

Claim No: 411144

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Louisburg Home Construction Ltd. v. Eddy Group Ltd., 2013 NSSM 32

BETWEEN:

LOUISBURG HOME CONSTRUCTION LTD.

Claimant

- and -

EDDY GROUP LIMITED and MAAX CANADA INC.

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 6, 2013 and June 3, 2013

Decision rendered on July 2, 2013

APPEARANCES

For the Claimant Ahmad Farhan, President, and Ted Torrey, Project Mgr.

For the Defendant,
Eddy Group Ltd. Peter Eddy, Operations Mgr. and Ken Green, Branch
Mgr.

For the Defendant,
Maax Canada Inc. Scott Snyder, Atl. Reg. Mgr., and Michael Comeau,
Nova Scotia sales rep.

BY THE COURT:

[1] The Claimant is a homebuilder. In 2009 it built a home for a customer, and installed therein a bathtub manufactured by the Defendant Maax Canada Inc. ("Maax") The type of tub was a Casa 6032, which is a model which contains a motor and Jacuzzi-type jet streams. It retails for about \$1,200.00.

[2] That bathtub was purchased from a plumbing contractor, Aqualine Plumbing & Heating, which has since gone bankrupt and is not a part of this lawsuit. It is unclear where Aqualine itself purchased the bathtub; it could possibly have been purchased through the wholesaler Eddy Group Limited, which is the other Defendant in this claim, but that has not been established.

[3] That bathtub developed a number of problems, as reported by the homeowners, which led to a series of efforts by the Claimant to investigate and possibly repair the problem. The problems had to do with noise - which was described as "squeaks" to a degree that was unsatisfactory. The Claimant reported this problem to representatives of the manufacturer, Maax, as well as to the Atlantic Home Warranty Program ("AHW"). The latter sent out a qualified inspector, Dennis Naugler, who added his input into possible solutions.

[4] Maax sent an authorized representative, David Kelly, who made some determinations of possible causes. It appears that most of the people reviewing the situation with that first bathtub thought it could possibly be remedied by shimming or otherwise supporting it. In other words, it appeared to be a problem with the bathtub moving in place. Those fixes did not do the trick. Mr. Kelly reported back to the manufacturer that he could not determine whether or not

there was some manufacturing defect that was causing these squeaks. Upon being told that the Claimant intended to remove the tub and replace it with another one, he asked if he could be allowed to see it after it was removed in order to have a closer look at it. In fact he did look at it and was still unable to come to any conclusions. His assessment was that it no longer made any noise, once removed from its place in the home.

[5] According to the evidence of Teddy Torrey of the Claimant company, he was in e-mail contact with a Maax after sales service person in Québec, who instructed him to deliver the removed bathtub to the facility operated by Eddy Group Ltd. (“Eddy”), where he would be given a replacement. According to his uncontested evidence, he did as he was instructed, although when he reached the Bayers Lake warehouse, no one there initially seem to know anything about such an arrangement. Eventually someone pointed to a bathtub on an upper shelf, which was removed and handed over to Mr. Torrey.

[6] Strangely, no one asked Mr. Torrey to sign anything and no paperwork or electronic trail documenting the exchange appears to have been created. This is significant because the representatives of both Maax and Eddy who were present at the trial, all testified and insisted that Maax never instructed Eddy to supply a tub, and Eddy has no record of having taken part in this exchange. What is also apparent is that Eddy did not then, and does not now, regularly stock product from Maax, although it admits that it would have acted as a go-between on a courtesy basis, had it been specifically asked to do so.

[7] As such, the court is left to wonder how this could have happened.

[8] What is clear is that a second bathtub went into the home the same day that the first one was removed. The precise date is not known, but it appears that this would have been in or about late July of 2011.

[9] Mr. Torrey testified that he had taken pictures and videos of the first bathtub, which appeared to have been the victim of a computer crash along with all of his e-mails to and from the Québec-based representative of Maax.

[10] Approximately two weeks after the installation of the second tub, the Claimant received a report from the homeowner that the problem had recurred. The tub was making mysterious noises.

[11] The representative from Atlantic Home Warranty came and did some further inspections on this second tub. He took pictures and also shot a short video showing somebody standing in the tub, and if one listens closely one can hear the kind of popping sounds that appear to suggest that the tub lacked structural integrity of some kind. Various observations were made about possible problems with the way the motor was installed. In this instance, Mr. Naugler made more detailed notes, which I will quote in full:

“The tub squeaks a fair amount. The front panel comes off. The tub is mounted to a base from the manufacturer. Builder has drilled holes and filled the underside with expanding foam to try to alleviate the noise but was unsuccessful. They are going to contact the manufacturer next. The first tub has been replaced. The floor was checked prior to the installation of the new tub and no squeaks were found in the floor. The new tub has a popping noise from the floor area about two thirds of the way back from the tap it sounds like a connection that may be loose or glue pulling apart. The tub feels solid. After several minutes the tub makes a noise again when stepped into. Builder called the plumber and it was suggested that he deal with the manufacturer. We tried running hot water in the shower and the noise was very clear without anyone even in the tub. We then ran

cold water and got the same result. Looking inside we discovered that the motor only has one bolt holding it in place. The one bolt is barely holding the motor in place. Noise is worse and now occurs when the tub is not full of water. Possible manufacturing problem. Motor is up against the tub and causing creaking noises. Tub only bolted on one side [the outside by skirt] and too close to body of tub. The tub makes the same noise as before where the connection at the motor is. We put a piece of carpet in as a buffer and that seemed to work. There are still noises coming from the connections between the tub and the Jets. There is a consistent and reproducible noise at the head of the tub. This appears to be a noise from the acrylic tub meeting the plywood base. It is consistently in the same place. The builder is doing some research to determine if this is a manufacturers defect. On September 20 the builder informed me that they removed one of the tubs in another house that was making the same type of noise and discovered that it was the jet pipe's rubbing on the acrylic tub. This is a manufacturers defect and therefore a defect in materials. The builder is dealing with the manufacturer on the product. Because this is a defect in workmanship or materials as laid out by AHW the builder is responsible to have the tub either repaired or replaced.

Procedure: remove the existing tub and replace with a new one with the new unit is to be installed as per manufacturer's installation guidelines. Tub is to be tested to ensure it does not squeak. Tile and any other surrounding materials damaged during the removal and new installation are to be repaired. All debris is to be removed from the site. All junctions between the new unit and tiles are to be caulked with a flexible caulking matching colour as soon as possible.

[12] According to AHW procedure, the task of replacing this tub was taken away from the builder and contracted out to someone independent chosen by AHW. A contract was given to Ramar Properties Limited, which rendered an invoice to AHW in the amount of \$9,000.00 plus HST for a total of \$10,350.00. This cost was passed on to the Claimant, consistent with the relationship between builders and the warranty program. The Claimant now seeks to recover this amount (and slightly more) from the Defendants.

[13] There is no evidence that the work done by Ramar specifically solved the problem; all we know is that the homeowner has not made any further

complaints. It is also worth mentioning that no one testified that either noisy tub was in any way dangerous, or that it would not function properly as a bathtub. The squeaks would have been an annoyance only, which some people might have been prepared to live with (not that they would not have been within their rights to expect better).

[14] Although the \$9,000.00 bill by Ramar is not broken down, the evidence before me is to the effect that bathtubs of this general type cost about \$1,200.00, although I am not sure if that is retail or wholesale. It must be presumed that the balance of the Ramar cost was for labour, including repairs to the ceramic tile surrounding the tub.

[15] There was no evidence before me as to how AHW let this particular contract, and whether or not there were competitive quotes on the work. The Defendants question whether the Ramar account was reasonable.

DISCUSSION AND FINDINGS

[16] There are a number of issues in this case, which I will address in no particular order of importance.

Was there a defect in the first tub?

[17] What we know about the first tub is that it was a Maax, and that there was something wrong with the way it performed. A number of qualified people looked at it. No one was able to identify a specific defect in manufacture. Nor was anyone able to fashion a remedy. Practically speaking, removing and

replacing the tub was probably the right thing to do, as it would not have been worthwhile to invest more resources in trying to make it work.

[18] From the point of view of Maax, all it knew was what was reported back by Mr. Kelly, to the effect that he could not identify a defect. It appears that Maax was anticipating getting the tub back so it could be properly inspected at its factory. The evidence of the Maax witnesses was that, according to their records, they never saw that tub again and no one has any idea where it ended up.

[19] On a balance of probabilities, I am unable to find that this tub had a manufacturer's defect. There are other possibilities. It is at least as likely, if not more so, that something occurred during the installation that created this problem. The plumber who supplied and installed the plug was not called to give evidence, and - because the Aqualine company is bankrupt - it was not made a party to the claim.

Was the second tub a Maax?

[20] According to the evidence of the two Maax representatives, the second tub was not manufactured by Maax. Their reaction when first seeing the video was instantaneous; they are able to recognize their own product and this was not one of their tubs.

[21] It was also their evidence that they did not supply that tub, and that they did not direct the Claimant to pick up a new tub at Eddy. While I do not question that these witnesses were telling the truth, I am prepared to find that they must

be lacking some information. Maax is a large company. Someone must have directed the Claimant to Eddy. And someone must have made arrangements for a new tub to be supplied, even if it was not a Maax. It is at least possible that because time was of the essence, they directed Eddy to supply the closest rough equivalent.

[22] I find it significant that when Mr. Torrey arrived at Eddy, no one seemed to know about this arrangement. How that confusion led to a tub being supplied is a mystery. According to Maax, it did not supply this tub or authorize its supply, and it did not receive back the original tub. According to Eddy, it is not missing a tub from its inventory.

[23] I will not attempt to sort out this mystery, or speculate on what might have happened, beyond what is necessary to decide this case.

What responsibility, if any, falls on Eddy?

[24] The first point is that Eddy was at most a conduit for the supply of a tub by Maax. Given that it was not the seller (or likely even the supplier) of the first tub, it had no responsibility to the Claimant for that tub. Assuming that the second tub came off its shelves, there is still no evidence that it was in any contractual relationship with the Claimant.

[25] For a party to be held liable - to any degree - for the supply of a defective product, it must either be the seller or the manufacturer. The largest amount of liability is always on the seller, who is in a contractual relationship and who is subject to implied warranties under the *Sale of Goods Act* and possibly other

legal duties. Had the original supplier, Aqualine, not been bankrupt it would have been a logical target for liability.

[26] Eddy was not a seller. Even if it supplied the first tub, which is questionable, it was a wholesaler - a middleman. Such a party owes no independent duties to the ultimate buyer.

[27] Eddy was also not a manufacturer, and as such has none of the legal duties that might fall on a manufacturer.

[28] As such, the case against Eddy must be dismissed. There is simply no viable case against it.

What responsibility might fall on Maax?

[29] In general, manufacturers of consumer products carry limited legal responsibility for defects. The law has made exceptions when products create danger and cause injury or death. The law imposes a duty of care to make safe products, and imposes liability for damage caused by an unsafe product.

[30] The attempt to recover damages against a manufacturer for a defective product that is unsatisfactory, but not dangerous, falls into the category of pure economic loss which is not recoverable, absent an express warranty of some kind.

[31] While this principle may not be well known to the average person, it is part of an orderly system of responsibility that recognizes that the party best able to

answer for defective merchandise is the seller, who will have recourse to his seller going back through the chain of contractual relationships, and so on back to the manufacturer. Because this chain can sometimes be impractical, manufacturers will often - as an incentive to have people buy their products - supply warranties that the ultimate consumer can rely upon.

[32] The evidence before me is that Maax does supply a standard warranty with its products. However, that warranty has limits. The following paragraphs are important here:

MAAX warrants acrylic units to be free from defects in workmanship and materials under normal use and service for a period of ten (10) years from the initial date of purchase

Any product reported to the authorized dealer or to MAAX as being defective within the warranty period will be repaired or replaced (with a product of equal value) at the option of MAAX.

In no event will MAAX be liable for the cost of repair or replacement of any installation materials, including but not limited to tiles, marble etc.

In any case, MAAX cannot be liable for any amount over and above the purchase price paid for the product by the owner/end-user, contractor or builder.

[33] Courts are always prepared to interpret warranties in the way that is most favourable to the consumer, but where the language is clear (as it is here) there is no legal basis to impose greater liability.

[34] As such, the liability of Maax under its warranty would be at most the cost of the tub. Nothing could be recovered for the additional cost of changing tubs, nor for the consequential damage to surrounding structures such as tile work.

[35] Even so, I am unable to find that Maax is liable under its warranty. Its initial response to the reported problem was to send a technician who witnessed the problem, but could not find anything specifically wrong with the tub. After that, everything became very confusing.

[36] I do not doubt that the Claimant acted responsibly and tried to rectify the problem, but in the final analysis there is very little evidence on which to make any adverse finding against Maax. There is no paper trail which would get closer to the bottom of the mystery surrounding the second tub. Perhaps we would be in a clearer situation had the Claimant not experienced a computer failure which wiped out all relevant emails and photographs.

[37] I find that the Claimant has not made out a case against Maax.

Conclusions

[38] The Claimant's claim was for \$13,600.00 which included the \$10,350.00 owed to Atlantic Home Warranty, as well as some additional expenses such as supervision time spent by Mr. Torrey and an amount paid to a tiling contractor. Had I found that a defect in quality had been established against Maax, I would have limited recovery to the cost of a new tub, namely \$1,200.00. However, as noted, I am unable to make a finding that Maax supplied a defective tub, or that it in any other way breached the terms of the warranty.

[39] The Claimant also sought an extraordinary amount of costs. Evidently, Mr. Farhan travelled to Quebec to serve the claim personally against Maax, at a cost of approximately \$1,400.00. Had I found in favour of the Claimant, I would have disallowed these costs as excessive. The Claimant could easily have sent

the papers to be served by a local process server, at a cost of at most a couple of hundred dollars. Why Mr. Farhan did as he did is puzzling, and I would not penalize any other party with that cost.

[40] In the result, the claim is dismissed against both Defendants.

Eric K. Slone, Adjudicator