cards discussed above. This gesture may have been “nice” but there is no indication the tenants made such a claim or that it was a legal settlement of any claims.

[29] There is no element of betterment, such as if the floor failed after considerable use and was replaced with new. It required almost immediate replacement. There is no indication that the replacement floor is more valuable than the original, or that the cost of remediation was excessive or beyond the scope of the original job. The measure of damages is what the claimant would have had if the contract had been performed – that is, a functional floor installed properly, or a functional substitute floor installed properly if the Defendant had alerted the Claimant in a timely fashion of the problems.

[30] I add the receipts that I have allowed at $24,508.10 inclusive of tax. I award this amount. As a residential project, I infer that the Claimant would have received none, or virtually none, of the HST back.

[31] I also award prejudgment simple interest from May 21, 2023 (which I take as a centre of gravity for the expenses which were incurred between February and

June 2023) and the date of this decision, at 4% pursuant to Regulation 16 under the Small Claims Court Forms and Procedures Regulations, thus being $980.32.

[32] I award the filing cost of $199.35. There is no invoice for service.

[33] The total allowed is $25,687.77. This Court's $25,000 jurisdiction is exclusive of prejudgment interest, and this award is accordingly within its jurisdictional mandate. Judgment is in favour of the corporate claimant only.

[34] I thank the parties for their patience in awaiting this decision.

Balmanoukian, Small Claims Court Adjudicator